

Voices Against Violence



Paper Three:

A Review of the Legislative Protections Available to Women with Disabilities who have Experienced Violence in Victoria

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Paper written by Georgina Dimopoulos, Legal Consultant and PhD in Law candidate at the University of Melbourne, with Elanor Fenge, Juris Doctor graduate, University of Melbourne, for the Voices Against Violence Research Project.

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Voices Against Violence Research Project team

Women with Disabilities Victoria – Keran Howe, Sharon Granek

Office of the Public Advocate – Magdalena McGuire

Domestic Violence Resource Centre Victoria – Vig Geddes, Delanie Woodlock

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Privacy note

The case studies in this paper have been de-identified to protect people's privacy. All the names used are pseudonyms and identifying details (such as people's nationalities) have been changed.

Content note:

Please be aware that the material contained in this paper may be distressing to some readers.

This content of this report reflects the law as at October 2013.

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About the research project team

Women with Disabilities Victoria

Women with Disabilities Victoria (WDV) is an organisation run by women with disabilities for women with disabilities. Its members, board and staff have a range of disabilities, backgrounds, lifestyles and ages. It is united in working towards its vision of a world where all women are respected and can fully experience life. Using a gender perspective allows the organisation to focus on areas of inequity of particular concern to women with disabilities, including women's access to health services, parenting rights and safety from gender-based violence. WDV undertakes research, advocacy and professional education and provides information, leadership and empowerment programs for women with disabilities. It has dedicated particular attention to the issue of male violence against women with disabilities, due to its gravity and high rate of occurrence.

Office of the Public Advocate

The **Office of the Public Advocate (OPA)** is an independent statutory body established by the Victorian State Government. Working within a human rights framework, its mission is to promote and protect the rights and interests of people with disabilities and to work to eliminate abuse, neglect and exploitation. It provides various services that work towards achieving those goals including an Advocate/Guardian Program, a Community Visitors Program, an Independent Third Person Program, and an Advice Service. It also advocates for systemic changes in the lives of people with disabilities by undertaking research, policy advocacy and community education. The Public Advocate is strongly committed to tackling violence against people with disabilities, particularly women, who make up the largest proportion of victims of violence.

Domestic Violence Resource Centre Victoria

The **Domestic Violence Resource Centre Victoria (DVRCV)** aims to prevent violence in intimate and family relationships and promotes non-violent and respectful behaviour. It works within a feminist framework with an understanding of the gendered nature of family violence and in partnership with other organisations with similar aims. DVRCV receives core funding from the Victorian Department of Human Services with additional funding from a variety of government and philanthropic organisations. It provides training, publications, websites, policy advice and advocacy, as well as initial support and referral for women experiencing violence.

The Voices Against Violence Research Project

The Voices Against Violence Research Project was a cross-sectoral partnership, undertaken between WDV, OPA and DVRCV. The project investigated the circumstances of women with disabilities of any kind (including physical, sensory and cognitive impairments and mental ill-health) who have experienced violence.

The need for the project arose when our organisations recognised the lack of available information regarding violence against women with disabilities. We knew that women with disabilities experience higher rates of violence than women in the general community. We also knew that they can encounter significant barriers to accessing appropriate support services and justice outcomes. In spite of this, there was a lack of data about the nature and extent of violence against women with disabilities in Victoria.

There was also a lack of information and knowledge about what we can do to respond to this problem and prevent it from occurring. This project addresses some of these omissions. We have done this by conducting an extensive fact-finding mission relating to violence against women with disabilities, which included:

- a paper outlining current issues in understanding and responding to violence against women with disabilities
- a review of the legislative protections available to women with disabilities in Victoria who have experienced violence
- a review of OPA's records of violence against women with disabilities
- interviews with staff and volunteers from OPA's major program areas
- in-depth interviews with women with disabilities who have experienced violence
- consultations with women with disabilities
- engaging with the disability, family violence, sexual assault, legal and other service sectors.

This data has been used to devise evidence-based recommendations for legal, policy and service sector reform.

This project built on previous work undertaken by the organisations, including *Building the Evidence: a report on the status of policy and practice in responding to violence against women with disabilities in Victoria* by Lucy Healey, Keran Howe, Cathy Humphreys and Felicity Julien for WDV, DVRCV and the University of Melbourne; *Violence Against People with Cognitive Impairments* by Janine Dillon for OPA; and *Getting Safe Against the Odds* by Chris Jennings for the DVRCV.

Reference group

The project benefited from the expert advice of a reference group comprising the following representatives:

- Maree Willis, representative of women with disabilities
- Beverley Williams, representative of women with disabilities
- Chris Jennings, consultant
- Marita Nyhuis, Department of Human Services
- Philippa Bailey, DVRCV
- Chris Atmore, Federation of Community Legal Centres Victoria
- Marg Camilleri, Federation University Australia
- Christine Chong, inTouch Multicultural Centre Against Family Violence
- Patsie Frawley, La Trobe University
- Sarah Fordyce, National Disability Services
- John Chesterman, OPA
- Bianca Truman, Safe Futures Foundation
- Dagmar Jenkins, South Eastern Centre Against Sexual Assault
- Cheryl Sullivan, Women and Mental Health Network
- Lucy Healey, The University of Melbourne
- Jen Hargrave, WDV

Project funding

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What the project explored

The overarching research question for the Voices Against Violence Research Project was to investigate the nature of violence against women with disabilities in Victoria. As part of this investigation, the project explored issues such as:

- the impacts of violence against women with disabilities in Victoria
- the help-seeking behaviour of women with disabilities who have experienced violence
- the legal context and social services responses to women with disabilities who have experienced violence.

The research papers

This paper is one of a series of publications for the Voices Against Violence Research Project. The papers for this project are:

1. *Voices Against Violence, Paper One: Summary Report and Recommendations*
2. *Voices Against Violence, Paper Two: Current Issues in Understanding and Responding to Violence against Women with Disabilities*
3. *Voices Against Violence, Paper Three: A Review of the Legislative Protections Available to Women with Disabilities who have Experienced Violence in Victoria*
4. *Voices Against Violence, Paper Four: A Review of the Office of the Public Advocate's Records on Violence against Women*
5. *Voices Against Violence, Paper Five: Interviews with Staff and Volunteers from the Office of the Public Advocate*
6. *Voices Against Violence, Paper Six: Raising Our Voices – Hearing from Women with Disabilities*
7. *Voices Against Violence, Paper Seven: Summary Report and Recommendations in Easy English.*¹

¹ To access the papers, refer to the research partners' websites:
Women with Disabilities Victoria www.wdv.org.au/publications.htm
Office of the Public Advocate www.publicadvocate.vic.gov.au/research/255/
Domestic Violence Resource Centre Victoria www.dvrcv.org.au/publications/books-and-reports/

These papers have been written by different authors over a period of time, reflecting different language and definitions. In this period, the complexity of dealing with violence in different contexts – which employ different understandings of disability and different understandings of violence – has become evident. Grappling with this complexity has been a valuable learning and the thinking of the project team has evolved through the life of the project. We have endeavoured to standardise the language across papers as far as possible.

Underlying premises of the project

- Violence is a gendered issue. The majority of victims of violence are women and the greatest numbers of perpetrators are men.
- Violence is about power and control. Perpetrators (who are usually men) use violence in order to intentionally control or dominate other people (usually women).
- Violence against women is a human rights issue. Therefore, a human rights framework needs to inform our understandings of, and responses to, violence.
- Women with disabilities experience multiple and intersecting forms of discrimination. Violence against women with disabilities is the result of the intersection of gender-based discrimination, disability-based discrimination and other forms of subordination.
- Women with disabilities experience violence at a higher rate and for longer periods of time than women in the general population. They also encounter significant barriers to receiving appropriate services and justice responses to their experiences of violence.
- Violence against women is preventable. There is considerable scope for governments and communities to prevent violence before it occurs.
- Disability is created by discriminatory practices and attitudes that have built up over time. Disability is preventable and can be addressed through government policy and regulation.

Working definitions

It was important for this project to be based on an understanding of the terms 'disability' and 'violence against women'. The Project team drew on extensive literature to inform its own working definitions.²

In defining 'violence against women with disabilities' the project team took account of the numerous ways power and control is exercised and the various forms of violence in which it is manifest.

In defining 'disability' the team took account of the common practice of using 'disability' and 'impairment' interchangeably. However, it was important for the project team to make explicit its understanding of the structural underpinnings of disability (noted in the Underlying premises above).

Below are definitions that will assist the reader to better understand how abuse and violence can and does affect women with disabilities.

Disability is a social construct and stems from the interaction of a person's functional impairment with a disabling environment. Disabling environments create structural, attitudinal and behavioural barriers; for example, by preventing people with functional impairments from accessing housing, education, work opportunities, transport. A specific type of disability arises from the interaction of a specific impairment with an environment that creates barriers. Some barriers are specific to that impairment; for example, a physical or sensory or cognitive disability arises from the interaction of a physical, sensory or cognitive impairment with an environment that creates barriers for the particular impairment. In addition, some barriers develop regardless of the particular impairment; for example, negative stereotyping of 'people with disabilities'.³

Violence against women with disabilities is a human rights violation resulting from the interaction of systemic gender-based discrimination against women and disability-based discrimination against people with disabilities. It includes family violence, sexual assault and disability-based violence. A range of behaviours are associated with these forms of violence, including emotional, verbal, social, economic, psychological, spiritual, physical and sexual abuses. These may be perpetrated against women with disabilities by multiple perpetrators, including intimate partners and other family members, and those providing personal and other care in the home or in institutional, public or service settings.

2 See *Voices Against Violence, Paper Two: Current Issues in Understanding and Responding to Violence against Women with Disabilities* for a detailed discussion of these and other relevant terms and problems associated with recognising the complexity of violence against women with disabilities.

3 The social model of disability was first conceptualised by Mike Oliver. For a further exploration of the concept, see for example, Mike Oliver (1983) *Social Work With Disabled People*, London, Macmillan

Abbreviations

ALRC	Australian Law Reform Commission
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CIU	Criminal Investigations Unit
Crimes Act	<i>Crimes Act 1958</i> (Vic)
CRPD	Convention on the Rights of Persons with Disabilities
Disability Act	<i>Disability Act 2006</i> (Vic)
Equal Opportunity Act	<i>Equal Opportunity Act 2010</i> (Vic)
Evidence Act	<i>Evidence Act 2008</i> (Vic)
Family Law Act	<i>Family Law Act 1975</i> (Cth)
FDR	Family dispute resolution
FVC Division	Family Violence Court Division of the Magistrates' Court of Victoria
FVIO	Family violence intervention order
FVP Act	<i>Family Violence Protection Act 2008</i> (Vic)
FVSN	Family violence safety notice
ITP	Independent Third Person
NSWLRC	New South Wales Law Reform Commission
OPA	Office of the Public Advocate
OPP	Office of Public Prosecutions
PSIO	Personal safety intervention order
PSIO Act	<i>Personal Safety Intervention Orders Act 2010</i> (Vic)
SAC	Sentencing Advisory Council

SFVS	Specialist Family Violence Service of the Magistrates' Court of Victoria
SOCAU	Sexual Offences and Child Abuse Unit
SOCIT	Sexual Offences and Child Abuse Investigation Team
UN	United Nations
VARE	Visual and audio recorded evidence
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VLRC	Victorian Law Reform Commission
Victorian Charter	<i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i>

Section 1: Executive Summary

Family violence

Women with disabilities in Victoria who have experienced violence may face a myriad of barriers in accessing appropriate support services and avenues of redress through the legal system. Intervention orders are one of the few legal options available for women with disabilities who seek safety from violence, and for those attempting to protect them. The availability of intervention orders in emergency situations, and their injunctive rather than punitive operation, enable intervention orders to supplement criminal justice responses to family violence or to provide a remedy where the criminal law may not apply.

The *Family Violence Protection Act 2008* (Vic) (FVP Act) and the *Personal Safety Intervention Orders Act 2010* (PSIO Act) provide similar avenues of legal protection from violence for women with disabilities in Victoria. Key to assessing the effectiveness of this legislation is to consider whether each Act provides 'an effective and accessible system' of family violence intervention orders (FVIO) or personal safety intervention orders (PSIO).

The definition of 'family violence' in the FVP Act and the definition of 'prohibited behaviour' in the PSIO Act address many of the key forms of violence experienced by women with disabilities, including the more latent forms, such as impairment-related abuse and forced social isolation. The express recognition of economic abuse and emotional or psychological abuse as forms of family violence, and a broad definition of 'family' to include carers, are particularly significant features of the FVP Act. However, inadequate and inconsistent responses by law enforcement agencies to family violence and to breaches of intervention orders remain a significant barrier to their efficacy in protecting women with disabilities in Victoria who have experienced violence.

In contrast to state family violence legislation, the prevention of family violence is not the primary focus of the *Family Law Act 1975* (Cth) (Family Law Act). The different purposes of the Victorian and Commonwealth legislative frameworks for family violence necessarily influence the scope of protection afforded to women with disabilities in Victoria.

Issues concerning the interaction between state intervention orders made under the FVP Act and orders made under the Family Law Act do not arise in all cases that involve family violence, because a woman seeking a FVIO under the FVP Act may not have any cause to be involved in family law proceedings. However, where interaction issues do arise, gaps in protection created by different orders and a lack of integration between courts at the state and federal levels often lead to inadequate protection for women with disabilities from family violence.

Sexual assault

Women with disabilities are at a significantly greater risk of sexual assault than women without disabilities. They also face substantial barriers to justice, which can operate at various levels and often overlap or interact. These barriers include:

- inadequate education and barriers to access information resulting in a woman's lack of knowledge or awareness that a sexual offence has been committed against her
- communication difficulties that impede the woman's ability to disclose sexual assault and articulate particulars
- a greater dependence on others for her basic needs, care and support
- a woman's care provider or family member acting as a 'gatekeeper' to disclosure, information and assistance
- power imbalances in the relationship between the woman and the perpetrator, who may be an intimate partner, family member or care provider
- physical and social isolation, which prevent a woman from accessing support services.

If the sexual assault of a woman with a disability is reported to the police, further barriers emerge at several points in the criminal justice process. 'Filtering' of matters initially occurs with the police in their recording and investigation of a complaint and their decision to charge the suspect. If the police do charge a suspect, discretionary decisions are subsequently made by the Office of Public Prosecutions (OPP).

The *Crimes Act 1958* (Vic) (Crimes Act) contains two offences that aim to address the particular risk of people with cognitive impairment to sexual assault.⁴ These supplement other sexual offences in the Crimes Act – such as rape, indecent assault and incest – where the victim's cognitive impairment is an aggravating factor in the offence committed.

The offences in sections 51 and 52 of the Crimes Act regulate people in a position of relative power and trust who provide care or support, or medical or therapeutic services, to a person with cognitive impairment. The primary rationale for these provisions is to protect vulnerable people from being sexually exploited by those in a position of responsibility, supervision or authority towards them.

The acute challenge in the legal regulation of sexual offences against women with disabilities lies in striking an appropriate balance between sexual agency and autonomy on the one hand, and protecting particularly vulnerable people from sexual abuse and exploitation on the other.

⁴ Unless stated otherwise or quoted from another source, in this paper cognitive impairment includes intellectual disability, mental illness, acquired brain injury and dementia.

While subdivision 8D of the Crimes Act addresses two specific circumstances in which women with cognitive impairment may be at greater risk of sexual assault – namely, when receiving medical or therapeutic services or when residing in or attending a facility – the greater obstacle lies in women with disabilities who are victims of sexual assault gaining access to the criminal justice system in the first place.

Evidence issues

If a family violence or sexual assault complaint does proceed to court, women with disabilities, particularly women with a cognitive impairment, are confronted with a host of new barriers and difficulties when giving evidence. Prejudicial assessments are commonly made about the competency, reliability and credibility of women with disabilities, which consequently diminishes the weight of their evidence.

Various Victorian Acts relevant to family violence and sexual assault provide for modified court procedures for, or alternative arrangements to, giving evidence in court.

- In a criminal proceeding for a sexual offence or an indictable offence involving an assault or injury to another person, a witness with a cognitive impairment may give evidence-in-chief in the form of an audio or audio-visual recording.⁵
- In sexual offence proceedings, the whole of the evidence of a cognitively impaired complainant (including cross-examination and re-examination) must be given at a special hearing, recorded as an audio-visual recording and presented to the court in that format.⁶
- The FVP Act and the PSIO Act allow for a more flexible approach to evidence in proceedings for a FVIO or a PSIO. Both Acts permit the court to inform itself ‘in any way it thinks fit’, despite any contrary rules of evidence,⁷ and they allow the court to order that the whole or part of the proceedings be heard in closed court or that only specified people be present during the proceedings.⁸ The FVP Act and the PSIO Act each empower the court to direct that alternative arrangements be made for an intervention order proceeding.⁹

5 *Criminal Procedure Act 2009* (Vic) ss 366-7.

6 *Criminal Procedure Act 2009* (Vic) ss 369-70.

7 *Family Violence Protection Act 2008* (Vic) s 65(1); *Personal Safety Intervention Orders Act 2010* (Vic) s 47(1).

8 *Family Violence Protection Act 2008* (Vic) s 68(1); *Personal Safety Intervention Orders Act 2010* (Vic) s 51(1).

9 *Family Violence Protection Act 2008* (Vic) s 69(1); *Personal Safety Intervention Orders Act 2010* (Vic) s 52(1).

Key themes

This paper reviewing the legislation and the literature, as well as the practical perspectives provided by stakeholders regarding the adequacy of legal protections and barriers to justice for women with disabilities in Victoria who have experienced violence, presents a clear pathway for future practice, legislative amendment and research. Three major themes have emerged from the present analysis:

1. The Victorian and federal legislative frameworks go some way towards protecting women with disabilities who have experienced violence, but there is substantial room for improvement.

Effective legal responses to violence against women with disabilities must expressly acknowledge its social context and various forms, and must focus on increasing support to women with disabilities, to enable them to more effectively access and participate in the legal process. Guiding principles in family violence legislation, which expressly recognise the unique impacts of family violence upon women with disabilities, are significant in this regard. Legislative examples are another strategy that may produce more consistent responses to family violence experienced by women with disabilities from various participants in the justice system. This review has also highlighted the need to provide greater support to women with a cognitive impairment when they give evidence in court, through additional legislative recognition of their disabilities and modifications to court processes.

2. The barriers to justice confronting women with disabilities in Victoria who have experienced violence do not emanate solely from the Victorian and federal legislative frameworks.

While this paper has sought to draw attention to gaps in the Victorian and federal legislation and to make recommendations for their improvement, the systemic barriers to justice for women with disabilities must also be addressed. Particular obstacles emerge in identifying that a legal wrong has occurred; reporting that legal wrong to the police; police recognition that a woman has a disability; police capacity to communicate effectively with particular women; and in the exercise of police and prosecutorial discretion to pursue a complaint and lay charges. Specialist training to police, prosecutors, legal practitioners, court staff and judicial officers may assist in addressing some of these barriers, as may express recognition in police codes of practice and OPP policies of the unique challenges experienced by women with disabilities who have experienced violence.

3. There is a need for further research and data collection on women with disabilities who have experienced violence.

This paper has highlighted a stark dearth of academic literature and statistical data on the prevalence and incidence of violence against women with disabilities and on the practical operation of legislative frameworks that exist for their protection. Particularly fruitful areas for further research in this regard include:

- the prevalence and incidence of violence against women with disabilities, particularly economic abuse
- empirical data on intervention orders made under the FVP Act and the PSIO Act for the protection of women with disabilities, including the nature of the violence from which protection is sought; by whom the application is made; the nature of any conditions imposed on the intervention order; the incidence of contravention and sentencing for contravention
- the incidence and characteristics of sexual assault of women with disabilities
- the practical operation of the Victorian Charter to protect women with disabilities who have experienced violence.

The combined impact of the recommendations in this paper may result in progress towards overcoming the barriers to justice that confront women with disabilities who have experienced violence, and towards ensuring that these women's experiences of violence, in its various manifestations, are adequately recognised across the legal system. Adopting a 'disability lens' to the development of appropriate protections, which are sensitive to the human rights and needs of women with disabilities, will serve to ensure that the rights of such women are not marginalised or overlooked in the formulation of laws, policies and procedures.¹⁰

10 Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Talking rights - Consulting with Victorians about the rights of people with disabilities and the Charter* (VEOHRC, 2011) 23 (VEOHRC Talking Rights Report).

Section 2: Introduction

Women with disabilities are disproportionately vulnerable to violence,¹¹ and they experience higher rates of violence than women without disabilities.¹² They also face unique difficulties and obstacles in seeking protection from violence and access to justice, and systemic barriers to disclosure and legal redress. Such barriers include a lack of awareness or education about different forms of violence; obstacles to identifying and disclosing violence that has occurred; lack of access to appropriate support services and to the court system; as well as public awareness and negative community perceptions of women with disabilities – including their credibility as witnesses and societal marginalisation.¹³

This paper explores these barriers to justice in the context of an analysis of the effectiveness of the domestic legal frameworks for the protection of women with disabilities in Victoria who have experienced violence. Stakeholder interviews, which appear as ‘practical perspectives’ throughout this report, inform the practical awareness, understanding and application of these legal frameworks and highlight potential areas for improvement of access to justice for women with disabilities in Victoria who have experienced violence.

As the Victorian Law Reform Commission (VLRC) recognised in its *Review of Family Violence Laws report* (Family Violence Laws Report), women with disabilities may experience violence from different sources and in different forms, which may necessitate different responses to those appropriate for people without disabilities.¹⁴ However, no common understanding or uniform definition exists of what constitutes violence against women, which is reflected in the various legal definitions of violence against women in different jurisdictions across Australia.¹⁵ As Healey has astutely observed:

11 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response: Final Report*, ALRC Report No 114, NSWLRC Report No 128 (2010) vol 1, 87 [1.9]; Karen Hughes, Mark Bellis, Lisa Jones, Sara Wood, Geoff Bates, Lindsay Eckley, Ellie McCoy, Christopher Mikton, Tom Shakespeare and Alana Officer, ‘Prevalence and risk of violence against adults with disabilities: a systematic review and meta-analysis of observational studies’ (2012) 379 *The Lancet* 1621.

12 See Lucy Healey, Keran Howe, Cathy Humphreys, Chris Jennings and Felicity Julian, *Building the Evidence: A report on the status of policy and practice in responding to violence against women with disabilities in Victoria* (Victorian Women with Disabilities Network Advocacy Information Service, 2008) (Building the Evidence); Janine Dillon, *Violence against people with cognitive impairments: Report from the Advocacy/Guardianship program at the Office of the Public Advocate, Victoria* (OPA, 2010).

13 Family Violence Safety Notice (FVSN) Evaluation Steering Committee, *Final Report to Victoria Police* (2010) 85.

14 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006) 39 [2.83] (*Family Violence Laws Report*).

15 McGuire, *Voices Against Violence Research Project, Paper Four*, above n 2, 13. For a more detailed overview of the definitional issues concerning the notions of ‘violence’ and ‘disability’ in the context of women with disabilities who have experienced violence, see Healey, *Voices Against Violence Research Project, Paper Two*, above n 1, 9-11.

Different bodies have different stakes and purposes in defining 'violence' and 'disability'. ... This is reflected in the lack of consensus in legislation, government policy, research, and service providers' remit in Victoria and across Australia about how to name 'violence'.¹⁶

There is presently no specific legal and institutional framework for the investigation and prosecution of violence against people with disabilities in Australia.¹⁷ The formulation of appropriate legal responses to the prevalent issue of violence against women must apply an intersectional analysis, appreciating women's diverse circumstances and backgrounds. Women's experiences of violence, the options available to address violence, and access to suitable support services and remedies, will be influenced by the intersection of gender with factors such as disability, age, geographical location, English language competency, religion, sexual orientation, indigenous status and ethnicity.¹⁸

A Aims of this paper

The principal aim of this paper is to provide an understanding of the legislative protections available to women with disabilities in Victoria who have experienced violence, to analyse the effectiveness and operation in practice of these legislative protections and to make recommendations for their improvement. This paper seeks to make a valuable contribution to critical legal and policy debates concerning improvements to the legal frameworks available for women with disabilities in Victoria who have experienced violence.

Key questions that this paper addresses are:

- How are women with disabilities in Victoria who have experienced various forms of violence, including family violence and sexual assault, legislatively protected? Is this protection adequate?
- What barriers to justice do women with disabilities face in having their experiences of violence addressed by the legal system?
- What legal avenues and remedies are available to women with disabilities in Victoria who have experienced violence?

16 Healey, *Voices Against Violence Research Project, Paper Two*, above n 1, 13.

17 Women with Disabilities Australia, Submission to the United Nations, *Analytical Study on Violence against Women and Girls with Disabilities*, December 2011, 41 [166].

18 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (Department of Families, Housing, Community Services and Indigenous Affairs, 2009) 19; Stephanie Ortoleva and Hope Lewis, *Forgotten Sisters - A Report on Violence against Women with Disabilities: An Overview of its Nature, Scope, Causes and Consequences* (Violence Against Women with Disabilities Working Group, 2012) 28; Multicultural Disability Advocacy Association of NSW, *Violence Through Our Eyes: Improving Access to Services for Women from Non-English Speaking Backgrounds with Disability and Carers Experiencing Violence Project Report* (Multicultural Disability Advocacy Association of NSW, 2010).

This paper analyses the operation and effectiveness of the Victorian legislative framework for the protection of women with disabilities who have experienced violence, and its interaction with the Commonwealth legislative framework. An analysis of the role and relevance of the Victorian Charter and international law in the realm of disability rights and women's rights informs the above issues and the recommendations for amendment to the domestic legislative framework.

B Methodology

Legislative review

The chief methodological approach employed was a review and analysis of the following domestic legislation relevant to the protection of women with disabilities who have experienced violence in Victoria:

- *Family Violence Protection Act 2008* (Vic)
- *Personal Safety Intervention Orders Act 2010* (Vic)
- *Family Law Act 1975* (Cth)
- *Crimes Act 1958* (Vic)
- *Evidence Act 2008* (Vic)
- *Evidence (Miscellaneous Provisions) Act 1958* (Vic)
- *Criminal Procedure Act 2009* (Vic)
- *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Two international conventions, namely, the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), were also examined.

Literature review

The researcher developed a contextual understanding of the issues guiding the legislative review through a review of the relevant academic literature on the legal frameworks for protection of women with disabilities who have experienced violence and, in particular, the practical application and operation of these legal frameworks.

Databases searched were LexisNexis AU, Australian Public Affairs Information Service, AGIS Plus Text, Families & Society Collection, Health and Society, Humanities & Social Sciences Collection and Google Scholar. Search terms included 'violence, women and disability', 'violence against women', 'violence and disability' and 'domestic violence and law and Victoria'.

A stark finding from the database search was the dearth of academic literature on the issue of violence against women with disabilities in the Australian context. This paper contributes to the knowledge base in this area and provides impetus for further research.

Stakeholder consultations and interviews

Empirical data, in the form of consultations and interviews with various stakeholders in the family violence, criminal law, legal aid and disability sectors in Victoria, were gathered to complement the legislative and literature reviews and to offer practical perspectives on the issues emerging from these reviews.

Initial unstructured consultations were undertaken with a magistrate of the Melbourne Magistrates' Court and with two legal practitioners for the purpose of gathering background information and developing some of the scenarios contained in this paper. Structured telephone interviews were subsequently undertaken with two representatives from Villamanta Disability Legal Service and one representative from each of the following organisations: Women's Legal Service, Springvale Monash Legal Service, Human Rights Law Centre and Victoria Legal Aid.

Attempts were made to interview a Sergeant of Victoria Police; however, time constraints prevented the first researcher from pursuing the application process to obtain consent from Victoria Police. A simplified process to enable researchers to access members of Victoria Police for the purpose of a research project of this nature would be highly valuable.

The interview questions were provided to participants via email prior to the interview. All interviews were recorded and transcribed. All interview participants were provided with and signed a project information and interview consent form. The objective of the interviews was to gain insights and practical perspectives from stakeholders as to whether the existing legal protections available for women with disabilities who have experienced violence are adequate, how they could be improved and what other barriers are faced by women with disabilities in having their experiences of violence addressed by the legal system.

A series of open-ended questions were devised, based on the project framework. They were used to address the following key issues:

- the nature of the stakeholder's contact with women with disabilities
- the stakeholder's experience with the FVP Act and the PSIO Act
- whether the Victorian family violence legislation offers adequate protection for women with disabilities who have experienced violence or how it could be improved
- the stakeholder's experience with the provisions of the Family Law Act that address family violence
- whether the definitions of 'family violence' in the FVP Act and the Family Law Act adequately take account of women with disabilities or how could they be improved
- whether certain forms of violence against women with disabilities, such as economic abuse, are adequately addressed by the legislation
- the stakeholder's experience with the Crimes Act in the context of women with disabilities who are victims of sexual assault
- the stakeholder's experience of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Victorian Charter) as it relates to women with disabilities who have experienced violence
- other barriers that women with disabilities face in having their experiences of violence addressed by the legal system.

The responses of interview participants are excerpted as 'Practical perspectives' in this paper.

Section 3: Recommendations

Victorian family violence legislation

- (i) That a subsection be inserted into section 35 of the FVP Act for respondents with a cognitive impairment or protected persons in relation to family violence safety notices. This subsection may provide as follows:

If the police officer determines that the respondent or protected person is unable to sufficiently understand the explanation of the notice, the officer must comply with the officer's obligations under this section via a support person for the respondent or protected person.

Support person means a suitable family member, disability or independent advocacy worker or other person who can sufficiently understand the explanation of the notice.

- (ii) That guiding principles be inserted into the FVP Act and the PSIO Act to recognise the particularly damaging impact of violence on women with disabilities. The guiding principles may refer to the unique difficulties faced by women with disabilities due to their dependence on others for support, the power imbalances and lack of control in relationships that arise from their disability, and the fact that women's disabilities may be exploited by perpetrators. The implementation of this recommendation should be developed in consultation with relevant stakeholders in the women's and disability support services sectors.
- (iii) That best practice principles for courts exercising jurisdiction under the FVP Act and the PSIO Act be introduced to provide practical guidance to judicial officers, police officers, court staff, legal practitioners, service providers and litigants at each stage of the process for intervention orders under those Acts. These best practice guidelines should expressly acknowledge the unique impacts of family violence upon women with disabilities.

Alternative arrangements for giving evidence

- (i)** That provisions be inserted into the Evidence Act 2008 (Vic) to enable witnesses with disabilities to be provided with additional support during court appearances and when giving evidence.
- (ii)** That special procedures or alternative arrangements for giving evidence, such as evidence recorded at a pre-trial hearing, be available for all civil and criminal matters relating to violence against women, including intervention order applications under the FVP Act and the PSIO Act, where the complainant or the witness has a disability. These special procedures or alternative arrangements should be adopted as a mandatory requirement in the case of people with a cognitive impairment.
- (iii)** That a subsection (3A) be inserted into section 69 of the FVP Act as follows:

(3) If the witness has a cognitive impairment, the court must make a direction under subsection (1) unless it considers it is not appropriate to do so having regard to –

 - (a) the wishes expressed by the witness; and
 - (b) the severity of the cognitive impairment of the witness; and
 - (c) the facilities available for the conduct of the proceeding; and
 - (d) any other matters the court considers relevant.
- (iv)** That a subsection (3A) be inserted into section 52 of the PSIO Act as follows:

(3A) If the witness has a cognitive impairment, the court must make a direction under subsection (1) unless it considers it is not appropriate to do so having regard to –

 - (a) the wishes expressed by the witness; and
 - (b) the severity of the cognitive impairment of the witness;
 - (c) the facilities available for the conduct of the proceeding; and
 - (d) any other matters the court considers relevant.

Magistrates' Court of Victoria programs and services

- (i) That the Victorian Government extends the use of the Family Violence Court Division currently operating in selected Magistrates' Courts in Victoria across all Victorian Magistrates' Courts.
- (ii) That a specialist disability service, comprising community agencies and organisations that offer services and support to women with disabilities who have experienced violence, be established in the Magistrates' Court of Victoria to provide specific advice and referral services. The effective implementation of this recommendation may require the creation of disability liaison positions at the Magistrates' Court of Victoria.

Training and professional development

- (i) That judicial officers and court staff be provided with comprehensive, specialist training and professional development about the unique issues relevant to women with disabilities who experience violence. Training and development programs should:
 - explore the concept of 'disability', including the social model of disability and the difference between cognitive impairment and other kinds of disability
 - include techniques to improve the identification of a cognitive impairment
 - educate and develop the skills of judicial officers and court staff in effectively communicating with women with disabilities
 - raise awareness of the heightened targeting and exploitation of women with disabilities by perpetrators of violence; the particular impacts of violence on women with disabilities; and the barriers and disadvantages that they experience in seeking redress through the justice system
 - outline the existing procedures and arrangements that aim to provide support to women with disabilities when giving evidence in court.

The formulation of such programs should be undertaken in collaboration with women's and disability support services and organisations.

- (ii) That members of Victoria Police be provided with comprehensive, specialist training and professional development about the unique issues relevant to women with disabilities who experience violence. Training and development programs should:
- explore the concept of 'disability', including the social model of disability and the difference between cognitive impairment and other kinds of disability
 - include techniques to improve the identification of cognitive impairment
 - educate and develop the skills of Victoria Police members in effectively communicating with women with disabilities
 - raise awareness of the heightened targeting and exploitation of women with disabilities by perpetrators of violence; the particular impacts of violence on women with disabilities; and the barriers and disadvantages that they experience in seeking redress through the justice system
 - outline the existing procedures and arrangements that aim to provide support to women with disabilities during police interviews, including the Independent Third Person Program managed by the OPA.

These training and professional development programs should be provided in consultation with relevant women's and disability support services and organisations. The effective implementation of this recommendation will require the provision of additional resources.

Further research and data collection

- (i) That an integrated process be established for the collection of reliable statistics by Victorian law enforcement agencies, including Victoria Police, the OPP and the Magistrates' Court of Victoria, in relation to all forms of violence against women with disabilities. This database could include information on the kinds of violence experienced by women with disabilities in Victoria; police reports and prosecution rates for such offences; and prosecution outcomes.
- (ii) That further research be undertaken into the practical operation of legislative frameworks for the protection of women with disabilities who have experienced violence in Victoria, particularly in relation to:
- the prevalence and incidence of violence against women with disabilities, particularly economic abuse
 - empirical data on intervention orders made under the FVP Act and the PSIO Act for the protection of women with disabilities, including the nature of the violence from which protection is sought; by whom the application is made; the nature of any conditions imposed on the intervention order; the incidence of contravention and sentencing for contravention
 - the incidence and characteristics of sexual assault of women with disabilities
 - the practical operation of the Victorian Charter to protect women with disabilities who have experienced violence.

Section 4: The human rights context

A A human rights approach to disability

Women with disabilities have been identified as people at particular risk of having their human rights breached. This risk may be increased on the basis of the woman's age, sexual orientation, homelessness, indigenous status, cultural background and English language proficiency. Women with disabilities have reported an array of human rights failures, including discrimination issues due to their disability and barriers to participation in public life.¹⁹

The ensuing analysis of the legal protections available to women in Victoria who have experienced violence is informed by a human rights approach to disability. This approach affirms the inherent worth of every individual and holds that all people with disabilities have the right to enjoy equality of opportunity and to effectively participate and be fully included in society.²⁰ An analysis of violence against women with disabilities must be informed by and reflect the 'social model' understanding of disability.²¹ This perspective requires legal frameworks and physical and social environments to accommodate disabilities 'as an anticipated incident of human diversity', and to support women with disabilities in all their endeavours.²²

Adopting a human rights approach to disability has a number of benefits, which include empowering people with disabilities and increasing their participation, access and engagement; improving service delivery; and promoting a culture and dialogue of human rights.²³ The Victorian Charter and international human rights conventions such as the CRPD²⁴ and the CEDAW²⁵ can ensure that a human rights focus continues to underpin the development and implementation of domestic laws, policies and procedures to protect women with disabilities from violence and to uphold the rights of women with disabilities who have experienced violence.²⁶

19 Victorian Government, Submission to the National Human Rights Commission, *National Human Rights Consultation*, 9 June 2009, 25-6 [9.22]-[9.23].

20 CRPD art 3. Magdalena McGuire, *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (OPA, 2012) 24 (*Breaking the Cycle Report*), citing Martha Nussbaum, *Frontiers of Justice: Disability, Nationality and Species Membership* (Harvard University Press, 2006).

21 Ortoleva and Lewis, above n 17, 24.

22 Ibid 24-5. See also Phillip French, *Disabled Justice: The Barriers to Justice for Persons with a Disability in Queensland* (Queensland Advocacy Incorporated, 2007) 13. The CRPD Preamble (e) also confirms that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.

23 National Disability Services Victoria, Submission No 282 to the Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006*, July 2011, 3.

24 *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plenmtg, Agenda Item 67(b), UN Doc A/RES/61/106 (13 December 2006) annex I (CRPD).

25 *Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 24/180, UN GAOR, 34th sess, 107th plenmtg, Agenda Item 75, Supp No 46, UN Doc A/RES/34/180 (18 December 1979) annex (CEDAW).

26 National Disability Services Victoria, above n 22, 4.

While the CRPD and the CEDAW do not become part of Australian domestic law unless and until they are incorporated into domestic legislation,²⁷ it has been recognised that international law and international conventions are exercising an increasingly important influence upon the development of Australian statutory and case law and government decision-making.²⁸ The CRPD and the CEDAW can thus inform the development of laws and policies that are cognisant of the rights of women with disabilities and can guide the interpretation of domestic legislation.²⁹ Both conventions also serve a significant symbolic purpose, offer international avenues of complaint for human rights violations and can be used as advocacy tools in addition to the Victorian Charter for women with disabilities who have experienced violence.

B The Victorian human rights framework: the Victorian Charter

The Victorian Charter serves as a form of human rights protection for women with disabilities in Victoria who have experienced violence. The *Equal Opportunity Act 2010* (Vic) (Equal Opportunity Act) and the *Disability Act 2006* (Vic) (Disability Act) are the other two primary pieces of legislation that protect the rights of women with disabilities in Victoria.

Defining the basic human rights of all Victorians, the Victorian Charter protects a body of civil and political rights which derive from the *International Covenant on Civil and Political Rights*.³⁰ The Victorian Charter makes no specific mention of disabilities. However, the Preamble to the Victorian Charter relevantly recognises that ‘human rights belong to all people without discrimination’. The Victorian Charter defines ‘discrimination’ as having the same meaning as discrimination on the basis of an attribute set out in section 6 of the Equal Opportunity Act, which includes disability.³¹

27 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8, 315.

28 Bryan Horrigan & Brian Fitzgerald, ‘International and Transnational Influences on Law and Policy Affecting Government’ in Bryan Horrigan (ed), *Government Law & Policy: Commercial Aspects* (Federation Press, 1998) 2, 2.

29 VLRC, *Family Violence Laws Report*, above n 13, 54; New South Wales Law Reform Commission (NSWLRC), *People with cognitive and mental health impairments in the criminal justice system: An overview* (Consultation paper No 5, NSWLRC, 2010) 19.

30 999 UNTS 171 (entered into force 23 March 1976).

31 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3(1) (definition of ‘discrimination’); *Equal Opportunity Act 2010* (Vic) s 6(e).

Section 5 of the Victorian Charter provides that the human rights contained therein are in addition to other rights and freedoms that arise or are recognised under any other law, including international law, the common law and Commonwealth laws. A number of rights contained in the Victorian Charter are relevant to women with disabilities in Victoria who have experienced violence. These include:

- **the right to recognition and equality before the law** (section 8) – this includes a person's right to enjoy his or her human rights without discrimination;³² the right to equal protection of the law without discrimination;³³ and the right to equal and effective protection against discrimination.³⁴ Subsection 8(4) provides that measures taken to assist or advance people who are disadvantaged because of discrimination do not constitute discrimination³⁵
- **the right to life** (section 9)
- **the right to protection from torture and cruel, inhuman or degrading treatment** (section 10) – including a right to not be treated or punished in a cruel, inhuman or degrading way or to be subjected to medical or scientific experimentation or treatment without providing full, free and informed consent³⁶
- **the right to freedom of movement** (section 12) – including the freedom to choose where to live
- **the right to privacy and reputation** (section 13) – which provides that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with
- **the right to freedom of expression** (section 15) – including the freedom to seek, receive and impart information and ideas of all kinds by various means of communication³⁷
- **the right to protection of families and children** (section 17)
- **property rights** (section 20), which provides that a person must not be deprived of his or her property other than in accordance with law
- **the right to liberty and security** (section 21).

32 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 8(2).

33 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 8(3).

34 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 8(3).

35 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 8(4).

36 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) ss 10(b)-(c).

37 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 15(2).

The Victorian Charter creates a 'dialogue model' of human rights protection between the three arms of government, which aims to ensure that human rights are considered in the development, interpretation and application of laws and policies in Victoria.³⁸ This dialogue between the legislature, the executive and the judiciary is facilitated through six key means:³⁹

- A Statement of Compatibility must be tabled with any Bill introduced into Parliament, assessing the consistency of the Bill with the human rights in the Victorian Charter.⁴⁰
- The Scrutiny of Acts and Regulations Committee must consider all legislation introduced into Parliament and report on the compatibility of the legislation with human rights.⁴¹
- Public authorities must act compatibly with human rights and give proper consideration to human rights in their decision-making processes.⁴² 'Public authority' is broadly defined to encompass a range of decision-makers and service providers in Victoria, including police, courts, local councils and public servants, as well as private entities providing government services or exercising functions of a public nature.⁴³
- Courts and tribunals must interpret and apply legislation consistently with human rights so far as is possible.⁴⁴
- The Supreme Court of Victoria can issue a Declaration of Inconsistent Interpretation if it considers that a law cannot be interpreted and applied consistently with human rights, to which the Victorian Government must respond within six months.⁴⁵
- The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is responsible for monitoring and reporting on the implementation and operation of the Victorian Charter.⁴⁶

38 Human Rights Law Centre (HRLC), *Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation* (HRLC, 2012)4.

39 Ibid 4-5.

40 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 28.

41 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 30.

42 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 38.

43 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 4.

44 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) s 32.

45 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) ss 33, 36, 37.

46 *Charter of Human Rights and Responsibilities' Act 2006* (Vic) ss 40-43.

The Parliament of Victoria Law Reform Committee recognised in its report, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (Access to Justice Inquiry Report), that the Victorian Charter provides an important mechanism for people with disabilities to challenge decisions made about service provision and treatment.⁴⁷ If a woman with a disability believes that one or more of her rights under the Victorian Charter has been violated, she can make a complaint directly to the public authority concerned, or alternatively she can raise the matter with the Victorian Ombudsman. The Victorian Ombudsman is empowered 'to enquire into or investigate whether any administrative action ... is incompatible with a human right set out in the [Victorian Charter]' in relation to government departments, public statutory bodies and staff members of local councils.⁴⁸ The Victorian Charter does not establish an independent cause of action for breach of human rights under the Charter.⁴⁹ However, if a woman with a disability has an existing case against a public authority on the ground that an act or decision of the public authority was unlawful, then the woman can also raise a breach of human rights under the Victorian Charter before the Court or tribunal hearing the case.⁵⁰

As the human rights contained in the Victorian Charter are not absolute, they must be balanced against each other and against any public interest arguments for their limitation.⁵¹ Any limitation on human rights must be 'reasonable ... as can be demonstrably justified in a free and democratic society', taking into account the nature of the right; the importance, nature and extent of the limitation; the relationship between the limitation and its purpose; and whether any less restrictive means of achieving that purpose are reasonably available.⁵²

A report published by the VEOHRC in 2011, entitled *Talking rights: Consulting with Victorians about the rights of people with disabilities and the Charter* (VEOHRC Talking Rights Report), found that the Victorian Charter has not brought a 'disability lens' to the development of laws and policies – that is, it has not made disability issues more prominent in 'mainstream' law and policy, and it has not encouraged legislators and policy-makers to give greater consideration to the rights of people with disabilities.⁵³ The VEOHRC Talking Rights Report also observed a 'significant disparity between policy and practice' even when a 'disability lens' was applied to legal and policy development in Victoria.⁵⁴ It noted that:

47 Parliament of Victoria Law Reform Committee (Law Reform Committee), *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers: Final Report*, Parl Paper No 216 (2013) 55 (Access to Justice Inquiry Report).

48 Ombudsman Act 1973 (Vic) s 13(2).

49 Charter of Human Rights and Responsibilities' Act 2006 (Vic) s 39(3).

50 Charter of Human Rights and Responsibilities' Act 2006 (Vic) s 39(1).

51 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 54.

52 Charter of Human Rights and Responsibilities' Act 2006 (Vic) s 7(2).

53 VEOHRC, *Talking Rights Report*, above n 9, 23.

54 Ibid.

[m]any people felt that there is great disparity between the practice of public authorities in reality and the legislative standards set by the Charter. ... [E]ven when the rights of persons with disabilities are taken into account when developing policies, this is more in the way of a 'feel-good exercise' than a serious attempt at overcoming the barriers persons with disabilities face in enjoying their rights and fully participating in society.⁵⁵

The VEOHRC Talking Rights Report identified several gaps in the promotion and protection of the human rights of people with disabilities, the most significant being a lack of awareness about the Victorian Charter.⁵⁶ The report also highlighted the absence of a complaints mechanism, the absence of economic, social and cultural rights, a lack of government support for people with disabilities and the inaccessibility of the Victorian Charter due to its complex legal nature as key weaknesses.⁵⁷

However, a primary strength of the Victorian Charter lies in its potential to be used as an advocacy tool to better promote the human rights of women with disabilities who have experienced violence and to improve outcomes.⁵⁸ Many disability advocacy groups are using the Victorian Charter to advocate for the promotion, support and protection of rights of people with disabilities, and they have experienced success in doing so.⁵⁹ There nonetheless remains scope for stronger links to be forged between human rights discourse and disability discourse. The VEOHRC Talking Rights Report noted that there was a 'deficit in knowledge' at the level of advocacy organisations,⁶⁰ with the majority of advocates interviewed having little or no knowledge of the Victorian Charter and no experience in employing it as an advocacy tool.⁶¹ VEOHRC added that:

There was a general sense [amongst interview participants] that the Charter has created a human rights dialogue in Victoria, which has enabled advocates to frame their arguments using the language of human rights. Participants who had experience advocating with the Charter believed that referring to the Charter and employing the language it uses reinforced their claim and gave more weight to their position.⁶²

55 Ibid 24.

56 Ibid 7, 25-6.

57 Ibid 7, 25-8.

58 For a practical insight into the ways in which the Victorian Charter has operated to protect and promote the human rights of people with disabilities in Victoria, see HRLC, above n 37, particularly at 29 (case study 42), 32-3 (case studies 51, 53 and 54), 36-78 (case studies 63, 64, 67 and 71) (*Victorian Charter in Action Report*). See also Victorian Advocacy League for Individuals with Disability, Submission No 199 to the Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006*, July 2011, 1-2; Victorian Equal Opportunity and Human Rights Commission, *The Victorian Charter of Human Rights and Responsibilities: Civil and Political Rights Explained* (State of Victoria, 2008); National Disability Services Victoria, above n 22, 3-4.

59 VEOHRC, *Talking Rights Report*, above n 9, 22.

60 Ibid 26.

61 Ibid 22.

62 Ibid.

To enable the Victorian Charter to be more effectively employed as an advocacy tool for women with disabilities who have experienced violence, there must also be capacity building in the community sector – particularly the disability sector and the violence sector – to enable representatives of advocacy organisations to better understand and use the Victorian Charter in this manner.

Practical perspective

Human rights protection and instruments like the Victorian Charter can play a really important role in filling gaps in protection in existing legal frameworks and refocusing the attention of lawmakers and service providers on the integrity of their decision-making processes and on the rights of the individual that they are dealing with. However, the fact of the Charter's existence is not enough to ensure that protection is provided and rights are realised in every circumstance. People also need to be educated and empowered to be able to assert their rights and access adequate support to help them do that. The Victorian Charter is a very important instrument in setting up a human rights framework, but there is potential for it to be used more regularly and more actively to assist women with disabilities (*Interview participant, Human Rights Law Centre*).

C The role and relevance of international human rights conventions

Australia is party to several human rights conventions that protect the rights of women and people with disabilities. Two international conventions are particularly relevant to the present report: the CRPD⁶³ and the CEDAW.⁶⁴

1 Convention on the Rights of Persons with Disabilities – CRPD

The CRPD and its Optional Protocol were adopted by the United Nations (UN) on 13 December 2006 and entered into force on 3 May 2008. Australia ratified the CRPD on 17 July 2008 and acceded to the Optional Protocol on 21 August 2009.

The CRPD elaborates on and clarifies the application of existing human rights to people with disabilities, by identifying those rights and outlining mechanisms for their realisation.⁶⁵ This Convention also imposes obligations and responsibilities upon State Parties to take necessary steps to ensure the full enjoyment of those human rights by people with disabilities.

63 CRPD, GA Res 61/106, UN GAOR, 61st sess, 76th plenmtg, Agenda Item 67(b), UN Doc A/RES/61/106 (13 December 2006) annex I.

64 CEDAW, GA Res 24/180, UN GAOR, 34th sess, 107th plenmtg, Agenda Item 75, Supp No 46, UN Doc A/RES/34/180 (18 December 1979) annex.

65 VEOHRC, *Talking Rights Report*, above n 9, 43.

The significance of the CRPD lies in its status as the first legally binding international convention for the specific protection and promotion of the rights of people with disabilities.⁶⁶ The CRPD represents a 'paradigm shift' in the approach to disability and there is evidence that it has had a positive impact upon people with disabilities in Victoria.⁶⁷ According to National Disability Services Victoria:

... the [CRPD] reflects a social model of disability in which disability is seen as a result of the interaction of people who have impairments with attitudinal and environmental barriers such as policies, legislation and practices that hinders them from full and effective participation in society.⁶⁸

The CRPD adopts a 'social model' and a 'rights-based' approach, ensuring that disability is conceptualised as a rights-based issue.⁶⁹ This is demonstrated by the more expansive definition of 'people with disabilities' in article 1, to include people who have 'a long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.⁷⁰ As the VEOHRC Talking Rights Report observed:

The CRPD takes into account not only physical challenges, such as accessibility, but also the various social obstacles and stereotypes that lead to the exclusion of persons with disabilities and the denial of their rights. Removing these obstacles is necessary in order for persons with disabilities to exercise their rights on an equal basis with others.⁷¹

The stated purpose of the CRPD is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.⁷² The Preamble to the CRPD recognises that 'women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation'.

66 Ibid 42.

67 Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (Parliament of Victoria, 2011) 50 [254].

68 National Disability Services Victoria, above n 22, cited in Scrutiny of Acts and Regulations Committee, above n 66, 50 [254].

69 VEOHRC, *Talking Rights Report*, above n 9, 42; Ortoleva and Lewis, above n 17, 24.

70 CRPD art 1.

71 VEOHRC, *Talking Rights Report*, above n 9, 42.

72 CRPD art 1.

Article 3 of the CRPD contains the following guiding principles:

- a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- b) Non-discrimination;
- c) Full and effective participation and inclusion in society;
- d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e) Equality of opportunity;
- f) Accessibility;
- g) Equality between men and women; and
- h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The CRPD provides for, among other human rights, freedom from torture and cruel, inhuman or degrading treatment;⁷³ freedom from exploitation, violence and abuse;⁷⁴ physical and mental integrity;⁷⁵ equality before the law;⁷⁶ and access to public and community life.⁷⁷ Of crucial relevance to this paper are articles 6 (Women with Disabilities) and 16 (Freedom from exploitation, violence and abuse).

Article 6 of the CRPD recognises that 'women and girls with disabilities are subject to multiple discrimination'.⁷⁸ This provision requires State Parties to ensure the 'full and equal enjoyment' by women with disabilities of all human rights and fundamental freedoms;⁷⁹ and to take 'all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms' set out in the CRPD.⁸⁰ Article 6 thus acknowledges the particular targeting of women with disabilities and the obstacles that they must overcome in order to equally enjoy their human rights.⁸¹

73 CRPD art 15.

74 CRPD art 16.

75 CRPD art 17.

76 CRPD arts 5, 12, 13.

77 CRPD arts 9, 19.

78 CRPD art 6(1).

79 CRPD art 6(1).

80 CRPD art 6(2).

81 VEOHRC, *Talking Rights Report*, above n 9, 43.

Article 16 of the CRPD seeks to protect people with disabilities from 'all forms of exploitation, violence and abuse, including their gender-based aspects', by requiring State Parties to take legislative, administrative and other measures to afford such protection.⁸² It also aims to ensure appropriate forms of gender-sensitive assistance and support for people with disabilities and their families and caregivers, including through information and education on how to avoid, recognise and report instances of exploitation, violence and abuse.⁸³ For people with disabilities who are victims of violence, State Parties are required to promote their recovery, rehabilitation and social integration, including through the provision of protection services.⁸⁴ State Parties are also obliged to implement effective legislation and policies, including those which are women-focused, to ensure that instances of violence against people with disabilities are identified, investigated and prosecuted.⁸⁵

The CRPD is laudable for its comprehensive and holistic approach to the human rights of people with disabilities. The uniqueness and strength of this international convention also lie in its gender perspective. The CRPD adopts a 'gender lens', which is clearly reflected in the Preamble and articles 3 and 6, as well as in other substantive provisions such as article 8 on awareness-raising, article 16 on freedom from exploitation, violence and abuse and article 25 on health.⁸⁶ Ortoleva and Lewis observe that the CRPD 'explicitly mandates the inclusion of women in all of the rights enumerated in the CRPD and also addresses the fact that the CEDAW does not explicitly reference women with disabilities'.⁸⁷ The CRPD is thus a prime illustration of disability law 'leading the way', representing a breakthrough in the recognition of people with disabilities as citizens with equal rights, and in the protection and promotion of the human rights of people with disabilities.

2 Convention on the Elimination of all forms of Discrimination Against Women – CEDAW

The CEDAW was adopted by the UN on 18 December 1979 and entered into force on 3 September 1981. The Optional Protocol to the CEDAW was adopted on 6 October 1999 and entered into force on 22 December 2000. Australia ratified the CEDAW on 28 July 1983 and acceded to the Optional Protocol on 4 December 2008.

⁸² *CRPD* art 16(1).

⁸³ *CRPD* art 16(2).

⁸⁴ *CRPD* art 16(4).

⁸⁵ *CRPD* art 16(5).

⁸⁶ Ortoleva and Lewis, above n 17, 17.

⁸⁷ *Ibid.*

The CEDAW aims to protect and strengthen the human rights of women and to eliminate discrimination against women.⁸⁸ The Convention defines ‘discrimination against women’ more broadly than previous international conventions,⁸⁹ as ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise’ by women of their human rights and fundamental freedoms on an equal basis with men.⁹⁰

With no mention of disabilities or violence in the CEDAW, it has been submitted that this convention ‘fails to address disability in a gender context’.⁹¹ The *Declaration on the Elimination of Violence against Women* was adopted by the General Assembly of the UN on 20 December 1993, to complement and strengthen the CEDAW.⁹² The Declaration defines ‘violence against women’ as:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁹³

Article 2 of the Declaration elaborates on this definition, providing that violence against women encompasses ‘physical, sexual and psychological violence’ that occurs in the family and within the general community.⁹⁴

88 For an analysis of how the CEDAW can be used to protect women’s right to safety, including an overview of CEDAW’s complaints mechanisms and the investigatory powers associated with the Convention, see Bianca Fileborn, ‘Addressing sexual assault through human rights instruments’, *Australian Centre for the Study of Sexual Assault Aware No 25* (Australian Institute of Family Studies, 2010).

89 Simone Cusack, ‘Discrimination Against Women: Combating Its Compounded and Systemic Forms’ (2009) 34 *Alternative Law Journal* 86, 86; Hilary Charlesworth and Sara Charlesworth, ‘The Sex Discrimination Act and International Law’ (2004) 27 *University of New South Wales Law Journal* 858, 858.

90 CEDAW art 1.

91 Sue Salthouse, ‘Completely Knocked Out: Australian perspectives on disability, disempowerment and domestic violence’ (Paper presented at the Domestic Violence, Disability and Cultural Safety National Forum 2007, *Diverse and Inclusive Practice: Redrawing the Boundaries*, Brighton-Le-Sands, 8-9 November 2007) 4.

92 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks: Final Report*, Report No 117 (2011) 65 [2.17].

93 *Declaration on the Elimination of Violence against Women*, 20 December 1993, UN GAOR, A/RES/48/104 (entered into force on 23 February 1994) art 1.

94 *Declaration on the Elimination of Violence against Women*, 20 December 1993, UN GAOR, A/RES/48/104 (entered into force on 23 February 1994) arts 2(a)-(b).

3 Access to justice for women with disabilities

Both the CRPD and the CEDAW incorporate two vital elements of human rights which are a focus of this paper, namely, legal capacity and access to justice.⁹⁵ These are addressed in articles 12 and 13 of the CRPD and in article 15 of the CEDAW. Articles 12 and 13 of the CRPD relevantly state:

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

...

Article 13 - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

⁹⁵ For an overview of the interrelationship between the CRPD and the CEDAW and the strengths and weaknesses of each convention, see Ortoleva and Lewis, above n 17, 26-23, 29-43.

Article 15 of the CEDAW focuses on ensuring women's legal autonomy.⁹⁶ It relevantly states:

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
- ...
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Other provisions of the CRPD that affect the interaction of women with disabilities with the justice system are:

- awareness-raising (article 8) – raising awareness about people with disabilities and combating stereotypes and prejudices
- accessibility (article 9) – ensuring that people with disabilities have equal access to information and communications and public facilities and services
- access to information (article 21) – ensuring that people with disabilities can seek, receive and impart information and ideas equally with others and through all forms of communication, including through the provision of information in accessible and appropriate formats.

⁹⁶ Ortoleva and Lewis, above n 17, 20.

4 The CRPD and the CEDW in domestic law

The true effectiveness of the CRPD and the CEDAW lies in the domestic implementation of these international conventions. As a party to the CRPD and the CEDAW, Australia has agreed to implement domestic measures to satisfy its international obligations.⁹⁷ Under the CRPD, Australia is obliged to introduce measures that promote the full realisation of human rights for people with disabilities.⁹⁸ To this end, the CRPD requires States Parties to adopt legislative and administrative measures for the implementation of the Convention rights;⁹⁹ to consider the protection and promotion of the human rights of people with disabilities in all policies and programs;¹⁰⁰ to take measures to eliminate discrimination on the basis of disability;¹⁰¹ and to promote the training of staff working with people with disabilities so as to improve service delivery.¹⁰² Article 4(3) of the CRPD also requires State Parties to consult and actively involve people with disabilities, through their representative organisations, in the development and implementation of legislation and policies to implement the convention rights and in other decision-making processes on issues concerning people with disabilities.¹⁰³ Similarly, Australia is obliged under the CEDAW to implement gender equality in domestic legislation;¹⁰⁴ to establish legal protection of the rights of women and to ensure effective protection of women from discrimination through courts and other public institutions.¹⁰⁵

Australia must regularly report to the CRPD Committee and to the CEDAW Committee on its achievements in meeting its obligations under each international convention.¹⁰⁶ The reports must outline the legislative, judicial, administrative or other measures that Australia has taken to give effect to the provisions of the relevant convention, progress made and any factors or difficulties affecting the fulfilment its convention obligations.¹⁰⁷

Australia's accession to the Optional Protocol to the CRPD and to the Optional Protocol to the CEDAW enables individuals to bring a complaint directly to the UN CRPD Committee or the UN CEDAW Committee after all domestic avenues and remedies have been exhausted. The Committees can conduct inquiries into grave and systemic violations under the CRPD or the CEDAW.¹⁰⁸

97 CRPD art 4; CEDAW art 2.

98 CRPD art 4(1).

99 CRPD art 4(1)(a).

100 CRPD art 4(1)(c).

101 CRPD art 4(1)(e).

102 CRPD art 4(1)(i).

103 CRPD art 4(3).

104 CEDAW art 2(b).

105 CEDAW art 2(c).

106 CEDAW arts 17-20; CRPD arts 34-36.

107 CEDAW art 18; CRPD art 35.

108 *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plenmtg, Agenda Item 67(b), UN Doc A/RES/61/106 (13 December 2006) annex II, art 6(CRPD *Optional Protocol*); *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 54/4, annex, UN GAOR, 54th sess, 28th plenmtg, Agenda Item 109, Supp No 49, UN Doc A/RES/54/4 (6 October 1999) annex, art 8 (CEDAW *Optional Protocol*).

For a complaint to be 'admissible', the person must also be able to identify the precise right that is alleged to have been breached and ensure that the facts occurred after Australia ratified the Optional Protocol.¹⁰⁹ The VEOHRC has noted that in practice, the 'vast majority' of complaints to these Committees are assessed as 'inadmissible'.¹¹⁰ For complaints that are accepted, the Committee provides the country with an opportunity to respond, which is a time-consuming and lengthy process.¹¹¹ Furthermore, the Committee only holds recommendatory powers. If the Committee does find that there has been a human rights violation, it issues a 'view', recommending steps that the country should take to adhere to its obligations under the CRPD or the CEDAW.¹¹² The optional nature of these recommendations diminishes their practical efficacy for women with disabilities in Victoria who may pursue this international avenue upon exhaustion of all domestic legal avenues.

While practical and conceptual limitations exist in the ability of human rights discourse to protect the rights of women with disabilities, international human rights instruments such as the CRPD and the CEDAW represent influential and politically significant mechanisms for change.¹¹³ Various legislative and policy initiatives at the domestic level are attributable to Australia's human rights obligations under international law and the use of human rights frameworks. These include the Victorian Charter, the establishment of the Australian Human Rights Commission and the implementation of the *National Plan to Reduce Violence Against Women and their Children 2010-2022*¹¹⁴ and the *National Disability Strategy 2010 to 2020*.¹¹⁵

At the symbolic or ideological level, the CRPD and the CEDAW assist in recognising, respecting and promoting the subjectivity and the rights of women with disabilities.¹¹⁶ Ortoleva and Lewis emphasise the significance of these conventions thus:

... the intersection between the provisions of the [CEDAW] and the [CRPD], along with various [UN] Resolutions and policy statements on human rights, women's rights and disability rights demonstrates the synergy that exists to foster changes in law, policy, and practice to ensure the inclusion of women with disabilities in an understanding of violence against women and its causes and consequences, recognizing the multiple and intersecting dimensions of women's lives.¹¹⁷

109 CRPD Optional Protocol arts 2(b), (f); CEDAW Optional Protocol art 4.

110 VEOHRC, *Talking Rights Report*, above n 9, 45-6.

111 VEOHRC, *Talking Rights Report*, above n 9, 46; CEDAW Optional Protocol art 6; CRPD Optional Protocol art 3.

112 CRPD Optional Protocol arts 5-6; CEDAW Optional Protocol arts 7-8.

113 Fileborn, above n 87. See also Hilary Charlesworth and Christine Chinkin, *The boundaries of international law: A feminist analysis* (Manchester University Press, 2000).

114 Council of Australian Governments, *National Plan to Reduce Violence against Women and their Children 2010-2022* (Commonwealth of Australia, 2012).

115 Council of Australian Governments, *National Disability Strategy 2010 to 2020* (Commonwealth of Australia, 2011).

116 Helen Meekosha, 'Toward the Adoption of a UN Convention on the Rights of Persons with Disabilities in Australia' (Paper presented at the International Forum on Disabilities, Osaka, Japan, October 2002).

117 Ortoleva and Lewis, above n 17, 16-17.

The language of human rights can be empowering for women with disabilities as a marginalised group in society. It enables women with disabilities and advocates working on their behalf 'to assert their needs in the language of the powerful',¹¹⁸ articulating their rights in a way that resonates with those in a position of institutional power and influence.¹¹⁹ The broader challenge is whether human rights-based claims can be extended to embrace the aspiration to end violence against women with disabilities through fundamental transformations of gender and social orders and relations.¹²⁰

118 Ursula O'Hare, 'Realising human rights for women' (1999) 21 *Human Rights Quarterly* 364, 380.

119 Fileborn, above n 87; Charlesworth and Chinkin, above n 112, 210; Liz Kelly, 'Inside outsiders: Mainstreaming violence against women into human rights discourse and practice' (2005) 7 *International Feminist Journal of Politics* 471, 490.

120 Kelly, above n 118, 491.

Section 5: Domestic avenue of protection: family violence

A Introduction

Women with disabilities are at an increased risk of family violence than are women without disabilities. Their heightened risk has been attributed to reliance on care and assistance for daily living needs, a lack of awareness or knowledge that abuse has occurred, communication difficulties and societal discrimination.¹²¹ The risk of family violence for women with disabilities is also affected by race,¹²² gender,¹²³ sexuality,¹²⁴ age and geography (that is, the availability and accessibility of services in rural compared to urban areas).¹²⁵ Women with disabilities who find themselves in situations of dependence and powerlessness are often 'easy targets' for abuse.¹²⁶

Practical perspective

Women with disabilities who attend at the Women's Legal Service have usually experienced family violence at the hands of an intimate partner, and in a lot of circumstances, that partner is also their carer. It poses a number of different challenges for these women in terms of reporting and pursuing criminal charges against the perpetrator because of their intimate and dependent relationship (*Interview participant, Women's Legal Service*).

121 See, e.g. Stephen Gilson, Elizabeth DePoy and Elizabeth Cramer, 'Linking the assessment of self-reported functional capacity with abuse experiences of women with disabilities' (2001) 7 *Violence Against Women* 418.

122 See, e.g. Elizabeth Lightfoot and Oliver Williams, 'The Intersection of Disability, Diversity, and Domestic Violence: Results of National Focus Groups' (2009) 18 *Journal of Aggression, Maltreatment and Trauma* 133.

123 See, e.g. Sara-Beth Plummer and Patricia Findley, 'Women with Disabilities' Experience with Physical and Sexual Abuse: Review of the Literature and Implications for the Field' (2012) 13 *Trauma, Violence and Abuse* 15.

124 See, e.g. Daryl Higgins, 'Sexuality, human rights and safety for people with disabilities: the challenge of intersecting identities' (2010) 25 *Sexual and Relationship Therapy* 245.

125 See, e.g. Nancy Fitzsimons, Annette Hagemeister and Elizabeth Braun, 'Interpersonal Violence Against people with Disabilities: Understanding the Problem from a Rural Context' (2011) 10 *Journal of Social Work in Disability and Rehabilitation* 166.

126 VLRC, *Family Violence Laws Report*, above n 13, 40 [2.84]; FVSN Evaluation Steering Committee, above n 12, 85; Salthouse, above n 90, 7.

Practical perspective

Women with disabilities often have quite complex interconnected legal problems. It might be that they have limited access to funds, limited access to support, unstable housing, which are all exacerbated or made more difficult to resolve due to their disability. Victoria Legal Aid (VLA) tries to offer a holistic service to such clients; we try to untangle those balls of problems to ascertain what might be at the root of it. For instance, a woman with a disability who has been the victim of violence may in the first instance want to get out of the violent relationship. But if she doesn't have independent access to funds or if she needs independent accommodation, VLA would try to assist her with these broader socio-legal problems to help prevent her disadvantage becoming more entrenched (Interview participant, Victoria Legal Aid).

Women with disabilities in Victoria who have experienced violence may face a myriad of barriers in accessing appropriate support services and avenues of redress through the legal system. Legal protections available are affected by issues such as the nature of the violence and the likelihood of its recurrence; the relationship between the victim and the perpetrator; and the availability of civil and/or criminal remedies. These issues are explored in the subsequent analysis of the Victorian and Commonwealth legislative frameworks.

B The Victorian legislative framework

Intervention orders were devised as a practical response to family violence that sought to complement the criminal justice response and to offer greater protection for women and children.¹²⁷ The VLRC Family Violence Laws Report identified various limitations of the criminal justice response to family violence. These limitations, which are heightened in the case of women with disabilities, include a failure by police and courts to accept the gravity of family violence as a crime and thus to enforce the criminal law; evidentiary challenges for women with disabilities as victims; and the fact that not all forms of family violence are criminal offences.¹²⁸ Women with cognitive impairment in particular may face significant difficulties being taken seriously by police when they articulate their experience of family violence.¹²⁹ The standard of proof for a criminal conviction – beyond reasonable doubt – can be difficult to satisfy in family violence cases, such as where the victim is the only witness, or where other witnesses are unwilling to become involved in what is considered a predominantly 'private' family matter.¹³⁰

127 VLRC, *Family Violence Laws Report*, above n 13, 60 [3.38], [3.40], 61 [3.42], citing Women's Policy Co-ordination Unit, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence Summary Paper* (Victorian Department of Premier and Cabinet, 1985) 123.

128 VLRC, *Family Violence Laws Report*, above n 13, 55 [3.25]-[3.26], 57 [3.29]-[3.32], 58 [3.35].

129 Ibid 55 [3.25]; Jonathon Goodfellow and Margaret Camilleri, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice*, Final Report of Stage One of the Sexual Offences Project (Disability Discrimination Legal Service, 2003) 56.

130 VLRC, *Family Violence Laws Report*, above n 13, 57 [3.30].

The perceived benefits of intervention orders are four-fold: (i) accessibility for women, as an order can be obtained on the civil standard of 'balance of probabilities' rather than the criminal standard of proof of 'beyond reasonable doubt'; (ii) flexibility, in both their application to a range of threatening and violent behaviour that may not amount to criminal offences, and in the remedies available; (iii) they serve a preventative purpose, averting the escalation of family violence; and (iv) their ability to be used by women who are reluctant to involve the police.¹³¹ The strategic value of intervention orders lies in their uptake by victims of violence, the vital role of the police in the application process and in their adoption by government as a political response to violence.¹³²

Intervention orders are an 'essential part of the toolkit' and 'one of the few legal options available' for women with disabilities who seek safety from violence, and for those attempting to protect them.¹³³ They are relatively straightforward to obtain, provided that the statutory criteria are met, and they can be empowering for women with disabilities who have experienced violence. The availability of intervention orders in emergency situations, their injunctive rather than punitive operation, and the ability to obtain an interim intervention order in the absence of the respondent and without notifying the respondent,¹³⁴ and are further benefits which enable intervention orders to supplement criminal justice responses or to provide a remedy where the criminal law may not apply.¹³⁵

Practical perspective

The FVP Act and the PSIO Act are weighted in favour of victims of violence. In my experience, it has been easy for people to get intervention orders to protect themselves and the police are very proactive in running these matters on behalf of the victim. This reduces the demands on the victim, as they are not required to go to the police station, then to the Magistrates' Court to fill out the application form and then present their case to the magistrate. From the experience of our workers representing respondents to intervention orders, it is incredibly hard to resist those applications, which suggests that the victims are quite well protected (*Interview participant, Victoria Legal Aid*).

131 Women's Policy Co-ordination Unit, above n 126, 120-23, cited in VLRC, *Family Violence Laws Report*, above n 13, 60 [3.39] and Sentencing Advisory Council, Breaching Intervention Orders Report (Sentencing Advisory Council, 2008) 5 [2.2.3] (Breaching Intervention Orders Report).

132 Karen Wilcox, 'Recent innovations in Australian protection order law – a comparative discussion' (Topic paper No 19, Australian Domestic and Family Violence Clearinghouse, 2010) 3.

133 OPA, Submission No 29 to the Parliament of Victoria Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, 13 September 2011, 33 [4.34] (*Access to Justice Inquiry Submission*).

134 See *Family Violence Intervention Orders Act 2008* (Vic) s 54; *Personal Safety Intervention Orders Act 2010* (Vic) s 37.

135 Wilcox, above n 131, 3.

A sustained criticism of intervention orders is their inability to adequately protect people – particularly women and children – from family violence. As the VLRC Family Violence Laws Report noted,¹³⁶ some research has indicated that intervention orders have only a negligible protective impact, particularly where children are involved and where there is a history of prior, persistent abuse.¹³⁷ These concerns are amplified for women with disabilities, who may be financially dependent on the perpetrator of the family violence or rely on the perpetrator for ongoing care. An integrated response to intervention orders – through measures such as the inclusion of tailored conditions in orders; mandatory counselling under the FVP Act made by Family Violence Court Divisions of the Magistrates' Court of Victoria; and effective police responses to breaches – is vital for the more effective protection of women with disabilities who have experienced violence. These issues are explored in further detail below.

1 FVP Act

The FVP Act expressly recognises that family violence is predominantly committed by men against women; that it can have serious adverse impacts upon children and the entire community; and that family violence occurs in all areas of society irrespective of location, socioeconomic and health status, age, culture, gender, sexual identity, ability, ethnicity or religion.¹³⁸ The FVP Act also acknowledges that family violence extends beyond physical and sexual violence, and that it may involve emotional or psychological abuse and economic abuse, overt or subtle exploitation of power imbalances and that it may comprise isolated incidents or patterns of abuse over a period of time.¹³⁹

The stated purpose of the FVP Act is to protect the safety of children and adults who have experienced family violence, to prevent and reduce family violence and to promote the accountability of perpetrators of family violence.¹⁴⁰ The FVP Act aims to achieve this purpose by providing an effective and accessible system of FVIOs and family violence safety notices (FVSN) and by creating offences for contraventions of such orders and notices.¹⁴¹

136 See VLRC, *Family Violence Laws Report*, above n 13.

137 VLRC, *Family Violence Laws Report*, above n 13, 61 [3.42], citing as examples in support of this proposition Adele Harrell and Barbara Smith, 'Effects of Restraining Orders on Domestic Violence Victims' in Eve Buzawa and Carl Buzawa (eds), *Do Arrests and Restraining Orders Work?* (SAGE, 1996) 214, 229-33, 240-1.

138 *Family Violence Protection Act 2008* (Vic) Preamble.

139 *Family Violence Protection Act 2008* (Vic) Preamble.

140 *Family Violence Protection Act 2008* (Vic) ss 1(a)-(c).

141 *Family Violence Protection Act 2008* (Vic) s 2.

The FVP Act:

- expands the definition of family violence to include economic abuse and emotional or psychological abuse
- extends access to FVIOs to vulnerable parties through a broad definition of 'family member', which covers family and family-like relationships, including carers of people with disabilities
- increases police powers to respond to family violence more efficiently and effectively
- improves court processes for victims, such as by restricting cross-examination of victims by self-represented respondents.¹⁴²

The express recognition of economic abuse and emotional or psychological abuse as forms of family violence, and a broad definition of 'family' to include carers, are particularly significant features of the FVP Act for women with disabilities. These features are explored below.

(a) Forms of violence captured by the FVP Act

Section 5 of the FVP Act defines 'family violence' as behaviour by a person towards a family member of that person if that behaviour is:

- physically or sexually abusive
- emotionally or psychologically abusive
- economically abusive
- threatening
- coercive
- in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person.¹⁴³

Subsection 5(2) elaborates upon this definition, providing a non-exhaustive list of types of behavior that satisfy the definition of 'family violence' in sub-section 5(1). These include:

- assaulting or causing personal injury to a family member or threatening to do so
- sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour
- intentionally damaging a family member's property, or threatening to do so

¹⁴² FVSN Evaluation Steering Committee, above n 12, 7.

¹⁴³ Family Violence Protection Act 2008 (Vic) s 5(1)(a).

- unlawfully depriving a family member of his or her liberty, or threatening to do so
- causing or threatening to cause the death of, or injury to, an animal, so as to control, dominate or coerce the family member.

The FVP Act stipulates that behaviour may constitute family violence even if it would not amount to a criminal offence,¹⁴⁴ which offers broader protection to women with disabilities. Through an expansive definition of ‘family violence’, the FVP Act addresses many of the key forms of violence experienced by women with disabilities, including the more latent forms, such as disability-related violence and forced social isolation. The express recognition of economic abuse and emotional or psychological abuse as forms of family violence in the FVP Act is extremely significant for women with disabilities, particularly given that they experience these forms of abuse at very high rates. Emotional or psychological abuse and economic abuse are usually accompanied by other forms of violence, such as physical or verbal abuse.¹⁴⁵ The FVP Act expands on economic abuse and emotional or psychological abuse as distinct forms of family violence through separate definitions and examples of each.

(i) Economic abuse

Women with disabilities are at particular risk of experiencing economic abuse, primarily due to the power imbalance that may exist between these women and the perpetrators who target them.¹⁴⁶ An inability to access funds can prevent women from leaving abusive relationships, thereby leading to their social isolation.¹⁴⁷ Economic abuse can have adverse health consequences for women and their children, and can lead to legal problems, poor credit records, debt and material deprivation.¹⁴⁸ However, there is a scarcity of research and evidence on the prevalence of economic abuse in Victoria, its impact upon victims, the legal frameworks for protection of people who experience economic abuse or the operation and (in) effectiveness of those legal frameworks.¹⁴⁹

144 Family Violence Protection Act 2008 (Vic) s 5(3).

145 McGuire, *Voices Against Violence Research Project, Paper Four*, above n 2, 22, 39.

146 Ibid 33.

147 ALRC and NSWLRC, above n 10, 214 [5.90]; Fiona Macdonald, *Spotlight on Economic Abuse: A Literature and Policy Review* (Good Shepherd Youth & Family Service and KildonanUnitingCare, 2012) iii.

148 Elizabeth Branigan, *His Money or Our Money? Financial Abuse of Women in Intimate Partner Relationships* (Coburg-Brunswick Community Legal and Financial Counselling Centre, 2004) ii; McGuire, *Voices Against Violence Research Paper Four*, above n 2, 33.

149 Macdonald, above n 146, 16; John Chesterman, *Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults* (Winston Churchill Memorial Trust of Australia, 2013) 17. The following is a sample of the available research on economic abuse, particularly of elderly people: Peteris Darzins, Georgia Lowndes, Jo Wainer, Kei Owada and Tijana Mihaljic, *Financial abuse of elders: A review of the evidence. Protecting Elders' Assets Study* (Monash University, 2009) (*Financial abuse of elders*); Jo Wainer, Peteris Darzins and Kei Owada, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elders' Assets Study* (Monash University, 2010) (*Prevalence of Financial Elder Abuse*); Jo Wainer, Kei Owada, Georgia Lowndes and Peteris Darzins, *Diversity and financial elder abuse in Victoria: Protecting Elders' Assets Study* (Monash University, 2011) (*'Diversity and financial elder abuse'*); Christopher King, Jo Wainer, Georgia Lowndes, Peteris Darzins and Kei Owada, *For love or money: Intergenerational management of older Victorians' assets: Protecting Elders' Assets Study* (Monash University, 2011) (*For love or money*); Tanya Corrie and Magdalena McGuire, *Sharing Solutions Across Sectors: A Spotlight on Economic Abuse Research Report* (Good Shepherd Youth & Family Service and KildonanUnitingCare, 2013); Branigan, above n 147.

Economic abuse is defined in section 6 of the FVP Act as 'behaviour by a person (the first person) that is coercive, deceptive or unreasonably controls another person (the second person), without the second person's consent:

- in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour
- by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses'.

Section 6 offers various examples of conduct that may constitute economic abuse. For women with disabilities, these include:

- coercing a person to relinquish control over assets and income
- removing or keeping a family member's property without permission, or threatening to do so
- disposing of property owned by a person against his or her wishes
- preventing a person from having access to joint financial assets to meet normal household expenses
- preventing a person from seeking or keeping employment
- coercing a person to claim social security payments
- coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person
- coercing a person to sign a contract for the purchase of goods or services; or for the provision of finance, a loan or credit; a contract of guarantee; or a legal document for the establishment or operation of a business.

Women with disabilities experience economic abuse in unique and diverse ways. They may be denied money for medication and vital disability-related personal needs. Perpetrators may take control of their finances. They can be prevented from attending work because the perpetrator refuses to assist with their daily routines such as washing or grooming or damages their communication devices or wheelchairs.¹⁵⁰

150 Gill Hague, Ravi Thiara, Pauline Magowan and Audrey Mullender, *Making the Links: Disabled Women and Domestic Violence - Final Report* (Women's Aid Federation of England, 2008) 33-4; Diane Smith and Claudia Hilton, 'An occupational justice perspective of domestic violence against women with disabilities' (2008) 15 *Journal of Occupational Science* 166, 168; Macdonald, above n 146, 17.

However, it may be difficult for a woman with a disability to prove that economic abuse has occurred, as the person taking control of her finances may contend that it is reasonable to do so, on the basis that the woman cannot manage her financial affairs due to her disability.¹⁵¹ As Corrie and McGuire have noted, economic abuse is often not recognised or understood by members of the community as a form of family violence, such that women with disabilities who experience economic abuse may not receive appropriate responses from the service sector.¹⁵²

Practical perspective

Even though ‘family violence’ is very broadly defined in the FVP Act and includes economic abuse and emotional or psychological abuse, those are the types of abuse that would be far more difficult to get a response from the police for. If a woman has been a victim of physical or sexual violence, it is much easier for the police to respond than other, less obvious forms of violence (*Interview participant, Victoria Legal Aid*).

The nature of a woman’s dependence on a partner, family member or other person can heighten her vulnerability to economic abuse, which is commonly experienced together with other forms of family violence.¹⁵³ A recent Victorian study of violence against people with cognitive impairments identified a range of perpetrators of economic abuse, including intimate partners, parents, children and paid or unpaid care providers.¹⁵⁴ An economic power imbalance in a relationship has the potential to foster family violence, by creating obstacles for a woman with a disability who experiences violence to leave the relationship.¹⁵⁵ Economic abuse of a woman with a disability may be perpetrated by a person who is not a family member or intimate partner, but is in a family-like relationship with the woman by living with her or providing personal care and support in the woman’s home.¹⁵⁶

151 ALRC and NSWLRC, above n 10, 214 [5.90].

152 Corrie and McGuire, above n 148, iii, 36.

153 Macdonald, above n 146, 16. See also Cynthia Sanders and Meg Schnabel, ‘Organizing for economic empowerment of battered women’ (2007) 14 *Journal of Community Practice* 47; Healey et al, *Building the Evidence*, above n 11; Ortoleva and Lewis, above n 17, 15.

154 Dillon, above n 11, 13, 16-18.

155 Macdonald, above n 146, iii.

156 Ibid 4; Dillon, above n 11, 8, 12.

Practical perspective

The first stumbling block to addressing economic abuse is that the women with disabilities themselves are unlikely to recognise there has been a legal wrong done to them. They may feel uncomfortable or unhappy in the situation, but making the link between those feelings and realising that there may be a legal avenue of redress is very difficult. Even if women with disabilities recognise that there might be a legal dimension to their issue of violence or abuse, knowing where to go for help is a real challenge, as is getting a response from the police or a legal service provider (*Interview participant, Victoria Legal Aid*).

Economic abuse often occurs concurrently with other forms of violence and its long-term, severe impacts are more pronounced for women with disabilities.¹⁵⁷ As submissions to the Australian Law Reform Commission and New South Wales Law Reform Commission Inquiry into specified family violence laws and legal frameworks to improve the safety of women and their children (ALRC/NSWLRC Inquiry) emphasised:

Economic abuse ... may have an increased impact on people with a disability who may be vulnerable to economic exploitation, intimidation and abuse from carers, partners and other family members, due to their dependence, having impaired decision-making capacity, and their not being afforded sufficient control of their finances by family members, proxies, or service systems.¹⁵⁸

In their submission to the ALRC/NSWLRC Inquiry, the Magistrates' Court of Victoria and the Children's Court of Victoria noted that it was rare for applicants for FVIOs to rely solely on economic abuse. Rather, this form of family violence is usually cited in applications together with other forms, such as physical abuse, threats or emotional and psychological abuse.¹⁵⁹ The Courts' submission added that they were unaware of any charges concerning breach of an intervention order based solely on economic abuse. This experience was reiterated by the magistrate consulted for this report, who stated that intervention order applications under the FVP Act almost always rely upon multiple forms of violence.

157 Macdonald, above n 146, 16; Branigan, above n 147, ii.

158 ALRC and NSWLRC, above n 10, 214 [5.90] (citations omitted).

159 Ibid 215 [5.92].

The prevalence and increasing incidence of economic abuse of elderly people, both in Australia and in overseas jurisdictions, has been well-documented.¹⁶⁰ This trend has been attributed to the increasing number of elderly people living with disability and/or living in the community alone or with family (rather than in aged care facilities), and the concentration of assets and wealth among elderly people.¹⁶¹ Various studies on the issue of economic abuse of elderly people – commonly labelled ‘elder abuse’ – have highlighted that older women with cognitive impairment, notably dementia, are most vulnerable to this form of family violence.¹⁶² This may be due to such women’s failure to recognise that economic abuse has occurred, a reluctance to report it, their financial dependence and diminished employability, health issues and a greater need for care.¹⁶³ In these instances, the economic abuse may be detected and reported by outsiders such as medical professionals or healthcare workers.¹⁶⁴

These studies have also observed that, to the extent that economic abuse of elderly people is predominantly a family issue, legal protection is likely to be ineffective.¹⁶⁵ This observation applies with equal force to women with disabilities, as reliance on the perpetrator of the abuse for care and support is a significant barrier to leaving an abusive relationship.¹⁶⁶

(ii) Emotional or psychological abuse

Emotional or psychological abuse is defined in section 7 of the FVP Act as ‘behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person’.¹⁶⁷ Examples are provided to aid the interpretation of this provision. Those of pertinence to women with disabilities are threatening to withhold a person’s medication, and preventing a person from making or keeping connections with the person’s family, friends or culture.¹⁶⁸ These two examples are illustrations of impairment-related abuse, whereby perpetrators exploit women’s disabilities so as to exert control and power over them.¹⁶⁹

160 See, e.g. Wainer et al, *Diversity and financial elder abuse*, above n 148; King et al, *For love or money*, above n 148; Darzins et al, *Financial abuse of elders*, above n 148; Macdonald, above n 146, 11; Marta Lundy and Susan Grossman, ‘Elder Abuse: Spouse/Intimate Partner Abuse and Family Violence Among Elders’ (2004) 16 *Journal of Elder Abuse and Neglect* 85; Ortoleva and Lewis, above n 17, 36.

161 Wainer et al, *Diversity and financial elder abuse*, above n 148, 19.

162 See Darzins et al, *Financial abuse of elders*, above n 148, 17; Corrie and McGuire, above n 148, i.

163 Macdonald, above n 146, iii, 16; Dale Bagshaw, Sarah Wendt and Lana Zannettino, ‘Preventing the abuse of older people by their family members’ (Stakeholder paper No 7, Australian Domestic and Family Violence Clearinghouse, 2009); Ludo McFerran, ‘The disappearing age: a discussion paper on a strategy to address violence against older women’ (Topic paper No 18, Australian Domestic and Family Violence Clearinghouse, 2009); Sylvia Straka and Lyse Montminy, ‘Responding to the needs of older women experiencing domestic violence’ (2006) 12 *Violence Against Women* 251.

164 Darzins et al, *Financial abuse of elders*, above n 148, 17.

165 Darzins et al, *Financial abuse of elders*, above n 148, 7.

166 Macdonald, above n 146, 16.

167 *Family Violence Protection Act 2008* (Vic) s 7.

168 *Family Violence Protection Act 2008* (Vic) s 7.

169 McGuire, *Voices Against Violence Research Project, Paper Four*, above n 2, 10.

In *Voices Against Violence Research Project Paper Four: A Review of the OPA's Records on Violence against Women with Disabilities*, psychological violence was found to be the most common form of violence experienced by women (29 out of 45 cases).¹⁷⁰ Impairment related abuse was reported in six women's cases, and included the deliberate over-feeding of a woman with Prader-Willi Syndrome (leading to her gaining 40 kilograms in two years); the withholding of anti-psychotic medication; taking a woman's hearing aids; denying a woman money so that she could not buy medication; engaging in a dangerous and inappropriate 'care' regime with a woman; and preventing a woman from seeing a doctor in relation to her disability.¹⁷¹

Similarly, in a review of 86 OPA cases of people with cognitive impairments who had experienced violence, Dillon found that impairment-related abuse was reported in 10 cases, and that it was quite evenly represented across all age groups among people with various impairments that limited their physical functioning.¹⁷² Examples of impairment-related abuse in those cases included restraining the person so as to administer non-prescribed medications; failure to provide medication or to support the person when illness ensued; keeping mobility aids out of reach; and exploiting the person in order to access his or her service support.¹⁷³

The definition of emotional or psychological abuse in section 7 of the FVP Act, as behaviour that 'torments, intimidates, harasses or is offensive', appears sufficiently broad to capture impairment-related abuse against women with disabilities.

In their final report, *Family Violence - A National Legal Response* (ALRC/NSWLRC Family Violence Report), the ALRC and the NSWLRC recommended that family violence legislation include examples of emotional and psychological abuse that illustrate conduct which would affect certain vulnerable groups, including people with disability.¹⁷⁴ This paper endorses this recommendation. While section 7 of the FVP Act provides some examples of emotionally or psychologically abusive behaviour, the following examples could be added to this section to enhance its sensitivity to violence experienced by women with disabilities:

- threatening to institutionalise a person
- withdrawing care on which the person is dependent
- preventing the person from accessing necessary treatment or aids and equipment used in the person's daily life.¹⁷⁵

170 Ibid 10, 22, 39.

171 Ibid 21.

172 Dillon, above n 11, 13.

173 Dillon, above n 11, 13.

174 ALRC and NSWLRC, above n 10, recommendation 5-2.

175 See ALRC, above n 91, 83 [3.30].

The inclusion of such examples in the FVP Act would serve as a significant educative tool and potentially lead to more consistent responses to family violence experienced by women with disabilities from various participants in the justice system.¹⁷⁶

(b) Family members

The FVP Act has broadened the definition of ‘family member’ to include different types of relationships in which women with disabilities may experience family violence, beyond a marital or domestic relationship. This definition was the result of considerable support and input from disability and women’s advocates.

Section 8 of the FVP Act defines a ‘family member’ as:

- a person who is, or has been, the relevant person’s spouse or domestic partner
- a person who has, or has had, an intimate personal relationship with the relevant person
- a person who is, or has been, a relative of the relevant person
- a child who normally or regularly resides with the relevant person or has previously resided with the relevant person on a normal or regular basis
- a child of a person who has, or has had, an intimate personal relationship with the relevant person.

Also contained within this definition of ‘family member’ is a person whom the woman experiencing the violence reasonably ‘regarded as being like a family member’.¹⁷⁷ In this instance, the Court examines the circumstances of the relationship in its entirety.¹⁷⁸ As applied to women with disabilities, these circumstances relevantly include:

- the nature of the social and emotional ties between the woman experiencing the violence and the other person¹⁷⁹
- whether the woman and the other person live together or relate together in a home environment¹⁸⁰
- the duration of the relationship and the frequency of contact¹⁸¹

176 ALRC and NSWLRC, above n 10, 239 [5.189].

177 *Family Violence Protection Act 2008* (Vic) s 8(3).

178 *Family Violence Protection Act 2008* (Vic) s 8(4).

179 *Family Violence Protection Act 2008* (Vic) s 8(3)(a).

180 *Family Violence Protection Act 2008* (Vic) s 8(3)(b).

181 *Family Violence Protection Act 2008* (Vic) s 8(3)(e).

- any financial or other form of dependence or interdependence between the woman and the other person¹⁸²
- the provision of any responsibility or care (whether paid or unpaid), sustenance or support between the woman and the other person.¹⁸³

Subsection 8(3) of the FVP Act expressly recognises that carers can be considered ‘family members’ through the following example:

A relationship between a person with a disability and the person’s carer may over time have come to approximate the type of relationship that would exist between family members.¹⁸⁴

This acknowledgment is extremely significant for women with disabilities, as the perpetrators of violence against women with disabilities commonly include care providers (as well as intimate partners and family members).¹⁸⁵ Care providers who provide in-home care and support are privy to their clients’ personal lives and may be capable of exploiting their disabilities and exerting violence and abuse. The FVP Act thus enhances the protection available to women with disabilities through a recognition that a family-like relationship between a woman and her care provider may develop over time.

(c) Jurisdiction

The granting of FVIOs is the primary means by which courts in Victoria exercising jurisdiction under the FVP Act seek to achieve the objectives of the Act, being to prevent family violence and protect people who experience or are at risk of family violence.¹⁸⁶ An application for a FVIO must be made at the Magistrates’ Court of Victoria.¹⁸⁷ The Children’s Court of Victoria also has jurisdiction to hear applications for FVIOs where the affected family member, the protected person or the respondent is a child at the time the application is made.¹⁸⁸

Section 145 of the FVP Act defines the Magistrates’ Court as including the Family Violence Court Division (FVC Division) and the Neighbourhood Justice Division of that Court. The FVC Division was established under section 4H(1) of the *Magistrates’ Court Act 1989* (Vic) and commenced sitting at the Magistrates’ Court of Victoria at Ballarat and Heidelberg in 2005.¹⁸⁹

182 *Family Violence Protection Act 2008* (Vic) ss 8(3)(f)-(g).

183 *Family Violence Protection Act 2008* (Vic) s 8(3)(h)-(i).

184 *Family Violence Protection Act 2008* (Vic) s 8(3) example.

185 See, e.g. Plummer and Findley, above n 122, 21.

186 *Family Violence Protection Act 2008* (Vic) s 1.

187 *Family Violence Protection Act 2008* (Vic) s 42.

188 *Family Violence Protection Act 2008* (Vic) s 146.

189 Magistrates’ Court of Victoria Court Support and Diversion Services, *A Guide to Specialist Courts and Court Support Services* (Magistrates’ Court of Victoria, 3rd ed, 2013) 24.

It specialises in hearing family violence cases. The aims of the FVC Division are to improve accessibility to the Court, to promote the safety of people affected by violence, to increase the accountability of perpetrators and to improve protection for children exposed to family violence.¹⁹⁰ It also strives to simplify the application process for FVIOs by providing support services to victims.

Features of the FVC Division that may offer greater assistance to women with disabilities seeking protection through a FVIO are:

- special support services at the Court, including advocacy, referral, legal services and links to community family violence organisations
- specially assigned magistrates, family violence registrars, support workers and family violence outreach workers with training and knowledge in family violence matters
- an increased focus on recognising and responding to the needs of particularly vulnerable applicants, including those with a disability.¹⁹¹

Magistrates in the FVC Division can hear FVIO applications and related matters – such as family law parenting orders matters and Victims of Crime applications related to family violence – concurrently. Streamlining the process in this manner can help to minimise the adverse impacts upon women with disabilities by obviating the need for multiple court hearings.

Part 5 of the FVP Act empowers Magistrates in the FVC Division to make orders to assess the eligibility of respondents for counselling¹⁹² and, if appropriate, to require a respondent to attend counselling.¹⁹³ The purpose of a counselling order is to increase the respondent's accountability for the violence committed and to encourage a change in behaviour,¹⁹⁴ through participation in a Men's Behavioural Change Program. Court directed counselling orders under Part 5 of the FVP Act, at present, can only be made at the Ballarat and Heidelberg Magistrates' Courts, and can only be recommended by the Court in other areas across Victoria. This is because only the Ballarat and Heidelberg Magistrates' Courts currently have designated family violence respondent workers, who assess the eligibility of respondents for counselling and assist respondents in family violence cases.

190 Ibid 24.

191 Magistrates' Court of Victoria, *Family Violence Court Programs*, <<http://www.magistratescourt.vic.gov.au/jurisdictions/intervention-orders/family-violence-court-programs>> [see note in comments]

192 *Family Violence Protection Act 2008* (Vic) ss 127(a), 129.

193 *Family Violence Protection Act 2008* (Vic) ss 127(b), 130.

194 *Family Violence Protection Act 2008* (Vic) s 127(b)(ii).

Practical Perspective

Some community legal centres and other advocacy support groups have presence at some Magistrates' Courts to try to help women with disabilities. But there is nowhere near enough assistance, such as legal advice, non-legal advocacy and support services, readily available at court to women with disabilities who experience violence (*Interview participant, Villamanta Disability Rights Legal Service*).

An additional family violence initiative of the Magistrates' Court of Victoria is the Specialist Family Violence Service (SFVS), which operates at the Frankston, Sunshine, Werribee, and Melbourne Magistrates' Courts.¹⁹⁵ The SFVS aims to simplify access to the justice system for, and enhance the safety of, people affected by family violence and their children.¹⁹⁶ While the SFVS courts specialise in hearing applications for FVIOs and have very similar features to the FVC Division, they are not a new division of the Magistrates' Court of Victoria. They do not have a family violence respondent support worker, they cannot order a respondent to attend the Men's Behavioural Change Program and they cannot hear other proceedings relating to the parties involved in the intervention order application.¹⁹⁷

A report by the Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention* (Sentencing for Contravention Report), found that the volume of FVIO matters determined by the Magistrates' Court of Victoria increased by 82% between 2004-05 and 2011-12, with a consequent increase in the number of FVIO contravention charges sentenced by the Court.¹⁹⁸

Given this substantial increase, it is recommended that the Victorian Government extend the use of the FVC Division currently operating in selected Magistrates' Courts in Victoria across all Victorian Magistrates' Courts, so as to increase the availability of specialised services and support for women with disabilities. It also recommends that a specialist disability service, comprising community agencies and organisations that offer services and support to women with disabilities who have experienced violence, be established in the Magistrates' Court of Victoria to provide specific advice and referral services to women with disabilities who have experienced violence. The effective implementation and operation of this specialist disability service may require the creation of disability liaison positions at the Magistrates' Court.

195 Magistrates' Court of Victoria, above n 188, 25.

196 Ibid.

197 Ibid.

198 Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention - Monitoring Report* (Sentencing Advisory Council, 2013) 46 [5.23] (*Sentencing for Contravention Report*).

Recommendation 1: That the Victorian Government extend the use of the Family Violence Court Division currently operating in selected Magistrates' Courts in Victoria across all Victorian Magistrates' Courts.

Recommendation 2: That a specialist disability service, comprising community agencies and organisations that offer services and support to women with disabilities who have experienced violence, be established in the Magistrates' Court of Victoria to provide specific advice and referral services. The effective implementation of this recommendation may require the creation of disability liaison positions at the Magistrates' Court of Victoria.

Family violence issues are a significant component of judicial education, with magistrates participating in ongoing professional development about family violence matters.¹⁹⁹ *The Family Violence Bench Book* produced by the Judicial College of Victoria (*JCV Family Violence Bench Book*) serves as a sentencing resource and an educative tool for judicial officers making orders under the FVP Act.²⁰⁰ Section 5.8 of the *JCV Family Violence Bench Book*, which focuses upon people with cognitive, physical disabilities or mental ill health in the social context of family violence, recognises that:

[p]eople with disabilities experience higher rates of violence than non-disabled people. Women with disabilities are particularly over-represented as victims of family violence and may have different needs from other victims.²⁰¹

This section of the *JCV Family Violence Bench Book*, which was prepared in consultation with WDV, defines disability and outlines the prevalence of family violence against people with disabilities, disability as a risk factor and the forms of family violence experienced by people with disabilities.²⁰² It also discusses the various barriers to reporting family violence for people with disabilities, including that the behaviour may not be recognised as family violence, limited access to services or alternative accommodation, and limited access to the justice system.²⁰³

199 Ibid 46 [5.24].

200 Judicial College of Victoria, *Family Violence Bench Book* (2010-2013) <<http://www.judicialcollege.vic.edu.au/eManuals/FVBBWeb/index.htm#34143.htm>> (*JCV Family Violence Bench Book*).

201 Ibid [5.8].

202 Ibid [5.8.1]-[5.8.4].

203 Ibid [5.8.5.1]-[5.8.5.3].

The barriers experienced by people with disabilities to accessing legal services and making intervention order applications identified by the *JCV Family Violence Bench Book* include difficulty gaining access to legal aid; lack of integrated support systems; ill-equipped court facilities; inadequate or inappropriate interpreting facilities; and the absence of flexible court procedures and practices to accommodate the needs of people with disabilities, such as the use of alternative technology.²⁰⁴ Section 5.8.6 of the *JCV Family Violence Bench Book* discusses how judicial officers can respond to some of these issues, providing that:

Judicial officers and court staff should consider modifying their usual approach to effective communication with parties and assessing credibility and competence of witnesses when dealing with affected family members or respondents with disabilities.²⁰⁵

Practical perspective

The key issue with family violence legislation is about ensuring that it is applied properly in practice. This involves improving the understanding of court staff, magistrates and judges that family violence against women with disabilities encompasses a very broad range of action, such as withholding medication. The issue is not with the definition of ‘family violence’, but how that definition is understood to apply. For example, economic abuse could be withholding a woman’s disability pension. Including more examples in the legislation would help, but there must also be training and awareness raising of court staff, magistrates and judges (*Interview participant, Women’s Legal Service*).

This paper commends the *JCV Family Violence Bench Book* as an educational resource that recognises and highlights the particular vulnerability of women with disabilities to family violence and its detrimental impacts. To ensure that court responses to the barriers to justice identified in the *JCV Family Violence Bench Book* are adequate and appropriate in practice, this paper recommends that judicial officers, court registrars and other court staff be provided with comprehensive, specialist training and professional development about the unique issues relevant to women with disabilities who experience violence.

Training and development programs should:

- explore the concept of ‘disability’, including the social model of disability and the difference between cognitive impairment and other kinds of disability²⁰⁶

204 Ibid [5.8.5.3].

205 Ibid [5.8.6]

206 Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011) 190.

- include techniques to improve the identification of cognitive impairments²⁰⁷
- educate and develop the skills of judicial officers and court staff in effectively communicating with women with disabilities
- raise awareness of the heightened targeting and exploitation of women with disabilities by perpetrators of violence; the particular impacts of violence on women with disabilities; and the barriers and disadvantages that they experience in seeking redress through the justice system
- outline the existing procedures and arrangements that aim to provide support to women with disabilities when giving evidence in court.²⁰⁸

The formulation of such programs should be undertaken in collaboration with women's and disability support services and organisations.

Recommendation 3: That judicial officers and court staff be provided with comprehensive, specialist training and professional development about the unique issues relevant to women with disabilities who experience violence. Training and development programs should:

- **explore the concept of 'disability', including the social model of disability difference between cognitive impairment and other kinds of disability**²⁰⁹
- **include techniques to improve the identification of intellectual disability or cognitive impairment**²¹⁰
- **educate and develop the skills of judicial officers and court staff in effectively communicating with women with disabilities**
- **raise awareness of the targeting and exploitation of women with disabilities by perpetrators of violence; the particular impacts of violence on women with disabilities; and the barriers and disadvantages that they experience in seeking redress through the justice system**
- **outline the existing procedures and arrangements that aim to provide support to women with disabilities when giving evidence in court.**²¹¹

207 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, recommendation 12.

208 Ibid.

209 Success Works, above n 205, 190 [6.2.4].

210 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, recommendation 12.

211 Ibid.

The formulation of such programs should be undertaken in collaboration with women's and disability support services and organisations. The effective implementation of this recommendation will require additional resources.

(d) Procedure and remedies

(i) Family violence intervention orders

A woman with a disability who has experienced family violence may seek the protection of a FVIO under the FVP Act. An application for a FVIO can be made by a police officer;²¹² or the person seeking protection;²¹³ or any other person with the written consent of the person seeking protection.²¹⁴ If the person seeking protection has a guardian, an application may be made by the guardian or any other person, with leave of the court.²¹⁵

In practice, applications for FVIOs under the FVP Act are most often made by the police. The Sentencing for Contravention Report found that between 2004-05 and 2011-12, there was a 196% increase in the number of FVIOs initiated by Victoria Police, with the majority (67%) of FVIOs in 2011-12 initiated by police. According to the the Sentencing for Contravention Report, this increase is consistent with the *Victoria Police Code of Practice for the Investigation of Family Violence* (FV Code of Practice), which envisages that police will make a significant proportion of all applications for FVIOs.²¹⁶

Practical perspective

I would estimate that three quarters of applications for FVIOs and PSIOs at the Melbourne Magistrates' Court are made by police (*Interview participant, Women's Legal Service*).

The FV Code of Practice recognises that some groups of women in the community, including women with disabilities, experience significantly higher rates of violence than others, and that some women are particularly vulnerable due to isolation by language, geography, disability, mental ill health issues or residency status.²¹⁷

212 *Family Violence Protection Act 2008* (Vic) s 45(a).

213 *Family Violence Protection Act 2008* (Vic) s 45(b).

214 *Family Violence Protection Act 2008* (Vic) s 45(c).

215 *Family Violence Protection Act 2008* (Vic) s 45(e).

216 Sentencing Advisory Council, *Sentencing for Contravention Report*, above n 197, 15 [2.49]-[2.50].

217 Victoria Police, *Code of Practice for the Investigation of Family Violence* (Victoria Police, 2nd ed, 2010) 3 [1.5] (*Family Violence Code of Practice*).

The FV Code of Practice identifies people with disabilities, especially women and girls, as a 'particularly vulnerable group' in the community.²¹⁸ It provides the following guidance to police in their dealings with people with disabilities:²¹⁹

2.5.3 People with disabilities

... It is important that the police approach to a person with a disability is not informed by negative stereotypes; but that police take the time to listen, acknowledge and respect even if there is insufficient evidence to prosecute.

... Police should be mindful of undiagnosed disabilities or a victim not accepting or wishing to disclose they have a disability. The effect of impairments on each individual will vary. For example, a physical disability may restrict the capacity to move freely and /or impair communication, and an intellectual disability or acquired brain injury may impede understanding and communication. However, do not assume that every person with a disability will have problems remembering information.

Investigating cases involving a person with a disability may take extra time. To ensure they meet the victim's needs, police should engage the services of a support person or independent third person as soon as possible. Where possible use a trained Independent Third Person or Guardian / Advocate from the Office of the Public Advocate. Allow people with a disability to communicate in their preferred way; for example, using AUSLAN, Braille, pictograms or by using a communication assistant.

Even if the capacity of a person to participate in police and court processes appears limited, neither the deterrent effect of police intervention, nor the victim's safety, should ever be underestimated or compromised.

Police must remain patient during their investigation and not make assumptions when assessing evidence. It is also important for police to be cautious of undue influence, power imbalances and/or possible manipulation by the alleged perpetrator. The alleged perpetrator may restrict movement, access to support and information, or try to create a perception of a lack of credibility or capacity.

Controlling behaviour may include:

- Withholding food, water, aid equipment such as hearing aids, wheelchairs, walking sticks, or readers, medication or transport
- If also a carer, withholding assistance with toileting, showering, dressing or eating
- Being rough with intimate body parts or engaging in inappropriate handling
- Demanding or expecting sexual activity in return for helping; taking advantage of physical weakness or inaccessible environment

218 Ibid 12 [2.5.3].

219 Ibid 12-13 [2.5.3]

- Threatening to punish, abandon or institutionalize the person with the disability
- Threatening that the person will not be believed by police because of their condition
- Controlling income such as disability support payments.

Additionally, violence may be so normalised and alternative options seem so limited for people with disabilities, that some victims may appear to 'choose' to remain in a violent relationship. It is critical that police, and others, do not in effect endorse these attitudes by a failure to intervene effectively and protect the victim from ongoing violence.

...

If the perpetrator has a disability and despite best efforts, an intervention order and/or criminal prosecution is not possible, police still have a responsibility to help ensure the victim's safety. This can be facilitated through appropriate referrals and working with family/friends, support workers and/or advocates/guardians.

A paid or unpaid carer may, on a case by case basis, be regarded as being like a family member. However, where the carer is providing domestic support and personal care on behalf of another person or an organisation (whether government or not), a remedy may be covered by other legislation. In those cases contact the carer's organisation for assistance.

Where appropriate, police will consider taking a statement via Video Audio Recording of Evidence (VARE). Seek advice from SOCIT.

This section of the FV Code of Practice heightens the sensitivity of Victoria Police members to the unique requirements of women with disabilities who have experienced family violence. It also suggests strategies for police to ensure that the victim's needs are adequately met, through involvement of appropriate support people and services. In principle, this is a noteworthy recognition; the difficulty lies in assessing how the FV Code of Practice operates and is implemented in practice.

A FVIO can be made on an interim basis or a final basis. In determining whether to make an interim order, the court must be satisfied that the order is necessary pending a final decision, to ensure the safety of the person seeking protection or the person's property, or to protect a child who has been subjected to family violence committed by the respondent.²²⁰ An interim order can be obtained in the absence of the respondent and without notifying the respondent,²²¹ and it may apply to more than one affected family member.²²²

220 *Family Violence Protection Act 2008* (Vic) s 53(1).

221 *Family Violence Protection Act 2008* (Vic) s 54

222 *Family Violence Protection Act 2008* (Vic) s 56.

To make a final order, the court must be satisfied that the respondent has committed family violence and is likely to continue or repeat that behaviour.²²³ A FVIO can be made for a specified period²²⁴ or if no period is specified in the order, it remains in force until revoked by the court or set aside on appeal.²²⁵

In deciding the conditions to be included in a FVIO, the court must give paramount consideration to the safety of:²²⁶

- the affected family member for the FVIO application
- any children who have been subjected to the family violence to which the application relates.

The court may include in a Family Violence Intervention Order (FVIO) any conditions that are necessary or desirable to ensure the protected person's safety. The order may include conditions that:²²⁷

- prohibit the respondent from committing family violence against the protected person
- exclude the respondent from the protected person's residence²²⁸
- prohibit the respondent from being in a specified place and or within specified distance of the protected person
- prohibit the respondent from approaching or contacting the protected person;
- direct the use of personal property belonging to the protected person, the protected person's family member or the respondent²²⁹
- prohibit the respondent from causing another person to engage in conduct prohibited by the order
- revoke any licence or permit to carry or use firearms.²³⁰

Where a FVIO is made against a care provider to protect the care provider's client – such as a woman with a disability – section 156 of the FVP Act requires a copy of the order to be served on the care provider's employer.²³¹

223 *Family Violence Protection Act 2008* (Vic) s 74(1).

224 *Family Violence Protection Act 2008* (Vic) s 97.

225 *Family Violence Protection Act 2008* (Vic) s 99.

226 *Family Violence Protection Act 2008* (Vic) s 80.

227 *Family Violence Protection Act 2008* (Vic) s 81(2).

228 *Family Violence Protection Act 2008* (Vic) ss 82-83.

229 *Family Violence Protection Act 2008* (Vic) s 86.

230 *Family Violence Protection Act 2008* (Vic) s 95.

231 *Family Violence Protection Act 2008* (Vic) s 156.

Contravention of a FVIO is a criminal offence under the FVP Act, punishable by up to two years' imprisonment and/or a fine.²³² The FVP Act also makes it an offence for a person to contravene a FVIO with the intention of causing, or expecting to cause, physical or mental harm (including psychological harm and suicidal thoughts) to the protected person, including self-harm; or apprehension or fear in the protected person for his or her own safety or that of any other person.²³³ This punishment for this offence is up to five years' imprisonment and/or a fine.²³⁴ A power of arrest without warrant automatically attaches to the intervention order for its duration.²³⁵

(ii) Family violence safety notices (FVSN)

FVSNs were introduced as part of the FVP Act on 8 December 2008. The main impetus for their introduction was to increase the safety of affected family members through police actions by:

- providing immediate safety to victims of family violence and their children
- acting as an application for a family violence protection order
- acting as a summons for a respondent to attend court on the first mention date.²³⁶

An evaluation of a two-year pilot of FVSNs found that the project had to some degree met its objectives: the notices had contributed to an improved after hours response by Victoria Police to family violence incidents;²³⁷ the introduction of FVSNs had marginally improved the safety of affected family members;²³⁸ and the accountability of perpetrators had increased through an increase in civil actions and in final FVIOs being made by courts (such orders were granted in 67% of FVSN applications).²³⁹ However, concerns were expressed about inadequate police practices, including police responses to women with disabilities who reported family violence.²⁴⁰

A FVSN is a form of temporary protection issued by Victoria Police against a respondent where no other orders are in place,²⁴¹ and where the notice is necessary to ensure the safety of the affected family member; or to preserve property of the affected family member; or to protect a child who has been subjected to family violence committed by the respondent.²⁴²

232 *Family Violence Protection Act 2008* (Vic) s 123.

233 *Family Violence Protection Act 2008* (Vic) s 123A.

234 *Family Violence Protection Act 2008* (Vic) s 123A.

235 *Family Violence Protection Act 2008* (Vic) s 124.

236 FVSN Evaluation Steering Committee, above n 12, i.

237 Ibid i-ii.

238 Ibid iii.

239 Ibid v-vii.

240 Ibid iv-v.

241 *Family Violence Protection Act 2008* (Vic) ss 24(c), (d), (da), 26(1)(b).

242 *Family Violence Protection Act 2008* (Vic) ss 24(e), 26(1)(a).

An application for a FVSN is made by a police officer who responds to an incident involving family violence to a Sergeant or higher ranked police officer.²⁴³ The application is made after hours, being before 9am or after 5pm on a weekday or on a weekend or public holiday.²⁴⁴ A FVSN can include any conditions that the court can include in a FVIO.²⁴⁵ However, the police must consider the practicality of imposing a condition that prohibits the respondent from being anywhere within a specified distance from a particular place.²⁴⁶ This may be a particularly relevant consideration in the context of women with disabilities who experience family violence if the perpetrator is also the woman's care provider and she is solely dependent on the perpetrator for her basic needs.

A FVSN operates as an application for a FVIO and a summons to a first mention date, which must be within 120 hours of the notice being served.²⁴⁷ The notice remains in force from the time that it is served on the respondent until the court either makes a FVIO at the first mention date and that order is served on the respondent, or the court refuses the intervention order application.²⁴⁸

Contravention of a FVSN is a criminal offence punishable by up to two years' imprisonment and/or a fine.²⁴⁹ Contravention with an intention to cause physical or mental harm to the protected person or apprehension or fear in the protected person, is a criminal offence punishable by up to five years' imprisonment and/or a fine.²⁵⁰ Police powers of arrest without warrant attach to a contravention of a FVSN.²⁵¹

Practical Perspective

There should be more severe penalties where breach of a FVIO or a PSIO causes psychological or emotional harm to a woman with a disability (*Interview participant, Villamanta Disability Rights Legal Service*).

The OPA expressed concern in its submission to the Access to Justice Inquiry that people with cognitive disabilities do not receive sufficient and appropriate information about intervention orders made against them, which may result in an unwitting breach, such as by accepting a telephone call or dinner invitation from the protected person.²⁵²

243 *Family Violence Protection Act 2008* (Vic) s 24.

244 *Family Violence Protection Act 2008* (Vic) s 24(f).

245 *Family Violence Protection Act 2008* (Vic) s 29(1).

246 *Family Violence Protection Act 2008* (Vic) s 29(2).

247 *Family Violence Protection Act 2008* (Vic) s 31.

248 *Family Violence Protection Act 2008* (Vic) s 30.

249 *Family Violence Protection Act 2008* (Vic) s 37.

250 *Family Violence Protection Act 2008* (Vic) s 37A.

251 *Family Violence Protection Act 2008* (Vic) s 38.

252 Office of the Public Advocate, *Access to Justice Inquiry Submission*, above n 132, 33 [4.35].

Practical perspective

There are cases where an application is made for an intervention order either for a person with a cognitive impairment, or against a person who has a cognitive impairment, or where both the applicant and the respondent have some sort of cognitive impairment. This is really fraught because clients might not even understand the implications of having an intervention order made against them or having an intervention order made against another person who is a threat to them. Due to the person's cognitive impairment, it becomes meaningless or even counterproductive to have those intervention orders in place (*Interview participant, Villamanta Disability Rights Legal Service*).

Practical Perspective

The magistrate must put his or her mind to whether the applicant or the respondent with a cognitive impairment has the capacity to understand the terms of an intervention order made. There must be strong language in the legislation that a magistrate must be confident that the respondent and/or the protected person in any intervention order matter has the capacity to understand the terms of the order. This may require an independent assessment of the respondent or the protected person (*Interview participant, Villamanta Disability Rights Legal Service*).

Section 35 of the FVP Act requires the police officer who serves a FVSN on a respondent or protected person to explain the notice and take 'reasonable steps' to ensure that the respondent or protected person understands the nature and consequences of the notice.²⁵³ Subsection 35(3) provides that if the police officer determines that the respondent or protected person is unable to sufficiently understand the English language, the police officer must explain the FVSN via an interpreter.

This report recommends that a similar protection to that in subsection 35(3) be inserted into the FVP Act for cognitively impaired respondents or protected persons, who may also experience difficulties in sufficiently understanding all of the matters listed in s 35(2) that the police officer must explain regarding the FVSN. This subsection may provide for a family member or a disability or advocacy support worker to explain the FVSN to the respondent or protected person.

²⁵³ Family Violence Protection Act 2008 (Vic) ss 35(1)-(2).

Recommendation 4: That a subsection be inserted into section 35 of the FVP Act for cognitively impaired respondents or protected persons. This subsection may provide as follows:

If the police officer determines that the respondent or protected person is unable to sufficiently understand the explanation of the notice, the officer must comply with the officer's obligations under this section via a support person for the respondent or protected person.

Support person means a family member, disability or advocacy support worker or other person who can sufficiently understand the explanation of the notice.

(e) Application of the Law

Scenario 1:

Cynthia has an intellectual disability. She lives with her husband Tony, is not employed and has no children. Tony regularly hits Cynthia and breaks items of household furniture when he is angry. Cynthia does not want to call the police, as she relies on Tony, emotionally and financially. She loves him and does not want to leave him. Instead, Cynthia wants the violence to stop.

The physical abuse Cynthia has suffered clearly falls within the definition of 'family violence' in the FVP Act and as the violence was committed by Cynthia's husband, this satisfies the 'family member' requirement of the Act. It is likely that the police would make an application for a FVIO on Cynthia's behalf, particularly given her reluctance to report the family violence. To ensure Cynthia's safety and accommodate her desire to continue living with Tony, a final FVIO is likely to be made imposing two conditions, namely, the prohibition of family violence and the prohibition of damage to property. However, it is questionable whether an intervention order will suffice to change Tony's behaviour and enable Cynthia to feel safe in her home without adequate support to understand her rights and options.

Scenario 2:

Peggy has a physical disability and requires the use of a wheelchair. She lives at home by herself and her neighbour Miranda cares for her three days a week. This private voluntary arrangement between Peggy and Miranda has been in place for the past six months. Recently, Miranda started belittling Peggy, calling her names, yelling at her and only begrudgingly assisting her in daily living. Miranda has also threatened to withhold Peggy's medication until Peggy pays for some of Miranda's personal expenses. Peggy does not have any family members who live nearby and could take care of her; therefore, she wants Miranda to continue as her care provider as she cannot afford private care. However, the daily abuse is causing Peggy's mental state to deteriorate.

Miranda's behaviour towards Peggy would satisfy the definition of 'emotional or psychological abuse' in section 7 of the FVP Act as a form of family violence. Miranda's threats to withhold medication are provided as a specific example of emotionally or psychologically abusive behaviour. Peggy's obstacle in obtaining a FVIO under the FVP Act will be establishing that Miranda is a 'family member'.²⁵⁴ In assessing whether Miranda is a person whom Peggy reasonably 'regarded as being like a family member', the Court will examine the circumstances of the relationship in its entirety. Relevant factors in this case are that Miranda is Peggy's unpaid care provider three days a week and has been performing this role for six months; that Peggy relies on Miranda for the administration of her medication; and that Peggy relies on Miranda for assistance and care as she does not have any family close by. If Peggy satisfied the Court that she reasonably regarded Miranda as being like a family member, the Court would be likely to grant a FVIO with a condition prohibiting Miranda from committing family violence against Peggy. However, it is questionable whether an intervention order will suffice to change Miranda's behaviour and enable an amicable relationship to develop between Peggy and Miranda without additional external support being provided to Peggy.

254 *Family Violence Protection Act 2008* (Vic) s 8(3).

Scenario 3:

Mary has a severe physical disability. She lives with her husband Steve and their disabled 12-year-old son. Steve has an alcohol and drug addiction and uses all the family's Centrelink payments on alcohol and drugs. There is not enough money for food, household maintenance, clothing and to meet their son's ongoing medical expenses. Mary would like Steve to give her access to some of the Centrelink payments so that she can meet their living expenses and ensure that their son receives the appropriate care that he requires.

Steve's withholding of the family's Centrelink payments satisfies the definition of 'economic abuse' in section 6 of the FVP Act and is indeed an example provided in that section of 'preventing a person from having access to joint financial assets to meet normal household expenses'. Steve's behaviour is thus a form of family violence which would enable Mary to apply at the Magistrates' Court for a FVIO (or to have the police or another person apply on her behalf). Mary may also wish to apply for an intervention order on behalf of her son. It is unclear from current practice whether the Court would be willing to grant a FVIO on the ground of economic abuse alone; often such applications involve other forms of family violence. However, if the Court does grant an intervention order, it will protect both Mary and her son as affected family members.²⁵⁵ The FVIO may include a condition requiring Mary to open a separate bank account and Centrelink to deposit a specified portion of the fortnightly payments into Mary's account, to enable her to meet the household expenses and her son's ongoing medical expenses.

2 Personal Safety Intervention Orders Act

The PSIO Act is another avenue of legal protection from violence for women with disabilities. The dual purpose of the PSIO Act is to protect the safety of victims of assault, sexual assault, harassment, property damage or interference with property, stalking and serious threats,²⁵⁶ and to promote the resolution of disputes through mediation where appropriate.²⁵⁷ As with the FVP Act, the PSIO Act strives to achieve these purposes by providing an effective and accessible system of PSIOs;²⁵⁸ encouraging the use of mediation where appropriate;²⁵⁹ and creating an offence for contravention of a PSIO.²⁶⁰

255 *Family Violence Protection Act 2008* (Vic) s 56.

256 *Personal Safety Intervention Orders Act 2010* (Vic) s 1(a).

257 *Personal Safety Intervention Orders Act 2010* (Vic) s 1(b).

258 *Personal Safety Intervention Orders Act 2010* (Vic) s 2(a).

259 *Personal Safety Intervention Orders Act 2010* (Vic) s 2(b).

260 *Personal Safety Intervention Orders Act 2010* (Vic) s 2(c).

The PSIO Act does not apply where the parties are ‘family members’ as defined in the FVP Act. If the court determines that the affected person and the respondent to an application for a PSIO under the PSIO Act are family members, then the court can either strike out the PSIO application, or continue to hear it as an application for a FVIO.²⁶¹ Reciprocally, if the court determines that the parties to an application for a FVIO under the FVP Act are not family members, then the court can either strike out the FVIO application, or continue to hear it as an application for a PSIO.²⁶²

(a) Forms of violence captured by the Personal Safety Intervention Orders Act

Section 5 of the PSIO Act protects against ‘prohibited behaviour’, which is defined as:²⁶³

- assault
- sexual assault
- harassment
- property damage or interference
- making a serious threat.

The PSIO Act further defines ‘assault’ and sexual assault,²⁶⁴ harassment,²⁶⁵ ‘property damage or interference’,²⁶⁶ ‘serious threat’²⁶⁷ and ‘stalking’.²⁶⁸ Two examples of ‘property damage or interference’ in the definition of that term in section 8 of the PSIO Act are directly relevant to women with disabilities: withholding the person’s food or medication; and preventing the person accessing his or her wheelchair. The examples in the definition of ‘harassment’ in section 7 of the PSIO Act identify derogatory taunts on the basis of a person’s race, sexual orientation or gender identity. This report recommends that the example be amended to include harassment on the basis of a person’s disability.

261 *Family Violence Protection Act 2008* (Vic) s 176E(2).

262 *Personal Safety Intervention Orders Act 2010* (Vic) s 136(2).

263 *Personal Safety Intervention Orders Act 2010* (Vic) s 5.

264 *Personal Safety Intervention Orders Act 2010* (Vic) s 6.

265 *Personal Safety Intervention Orders Act 2010* (Vic) s 7.

266 *Personal Safety Intervention Orders Act 2010* (Vic) s 8.

267 *Personal Safety Intervention Orders Act 2010* (Vic) s 9.

268 *Personal Safety Intervention Orders Act 2010* (Vic) s 10.

(b) Jurisdiction

An application for a PSIO must be made at the Magistrates' Court or the Children's Court.²⁶⁹ If a child is involved at the time the application is made – as an affected person, a protected person or a respondent – then the Family Division of the Children's Court and the Magistrates' Court each have jurisdiction under the PSIO Act to hear the application.²⁷⁰ However, if the respondent is a child, then the application should, if practicable, be handled by the Children's Court.²⁷¹

Where there are concurrent related applications under the FVP Act and the PSIO Act – although against different people – the applications can be heard together if the court considers that the applications are sufficiently related and that it is appropriate to do so.²⁷² A FVIO prevails to the extent of any inconsistency with a PSIO.²⁷³

(c) Procedure

An application for a PSIO can be made by the affected person, or if the affected person is an adult, by any other person with the affected person's written consent.²⁷⁴ If the affected person is a child, an application can be made by the child's parent, or any other person with the parent's written consent or with leave of the court.²⁷⁵ If the affected person is above 14 years of age, then he or she can make an application with leave of the court.²⁷⁶ If the affected person has a guardian, an application can be made by the guardian or by any other person with leave of the court.²⁷⁷ An application can also be made by a police officer.²⁷⁸ A child's parent can include the child as an affected person in an application for a PSIO if the applications arise out of the same or similar circumstances.²⁷⁹

269 *Personal Safety Intervention Orders Act 2010* (Vic) s 12.

270 *Personal Safety Intervention Orders Act 2010* (Vic) s 103(1).

271 *Personal Safety Intervention Orders Act 2010* (Vic) s 103(2).

272 *Personal Safety Intervention Orders Act 2010* (Vic) s 133; *Family Violence Protection Act 2008* (Vic) s 176B.

273 *Personal Safety Intervention Orders Act 2010* (Vic) s 134; *Family Violence Protection Act 2008* (Vic) s 176C.

274 *Personal Safety Intervention Orders Act 2010* (Vic) ss 15(a)-(b).

275 *Personal Safety Intervention Orders Act 2010* (Vic) s 15(c)(i), (ii).

276 *Personal Safety Intervention Orders Act 2010* (Vic) s 15(c)(iii).

277 *Personal Safety Intervention Orders Act 2010* (Vic) s 15(d).

278 *Personal Safety Intervention Orders Act 2010* (Vic) s 15(e).

279 *Personal Safety Intervention Orders Act 2010* (Vic) s 17.

At a mention or a hearing of an application for a PSIO, the court may give mediation directions if it considers that mediation may be appropriate in the circumstances.²⁸⁰ Such directions may require the parties to attend a mediation assessment or to attend mediation.²⁸¹ The court can only direct the parties to attend mediation if it has received a mediation assessment certificate stating that the matter is suitable for mediation.²⁸² In conducting a mediation assessment, the Dispute Assessment Officer must have regard to any guidelines issued under section 34 of the PSIO Act.²⁸³

The *Guideline Criteria for Assessing Suitability for Mediation* (Mediation Guideline Criteria) issued under section 34 of the PSIO Act describes the types of matters that will be assessed as unsuitable for mediation; the criteria for a mediation suitability assessment; and strategies to overcome unsuitability factors. In determining whether a matter is suitable for mediation, the Dispute Assessment Officer is required to consider the factors listed in the Mediation Guideline Criteria, and whether any strategies may be used to enable mediation to occur.

The mediation suitability factors in the Mediation Guideline Criteria relevantly include:²⁸⁴

- the history between the parties, including any violence, fear and power imbalances
- fear or concern expressed by either party
- the future risk of harm, including escalation of the threat or violence
- any power imbalance between the parties
- the level of vulnerability of the applicant – for example:
 - ... a person may have ... a disability ... Another example is if a person with a physical or cognitive disability alleges that they have experienced violence from their carer, the power imbalance would be too great and the matter would be referred back to the Registrar.
- the capacity of both parties to understand and participate in the mediation process - for example, 'a party who has a cognitive disability may have difficulty in understanding the mediation process'
- the duration and nature of the behaviour
- whether the application was brought by a police officer on behalf of the applicant – this may indicate unsuitability for mediation, because of the severity of the respondent's behaviour or the vulnerability of the applicant.

280 *Personal Safety Intervention Orders Act 2010* (Vic) s 26.

281 *Personal Safety Intervention Orders Act 2010* (Vic) s 26(1).

282 *Personal Safety Intervention Orders Act 2010* (Vic) ss 26(2), 28.

283 *Personal Safety Intervention Orders Act 2010* (Vic) s 29.

284 Magistrates' Court of Victoria, *Guideline Criteria for Assessing Suitability for Mediation* (Department of Justice, 2013) 2-3.

The Mediation Guideline Criteria provides that, where parties are affected by any of the unsuitability factors, the Dispute Assessment Officer is to consider whether a number of strategies will enable parties to participate effectively and so make the matter suitable for mediation. The strategy of relevance to women with disabilities is the presence of a support person – a family member, a friend, a disability advocate, a lawyer or other professional person – to overcome a power imbalance or assist the woman to participate fully in mediation. The Mediation Guideline Criteria offers as an example, ‘a party with a cognitive disability who may have difficulty in understanding the mediation process may be able to participate with a support person or advocate assisting them’.²⁸⁵ Where a matter is assessed as being appropriate for mediation, section 31 of the PSIO Act requires the mediator to terminate the mediation if the matter is assessed as no longer being suitable.²⁸⁶

Despite these purported safeguards, the purpose of the PSIO Act, ‘to promote the resolution of disputes through mediation where appropriate’, and the procedures in the Act for mediation directions and assessment, may present a risk for women with disabilities. A woman’s disability may generate a power imbalance and hence impair her capacity to negotiate assertively and effectively with the perpetrator of the violence.²⁸⁷ Cooper and Brandon have observed that ‘[i]n some cases overriding concerns as to safety and the level of assertiveness that a client could achieve with a former partner will mean that a process such as mediation is clearly inappropriate’.²⁸⁸ Concerns have been raised that female victims of violence may ‘slip through’ assessment and screening processes.²⁸⁹ The safety of victims and the potential for mediation to aggravate the situation or to result in coerced agreements,²⁹⁰ are further troubling issues for women with disabilities. However, in appropriate circumstances, a well conducted mediation may be an empowering experience for women with disabilities.

285 Ibid 3.

286 *Personal Safety Intervention Orders Act 2010* (Vic) s 31.

287 Donna Cooper and Mieke Brandon, ‘How can family lawyers effectively represent their clients in mediation and conciliation processes?’ (2007) 21 *Australian Journal of Family Law* 288, 296.

288 Ibid 296.

289 Jennifer Martin and Kathy Douglas, ‘Social Work and Family Dispute Resolution’ (2007) 60 *Australian Social Work* 295, 297; Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 179; Rachael Field and Mieke Brandon, ‘A conversation about the introduction of compulsory family dispute resolution in Australia: Some positive and negative issues for women’ (2007) 18 *Australasian Dispute Resolution Journal* 27, 27; Domestic Violence and Incest Resource Centre (DVIRC), ‘Behind Closed Doors: Family Dispute Resolution and Family Violence’ (Discussion Paper No 6, DVIRC, 2007) 22-29.

290 Donald Saposnek, ‘Commentary: The future of the history of family mediation research’ (2004) 22 *Conflict Resolution Quarterly* 37, 41; Rachael Field, ‘Federal family law reform in 2005: The problems and pitfalls for women and children of increased emphasis on post-separation informal dispute resolution’ (2005) 5 *Queensland University of Technology Law and Justice Journal* 28, 31; Rachael Field, ‘Using the feminist critique of mediation to explore “the good, the bad and the ugly” implications for women of the introduction of mandatory family dispute resolution in Australia’ (2006) 20 *Australian Journal of Family Law* 45.

(d) Remedies

A PSIO can be made on an interim basis or a final basis. In determining whether to make an interim order, the court must be satisfied that the order is necessary pending a final decision, to ensure the safety of the person seeking protection or to preserve the person's property.²⁹¹ An interim order can be obtained in the absence of the respondent and without notifying the respondent,²⁹² and it may apply to more than one affected person.²⁹³ The court cannot make an interim PSIO if there is an existing FVIO for which the affected person is a protected person and the respondent is a respondent, or vice versa.²⁹⁴ However, the court can make an interim order if the respondent is a protected person and the affected person is a respondent under an existing FVIO.²⁹⁵

To make a final order, the court must be satisfied that:

- the respondent has committed prohibited behavior against the affected person and is likely to repeat or continue that behavior, and the respondent's prohibited behaviour would cause a reasonable person to fear for his or her safety²⁹⁶
- the respondent has stalked the affected person and is likely to continue or repeat the stalking²⁹⁷
- the respondent and the affected person are not family members²⁹⁸
- it is appropriate in all the circumstances of the case to make a final order.²⁹⁹

If the respondent is a child or has a cognitive impairment, the court may consider the respondent's ability to understand the nature and effect of a final order and comply with the conditions of the order in determining the appropriateness of making a final order.³⁰⁰ However, the court cannot make a final order under section 61 of the PSIO Act if there is an existing FVIO for which the affected person is a protected person and the respondent is a respondent; or the respondent is a protected person and the affected person is a respondent.³⁰¹ A PSIO can be made for a specified period³⁰² or if no period is specified in the order, it remains in force until revoked by the court or set aside on appeal.³⁰³

291 *Personal Safety Intervention Orders Act 2010* (Vic) s 35(1).

292 *Personal Safety Intervention Orders Act 2010* (Vic) s 37.

293 *Personal Safety Intervention Orders Act 2010* (Vic) s 39.

294 *Personal Safety Intervention Orders Act 2010* (Vic) s 36(1).

295 *Personal Safety Intervention Orders Act 2010* (Vic) s 36(2).

296 *Personal Safety Intervention Orders Act 2010* (Vic) s 61(1)(a)(i).

297 *Personal Safety Intervention Orders Act 2010* (Vic) s 61(1)(a)(ii).

298 *Personal Safety Intervention Orders Act 2010* (Vic) s 61(1)(b).

299 *Personal Safety Intervention Orders Act 2010* (Vic) s 61(1)(c).

300 *Personal Safety Intervention Orders Act 2010* (Vic) s 61(2).

301 *Personal Safety Intervention Orders Act 2010* (Vic) s 62.

302 *Family Violence Protection Act 2008* (Vic) s 77.

303 *Family Violence Protection Act 2008* (Vic) s 79.

In granting a PSIO, the court can include any conditions that it considers necessary or desirable in the circumstances,³⁰⁴ including conditions that:³⁰⁵

- prohibit the respondent from committing prohibited behavior against the protected person
- prohibit the respondent from stalking the protected person
- exclude the respondent from the protected person's residence
- prohibit the respondent from approaching, telephoning or contacting the protected person, including through emails or text messages
- prohibit the respondent from being anywhere within a specified distance of the protected person or a specified place
- prohibit the respondent from causing another person to engage in conduct prohibited by the order
- revoke or suspend the respondent's weapons approval or weapons exemption
- cancel or suspend the respondent's firearms authority.

Where a PSIO is made against a care provider to protect the care provider's client – such as a woman with a disability – section 113 of the PSIO Act requires a copy of the order to be served on the care provider's employer.³⁰⁶

The contravention of a PSIO is a criminal offence punishable by up to two years' imprisonment and/or a fine.³⁰⁷ A person can be arrested without warrant and detained by the police if there are reasonable grounds to believe that the person has contravened the intervention order.³⁰⁸

The PSIO Act does not acknowledge or recognise the unique position of women with disabilities who may require the protection provided by an order made under the Act. The only oblique reference to disability is made in the context of explaining an interim order or final order made. In both instances, the court registrar must provide to the respondent and the protected person a written explanation of the order, which explains the purpose, terms and effects of the order and the consequences and penalties for its contravention.³⁰⁹ In the case of an interim order, the written explanation must include details of when the order expires and how it can be varied, the fact that the order is a civil order of the court and the process for determining the final order.³¹⁰

304 *Personal Safety Intervention Orders Act 2010* (Vic) s 67(1).

305 *Personal Safety Intervention Orders Act 2010* (Vic) s 67(2).

306 *Personal Safety Intervention Orders Act 2010* (Vic) s 113.

307 *Personal Safety Intervention Orders Act 2010* (Vic) s 100.

308 *Personal Safety Intervention Orders Act 2010* (Vic) s 101.

309 *Personal Safety Intervention Orders Act 2010* (Vic) ss 40(1), 76(1).

310 *Personal Safety Intervention Orders Act 2010* (Vic) s 40(1).

The PSIO Act provides that the written explanation of an interim order or a final order 'may be accompanied by written information about any relevant services that may be available to the protected person ... including... counselling services, drug and alcohol services, disability services, financial counselling services, mental health services and advocacy services'.³¹¹

(e) Application of the law

Scenario 4:

Beth has a physical disability that requires the use of a wheelchair. She works in a local estate agent's office. Beth's new boss has on several occasions taken her into his office and touched her inappropriately. He has jokingly told Beth that she cannot run away from him. As it has taken Beth many months to locate this job, Beth has not yet told the police for fears about the future of her employment.

Sexual assault is considered a 'prohibited behaviour' under the PSIO Act, such that Beth can apply for a PSIO. Given Beth's reluctance to report the matter, the police may make an application on Beth's behalf, or a colleague of Beth's may make an application with her written consent. If Beth's boss threatens to terminate her employment for seeking a PSIO, Beth may file a disability or sexual discrimination claim under the *Equal Opportunity Act 2010* (Vic) or the *Sex Discrimination Act 1984* (Cth). The police could also charge Beth's boss with sexual assault, although this would be unlikely to succeed if Beth did not support this course of action.

Scenario 5:

Edwina is paraplegic and requires daily assistance from a care provider. Edwina contracts her care through an agency that regularly sends different care providers to Edwina's unit. The latest care provider, whom Edwina had never met before, picked up Edwina's pet cat and threw her across the living room, causing the cat visible distress.

Although Edwina has experienced violence from her care provider, which can be considered a 'family like' relationship under the FVP Act, as this care provider had only worked for Edwina on one occasion, she would not be likely to satisfy the requirements for a FVIO under the FVP Act. In these circumstances, Edwina may be able to protect herself and her property from her care provider through a PSIO.

311 *Personal Safety Intervention Orders Act 2010* (Vic) ss 40(2), 76(4).

While the definition of 'property damage' in section 8 of the PSIO Act includes damage to a person's pet, it may be difficult for Edwina to obtain a PSIO if the care provider's behaviour occurred on only one occasion, as the definition of 'property damage' requires that the behaviour be 'repeated'. It may be more effective for Edwina to pursue the matter with the agency to ensure that this care provider is not again sent to her unit.

Scenario 6:

Katherine is vision impaired. She works in her local public library where she answers queries and interacts with library patrons. Katherine begins receiving daily emails to her staff account from a patron who had originally emailed her about a research inquiry. The emails are of a sexually explicit nature. Katherine soon receives the same emails to her personal email account as well as on Facebook. Katherine wants the emailing to stop.

The patron's constant emailing and the sexually explicit content of the emails to Katherine would constitute a 'course of conduct' that is 'demeaning, derogatory or intimidating', thus satisfying the definition of 'harassment' under section 7 of the PSIO Act as a form of 'prohibited behaviour'. If application for a PSIO made by Katherine or the police is granted by the court, the intervention order may include conditions prohibiting the patron from harassing Katherine via email and from contacting her by any means of communication. It may also be possible for police to charge the patron under section 474.17 of the *Criminal Code Act 1995* (Cth), which makes it an offence to use a carriage service, such as email, to menace, harass or offend.

3 Effectiveness of the FVP Act and the PSIO Act in protecting women with disabilities

According to Wilcox, '[s]trong, tailor-made, accessible and enforceable protection orders are now a cornerstone of Australia's violence prevention strategy'.³¹² Key to assessing the effectiveness of the FVP Act and the PSIO Act in protecting women with disabilities who have experienced violence is to consider whether each Act provides 'an effective and accessible system' of FVIOs or PSIOs.

312 Wilcox, above n 131, 1.

Practical perspective

The FVP Act is a really good start in terms of offering protection to women with disabilities in Victoria. The definition of ‘family violence’ in the Act is quite broad and it provides for both intervention by police and applications by individuals. The FVP Act could be made clearer by including more specific examples around family violence and disability. Practical measures would also assist in the more effective operation of the FVP Act, such as having disability advocates at Magistrates’ Courts, and a more integrated system that recognises the different services that support women with disabilities in the context of family violence (*Interview participant, Women’s Legal Service*).

(a) Acknowledging the unique position of women with disabilities

While the FVP Act recognises the detrimental effects of violence upon children and its prevalence in all areas of society,³¹³ it does not mention that family violence also has a particularly damaging impact on other groups in society who are at heightened risk. Family violence legislation in Victoria should acknowledge the particularly damaging impact of violence upon women with disabilities. This can be achieved through the insertion of guiding principles into the FVP Act and the PSIO Act. The guiding principles may refer to the unique difficulties faced by women with disabilities due to their dependence on others for support, the power imbalances and lack of control in relationships that arise from their disability, and the fact that women’s disabilities may be exploited by perpetrators.³¹⁴ The implementation of this recommendation should be developed in consultation with relevant stakeholders in the women’s and disability support sectors.

Recommendation 5: That guiding principles be inserted into the FVP Act and the PSIO Act to recognise the particularly damaging impact of violence on women with disabilities. The guiding principles may refer to the unique difficulties faced by women with disabilities due to their dependence on others for support, the power imbalances and lack of control in relationships that arise from their disability, and the fact that women’s disabilities may be exploited by perpetrators. The implementation of this recommendation should be developed in consultation with relevant stakeholders in the women’s and disability support sectors.

313 See *Family Violence Protection Act 2008* (Vic) Preamble (b), (c).

314 ALRC and NSWLRC, above n 10, 306 [7.44].

(b) Applying for an intervention order and consent to an application or conditions

Women with disabilities who have experienced family violence face greater difficulties in taking independent action to apply for a FVIO or a PSIO and to obtain appropriate advocacy and support.³¹⁵ At first instance, they may be unaware of their ability to obtain an intervention order.³¹⁶ An evaluation of the two-year pilot of FVSNs under the FVP Act identified a number of reasons why the use of FVSNs may be particularly problematic for women with disabilities. These include:

- any immediate exclusion of the perpetrator – who is often the woman’s care provider – from the woman’s residence not giving the woman sufficient time to implement appropriate supports
- difficulties locating alternative accommodation tailored to the woman’s disability
- difficulties seeking help with personal day-to-day care if the woman leaves the perpetrator.³¹⁷

The FVSN evaluation also noted that women with disabilities are less likely to attend court due to their disability and the short timeframe for return, increasing the likelihood that the court will dismiss the FVIO application.³¹⁸ This potentially exposes the woman to greater risk, as the perpetrator’s behaviour is unsanctioned. The FVSN evaluation considered it ‘essential’ that:

police make adequate assessments and formal referrals and other arrangements (e.g. assist women to relocate), to ensure that women with disabilities are safe and have the appropriate level of assistance, including assistance to access supports in order to attend court.³¹⁹

Practical perspective

For police to actually follow up and make an application for an intervention order under the FVP Act or the PSIO Act or to charge the perpetrator of the violence is a massive barrier that women with disabilities face (*Interview participant, Women’s Legal Service*).

315 FVSN Evaluation Steering Committee, above n 12, 86.

316 Office of the Public Advocate, *Access to Justice Inquiry Submission*, above n 132, 33 [4.35].

317 FVSN Evaluation Steering Committee, above n 12, 86.

318 Ibid.

319 FVSN Evaluation Steering Committee, above n 12, 86.

Where the applicant for a final order is a police officer, the PSIO Act and the FVP Act provide that a final order can be made, or an order can be varied or extended, without the consent of the affected person, but only with limited conditions.³²⁰ However, this limitation on the conditions that the court can include in the final order does not apply if the affected person (in the case of the PSIO Act) or the affected family member (in the case of the FVP Act) is cognitively impaired.³²¹ In that instance, it appears that the court can impose any of the conditions listed in section 67(2) of the PSIO Act upon a final PSIO or any of the conditions listed in section 81(2) upon a final FVIO.

For people with a cognitive impairment who have not given consent to the application brought on their behalf by the police, the court can impose conditions excluding the respondent from the protected person's residence;³²² prohibiting the respondent from approaching or contacting the protected person;³²³ and prohibiting the respondent from being within a specified distance of the protected person or a specified place.³²⁴ The FVP Act also enables the court to impose a condition relating to the use of personal property.³²⁵

This exception may serve to protect the interests of cognitively impaired people, who may not be fully capable of providing consent to the making of a final order or understanding the conditions to be imposed on that order. However, efforts must be made to establish that the cognitively impaired person is genuinely incapable of consenting. Where the exceptions relating to conditions that can be imposed on a FVIO or a PSIO apply, the court must strive to strike an appropriate balance between ensuring that cognitively impaired people are adequately protected from violence or prohibited behaviour, and upholding their autonomy to choose with whom they live and have contact with.

320 *Personal Safety Intervention Orders Act 2010* (Vic) ss 63(1)-(2), 87(1)-(2); *Family Violence Protection Act 2008* (Vic) ss 75(1)-(2), 110(1)-(2). For the PSIO Act, the limited conditions that can be imposed without the affected person's consent are those listed in ss 67(2)(a), (b), (f), (g), (h). For the FVP Act, the limited conditions that can be imposed without the affected family member's consent are those listed in ss 81(2)(a), (f), (g), (h).

321 *Personal Safety Intervention Orders Act 2010* (Vic) s 63(3); *Family Violence Protection Act 2008* (Vic) s 75(3). 'Cognitive impairment' for the purposes of the PSIO Act has the same meaning as in section 3 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic), which defines it as 'impairment because of mental illness, intellectual disability, dementia or brain injury': see s 3(1).

322 *Personal Safety Intervention Orders Act 2010* (Vic) s 67(2)(c); *Family Violence Protection Act 2008* (Vic) s 81(2)(b).

323 *Personal Safety Intervention Orders Act 2010* (Vic) s 67(2)(d); *Family Violence Protection Act 2008* (Vic) s 81(2)(d).

324 *Personal Safety Intervention Orders Act 2010* (Vic) s 67(2)(e); *Family Violence Protection Act 2008* (Vic) s 81(2)(e).

325 *Family Violence Protection Act 2008* (Vic) s 81(2)(c).

Practical perspective

In our experience, it has at times been a ‘best interests’ driven service by the police, where regardless of whether the woman herself has called the police to an incident of family violence, or whether or not the woman wants an intervention order, the police will have a mandate to pursue that on her behalf. This is even where it might be against the woman’s interests. There can be tension where the police might not understand the nature or lifestyle of women with disabilities and their limited social supports. The police may also struggle to understand that their view of what might be in the woman’s best interests could be different to the woman’s view of what is in her best interests. The police take a fairly strong line towards violence against women and will be quite proactive (*Interview participant, Victoria Legal Aid*).

(c) Enforcement of intervention orders

The effectiveness of FVIOs and PSIOs is further influenced by their enforcement, which depends upon the police, prosecutors and the courts.³²⁶ Inadequate and inconsistent responses by law enforcement agencies to family violence and to breaches of intervention orders remain a significant barrier to their efficacy in protecting women with disabilities in Victoria who have experienced violence.³²⁷

The enforcement of FVIOs and PSIOs is fundamental to their effectiveness. As the Sentencing for Contravention Report observed:

[FVIOs] do not provide a ‘magic shield’ against further violence. The rate of sentenced FVIO contravention charges attests to this. As an injunctive remedy, a FVIO will have limited value unless compliance with the order is strictly enforced.³²⁸

This was similarly emphasised by the Victorian Court of Appeal in *Director of Public Prosecutions (Vic) v Johnson*.³²⁹

... Family violence is a serious problem in Australia. ... Breach of intervention orders is relatively common.³³⁰ ...

326 VLRC, *Family Violence Laws Report*, above n 13, 61 [3.42].

327 VLRC, *Family Violence Laws Report*, above n 13, 61-2 [3.42].

328 Sentencing Advisory Council, *Sentencing for Contravention Report*, above n 197, 27 [3.14] (footnote omitted).

329 (2011) 213 A Crim R 262 (‘Johnson’).

330 Sentencing Advisory Council, *Breaching Intervention Orders Report*, above n 130, 20 [3.6.1].

... offenders who breach orders and continue to threaten and assault their partners may go on to seriously injure or even kill them.³³¹ As was recognised during parliamentary debates on the Family Violence Protection Bill 2008 (Vic), intervention orders can only protect victims of threatened violence if they are effectively enforced and if breach of an order attracts an appropriate sentence. ... The Victorian Law Reform Commission ... observed:

The response to a breach of an intervention order is crucial to ensuring the intervention order system is effective in protecting family violence victims. If police or the courts do not respond adequately to breaches of intervention orders, they will be perceived as ineffectual – ‘not worth the paper they are written on’ – by victims and perpetrators alike.³³²

Practical perspective

The legislation is not at fault, but rather its implementation and the harsh realities of life when you try to put the legislation into effect. Intervention orders do not solve the problem if the perpetrator is determined to go on offending – there is only so much the law can do. Intervention orders in and of themselves will not solve the problem of violence against women with disabilities; there is a lot more to it than just one tool in the toolbox to try and protect them (*Interview participant, Villamanta Disability Rights Legal Service*).

The Sentencing Advisory Council’s analysis of sentencing outcomes for contravention of FVIOs in the July 2009 to June 2012 period found that fines were imposed in approximately 25% of cases, adjourned undertakings in approximately 23% of cases and community orders in approximately 19% of cases. Imprisonment was imposed in approximately 11% of cases, and wholly or partially suspended sentences of imprisonment imposed in approximately 13% of cases during that period.³³³ The average fine amount was \$550.10 for breach of a FVIO and the average length of imprisonment was 2.9 months.³³⁴ The Sentencing for Contravention Report found that the use of fines declined, the use of adjourned undertakings and community orders increased, and the use of custodial sentences increased in the case of repeat contravention, between 2004-07 and 2009-12.³³⁵

331 VLRC, *Family Violence Laws Report*, above n 13, 32-3 [2.61].

332 Johnson (2011) 213 A Crim R 262, 265 [4]-[5] (Neave JA), citing VLRC, *Family Violence Laws Report*, above n 13, 371-2 [10.67].

333 Sentencing Advisory Council, *Sentencing for Contravention Report*, above n 197, 31-2 [4.16]-[4.23].

334 Ibid 31-2 [4.20]-[4.21].

335 Ibid 2 [1.9].

In response to concerns about the predominance of ‘low-end orders’ – namely, fines and adjourned undertakings – the Sentencing Advisory Council produced *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* (FVIO Guiding Principles).³³⁶

The FVIO Guiding Principles provide that the primary purpose of sentencing for breach of a FVIO should be to achieve compliance with the order, so as to ensure the safety and protection of the victim.³³⁷ The guidelines state that community protection, which encompasses victim protection, should be the central purpose against which other sentencing purposes (including punishment, deterrence, rehabilitation and denunciation) are balanced.³³⁸ The FVIO Guiding Principles identify disability as a particular vulnerability of a victim of family violence that may aggravate the seriousness of a contravention and justify a higher penalty.³³⁹

The Sentencing Advisory Council has recognised that legislative and procedural reforms over the past five to 10 years have instigated a ‘cultural change’ and a more thorough understanding of the nature of family violence amongst the police and magistracy, particularly the introduction of the FVP Act, procedural changes by Victoria Police pursuant to the revised Family Violence Code of Practice, and the increasingly specialised nature of family violence decision-making and service provision in the Magistrates’ Court.³⁴⁰ However, there is still progress to be made in ensuring that women with disabilities are adequately protected from violence where a FVIO or a PSIO is breached.

C The Commonwealth legislative framework

1 Family Law Act

In contrast to state family violence legislation, the prevention of family violence is not the primary focus of the Family Law Act.³⁴¹ While family violence is a significant consideration in parenting matters, the chief concern of the Family Law Act is the recognition and enforcement of the rights and responsibilities between spouses or de facto couples and their children upon relationship breakdown.³⁴² Nevertheless, one of the stated principles to be applied by courts exercising jurisdiction under the Family Law Act is ‘the need to ensure protection from family violence’.³⁴³

336 See Sentencing Advisory Council, *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* (Sentencing Advisory Council, 2009) (FVIO Guiding Principles).

337 Ibid 3 [1.2].

338 Ibid.

339 Ibid 5 [2.10].

340 Sentencing Advisory Council, *Sentencing for Contravention Report*, above n 197, 44 [5.7].

341 ALRC and NSWLRC, above n 10, 307 [7.47].

342 Ibid, citing Anthony Dickey, *Family Law* (Thomson Reuters Australia, 5th ed, 2007) 43.

343 *Family Law Act 1975* (Cth) s 43(1)(ca).

(a) Definition of ‘family violence’

Section 4AB of the Family Law Act defines family violence as ‘violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family, or causes the family member to be fearful’.³⁴⁴ The definition offers a non-exhaustive list of examples of behaviour that may constitute family violence, including:³⁴⁵

- assault;
- sexual assault or other sexually abusive behaviour;
- stalking;
- repeated derogatory taunts;
- intentionally damaging or destroying property;
- intentionally causing death or injury to an animal;
- unreasonably denying the family member the financial autonomy that he or she would otherwise have had;
- unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support;
- preventing the family member from making or keeping connections with his or her family, friends or culture; or
- unlawfully depriving the family member, or any member of the family member’s family, of his or her liberty.

The definition of ‘family violence’ in the Family Law Act contains many features or elements of the definitions of ‘family violence’ in the FVP Act and ‘prohibited behaviour’ in the PSIO Act. In the ALRC/NSWLRC Family Violence Report, the Commissions considered it essential that state courts and federal family courts have a ‘thorough understanding’ of the nature of family violence, such that:

the provisions setting out the nature, features and dynamics of family violence in the Family Law Act should mirror the provisions of state and family legislation as far as possible.³⁴⁶

³⁴⁴ *Family Law Act 1975* (Cth) s 4AB(1).

³⁴⁵ *Family Law Act 1975* (Cth) s 4AB(2).

³⁴⁶ ALRC and NSWLRC, above n 10, 307 [7.48].

This paper agrees with these views. The express recognition of economic abuse as a distinct form of family violence in both the FVP Act and the Family Law Act, for example, offers scope for the development of a common family violence framework in the various Victorian and federal legal and regulatory instruments which offer protections for, and responses to, women with disabilities who have experienced family violence in its various forms.³⁴⁷

(b) Family Violence Best Practice Principles

Judicial understanding of family violence in the federal family courts – namely, the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia – is informed and guided by the *Family Violence Best Practice Principles* (Best Practice Principles).³⁴⁸ The principles serve as ‘background information’ and a voluntary ‘checklist’ of matters that judges, court staff, legal professionals and litigants may consider at each stage of the case management process in family law disputes involving children.³⁴⁹ The Best Practice Principles recognise ‘the harmful effects of family violence and abuse on victims’ and ‘the place accorded to the issue of family violence’ in the Family Law Act.³⁵⁰

The Best Practice Principles purport to be sensitive to the cultural context in which family violence occurs, making reference to the increased complexities of violence for culturally and linguistically diverse communities.³⁵¹ However, they fail to acknowledge the increased vulnerability to, and particularly detrimental impacts of, family violence for women with disabilities. A single reference to disability is made in the Best Practice Principles in the context of intersectionality: noting ‘the intersection between, for example, culture and socio-economic status, age, disability, sexual orientation, place of residence, immigration status and homelessness’.³⁵²

Just as the Best Practice Principles recognise that ‘policy and service responses, including those of family courts and allied agencies, need to be developed within an understanding of complex cultural dynamics and the inter-relationship between violence, cultural and religious identity and social marginalisation’, such responses must also be developed within an understanding of the unique issues and challenges for women with disabilities who experience family violence.³⁵³

347 Macdonald, above n 146, iv.

348 Family Court of Australia, *Family Violence Best Practice Principles* (Family Court of Australia, 3rd ed, 2013) <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/fv_best_practice_for_flc> (*Best Practice Principles*). [See note in comments]

349 Ibid 1-3.

350 Ibid 2.

351 Ibid 7.

352 Ibid.

353 Ibid.

This paper suggests that the Best Practice Principles be updated to include an acknowledgement – by reference to the available published research – of the unique impacts of family violence upon women with disabilities, including why such women are at greater risk and why they may be less likely to report family violence.

This paper recommends that best practice principles also be introduced for courts exercising jurisdiction under the FVP Act and the PSIO Act – namely, state Magistrates' Courts and the Children's Court – to provide practical guidance to judicial officers, police officers, court staff, legal practitioners, service providers and litigants. Such best practice principles should include specific recognition of the unique challenges for women with disabilities who experience violence at all stages of the legal process.

Recommendation 6: That best practice principles for courts exercising jurisdiction under the FVP Act and the PSIO Act be introduced to provide practical guidance to judicial officers, police officers, court staff, legal practitioners, service providers and litigants at each stage of the process for intervention orders under those Acts. These best practice guidelines should expressly acknowledge the unique impacts of family violence upon women with disabilities.

(c) Family violence in the context of applications for parenting orders

The changes introduced to the Family Law Act by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) were viewed as highly problematic for victims of family violence. These changes include the introduction of the presumption of equal shared parental responsibility,³⁵⁴ the requirement for courts to consider whether a child spending equal time with both parents is reasonably practicable and in the best interests of the child,³⁵⁵ and the amendment of the 'best interests' considerations in section 60CC to make the benefit to the child of having a meaningful relationship with both parents and protection from physical and psychological harm the 'primary considerations' for the court in determining the best interests of the child.³⁵⁶

Several reports evaluating the 2006 reforms to the Family Law Act highlighted concerns about the operation of the Act where family violence was an issue.³⁵⁷ The reports found that the family law system did not always adequately identify and effectively respond to families where there were concerns about family violence.

354 *Family Law Act 1975* (Cth) s 61DA.

355 *Family Law Act 1975* (Cth) s 65DAA.

356 *Family Law Act 1975* (Cth) ss 60CC(2)(a)-(b).

357 See Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies, 2009); Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department, 2009); *Family Law Council, Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (Attorney-General's Department, 2009).

In response to these reports, the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) (FL Amendment Act) was enacted to improve the recognition of family violence in parenting disputes and the family law system's response to family violence concerns. The FL Amendment Act sought to make it easier for allegations of family violence to be brought before the court, and to give priority to a child's safety in determining what is in the best interests of the child when making parenting orders. Changes introduced to the Family Law Act by the FL Amendment Act include:

- a broader definition of 'family violence' to capture socially and financially controlling behaviour and exposing a child to family violence³⁵⁸
- a requirement that courts to give greater weight to a child's safety as a primary consideration when determining the child's best interests³⁵⁹
- amended and additional obligations upon advisers to encourage parents to prioritise a child's safety³⁶⁰
- a requirement that parties notify the court of family violence or child abuse allegations³⁶¹
- enabling the court to consider a wider range of FVIOs (interim orders, past orders and those made by consent, as well as final and contested orders) in determining the child's best interests.³⁶²

Subsections (3) and (4) of the definition of 'family violence' in section 4AB of the Family Law Act are concerned with a child's exposure to family violence. Family violence is relevant in several ways to an application for parenting orders under Part VII of the Family Law Act. The protection of children from being subjected or exposed to family violence is reflected in the objects of Part VII,³⁶³ as well as in the primary considerations³⁶⁴ and additional considerations³⁶⁵ to which the court must have regard in determining what is in the child's best interests.

358 *Family Law Act 1975* (Cth) s 4AB.

359 *Family Law Act 1975* (Cth) s 60CC(2A).

360 *Family Law Act 1975* (Cth) s 60D.

361 *Family Law Act 1975* (Cth) s 67ZBA.

362 *Family Law Act 1975* (Cth) s 60CC(3)(k).

363 Section 60(1)(b) of the Family Law Act provides that the objects of Part VII are to ensure that the best interests of children are met by protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

364 The primary consideration in section 60CC(2)(b) of the Family Law Act is 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'.

365 The additional considerations in section 60CC(3) that address family violence are: (j) any family violence involving the child or a member of the child's family; and (k) whether a family violence order applies, or has applied, to the child or a member of the child's family.

In applying the primary considerations in section 60CC(2) of the Family Law Act to determine what is in the child's best interests, the court must give greater weight to the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence,³⁶⁶ over the benefit to the child of having a meaningful relationship with both of the child's parents.

The additional consideration in section 60CC(3)(k) provides that, if a family violence order applies, or has applied, to the child or a member of the child's family, the court must consider any relevant inferences that can be drawn from the order. In doing so, the court may take into account the nature of the order; the circumstances in which it was made; any evidence admitted in proceedings for the order; and any findings made by the court in those proceedings.

Section 60CF of the Family Law Act requires the court in parenting proceedings to be informed of family violence orders that apply to the child or a member of the child's family.³⁶⁷ The court must ensure that any parenting order made is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence.³⁶⁸ The presumption of equal shared parental responsibility when making parenting orders is rebutted where there are reasonable grounds to believe that a child's parent or a person who lives with the parent has engaged in family violence.³⁶⁹

A court exercising jurisdiction under the Family Law Act cannot hear an application for parenting orders unless the applicant also files a certificate provided by a registered family dispute resolution (FDR) practitioner under section 60I(8).³⁷⁰ Section 60I(9) provides for six categories of exemption from the compulsory FDR requirement. The two exceptions which are most pertinent to women with disabilities are that:

- there are reasonable grounds to believe that there has been, or there is a risk of, family violence by one of the parties to the proceedings³⁷¹
- one or more of the parties cannot participate effectively in FDR, due to incapacity, physical remoteness from dispute resolution services or some other reason.³⁷²

366 *Family Law Act 1975* (Cth) s 60CC(2A).

367 *Family Law Act 1975* (Cth) ss 60CF(1), (2).

368 *Family Law Act 1975* (Cth) s 60CG.

369 *Family Law Act 1975* (Cth) s 61DA(2)(b).

370 *Family Law Act 1975* (Cth) s 60I(7).

371 *Family Law Act 1975* (Cth) s 60I(9)(b).

372 *Family Law Act 1975* (Cth) s 60I(9)(e).

Where an allegation of family violence or a risk of family violence is made by an ‘interested person’ in proceedings for parenting orders,³⁷³ the court must consider whether any interim or procedural orders should be made to enable the expeditious gathering of evidence of the allegation and to protect the child or any parties to the proceedings.³⁷⁴ In doing so, the court must consider whether orders should be made, or an injunction granted, under section 68B of the Family Law Act.³⁷⁵

Advisers (defined to include legal practitioners, family counsellors, FDR practitioners and family consultants)³⁷⁶ who advise or assist parents on matters arising under Part VII of the Family Law Act must encourage a parent to consider his or her children’s best interests as paramount, and to give greater weight to the child being protected from physical or psychological harm over the benefit of the child having a meaningful relationship with both parents.³⁷⁷

(d) Injunctions

A victim of family violence can apply for an injunction under the Family Law Act.³⁷⁸

In proceedings for an injunction in relation to children, the court can make an order or grant an injunction, with or without conditions,³⁷⁹ as it considers appropriate for the child’s welfare, including an injunction:

- for the personal protection of the child³⁸⁰
- for the personal protection of the child’s parent or a person with whom the child is to live with, spend time with or communicate with under a parenting order³⁸¹
- restraining a person from entering or remaining in the place residence, employment or education of the child, the child’s parent or other person referred to above.³⁸²

In proceedings between parties to a marriage for an order or injunction in circumstances arising out of the marital relationship, the court can make an order or grant an injunction as it considers proper, including an injunction:

- for the personal protection of a party to the marriage³⁸³

373 *Family Law Act 1975* (Cth) s 67ZBA. ‘Interested person’ is defined in s 67ZBA(4) as a party to the proceeding, an independent children’s lawyer or any other person prescribed by the regulations.

374 *Family Law Act 1975* (Cth) s 67ZBB(2).

375 *Family Law Act 1975* (Cth) s 67ZBB(5).

376 *Family Law Act 1975* (Cth) s 60D(2).

377 *Family Law Act 1975* (Cth) s 60D(1).

378 *Family Law Act 1975* (Cth) ss 68B, 114.

379 *Family Law Act 1975* (Cth) s 68B(3).

380 *Family Law Act 1975* (Cth) s 68B(1)(a).

381 *Family Law Act 1975* (Cth) s 68B(1)(b).

382 *Family Law Act 1975* (Cth) ss 68B(1)(c)-(d).

383 *Family Law Act 1975* (Cth) s 114(1)(a).

- restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party lives, or from entering or remaining in a specified area³⁸⁴
- restraining a party to the marriage from entering the other party's place of work³⁸⁵
- relating to the property of a party to the marriage or use or occupancy of the matrimonial home.³⁸⁶

A power of arrest without warrant attaches to an injunction made under the Family Law Act for the personal protection of a person, where there are reasonable grounds to believe that the injunction has been breached.³⁸⁷ However, unlike intervention orders made under the FVP Act or the PSIO Act, breach of an injunction is not a criminal offence.

(e) Application of the law

Scenario 7:

Sarah, who has a cognitive impairment, recently divorced from Mike, her husband of 10 years. They have two children, aged 14 and 9. Although Mike has moved out of the matrimonial home in which Sarah and the children continue to live, Mike has been following Sarah from home and from the children's school when she takes the children to school and picks them up. She has not yet made an application under the FVP Act for a family violence intervention order against Mike. Sarah and the children are very afraid that Mike is following them.

Mike's behaviour is likely to amount to stalking and fall within the definition of 'family violence' in section 4AB of the Family Law Act. Sarah may thus apply for an injunction under section 68B of the Family Law Act. The court may grant an injunction for the personal protection of both Sarah and her children from Mike.³⁸⁸ The injunction may also restrain Mike from entering or remaining within a specified distance of the matrimonial home and the children's school.³⁸⁹ If Sarah had applied for a FVIO under the FVP Act, she would be unable to seek the protection of an injunction under the Family Law Act unless the intervention order had lapsed or been dismissed.³⁹⁰

384 *Family Law Act 1975* (Cth) s 114(1)(b)

385 *Family Law Act 1975* (Cth) s 114(1)(c).

386 *Family Law Act 1975* (Cth) ss 114(1)(e)-(f).

387 *Family Law Act 1975* (Cth) ss 68C, 114AA.

388 *Family Law Act 1975* (Cth) ss 68B(1)(a)-(b).

389 *Family Law Act 1975* (Cth) s 68B(1)(c).

390 *Family Law Act 1975* (Cth) s 114AB(2).

D Interaction between the Victorian and Commonwealth legal frameworks

The different purposes of the Victorian and Commonwealth legislative frameworks for family violence necessarily influence the scope of protection afforded to women with disabilities. The divergent purposes of FVIOs and parenting orders, despite their interaction and overlap, influence their practical operation. The focus of proceedings under the FVP Act is the protection of affected family members who are at risk of family violence. The focus of proceedings under the Family Law Act for parenting orders is what arrangements will be in the best interests of the child. The distinct issues under consideration for each application may arise at different times and in different contexts.³⁹¹

Issues concerning the interaction between state intervention orders made under the FVP Act and orders made under the Family Law Act do not arise in all cases that involve family violence.³⁹² That is, a woman seeking a FVIO under the FVP Act may not have any cause to be involved in family law proceedings.³⁹³ However, where such interaction issues do arise, the legal system must provide adequate support and a seamless process for women with disabilities who seek both state intervention orders for their personal protection and the resolution of their family law matters in the federal family courts.³⁹⁴

Submissions to the ALRC/NSWLRC Inquiry revealed that the interaction between intervention orders made under state family violence legislation and parenting orders made under the Family Law Act can generate many 'gaps' in the protection of family violence victims.³⁹⁵ The ALRC/NSWLRC Family Violence Report identified the following key interaction issues:

- Inconsistent orders – whereby a FVIO made under the FVP Act and parenting orders made under the Family Law Act may contain inconsistent conditions, be directly inconsistent or be inconsistent in practice³⁹⁶
- The culture and practice of state Magistrates' Courts – whereby state magistrates are often reluctant to exercise family law jurisdiction³⁹⁷

391 ALRC and NSWLRC, above n 10, 767 [17.44].

392 Ibid 689 [15.78].

393 Ibid 307 [7.47]–[7.48].

394 Ibid 689 [15.78].

395 Ibid 690 [15.79].

396 Ibid 690 [15.80].

397 Ibid 691 [15.84]. For an in-depth discussion of the practice of state and territory courts, see Chapter 16 of the Commissions' Report.

- The culture and practice of federal family courts – whereby the Family Law Act provisions concerning the presumption of equal shared parental responsibility and the primary consideration of the child having a ‘meaningful relationship’ with both parents, put victims of family violence at risk³⁹⁸
- Unclear pathways for victims of family violence in negotiating state and federal legal systems, which results in duplication through multiple court hearings and different advice from different duty lawyers.³⁹⁹

A FVIO made under the FVP Act operates subject to its consistency with any orders or injunctions made under the Family Law Act.⁴⁰⁰ A court exercising jurisdiction under the Family Law Act can make a declaration under section 68Q that an order or injunction under that Act is inconsistent with a FVIO. The FVIO is invalid to the extent of the inconsistency.⁴⁰¹ In practical terms, these provisions can create a ‘gap in protection’ for the person sought to be protected by the FVIO.⁴⁰² This is particularly problematic where the terms of the parenting order do not include arrangements for the safety of the protected persons, or where they expose a protected person to the perpetrator of the family violence, often through shared care arrangements for a child.⁴⁰³

Section 68R of the Family Law Act permits a court making a FVIO under state legislation to ‘revive, vary, discharge or suspend’ an existing order or injunction made under the Family Law Act, including a parenting or recovery order and an injunction granted under ss 68B or 114. A state Magistrates’ Court can exercise its power under subsection 68R(1) of its own initiative or on application by any person,⁴⁰⁴ but only in relation to proceedings for a final FVIO, not in relation to an interim order.⁴⁰⁵ In exercising this power, the Magistrates’ Court must relevantly consider:

- whether contact with both parents is in the best interests of the child⁴⁰⁶
- that it is appropriate to amend an order or injunction that is inconsistent with an existing FVIO because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that family law order or injunction.⁴⁰⁷

398 Ibid 692 [15.88]-[15.89]. For an in-depth discussion of federal family courts, see Chapter 17 of the Commissions’ Report.

399 Ibid 693 [15.93].

400 *Family Violence Protection Act 2008* (Vic) s 176.

401 *Family Law Act 1975* (Cth) s 68Q.

402 ALRC and NSWLRC, above n 10, 690 [15.81].

403 Ibid 690 [15.82].

404 *Family Law Act 1975* (Cth) s 68R(2).

405 *Family Law Act 1975* (Cth) s 68R(4).

406 *Family Law Act 1975* (Cth) s 68R(5)(b).

407 *Family Law Act 1975* (Cth) s 68R(5)(c).

A Magistrates' Court can only amend a parenting order or an injunction to the extent that it relates to a person spending time with a child;⁴⁰⁸ and only when the court has material before it that was not before the court which made the existing parenting order.⁴⁰⁹ Section 90 of the FVP Act enables the Magistrates' Court to exercise the power granted to it by section 68R of the Family Law Act.⁴¹⁰ However, a common theme in submissions to the ALRC/NSWLRC Inquiry was that state courts making FVIOs rarely exercised this limited jurisdiction under the Family Law Act.⁴¹¹ In proceedings for an interim FVIO, section 68T of the Family Law Act enables the Magistrates' Court to suspend or vary a parenting order or injunction on an interim basis for 21 days or until the interim FVIO stops being in force.⁴¹²

If the Magistrates' Court decides to make a FVIO where the protected person or the respondent is the parent of a child, the court must decide whether or not it will or may jeopardise the protected person's safety or the child's safety for the child to have contact with the respondent.⁴¹³ If there are no existing Family Law Act orders and the court decides that the protected person's or the child's safety will not be jeopardised by the child having contact with the respondent, the Magistrates' Court must include a number of conditions in the FVIO.⁴¹⁴ These conditions relate to the form of contact arrangements between the protected person and the respondent; how handover of the child will occur to minimise the risk of family violence to the protected person; and how these arrangements are to be negotiated to maximise the safety of the protected person.⁴¹⁵ If the Magistrates' Court determines that it may jeopardise the protected person's or the child's safety for the child to have contact with the respondent, the court must include a condition in the FVIO prohibiting the respondent from living with, spending time with or communicating with the child.⁴¹⁶

For women with disabilities who have experienced violence, there is an evident tension arising from the interaction issues between parenting orders made under the Family Law Act and FVIOs made under the FVP Act. 'Gaps' in protection created by different orders and a 'lack of integration' between the courts at the state and federal levels generate inadequate protection for women with disabilities from family violence.⁴¹⁷

408 *Family Law Act 1975* (Cth) s 68R(1).

409 *Family Law Act 1975* (Cth) s 68R(3).

410 *Family Violence Protection Act 2008* (Vic) s 90.

411 ALRC and NSWLRC, above n 10, 691 [15.84].

412 *Family Law Act 1975* (Cth) s 68T.

413 *Family Violence Protection Act 2008* (Vic) s 91(1).

414 *Family Violence Protection Act 2008* (Vic) s 92(1).

415 *Family Violence Protection Act 2008* (Vic) s 92(1).

416 *Family Violence Protection Act 2008* (Vic) ss 91, 93.

417 ALRC and NSWLRC, above n 10, 693 [15.91].

These interaction concerns may also undermine one of the stated purposes of Division 11 of Part VII of the Family Law Act, which is 'to ensure that orders, injunctions and arrangements [made under the Act that provide for a child to spend time with a person] do not expose people to family violence'.⁴¹⁸ Addressing these interaction concerns is imperative given the findings of the Sentencing Advisory Council that children now represent the single largest category of protected persons under FVIOs, with a 295% increase between 2004-05 and 2011-12 in the number of protected children aged under 18 years.⁴¹⁹

418 *Family Law Act 1975* (Cth) s 68N(aa).

419 Sentencing Advisory Council, *Sentencing for Contravention Report*, above n 197, 51 [5.50].

Section 6: Domestic avenues of protection: sexual assault

A Introduction

Sexual assault in the context of family violence commonly involves multiple forms of sexual violence⁴²⁰ and repetition,⁴²¹ and occurs together with other forms of violence.⁴²² Many acts of sexual violence that a woman with a disability may experience as part of family violence constitute a sexual offence under criminal law.⁴²³ Sexual assault illustrates the interplay between violence, gender and disability, as women with disabilities remain the predominant victims.⁴²⁴ The type of disability may also affect a woman's risk of experiencing sexual assault. Women with intellectual disabilities, complex communication disabilities or psychiatric disabilities are the most vulnerable to sexual assault, due to their heightened support and care needs.⁴²⁵

Women with disabilities are at a significantly greater risk of sexual assault than women without disabilities.⁴²⁶ They also face substantial barriers to disclosure, which can operate at various levels and often overlap or interact.⁴²⁷ These barriers include:

- a woman's lack of knowledge or awareness that a sexual offence has been committed against her⁴²⁸
- communication difficulties that impede the woman's ability to disclose sexual assault and articulate particulars⁴²⁹
- a greater dependence on others for her basic needs, care and support⁴³⁰

420 ALRC and NSWLRC, above n 10, 1106 [24.34]-[24.37].

421 Ibid 1106-07 [24.38]-[24.40].

422 Ibid 1107-08 [24.41].

423 Ibid 1193 [26.26].

424 Suellen Murray and Anastasia Powell, 'Sexual assault and adults with a disability: Enabling recognition, disclosure and a just response' (Issues No 9, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2008) 4.

425 Ibid 4.

426 Ibid 1; ALRC and NSWLRC, above n 10, 1105 [24.32]; Goodfellow and Camilleri, above n 128, 20; Victorian Law Reform Commission, *Sexual Offences: Final Report* (Victorian Law Reform Commission, 2004) ('*Sexual Offences Final Report*') 321-23; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 28; Dillon, above n 11, 8.

427 Murray and Powell, above n 423, 5.

428 Goodfellow and Camilleri, above n 128, 20; VLRC, *Sexual Offences Final Report*, above n 425, 322 [6.5]; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 28-29; Murray and Powell, above n 423, 6.

429 Goodfellow and Camilleri, above n 128, 20; VLRC, *Sexual Offences Final Report*, above n 425, 322 [6.5]; Kelly Johnson, Ruth Andrew and Vivienne Topp, *Silent Victims: A Study of People with Intellectual Disabilities as Victims of Crime* (Office of the Public Advocate, 1988) 48; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 28; Murray and Powell, above n 423, 6, 13-14.

430 Goodfellow and Camilleri, above n 128, 20; VLRC, *Sexual Offences Final Report*, above n 425, 321 [6.3]; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 28-9; Ortoleva and Lewis, above n 17, 15.

- a woman's care provider or family member acting as a 'gatekeeper' to disclosure, information and assistance⁴³¹
- power imbalances in the relationship between the woman and the perpetrator, who may be an intimate partner, family member or care provider⁴³²
- physical and social isolation, which prevent a woman from accessing support services.⁴³³

Women with disabilities commonly experience sexual assault at the hands of someone they know, chiefly in their home or in a residential care facility, and sexual assaults are rarely reported to the police.⁴³⁴ Where a report is made, women with disabilities face difficulties in telling their story and establishing their credibility, such that their complaints are often not taken seriously by the police.⁴³⁵ Murray and Powell note that the national and international literature identifies three main perpetrator groups of sexual violence against women with disabilities:

- male residents in residential care facilities, against women with intellectual disabilities living in such settings
- family members (such as the woman's intimate partner) who may also perform a care provider role, or paid in-home care providers
- staff in residential care facilities or disability support services.⁴³⁶

Women with intellectual disabilities who live in supported residential facilities may be at greater risk of sexual assault; however inaction or inadequate responses by service providers at those facilities may underestimate the extent of the issue.⁴³⁷ Organisational policies and procedures can deter disclosure and/or prompt action, as a complaint must pass through multiple administrative channels before a formal report is made to the police.⁴³⁸

431 Murray and Powell, above n 423, 6.

432 Goodfellow and Camilleri, above n 128, 20.

433 Ibid; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 28; Murray and Powell, above n 423, 6; Salthouse, above n 90, 7-8.

434 Goodfellow and Camilleri, above n 128, 20-21; VLRC, *Sexual Offences Final Report*, above n 425, 321 [6.3]; Moira Carmody, 'Invisible Victims: Sexual Assault of People with an Intellectual Disability' (1991) 17 *Australia and New Zealand Journal of Developmental Disabilities* 229; Vicky Turk and Hilary Brown, 'The Sexual Abuse of Adults with Learning Disabilities: Results of a Two Year Incidence Survey' (1993) 6 *Mental Handicap Research* 212; Alexandra Neame and Melanie Heenan, 'What Lies Behind the Hidden Figures of Sexual Assault? Issues of Prevalence and Disclosure' (Briefing No 1, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2003); Salthouse, above n 90, 8.

435 Goodfellow and Camilleri, above n 128, 20-21; VLRC, *Sexual Offences Final Report*, above n 425, 322 [6.5]; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 28.

436 Murray and Powell, above n 423, 4-5.

437 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 28.

438 Murray and Powell, above n 423, 6, 13.

Further, women with disabilities may be reluctant to report a sexual assault for fear that they will lose support services or their accommodation as a consequence of reporting.⁴³⁹ The ability of a woman with a disability to report sexual assault is further reduced where the alleged perpetrator is the woman's care provider.⁴⁴⁰

Practical perspective

We often hear about people living in community residential units (CRUs) who are victims of sexual assault, sometimes by a co-resident. People living in CRUs are often inappropriately placed together because there is a great shortage of accommodation. The other scenario is a worker in the facility committing sexual assault against a resident with an intellectually disability.

The culture in CRUs used to be that violence or sexual assault was an internal matter and it was never reported to the police. Now this practice is recognised to be unacceptable, but it probably still occurs in some supported accommodation facilities (*Interview participant, Villamanta Disability Rights Legal Service*).

Practical perspective

There are so many women with disabilities who are victims of abuse in residential care facilities, and because of the set up and reporting procedures of the facilities, there is not enough evidence to go to trial. In one particular case, it took the service provider two days to notice the bruising on a woman who had been raped by a worker at the facility. The woman was immediately sent to a medical centre, but by that time, all forensic evidence had expired. There is also a gross level of under-reporting (*Interview participant, Villamanta Disability Rights Legal Service*).

A woman's disability is often a highly influential factor in her reluctance to disclose or report a sexual offence to the police.⁴⁴¹ In the family violence context, this factor may intersect with factors such as the woman's ongoing relationship with the perpetrator, her financial dependence on the perpetrator, her reliance on the perpetrator for care and support, the presence of children and the availability of civil avenues of redress such as intervention orders under the FVP Act or the PSIO Act.⁴⁴²

439 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 28.

440 Ibid 29.

441 See, e.g. Murray and Powell, above n 423; Goodfellow and Camilleri, above n 128; Jennifer Keilty and Georgina Connolly, 'Making a Statement: An Exploratory Study of Barriers Facing Women with an Intellectual Disability When Making a Statement about Sexual Assault to Police' (2001) 16 *Disability and Society* 273.

442 ALRC and NSWLRC, above n 10, 1193 [26.31], 1194 [26.33]; Murray and Powell, above n 423, 311.

If or when the woman realises that a sexual assault has occurred, she may have insufficient knowledge about her options and the services and resources available to her to report the sexual assault and engage with the criminal justice system.⁴⁴³ Alternatively, the woman may decide not to report the sexual assault to the police. Indeed, most sexual assaults do not enter the criminal justice system for this reason.⁴⁴⁴

If the sexual assault of a woman with a disability is reported to the police, barriers to justice emerge at several points in the criminal justice process. 'Filtering' of matters initially occurs with the police in their recording and investigation of a woman's complaint and their decision to charge the suspect. If the police do charge a suspect with a sexual offence, discretionary decisions are subsequently made by the OPP. The role of the police and the OPP in the ability of women with disabilities who have experienced sexual assault to obtain a remedy through the criminal justice system is explored below.

B Statistical data on sexual assault against women with disabilities

Statistics on the incidence and prevalence of sexual violence against women with disabilities are scant. This has been attributed to:

- women's failure to report sexual assault⁴⁴⁵
- systemic barriers for women with disabilities in seeking access to justice⁴⁴⁶
- the failure of service providers within the criminal justice system, including the police, to consistently or adequately identify sexual assault victims as having a disability⁴⁴⁷
- a lack of data collection by the police and courts on victims with disabilities who report sexual assault⁴⁴⁸
- adverse experiences for women upon their disclosure of sexual assault, including with police procedures.⁴⁴⁹

The VLRC in its *Sexual Offences: Final Report* (Sexual Offences Final Report) identified that '[t]he lack of data and the failure to accurately record information both on the incidence and characteristics of sexual assault of people with cognitive impairment impedes legal and policy development in this area'.⁴⁵⁰

443 ALRC and NSWLRC, above n 10, 1193 [26.29].

444 Ibid 1193 [26.30].

445 Goodfellow and Camilleri, above n 128, 18; VLRC, *Sexual Offences Final Report*, above n 425, 322 [6.5]; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 28.

446 Goodfellow and Camilleri, above n 128, 18.

447 Murray and Powell, above n 423, 3; ALRC and NSWLRC, above n 10, 1105 [24.32]; Goodfellow and Camilleri, above n 128, 18.

448 VLRC, *Sexual Offences Final Report*, above n 425, 340 [6.62].

449 Goodfellow and Camilleri, above n 128, 18.

450 VLRC, *Sexual Offences Final Report*, above n 425, 340 [6.62].

The VLRC recommended that a working group be convened to establish an integrated process for the collection of reliable statistics on sexual offences, which specifically addresses complainants and offenders with cognitive impairment.⁴⁵¹

Murray and Powell subsequently observed that:

... there is no standard national data collection that includes the experiences of sexual violence amongst adults with a disability, or more specifically, the experiences of women with a disability.

Reported crime data ... similarly provide an inadequate estimate of the prevalence of sexual violence experienced by adults with a disability. In addition to sexual assault already widely acknowledged as an under-reported crime, police recording of disability status among reported sexual offences is often incomplete and in many cases based on an individual police officer's subjective observations.⁴⁵²

Most recently, the Law Reform Committee's Access to Justice Inquiry Report recommended that a centralised database be established for the collection of statistics on people with an intellectual disability or cognitive impairment who have come into contact with the justice system. It was suggested that such a database could include information on the number of offences in Victoria involving people with an intellectual disability or cognitive impairment, either as victims or offenders; police reports and prosecution rates for such offences; and prosecution outcomes.⁴⁵³

This Voices Against Violence Research Project paper augments the recommendations of the VLRC Sexual Offences Final Report and the Law Reform Committee's Access to Justice Inquiry Report and recommends that an integrated process be established for the collection of reliable statistics by Victorian law enforcement agencies, including Victoria Police, the OPP and the Magistrates' Court of Victoria, in relation to all forms of violence against women with disabilities. This database could include information on the kinds of violence experienced by women with disabilities in Victoria; police reports and prosecution rates for such offences; and prosecution outcomes. A database of this nature will enable a (more accurate) picture to be created of the prevalence and incidence of violence against women with disabilities in Victoria.

451 Ibid recommendations 4, 166.

452 Murray and Powell, above n 423, 3 (citations omitted).

453 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, recommendation 1.

Recommendation 7: That an integrated process be established for the collection of reliable statistics by Victorian law enforcement agencies, including Victoria Police, the OPP and the Magistrates' Court of Victoria, in relation to all forms of violence against women with disabilities. This database could include information on the kinds of violence experienced by women with disabilities in Victoria; police reports and prosecution rates for such offences; and prosecution outcomes.

C Barriers to justice: the role of Victoria Police

An examination of the role of law enforcement agencies is vital to an understanding of the barriers faced by women with disabilities who have experienced sexual assault. The police are arguably the most important 'gatekeepers to the criminal justice system', influencing whether victims report a sexual assault and continue with their complaints, as well as the progress of sexual assault complaints to the courts for final determination.⁴⁵⁴

At first instance, it may be that the police fail to recognise that a woman has an intellectual disability or cognitive impairment.⁴⁵⁵ In its final evaluation report of the Victorian Department of Justice's Sexual Assault Reform Strategy (SARS),⁴⁵⁶ Success Works reported that magistrates, police and prosecutors found the identification of people with cognitive impairments an extremely difficult task.⁴⁵⁷ The police officers interviewed for the evaluation commonly applied their own judgment to assess whether or not a person has a cognitive impairment. They cited insufficient resources or capacity at the reporting stage as reasons for 'err[ing] on the side of caution' and assessing a person as being cognitively impaired.⁴⁵⁸ Interview participants in the Success Works evaluation supported the provision of additional information and training to police officers, judicial officers and court staff to facilitate the more effective conduct of interviews with sexual assault victims and more appropriate treatment of witnesses in court with cognitive impairment.⁴⁵⁹

454 Caroline Taylor, David Bradley, Shane Muldoon and Caroline Norma, *Policing Just Outcomes: Improving the police response to adults reporting sexual assault* (Social Justice Research Centre, Edith Cowan University, 2012) 167; ALRC and NSWLRC, above n 10, 1184-5 [26.8]; Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (Australian Government Office of the Status of Women, 2004) 5; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 101.

455 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 109-110.

456 For an overview of SARS, including the impetus for its development and its evaluation by Success Works, see above n 205.

457 Ibid 189 [6.2.3].

458 Ibid.

459 Ibid.

Success Works formed the view that there was:

... a clear need for the police, prosecutors and others in the criminal justice system to receive training in relation to the differences between cognitive impairment and others forms of disability and for people with disabilities to receive appropriate levels of support to be able to participate effectively in the process.⁴⁶⁰

Practical perspective

The ability to identify and accommodate disability is still very much lacking. Lawyers, police and people around women with disabilities can still be relatively ignorant about disability and how it might manifest. For instance, a woman with a disability might attempt to report an offence, but the police might not recognise that she has a disability. If the police are interpreting the way the woman presents and the quality of her evidence or complaint, assuming that she is someone without a disability, they might just see it as an ill-formed or unsophisticated complaint with insufficient weight to bother pursuing. If the police were aware that the woman had a disability, they may speak to her in a different way and provide better support to her to get the information that they need to pursue the claim (*Interview participant, Victoria Legal Aid*).

This paper recommends that members of Victoria Police be provided with comprehensive, specialist training and professional development about the unique issues relevant to women with disabilities who experience violence. Training and development programs should:

- explain the concept of 'disability', including the difference between cognitive impairment and other kinds of disability⁴⁶¹
- include techniques to improve the identification of intellectual disability or cognitive impairment⁴⁶²
- educate and develop the skills of Victoria Police members in effectively communicating with women with disabilities
- raise awareness of the particular impacts of violence on women with disabilities; the heightened vulnerability of women with disabilities to violence, and the barriers and disadvantages that they experience in seeking redress through the justice system

460 Ibid 190 [6.2.4]

461 Ibid.

462 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, recommendation 12.

- outline the existing procedures and arrangements that aim to provide support to women with disabilities during police interviews, including the Independent Third Person Program managed by the OPA.⁴⁶³

These training and professional development programs should be provided by the OPA, in consultation with relevant women's and disability support services and organisations, including WDV and the DVRCV. The implementation of this recommendation will require the provision of additional resources to the OPA.

Recommendation 8: That members of Victoria Police be provided with comprehensive, specialist training and professional development about the unique issues relevant to women with disabilities who experience violence. Training and development programs should:

- **explore the concept of 'disability', including the social model of disability, difference between cognitive impairment and other kinds of disability**⁴⁶⁵
- **include techniques to improve the identification of intellectual disability or cognitive impairment**⁴⁶⁵
- **educate and develop the skills of Victoria Police members in effectively communicating with women with disabilities**
- **raise awareness of the targeting and exploitation of women with disabilities by perpetrators of violence; the particular impacts of violence on women with disabilities; and the barriers and disadvantages that they experience in seeking redress through the justice system**
- **outline the existing procedures and arrangements that aim to provide support to women with disabilities during police interviews, including the Independent Third Person Program managed by the OPA.**⁴⁶⁶

These training and professional development programs should be provided by the OPA, in consultation with relevant women's and disability support services and organisations, including WDV and the DVRCV. The effective implementation of this recommendation will require the provision of additional resources to the OPA.

463 Ibid.

464 Success Works, above n 205, 190 [6.2.4].

465 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, recommendation 12.

466 Ibid.

Research has found that police are likely to decide not to pursue a sexual assault complaint or lay charges against the perpetrator if the victim has an intellectual disability or cognitive impairment.⁴⁶⁷ For female victims with such disabilities, their reliability, credibility and consent are questioned, particularly as most sexual offences are committed 'behind closed doors' within intimate partner or other family or care provider relationships.⁴⁶⁸

Additionally, female victims of sexual assault with intellectual disabilities or cognitive impairment may have communication difficulties which impede their ability to particularise or articulate details as required by the police, the prosecution and the courts in order to sustain a conviction.⁴⁶⁹ They may not understand the questions asked by police or the implications of their answers.⁴⁷⁰ When being interviewed by police, women with intellectual disabilities or cognitive impairment may be overly influenced or intimidated by the police officer as an authority figure, and may be more vulnerable to answering leading questions or to providing responses that they believe the police officer wants to hear.⁴⁷¹

Practical perspective

There is a very high attrition rate across the lifespan of police involvement and women with disabilities really struggle because disability is poorly understood in the justice system. The police take a pragmatic view of the likelihood of securing a conviction. If the woman struggles to communicate or to present coherent evidence about the sexual assault, the police might decide that it will be very hard to achieve a conviction against the perpetrator, so they will not commence the prosecution (*Interview participant, Victoria Legal Aid*).

Camilleri submits that the police assess a sexual assault victim's capacity to be a 'good witness' from the moment a report is made, according to a construct of attributes including the victim's ability to clearly verbalise the nature of the offence, and the victim's consistency in telling and retelling her story.⁴⁷² However, as Camilleri notes, 'a victim's verbal skills have no bearing on whether a crime has been committed'.⁴⁷³ Rather, the failure of a report of sexual assault made by a woman with cognitive impairment to proceed through the criminal justice system is often due to the system's limited capacity to accommodate alternative means of giving evidence.⁴⁷⁴

467 Taylor et al, above n 453, 169-72.

468 Ibid 171; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 104-5; Murray and Powell, above n 423, 5.

469 Taylor et al, above n 453, 202; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 274; VLRC, *Sexual Offences Final Report*, above n 425, 322-3 [6.4]-[6.8].

470 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 271, 274.

471 Ibid 274.

472 Margaret Camilleri, *[Dis]Able Justice: Why reports of sexual assault made by adults with cognitive impairment fail to proceed through the justice system* (PhD Thesis, University of Ballarat, 2009) 224-5.

473 Ibid 225.

474 Ibid.

The report of Taylor et al observed the findings of research and evidence reported in the literature that police use typifications of ‘ideal versus non-ideal victims’ in their decision-making in relation to sexual offences.⁴⁷⁵ According to this research, the presence of ‘hard evidence’ in addition to the victim’s word – such as witnesses, medical evidence, visible harm and other ‘objective’ items – made it more likely that police would pursue a sexual assault claim.⁴⁷⁶ Conversely, police were less likely to pursue a sexual assault claim if the victim’s word was the only form of evidence, if the victim would make a ‘poor witness’ due to a disability, cognitive impairment or mental ill health issues,⁴⁷⁷ and if the issue of victim consent was unclear.⁴⁷⁸ These issues lead to a high attrition of cases, such that only a very small number of women with disabilities who have experienced sexual assault and report it to the police ever reach the trial stage.⁴⁷⁹

Camilleri’s research found that the police encountered various ‘difficulties’ in handling sexual assault cases involving victims with cognitive impairment,⁴⁸⁰ and that the culture of the police informed discretionary decision making in such cases, as did the attitudinal or cultural differences between police units such as the between the Sexual Offences and Child Abuse Unit (SOCAU) and the Criminal Investigations Unit (CIU).⁴⁸¹

Practical perspective

There appears to be a general cultural attitude of reluctance amongst the police to have women with intellectual disabilities and cognitive impairment provide evidence, because they are not ‘good witnesses’. This is a real barrier in terms of these women pursuing criminal charges. It requires police improving their operational practices and procedures (*Interview participant, Women’s Legal Service*).

Practical perspective

The attitude or culture of the police is a big barrier. The police tend to brush off a report of violence or sexual assault by a woman with a disability or put it in the ‘too hard’ basket (*Interview participant, Villamanta Disability Rights Legal Service*).

475 Taylor et al, above n 453.

476 Ibid 206.

477 VLRC, *Sexual Offences Final Report*, above n 425, 325-26 [6.15]-[6.16]; Goodfellow and Camilleri, above n 128, 54-56.

478 Taylor et al, above n 453, 206.

479 VLRC, *Sexual Offences Final Report*, above n 425, 326 [6.16]; Camilleri, above n 471, 225.

480 Camilleri, above n 471, 233, 248.

481 Ibid 225-29.

Practical perspective

It has been in the culture of the police forever that people with intellectual disabilities are kind of 'second rate citizens' as regards having the law protect them. Sometimes the police do not respond quickly enough to reports of violence against women with disabilities or they are a bit ho-hum about it. The police have so much to do and not enough resources to do it that they tend to put these matters at the back of the queue. It all depends on police resources and the culture of the police and what they are told are the priorities (*Interview participant, Villamanta Disability Rights Legal Service*).

The Victoria Police *Code of Practice for the Investigation of Sexual Assault* (Sexual Assault Code of Practice) outlines how Victoria Police members must respond to reports of sexual assault. First introduced in 1992, the Sexual Assault Code of Practice was most recently republished in 2005 to include information on 'responding appropriately to victims from Indigenous communities, non-English speaking backgrounds, victims with a physical or cognitive impairment and children'.⁴⁸² The Sexual Assault Code of Practice recognises that some victims of sexual assault may require 'additional support and consideration', including people who are living with a disability or cognitive impairment.⁴⁸³

In relation to victims with disabilities, the Sexual Assault Code of Practice states that police must be mindful that additional support may be required to facilitate communication and to access police stations and medical facilities.⁴⁸⁴ The following are listed as examples of considerations when dealing with physically impaired victims:

- informing Forensic Medical Officers that the victim has a physical disability so they can make appropriate arrangements
- utilising the services of a sign language interpreter, preferably the same sex as the victim.⁴⁸⁵

The Sexual Assault Code of Practice also provides that when dealing with victims with a cognitive impairment, it is important for police 'to remain impartial, objective and patient during the full course of the investigation' and 'not to make assumptions when assessing either the evidence or the credibility of parties involved'.⁴⁸⁶

482 Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (Victoria Police, 2005) 1 ('*Sexual Assault Code of Practice*').

483 Ibid 6 [16].

484 Ibid 8 [27].

485 Ibid 8 [28].

486 Ibid 8 [29].

The Sexual Assault Code of Practice states that police must be aware of their manner of questioning and refrain from asking leading or suggestive questions to victims with cognitive impairment.⁴⁸⁷ It also notes the importance of police using resources, such as Independent Third Persons (ITPs), to ensure that victims with a cognitive impairment are provided with an appropriate level of service.⁴⁸⁸ The Sexual Assault Code of Practice provides that police must be mindful of the possibility of an undiagnosed or undisclosed cognitive impairment.⁴⁸⁹

The 'Guidelines for police interviewing a sexual assault victim' in the Sexual Assault Code of Practice remind police that an independent person – who could be a relative or close friend of the victim or a trained ITP – must be present at the interview if the victim has a cognitive impairment.⁴⁹⁰ 'Cognitive impairment' is defined to include an intellectual disability, mental illness, brain damage or dementia.⁴⁹¹

By its terms, the Sexual Assault Code of Practice attempts to ensure that police officers investigating sexual assault complaints in which the victim has a disability or cognitive impairment are cognisant of the unique considerations that arise for such victims. However, to ascertain the effectiveness of the Sexual Assault Code of Practice for women with disabilities who have experienced sexual assault, further research is required into its practical operation. It must be reiterated that, as the majority of sexual assaults against women with disabilities are unreported, the Sexual Assault Code of Practice is a significantly underutilised resource.

A new operating model for sexual assault investigations was developed by Victoria Police in response to the VLRC's Sexual Offences Final Report,⁴⁹² which highlighted the prevalent community concerns about low reporting, prosecution and conviction rates for sexual assault in Victoria, and high attrition rates of cases.⁴⁹³ The first feature of the new model is the establishment of specialist teams of investigators, called Sexual Offence and Child Abuse Investigation Teams, to investigate sexual assaults, liaise with and provide support to victims and to interview witnesses and suspects. The second feature is the establishment of Multidisciplinary Centres, which operate as 'one stop shops', separate from police stations, for the provision of various services involved in the investigation of and response to sexual assault, such as Centres Against Sexual Assault, the Department of Human Services and the Victorian Institute of Forensic Medicine.⁴⁹⁴

487 Ibid 9 [34].

488 Ibid.

489 Ibid 9 [35].

490 Ibid 9 [37].

491 Ibid 20 [95].

492 See VLRC, *Sexual Offences Final Report*, above n 425.

493 Martine Powell and Rebecca Wright, 'Professionals' Perceptions of a New Model of Sexual Assault Investigation Adopted by Victoria Police' (2012) 23 *Current Issues in Criminal Justice* 333, 334.

494 Ibid 333-34, 338.

A qualitative evaluation by Powell and Wright found that this new Victoria Police operating model for sexual assault investigations was perceived to have improved victim satisfaction, professional referrals, collaboration and reporting rates, to have decreased response and investigation times, and to have generated higher prosecution and conviction rates.⁴⁹⁵ The expansion of this model throughout Victoria, and its inclusion of specific services at Multidisciplinary Centres for women with disabilities, may assist in achieving better outcomes for women with disabilities who have experienced sexual assault.

D Access to Justice: the Independent Third Person program – ITP

The ITP Program, managed by the OPA, aims to assist people with cognitive impairments and mental illnesses who are interviewed by Victoria Police, and to assist police in their interviews with these persons.⁴⁹⁶ ITPs can provide support for a woman with an intellectual disability or cognitive impairment in police interviews.⁴⁹⁷ The role of the ITP is to:

- assist the person to understand his or her rights
- support the person through the police interview process; and
- facilitate communication between the person and police.⁴⁹⁸

The Victoria Police Manual sets out the requirement for an ITP ‘to be present at the interview of any person with an impaired mental state or capacity’. Any person who is believed to have a cognitive impairment or mental illness must have an ITP present when they are interviewed by Victoria Police. This includes women with disabilities who are interviewed by the police as victims of violence.⁴⁹⁹ An ITP can provide assistance to the woman to contact a lawyer, relative or friend; help the woman to understand any legal advice given; ensure that the woman understands the questions asked by police; ask the police to rephrase a question; and request a break during the interview if the woman is becoming distressed or is unable to concentrate.⁵⁰⁰

Although the ITP role is not enshrined in legislation, the common law has recognised the importance of the ITP role.⁵⁰¹ OPA’s research on the ITP program highlights that the program assists a significant number of women who are victims of sexual assault.⁵⁰²

495 Ibid 333.

496 See McGuire, *Breaking the Cycle Report*, above n 19, 17-23.

497 Office of the Public Advocate, *Independent Third Person Program* (OPA, 2009) 2 (*ITP Program*).

498 Ibid.

499 McGuire, *Breaking the Cycle Report*, above n 19, 18.

500 OPA, *ITP Program*, above n 496, 2.

501 See *Director of Public Prosecutions (Vic) v Alsem (Ruling)* (Unreported, County Court of Victoria, Judge Gucciardo, 15 November 2012).

502 McGuire, *Breaking the Cycle Report*, above n 19, 99.

E Barriers to Justice: The role of the Office of Public Prosecutions – OPP

Police decision-making in sexual assault matters is also influenced by police interactions with prosecution bodies – in Victoria, the OPP – which present the next barrier to justice in the process for women with disabilities who have experienced sexual assault. A common theme that emerged from interviews and focus groups conducted by Taylor et al with victims of sexual offences was the determinative role of the OPP in the progression of a sexual assault matter in court.⁵⁰³

Once a suspect is charged by police, OPP prosecutors assess the file to decide whether the matter should be prosecuted. If a case does proceed, it is constantly reassessed in the light of changing circumstances.⁵⁰⁴ Policies issued by the Director of Public Prosecutions are particularly important in this regard for their influence upon decision-making in sexual assault cases.

The Prosecutorial Discretion Policy provides that the initial consideration in the exercise of prosecutorial discretion is ‘whether the evidence is sufficient to justify the institution or continuation of a prosecution’. This policy requires that there be ‘admissible, substantial and reliable evidence’ that a criminal offence has been committed before a prosecution is instituted or continued.⁵⁰⁵ In assessing whether there is a ‘reasonable prospect of conviction’, the prosecutor must evaluate the likely strength of the case in court, for which the ‘availability, competence and credibility of witnesses’ is a relevant consideration.⁵⁰⁶ The Prosecutorial Discretion Policy also requires prosecutors to give regard to the following factor (among others) when evaluating the evidence:

(f) What sort of impression is the witness likely to make? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility? ...⁵⁰⁷

The direct link made in the Prosecutorial Discretion Policy between disability and witness credibility demonstrates that these considerations and factors can have a tangible impact upon women with disabilities in Victoria who have experienced violence in seeking redress through the legal system, as they are commonly assessed as not being competent or credible witnesses.

503 Taylor et al, above n 453, 230.

504 Lievore, above n 453, 5; ALRC and NSWLRC, above n 10, 1184-5 [26.8].

505 Director of Public Prosecutions Victoria (DPP (Vic)), *Director's Policy 2: The Prosecutorial Discretion*, 27 July 2013, < <http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aabd79d/2-The-Prosecutorial-Discretion.aspx> > 2.1.2. [See note in comments]

506 Ibid 2.1.4.

507 Ibid 2.1.5

The following observations by Taylor et al are particularly pertinent for women with disabilities who are victims of sexual assault:

The OPP Prosecutorial Guidelines are a diverse collection of rationales that can be employed by police in the first instance and prosecutors in the second to thwart pursuit of a victim's claim of sexual assault and, hence, to justify not responding to such claims. More than that, the guidelines require this diverse collection of rationales to be heeded – they are a real and substantial deterrent to police decision-making that might favour appropriate responses and they serve to cement any individual attitudes of police that are unreceptive of victims' claims.⁵⁰⁸

The above insights from research and practice contextualise the ensuing analysis of the legislative protections for women with disabilities in Victoria who are victims of sexual assault.

F Crimes Act

1 Overview

Sexual offences, including rape,⁵⁰⁹ indecent assault,⁵¹⁰ assault with intent to rape⁵¹¹ and incest⁵¹² are contained in subdivision 8A of the Crimes Act. Subdivision 8D of the Crimes Act specifically addresses the commission of sexual offences against people with cognitive impairment. The stated objectives of the sexual offences subdivisions of the Crimes Act are:

- to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity⁵¹³
- to protect children and persons with a cognitive impairment from sexual exploitation.⁵¹⁴

The Crimes Act contains guiding principles for courts interpreting and applying the sexual offences provisions of the Act.⁵¹⁵ Of relevance to women with disabilities are the facts that:

- there is a high incidence of sexual violence within society⁵¹⁶
- sexual offences are significantly under-reported⁵¹⁷

508 Taylor et al, above n 453, 231.

509 *Crimes Act 1958* (Vic) s 38.

510 *Crimes Act 1958* (Vic) s 39.

511 *Crimes Act 1958* (Vic) s 40.

512 *Crimes Act 1958* (Vic) s 44.

513 *Crimes Act 1958* (Vic) s 37A(a).

514 *Crimes Act 1958* (Vic) s 37A(b).

515 *Crimes Act 1958* (Vic) s 37B.

516 *Crimes Act 1958* (Vic) s 37B(a).

517 *Crimes Act 1958* (Vic) s 37B(b).

- a significant number of sexual offences are committed against women and other vulnerable people, including those with a cognitive impairment⁵¹⁸
- sexual offenders are commonly known to their victims⁵¹⁹
- sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.⁵²⁰

These guiding principles also feature in Part II, Division 2A of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic), which deals with confidential communications made by a complainant in sexual offence proceedings to a medical practitioner or counsellor;⁵²¹ and Part 8.2 of the *Criminal Procedure Act 2009* (Vic), which regulates the giving of evidence in sexual offence proceedings.⁵²²

Guiding principles serve an important function in the interpretation of the criminal law on sexual offences and in the application of the rules of evidence in sexual offence proceedings.⁵²³ The VLRC in its Sexual Offences Interim Report identified three distinct functions for guiding principles in the Crimes Act:

- as an educative tool, ensuring that sexual offences provisions are interpreted consistently with the objectives of the Act
- to enhance the weight of jury directions and instructions and to clarify any ambiguities in the interpretation of particular provisions
- to adequately recognise the unique nature and context of sexual assault (including that it is an underreported crime with severe consequences), which would support the interpretation of particular provisions.⁵²⁴

The introduction of the above objectives and guiding principles into the sexual offences subdivisions of the Crimes Act was motivated by the recommendations of the VLRC in its Sexual Offences Final Report.⁵²⁵ They appropriately recognise that women with cognitive impairment are particularly vulnerable as victims of sexual assault.

518 *Crimes Act 1958* (Vic) s 37B(c).

519 *Crimes Act 1958* (Vic) s 37B(d).

520 *Crimes Act 1958* (Vic) s 37B(e).

521 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32AB.

522 *Criminal Procedure Act 2009* (Vic) s 338.

523 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (Commonwealth of Australia, 2009) 111–12; ALRC and NSWLRC, above n 10, 1176 [25.184].

524 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (Victorian Law Reform Commission, 2003) 390 [8.88].

525 See VLRC, *Sexual Offences Final Report*, above n 425, recommendations 105, 106, 107.

2 Sexual offences against people with cognitive impairment

The increased risk of women with cognitive impairment to sexual exploitation has been attributed to their greater dependence on others for care and support, their limited decision-making ability, a lack of knowledge about sexual matters, their rights and the law, their socialisation to acquiescence, and the effects of their disability on their lifestyle and cognition.⁵²⁶

The Crimes Act contains two offences that aim to address the specific vulnerabilities of people with cognitive impairment to sexual assault. These supplement other sexual offences in the Crimes Act – such as rape, indecent assault and incest – where the victim’s cognitive impairment is an aggravating factor in the offence committed. The offences in sections 51 and 52 of the Crimes Act regulate people in a position of relative power and trust who provide care or support to a person with cognitive impairment, or who provide medical or therapeutic services.⁵²⁷ The primary rationale for these provisions is to protect vulnerable people from being sexually exploited by those in a position of care, responsibility, supervision or authority towards them.⁵²⁸ The potential for abuse of power within such relationships justifies the law’s role in offering additional protection.

For the purposes of subdivision 8D, ‘cognitive impairment’ is defined to include impairment because of mental illness, intellectual disability, dementia or brain injury.⁵²⁹ ‘Intellectual disability’ is defined by reference to the Disability Acts, in relation to a person over five years of age, the concurrent existence of significant sub-average general intellectual functioning; and significant deficits in adaptive behaviour, each of which became manifest before 18 years of age.⁵³⁰

Section 51 of the Crimes Act makes it an offence for a person who provides medical or therapeutic services to a cognitively impaired person who is not his or her spouse or domestic partner to:

- partake in an act of sexual penetration with that person⁵³¹
- commit, or be a party to the commission of, an indecent act with that person.⁵³²

526 Clare Graydon, Guy Hall and Angela O’Brien-Malone, ‘The concept of sexual exploitation in legislation relating to persons with intellectual disability’ (2006) 13 *E Law - Murdoch University Electronic Journal of Law* 150, 152-56.

527 ALRC and NSWLRC, above n 10, 1146 [25.68].

528 Graydon et al, above n 525, 151, 161.

529 *Crimes Act 1958* (Vic) s 50(1).

530 *Disability Act 2006* (Vic) s 3 (definition of ‘intellectual disability’).

531 *Crimes Act 1958* (Vic) s 51(1).

532 *Crimes Act 1958* (Vic) s 51(2). ‘Indecent act’ does not include an act done in the course of an appropriate and generally accepted medical, therapeutic or hygienic procedure: see *Crimes Act 1958* (Vic) s 50(1).

The offence of sexual penetration under section 51(1) is punishable by up to 10 years' imprisonment.⁵³³ The offence of committing an indecent act under section 51(2) is punishable by up to five years' imprisonment.⁵³⁴

The defences to each offence concern the accused's reasonable belief or awareness of the other person's cognitive impairment, depending on the purpose of the services provided by the accused. Where the services provided were related to the person's cognitive impairment, it is a defence for the accused to prove that the accused reasonably believed that the person did not have a cognitive impairment at the time of the alleged offence.⁵³⁵ Where the services provided by the accused were not related to the person's cognitive impairment, the accused must prove that he or she was not aware that the person had a cognitive impairment.⁵³⁶ Each defence must be proved on the civil standard of balance of probabilities.⁵³⁷

Section 52 of the Crimes Act creates a specific offence for sexual offences against people with a cognitive impairment by their workers at a facility,⁵³⁸ which includes a residential facility.⁵³⁹ The definition of 'worker' in section 50(1) of the Crimes Act has been broadened to capture both employees and volunteers at facilities who deliver or assist in the delivery of developmental or education programs or other services to cognitively impaired people residing in or attending the facility. However, 'worker' does not include a fellow resident or attendee with a cognitive impairment at the facility.

Section 52 prohibits a worker at a facility, who is not the cognitively impaired person's spouse or domestic partner, from:

- partaking in an act of sexual penetration with a cognitively impaired person who is a resident of or attends the facility⁵⁴⁰
- committing or being a party to the commission of an indecent act with a cognitively impaired person who is a resident of or attends the facility.⁵⁴¹

533 *Crimes Act 1958* (Vic) s 51(1).

534 *Crimes Act 1958* (Vic) s 51(2).

535 *Crimes Act 1958* (Vic) s 51(3).

536 *Crimes Act 1958* (Vic) s 51(4).

537 *Crimes Act 1958* (Vic) ss 51(3)-(4).

538 'Facility' is defined in s 50(1) of the *Crimes Act 1958* (Vic) as 'a service operated by any person or body (government or non-government) that provides programs specially designed to meet the developmental or educational needs of persons with a cognitive impairment and includes a residential facility'.

539 'Residential facility' is defined in s 50(1) of the *Crimes Act 1958* (Vic) as '(a) an approved mental health service as defined in section 3 of the *Mental Health Act 1986* (Vic); or (b) premises operated by any person or body (government or non-government) wholly or substantially for the purpose of providing residential services to intellectually disabled people; (c) a supported residential service within the meaning of the *Supported Residential Services (Private Proprietors) Act 2010* (Vic)'

540 *Crimes Act 1958* (Vic) s 52(1).

541 *Crimes Act 1958* (Vic) s 52(2). 'Indecent act' does not include an act done in the course of an appropriate and generally accepted medical, therapeutic or hygienic procedure: see *Crimes Act 1958* (Vic) s 50(1).

The offence of sexual penetration under section 52(1) is punishable by up to 10 years' imprisonment.⁵⁴² The offence of committing an indecent act under section 52(2) is punishable by up to five years' imprisonment.⁵⁴³

The issue of consent can be particularly problematic in sexual offences committed against women with disabilities, as can the notion of 'exploitation'.⁵⁴⁴ Consent is defined in section 36 of the Crimes Act as 'free agreement'.⁵⁴⁵ That section non-exhaustively lists circumstances in which a person does not consent to an act. As applied to a woman with a disability, these include:

- the woman submitting to the sexual act because of force or the fear of force or the fear of harm to herself or someone else,⁵⁴⁶ or because she is unlawfully detained⁵⁴⁷
- the woman being asleep, unconscious, or so affected by alcohol or drugs as to be incapable of freely agreeing⁵⁴⁸
- the woman being incapable of understanding the sexual nature of the act⁵⁴⁹
- the woman being mistaken about the sexual nature of the act or the identity of the person⁵⁵⁰
- the woman mistakenly believing that the act is for medical or hygienic purposes.⁵⁵¹

Consent is only a defence to a charge under subsections 51(1) and (2) and subsections 52(1) and (2) if the accused satisfies the court, on the balance of probabilities, that the accused reasonably believed that he or she was the spouse or domestic partner of the cognitively impaired person at the time of the alleged offence.⁵⁵² If consent is relevant to a charge under section 51 or 52, the prosecution bears the burden of proving lack of consent.⁵⁵³

542 *Crimes Act 1958* (Vic) s 52(1).

543 *Crimes Act 1958* (Vic) s 52(2).

544 See Graydon et al, above n 525, 157-61. For an overview of consent issues for people with intellectual disabilities in the context of sexual and reproductive health, see Gillian Eastgate, 'Sex, consent and intellectual disability' (2005) 34 *Australian Family Physician* 163.

545 *Crimes Act 1958* (Vic) s 36.

546 *Crimes Act 1958* (Vic) ss 36(a)-(b).

547 *Crimes Act 1958* (Vic) s 36(c).

548 *Crimes Act 1958* (Vic) s 36(d).

549 *Crimes Act 1958* (Vic) s 36(e).

550 *Crimes Act 1958* (Vic) s 36(f).

551 *Crimes Act 1958* (Vic) s 36(g).

552 *Crimes Act 1958* (Vic) ss 51(5), 52(3).

553 *Crimes Act 1958* (Vic) ss 51(6), 52(4).

Through subdivision 8D, the Crimes Act recognises the particular vulnerability of women with cognitive impairment to sexual abuse, including by their workers, whether paid or unpaid. However, the legislation is limited to workers at residential care facilities, not fellow residents, and it does not cover situations of domestic care providers or family members who sexually assault women with disabilities in their homes.

The acute challenge in the legal regulation of sexual offences against women with disabilities lies in striking an appropriate balance between sexual agency and autonomy on the one hand, and protecting particularly vulnerable people from sexual abuse and exploitation on the other. Murray and Powell describe the issue as follows:

In the case of intimate partners or informal care relationships, the issue of intervention becomes a particularly complex issue, with legislation continuing to struggle with the need to both acknowledge a person with a disability as having agency in their sexual life, while still wanting to provide some measure of protection for vulnerable adults. ...[I]t is a difficult balance between a law of paternalism or of protection.⁵⁵⁴

The ALRC and NSWLRC similarly recognised that, where sexual assault occurs in the context of family violence or intimate relationships, the fundamental issue in relation to sexual offences is that of balance: 'reconciling the need to protect people with a cognitive impairment from sexual exploitation while at the same time acknowledging their agency'.⁵⁵⁵

Graydon et al contend that the aim of the sexual offences provisions such as sections 51 and 52 of the Crimes Act is to 'achieve [a] protective function while avoiding unnecessary restriction, discrimination and paternalism'.⁵⁵⁶ However, they add that '[t]he difficulty lies in framing provisions which afford the required protection, but do not unnecessarily restrict sexual choice'.⁵⁵⁷ Graydon et al consider that the Victorian legislative approach to sexual offences against people with cognitive impairment, being a prohibition of sexual relations with any person employed to render any kind of service to them, may result in 'undue interference' with the right of cognitively impaired people to sexual expression.⁵⁵⁸

While subdivision 8D of the Crimes Act addresses two specific circumstances in which women with cognitive impairment may be particularly vulnerable to sexual assault – namely, when receiving medical or therapeutic services or if residing in or attending a facility – the greater challenge lies in engaging women with disabilities who are victims of sexual assault with the criminal justice system in the first place.⁵⁵⁹

554 Murray and Powell, above n 423, 13.

555 ALRC and NSWLRC, above n 10, 1146 [25.70].

556 Graydon et al, above n 525, 169.

557 Ibid 156.

558 Ibid 150, 169.

559 ALRC and NSWLRC, above n 10, 1146-47 [25.71].

The barriers that such women face in reporting sexual assault, as well as the handling of reported crimes through ‘administrative’ rather than legal avenues in institutional settings, are particularly problematic.⁵⁶⁰ There may be scope for the Crimes Act to introduce other specific sexual offences against people with cognitive impairment, such as those committed within a domestic setting by their care providers. However, stakeholder consultation on this issue lay beyond the scope of this paper, such that it makes no formal recommendations on this issue.

3 Application of the law

Scenario 8

Daisy has an intellectual disability. She lives in a supported residential service (SRS). Daisy was sexually assaulted by another resident of the SRS. Following the incident, workers at the SRS observed that Daisy was becoming increasingly distressed, violent and upset. Daisy disclosed the sexual assault to a worker at the SRS, but management did not believe Daisy’s allegations and so did not report the matter to police.

Daisy’s scenario demonstrates barriers to justice that may arise for women with disabilities living in supported residential services who experience sexual assault. Daisy’s intellectual disability affected her ability to communicate the sexual assault to workers at the SRS, or she may have been reluctant to do so due to fears that she may be relocated or her care and support withdrawn. Organisational policies presented a further impediment upon Daisy’s disclosure of the sexual assault to SRS workers. Delays in reporting a sexual assault to police will be forensically disadvantageous for Daisy, as evidence may no longer be available and Daisy may have difficulty recalling specific details. In these circumstances, Daisy may seek the support of an appropriate disability agency to assist her to report the sexual assault to the police.

Upon reporting the crime to the police, Daisy should be supported in the police interview by an ITP. OPA’s research on the ITP Program has highlighted that ITP volunteers play an important role in upholding the rights of people with disabilities who are interviewed by police, including women with disabilities who have experienced sexual assault.⁵⁶¹

560 Ibid. See also Joan Pestersilia, ‘Crime Victims with Developmental Disabilities: A Review Essay’ (2001) 28 *Criminal Justice and Behavior* 655; Murray and Powell, above n 423; Goodfellow and Camilleri, above n 128; Keilty and Connelly, above n 440; Haley Clark and Bianca Fileborn, ‘Responding to women’s experiences of sexual assault in institutional and care settings’ (ACSSA Wrap No 11, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2011).

561 See McGuire, *Breaking the Cycle Report*, above n 19.

The 'Making Rights Reality' program is a current example of an attempt to provide more holistic support to, and improve access to the criminal justice system for, victims of sexual assault who have a cognitive impairment and/or communication difficulties. This pilot project, run collaboratively by the South Eastern Centre Against Sexual Assault and the Springvale Monash Legal Service, offers support to sexual assault victims through police investigation, prosecution and crimes compensation processes. The program provides crisis care, counselling, advocacy, legal information and advice and communication support.⁵⁶² If the SRS in which Daisy resided was located in the south-eastern region of Melbourne, Daisy would be eligible to access the 'Making Rights Reality' program for assistance.

Scenario 9

Tamara has a physical disability and a cognitive impairment. She lives at home with her husband Sam. Last week, Sam sexually assaulted Tamara. When Sam was at work the next day, Tamara telephoned the police to report the sexual assault. The police officer who attended at Tamara's home did not initially recognise that Tamara had a cognitive impairment. At the police station, an ITP assisted Tamara to make her statement. The police also took a statement from Sam. They decided not to lay charges against Sam primarily due to Tamara's cognitive impairment, which affected her ability to communicate clearly and articulate her story.

Tamara's situation illustrates barriers to justice at the police stage of sexual assault reporting. The police assessed that Tamara was unlikely to be a credible witness and decided not to pursue her claim. It may also have been a case of 'her word against his', in which Sam's word would be considered more credible and reliable than Tamara's. The police may have also taken account of the fact that Tamara relied on Sam for her day-to-day care and basic needs in deciding whether to lay charges.

562 See South Eastern Centre Against Sexual Assault, *Making rights reality for sexual assault victims with a disability* (29 May 2013) South Eastern Centre Against Sexual Assault <http://www.secasa.com.au/services/making-rights-reality-for-sexual-assault-victims-with-a-disability/>

Section 7: Evidence issues for women with disabilities in family violence and sexual offence proceedings

A Introduction

Family violence and sexual assault are often difficult to prove and corroborate, particularly if there are no witnesses or physical symptoms and if the violence or assault has occurred over an extended time period.⁵⁶³ If a family violence or sexual assault complaint does proceed to court, women with disabilities, particularly a cognitive impairment, are confronted with a host of new barriers and difficulties when giving evidence.

The processes of giving evidence and cross-examination are often highly distressing, traumatic and intimidating for women with disabilities who are victims of family violence and sexual assault.⁵⁶⁴ The formality of the court environment and the complexity of courtroom language can be alienating and can create difficulties in understanding court procedures or responding to questions or legal processes.⁵⁶⁵ Long periods of cross-examination without a break may also cause women with disabilities to become very tired and irritable.⁵⁶⁶ Defence counsel may employ questioning strategies that deliberately exploit a woman's intellectual disability or cognitive impairment, such as leading questions, in order to confuse or intimidate the woman and to elicit a response that is adverse to and discredits her as a witness.⁵⁶⁷ Delays in a family violence or sexual assault matter being heard in court can affect the ability of women with intellectual disabilities or cognitive impairment to accurately recall information and details about relevant events, and they may be 'easily swayed and confused' by people who seek to influence their recollection.⁵⁶⁸

563 ALRC and NSWLRC, above n 10, 833 [18.9], citing Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, 'Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study' (Research Report No 15, Australian Institute of Family Studies, 2007) 117-18.

564 VLRC, *Family Violence Laws Report*, above n 13, 386 [11.1]; VLRC, *Sexual Offences Final Report*, above n 425, 323 [6.5]; New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) 261; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 272; Phillip French, Julie Dardel and Sonya Price-Kelly, *Rights denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairments* (People with Disability Australia, 2009) 34-5; Goodfellow and Camilleri, above n 128, 61-62.

565 VLRC, *Sexual Offences Final Report*, above n 425, 323 [6.5]; French, et al, above n 501, 34-5; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 278.

566 French et al, above n 563, 34-5.

567 Ibid; Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 273.

568 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 278.

Practical perspective

The court process itself is a disincentive and a major stressor for many people who have experienced sexual assault or family violence, irrespective of being female or having a disability, but particularly so in those circumstances. Giving evidence in court can be confronting, embarrassing, highly stressful and confusing. The extent to which a female victim with disabilities may have support to go through the court process is highly variable, depending on her own social networks and whether it is a more serious matter going through the higher courts where the OPP provides people to support victims in the process. There is less formal support of this nature provided in the Magistrates' Court for victims (*Interview participant, Victoria Legal Aid*).

Practical perspective

The main issue for our female clients, who predominantly have intellectual disabilities, is that when they are victims of family violence or sexual assault, it is very difficult to pursue the matter through the normal legal system because of the evidentiary issues related to their disability. The police will usually investigate, but then the matter does not get very far. It hits a brick wall at the evidentiary stage around the victim's intellectual disability or cognitive impairment (*Interview participant, Villamanta Disability Rights Legal Service*).

Practical perspective

A matter that our legal service handled recently involved several clients in a residential facility being sexually assaulted by a worker at the facility. The worker was first stood down and later dismissed. The matter went to trial but was discontinued due to evidentiary problems. Any counsel can fairly easily discredit a witness who is a bit shaky on memory or what date the incident happened, so a victim with a cognitive impairment does not stand a chance against defence counsel.

In these cases, it is the word of the worker, who does not have an intellectual disability, against the word of the victim resident who does have an intellectual disability or cognitive impairment. The worker clearly has the upper hand because they can argue their way out of it, whereas the victim is usually able to be tripped up in questioning and in cross-examination, if the matter even gets to court (*Interview participant, Villamanta Disability Rights Legal Service*).

A combination of these challenges can generate a perception amongst various actors in the criminal justice process, including the police, the OPP, jurors and the trial judge, that women with intellectual disabilities or cognitive impairment lack credibility and reliability as witnesses.⁵⁶⁹ Prejudicial assessments are commonly made about the competency, reliability and credibility of women with disabilities giving evidence in family violence or sexual assault cases, which consequently diminish the weight of their evidence. Rules of evidence and court processes and procedures have been devised or modified to enable people with intellectual disabilities or cognitive impairment to give reliable and credible evidence.⁵⁷⁰

The ensuing sections outline the rules of competency and compellability to give evidence and other evidentiary rules and procedures for giving evidence in the context of women with disabilities who have experienced family violence or sexual assault. The discussion seeks to highlight the difficulties that women with disabilities may experience in attempting to satisfy these rules of evidence and to comply with these court procedures.

B Capacity, competence, compellability and questioning of women with disabilities as witnesses

The *Evidence Act 2008* (Vic) (Evidence Act) creates a rebuttable presumption that every person has the physical, intellectual and mental capacity to give evidence.⁵⁷¹ Section 13 of the Evidence Act provides that a person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability), the person does not have the capacity to understand a question about the fact; or give an answer that can be understood to a question about the fact, and this incapacity cannot be overcome.⁵⁷²

Women with an intellectual disability or cognitive impairment may find it difficult to satisfy the competency requirements in the Evidence Act for reasons such as an inability to draw inferences required to answer a question, or a failure to understand the consequences of telling a lie under oath when giving sworn evidence.⁵⁷³

A person who is not competent to give evidence is not compellable, if substantial cost or delay would be incurred to overcome the person's inability to give evidence, and if adequate evidence has been or can be given by other witnesses.⁵⁷⁴

569 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 272; Ortoleva and Lewis, above n 17, 15; Salthouse, above n 90, 8.

570 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 269.

571 *Evidence Act 2008* (Vic) ss 12, 13(6).

572 *Evidence Act 2008* (Vic) s 13(1).

573 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 271.

574 *Evidence Act 2008* (Vic) s 14.

However, if a person's evidence is necessary to the proceeding, the court must take steps to overcome the person's lack of capacity. Sections 30 and 31 of the Evidence Act are examples of assistance that may be provided to enable witnesses to overcome disabilities. Section 30 enables a witness to give evidence through an interpreter if the witness cannot sufficiently understand and speak the English language to understand and adequately reply to questions. Section 31 enables a witness who cannot hear adequately or speak adequately to be questioned in 'any appropriate way'.

By virtue of sections 30 and 31 of the Evidence Act, assistance can be offered by an interpreter or an Auslan interpreter in proceedings involving a non-English speaking, deaf or mute witness. These two provisions take account of difficulties with the English language, deafness and muteness as disabilities which may impair a person's ability to give evidence.

In its submission to the Access to Justice Inquiry, the OPP expressed concern that relatively minimal support is provided to people with intellectual disability or cognitive impairment during court appearances. People with such disabilities may experience difficulties understanding and responding to questions, or may need to communicate their responses through non-standard forms of English, such as communication boards.⁵⁷⁵ This paper echoes the OPP's concerns and adds that people with physical disabilities should also be provided with extra support during court appearances. This paper recommends that provisions be inserted into the Evidence Act to enable witnesses with other disabilities – such as physical disabilities and cognitive impairments – to overcome difficulties that they may experience in giving evidence. Such provisions should be developed in consultation with relevant stakeholders in the disability sector.

Recommendation 9: That provisions be inserted into the Evidence Act 2008 (Vic) to enable witnesses with a range of disabilities to be provided with additional support during court appearances and when giving evidence.

The Evidence Act also seeks to protect 'vulnerable witnesses' from improper questions or improper questioning in cross-examination. The court must disallow an improper question or improper questioning put to a vulnerable witness in cross-examination, or inform the witness that it need not be answered, unless the court is satisfied, in all the relevant circumstances, that it is necessary for the question to be put.⁵⁷⁶ One of the ways in which a question or sequence of questioning is 'improper' is if it 'has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability)'.⁵⁷⁷

575 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 283.

576 *Evidence Act 2008* (Vic) s 41(2).

577 *Evidence Act 2008* (Vic) s 41(3)(d).

For the purposes of subsection 41(2), a 'vulnerable witness' includes a witness:

- who has a cognitive impairment
- whom the court considers to be vulnerable, having regard to any relevant condition or characteristic of the witness, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and any mental or physical disability to which the witness is, or appears to be, subject.⁵⁷⁸

In deciding whether to disallow a leading question that is put to a witness in cross-examination or to direct the witness not to answer the leading question, the court must take into account, among other matters, the extent to which 'any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers'.⁵⁷⁹

Sections 41 and 42 of the Evidence Act thus recognise that various factors can intersect to make a person vulnerable as a witness or affect their ability to answer certain kinds of questions, including gender and disability.

Practical Perspective

There is still not enough protection at the trial stage for women with disabilities in relation to cross-examination. Defence lawyers are really skilful at making a person sound inconsistent. The protections in the *Evidence Act 2008* (Vic) in relation to leading questions and improper questions do not go far enough (*Interview participant, Villamanta Disability Rights Legal Service*).

578 *Evidence Act 2008* (Vic) ss 41(4)(b), (c)(i), (ii).

579 *Evidence Act 2008* (Vic) ss 42(1), (2)(d).

C Alternative arrangements for giving evidence for witnesses with cognitive impairment

Various Victorian Acts relevant to family violence and sexual assault against women with disabilities provide for modified court procedures for, or alternative arrangements to, giving evidence in court. Modifications to court and case management procedures, arrangements for giving evidence and the availability of support services seek to overcome the barriers that women with intellectual disabilities and cognitive impairment in particular experience in their interactions with the justice system.⁵⁸⁰

The Evidence Act creates rules for the examination-in-chief, cross-examination and re-examination of witnesses. While evidence-in-chief is usually obtained in a question and answer format, the Evidence Act permits the court to allow such evidence to be obtained through a narrative form.⁵⁸¹ As the Law Reform Committee's Access to Justice Inquiry Report noted, '[p]roviding evidence in a narrative form may assist witnesses with an intellectual disability or cognitive impairment to recall events by telling their story of what has occurred'.⁵⁸² The prosecution may rely on both questions to the witness and a narrative account of the event from the witness to obtain the best evidence.⁵⁸³

Permitting special or alternative arrangements for taking evidence from victims with cognitive impairment is considered to offer additional protection for these witnesses from the stress and trauma of giving evidence in open court.⁵⁸⁴ These arrangements seek to ensure that witnesses with cognitive impairment are able to give evidence, while still ensuring a fair trial for the accused.⁵⁸⁵

In its Access to Justice Inquiry Report, the Law Reform Committee recommended that the Victorian government examine whether existing alternative arrangements for giving evidence could be expanded, so as to explore whether these measures could increase the level of participation of people with an intellectual disability or cognitive impairment in court proceedings.⁵⁸⁶ This paper endorses the VLRC's recommendation. It also supports and extends the recommendation made by the ALRC and NSWLRC in their Family Violence Report that witnesses who are vulnerable because of a physical disability or intellectual disability should be permitted to provide evidence recorded at a pre-trial hearing, which is admissible as the witness' evidence in a trial for a sexual offence or in proceedings for a FVIO under the FVP Act or for a PSIO under the PSIO Act.⁵⁸⁷

580 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 279.

581 Evidence Act 2008 (Vic) s 29(2).

582 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 277.

583 Ibid, citing Prianka Nair, 'Giving voice in court: Cushioning adversarialism for witnesses with intellectual disabilities' (2010) 21 *Current Issues in Criminal Justice* 481, 483.

584 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 292.

585 Ibid 293.

586 Ibid recommendation 39.

587 ALRC and NSWLRC, above n 10, 1232 [26.184] and recommendation 26-7.

To ensure that women with disabilities who have experienced violence can adequately and fully participate in the justice system, this paper recommends that special procedures or alternative arrangements for giving evidence, such as evidence recorded at a pre-trial hearing, should be available for all civil and criminal matters relating to family violence, including intervention order applications under the FVP Act and the PSIO Act. This paper further recommends that these special procedures or alternative arrangements should be adopted as a mandatory requirement in the case of people with a cognitive impairment.

Recommendation 10: That special procedures or alternative arrangements for giving evidence, such as evidence recorded at a pre-trial hearing, be available for all civil and criminal matters relating to family violence, including intervention order applications under the FVP Act and the PSIO Act, where the complainant or the witness has a disability. These special procedures or alternative arrangements should be adopted as a mandatory requirement in the case of people with a disability.

D Evidence in sexual offence or assault proceedings

In a criminal proceeding for a sexual offence or an indictable offence involving an assault or injury to another person, a witness with a cognitive impairment may give evidence-in-chief in the form of an audio or audio-visual recording.⁵⁸⁸ Such a recording is admissible as evidence as if its contents were the direct testimony of the witness.⁵⁸⁹ The witness must also appear at the hearing or trial and attest to the truthfulness of the contents of the recording, and be available for cross-examination or re-examination.⁵⁹⁰ In its Access to Justice Inquiry Report, the Law Reform Committee expressed the view that allowing pre-recorded evidence given by witnesses with an intellectual disability or cognitive impairment to be admissible in court assists these witnesses to provide ‘fuller, more accurate accounts of events’ than if they were to give evidence in court.⁵⁹¹

At a directions hearing, the court can make or vary any direction or order for the fair and efficient conduct of the proceeding.⁵⁹² In sexual offence proceedings, the whole of the evidence of a cognitively impaired complainant (including cross-examination and re-examination) must be given at a special hearing, recorded as an audio-visual recording and presented to the court in that format.⁵⁹³

588 *Criminal Procedure Act 2009* (Vic) ss 366-67.

589 *Criminal Procedure Act 2009* (Vic) ss 368.

590 *Criminal Procedure Act 2009* (Vic) s 368(1)(c)(ii).

591 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 275-6.

592 *Criminal Procedure Act 2009* (Vic) s 181(1).

593 *Criminal Procedure Act 2009* (Vic) ss 369-370.

The court must direct that a special hearing be held before or during the trial, having regard to (amongst other matters) the severity of the complainant's cognitive impairment, and whether conducting the special hearing during the trial is likely to intimidate or have an adverse effect on the complainant.⁵⁹⁴

This special hearing has come to be known as the 'VARE' process (visual and audio recorded evidence),⁵⁹⁵ which is admissible in evidence as if its contents were the direct testimony of the complainant in the proceeding.⁵⁹⁶ At a special hearing, the accused and the accused's legal practitioner are to be present in the courtroom, but the accused cannot be in the same room as the complainant when the complainant's evidence is being taken.⁵⁹⁷ However, the accused is entitled to see and hear the complainant while the complainant is giving evidence by means of closed circuit television (CCTV) or other communication facilities.⁵⁹⁸ A cognitively impaired complainant who gives evidence through the VARE process cannot be cross-examined or re-examined without leave of the court.⁵⁹⁹

The Law Reform Committee's Access to Justice Inquiry Report recognised a range of benefits of pre-recording evidence for people with a cognitive impairment. These include obtaining better quality evidence from a person with a short attention span or who cannot respond adequately to extensive questioning over a prolonged period of time; greater flexibility for rest breaks during the interview process; and the ability to capture non-verbal as well as verbal responses to questions.⁶⁰⁰

The Victoria Police Sexual Assault Code of Practice provides that the use of VARE should be considered in the first instance where the legislative criteria are met, and that police should consult with a member of the SOCAU for assistance with VARE interviews.⁶⁰¹

If a recording of a special hearing is admitted into evidence, the trial judge must warn the jury that it is routine practice for a cognitively impaired complainant's evidence to be given in this manner; that no adverse inference can be drawn against the accused as a result of the evidence being recorded; and that the complainant's evidence is not to be given any greater or lesser weight as a result of the evidence being recorded.⁶⁰²

594 *Criminal Procedure Act 2009* (Vic) ss 370(1A), (1B)(b), (d).

595 This was formerly known as the 'VATE' process (video or audio taping of evidence).

596 *Criminal Procedure Act 2009* (Vic) s 374.

597 *Criminal Procedure Act 2009* (Vic) ss 372(1)(a), (b)(i).

598 *Criminal Procedure Act 2009* (Vic) ss 372(1)(b)(ii), (d).

599 *Criminal Procedure Act 2009* (Vic) s 376.

600 Law Reform Committee, *Access to Justice Inquiry Report*, above n 46, 274, citing Goodfellow and Camilleri, above n 128, 68.

601 Victoria Police, *Sexual Assault Code of Practice*, above n 481, 21 [98]-[99].

602 *Criminal Procedure Act 2009* (Vic) s 375. See also section 375A, which requires the trial judge, if a special hearing is held during a trial, to warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the special hearing.

The *Criminal Procedure Act 2009* (Vic) (Criminal Procedure Act) also contains special protections for witnesses in criminal proceedings relating to a charge for a sexual offence or an offence of family violence as defined in the FVP Act.⁶⁰³ The court can direct alternative arrangements for the giving of evidence by a witness, including arrangements:

- permitting the evidence to be given from outside the courtroom by means of CCTV or other communication facilities⁶⁰⁴
- using screens to remove the accused from the direct line of vision of the witness⁶⁰⁵
- permitting a person, chosen by the witness and approved by the court, to be beside the witness while the witness is giving evidence, to provide emotional support to the witness⁶⁰⁶
- permitting only specified people to be present in court while the witness is giving evidence
- requiring legal practitioners not to robe and to be seated while examining or cross-examining the witness.⁶⁰⁷

The OPP Policy 8, *The Provision of Support Persons to Witnesses*, provides that the prosecution can apply to the court for any of these special arrangements to be made.⁶⁰⁸ This OPP policy reinforces that special arrangements can be made for the giving of evidence by children, persons with a cognitive impairment and adults in sexual offence cases.⁶⁰⁹ Acknowledging that giving evidence in sexual offence matters can be a traumatic and distressing experience for complainants, this policy provides that prosecutors must ensure that this trauma be reduced as much as possible.⁶¹⁰ It also requires that prosecutors ensure that witnesses with a mental impairment are afforded regular breaks during the giving of their evidence, which may require the prosecutor alerting the magistrate or judge that regular breaks should be considered if the need arises in the course of the witness' evidence.⁶¹¹

While this OPP policy touches upon the unique challenges faced by people with cognitive impairment when giving evidence in sexual offence proceedings, this paper considers that the policy does not adequately take account of the other difficulties that people with a range of disabilities may experience when giving evidence not only in sexual offence proceedings, but also in family violence matters.

603 *Criminal Procedure Act 2009* (Vic) s 359.

604 See *Criminal Procedure Act 2009* (Vic) ss 362-63.

605 *Criminal Procedure Act 2009* (Vic) s 364.

606 *Criminal Procedure Act 2009* (Vic) s 365.

607 *Criminal Procedure Act 2009* (Vic) s 360.

608 Director of Public Prosecutions Victoria (DPP (Vic)), Director's Policy 8: OPP Policy, *The Provision of Support Persons to Witnesses*, 4 March 2010 <<http://www.opp.vic.gov.au/getattachment/3bbb1361-391b-4144-ae7e-4aae6c2901ed/8-The-Provision-of-Support-Persons-to-Witnesses.aspx>> 8.1.1, 8.2. [See comment in notes]

609 *Ibid* 8.1.1.

610 *Ibid* 8.3.

611 *Ibid*.

This paper recommends that the OPP Policy 8, *The Provision of Support Persons to Witnesses*, be amended to acknowledge that giving evidence in sexual offence proceedings and family violence proceedings may be difficult for people with a range of disabilities and that prosecutors must ensure that special arrangements are made for complainants or witnesses with disabilities where it is considered appropriate.

Recommendation 11: That the OPP Policy 8, *The Provision of Support Persons to Witnesses*, be amended to acknowledge that giving evidence in sexual offence and/or family violence proceedings may be particularly difficult for people with physical disabilities or a cognitive impairment, and that prosecutors must ensure that special arrangements are made for complainants or witnesses with disabilities where it is considered appropriate.

E Evidence in proceedings under the FVP Act and the PSIO Act

The FVP Act and the PSIO Act allow for a more flexible approach to evidence in proceedings for a FVIO or a PSIO. Both Acts permit the court to inform itself 'in any way it thinks fit', despite any contrary rules of evidence.⁶¹² They also specify that several provisions and Part 3.10⁶¹³ of the Evidence Act and Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic)⁶¹⁴ apply to a proceeding for a FVIO order under the FVP Act⁶¹⁵ or for a PSIO under the PSIO Act.⁶¹⁶ The relevant Evidence Act provisions are sections 13 (circumstances in which a person lacks capacity to give evidence), 30 (which enables a witness to give evidence through an interpreter), 31 (which facilitates the giving of evidence by a witness who is deaf or mute) and 41 (which provides for the court's powers to disallow improper questions).

Evidence in proceedings for an intervention order under the FVP Act or the PSIO Act may be given by a person by affidavit or sworn statement.⁶¹⁷ However, a party can require a person giving evidence in this manner to attend the hearing to be called as a witness and to be cross-examined, without leave of the court.⁶¹⁸ Both Acts also allow the court to order that the whole or part of the proceedings be heard in closed court or that only specified people be present during the proceedings, so as 'to prevent an affected family member or protected person or a witness ... from being caused undue distress or embarrassment'.⁶¹⁹

612 *Family Violence Protection Act 2008* (Vic) s 65(1); *Personal Safety Intervention Orders Act 2010* (Vic) s 47(1). However, each Act also specifies that the provision does not apply to a proceeding for an offence under the Act.

613 Part 3.10 of the *Evidence Act 2008* (Vic) provides for the application of privileges.

614 Division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) provides for confidential communications by a complainant to her or his medical practitioner or counsellor in sexual offences proceedings.

615 *Family Violence Protection Act 2008* (Vic) s 65(2).

616 *Personal Safety Intervention Orders Act 2010* (Vic) s 47(2).

617 *Family Violence Protection Act 2008* (Vic) s 66(1); *Personal Safety Intervention Orders Act 2010* (Vic) s 48(1).

618 *Family Violence Protection Act 2008* (Vic) s 66(3); *Personal Safety Intervention Orders Act 2010* (Vic) s 48(3).

619 *Family Violence Protection Act 2008* (Vic) s 68(1); *Personal Safety Intervention Orders Act 2010* (Vic) s 51(1).

The FVP Act and the PSIO Act each empower the court to direct that alternative arrangements be made for an intervention order proceeding. These arrangements include:

- permitting the proceeding to be conducted from a place other than the courtroom via CCTV or other communication facilities
- using screens to remove the respondent from a party's or witness's direct line of vision
- permitting a person to be beside a party or witness while the party or witness is giving evidence for the purpose of providing emotional support to the party or witness
- requiring legal practitioners to be seated during the proceeding; and
- any other alternative arrangements the court considers appropriate.⁶²⁰

Under the FVP Act, the court has a discretion to make a direction for such alternative arrangements under section 69(1) if the witness is an adult, either on its own initiative or on the application of a party to the proceeding.⁶²¹ If the witness is a child, the court hearing an application for a FVIO must make a direction under section 69(1) unless it considers it inappropriate, having regard to the child's wishes, age and maturity, the facilities available for the conduct of the proceeding and any other relevant matters.⁶²² This paper considers that the protection afforded to children under section 69(3), in requiring the court to make a direction for alternative arrangements under section 69(1), should be extended to people with a cognitive impairment, and it makes a recommendation to this effect.

Recommendation 12: That a subsection (3A) be inserted into section 69 of the *Family Violence Protection Act 2008* (Vic) as follows:

(3) If the witness has a cognitive impairment, the court must make a direction under subsection (1) unless it considers it is not appropriate to do so having regard to –

- (a) the wishes expressed by the witness; and**
- (b) the severity of the cognitive impairment of the witness; and**
- (c) the facilities available for the conduct of the proceeding; and**
- (d) any other matters the court considers relevant.**

620 *Family Violence Protection Act 2008* (Vic) s 69(1); *Personal Safety Intervention Orders Act 2010* (Vic) s 52(1).

621 *Family Violence Protection Act 2008* (Vic) s 69(2).

622 *Family Violence Protection Act 2008* (Vic) s 69(3).

The FVP Act also contains special rules for the cross-examination of protected witnesses. A 'protected witness' for the purposes of a proceeding under the FVP Act is the affected family member or the protected person; a child; and any family member of a party to the proceeding; and any person that the court declares under subsection 70(2) to be a protected witness for the proceeding.⁶²³ That subsection enables the court to declare a person to be a protected witness if the person has a cognitive impairment or otherwise requires protection.⁶²⁴

Section 70(3) of the FVP Act provides that if a protected witness has a cognitive impairment, he or she must not be personally cross-examined by the respondent unless the court is satisfied the protected witness understands the nature and consequences of giving consent and would be competent to give evidence.⁶²⁵ For a protected witness to be personally cross-examined by the respondent, the protected witness must be an adult, and must consent to being cross-examined by the respondent, or, if the protected witness has a guardian, the guardian must consent.⁶²⁶ The court must also determine that the cross-examination would not have a harmful impact on the protected witness.⁶²⁷

The PSIO Act enables the court to make a direction for alternative arrangements under subsection 52(1) on its own initiative or on the application of a party to the proceeding, having regard to the witness's wishes, age and maturity, the facilities available for the conduct of the proceeding, and any other relevant matters.⁶²⁸ This paper recommends that a subsection be inserted into section 52 which requires the court to make a direction for alternative arrangements if the witness has a cognitive impairment.

Recommendation 13: That a subsection (3A) be inserted into section 52 of the *Personal Safety Intervention Orders Act 2010* (Vic) as follows:

(3A) If the witness has a cognitive impairment, the court must make a direction under subsection (1) unless it considers it is not appropriate to do so having regard to –

- (a) the wishes expressed by the witness; and**
- (b) the severity of the cognitive impairment of the witness;**
- (c) the facilities available for the conduct of the proceeding; and**
- (d) any other matters the court considers relevant.**

⁶²³ *Family Violence Protection Act 2008* (Vic) s 70(1).

⁶²⁴ *Family Violence Protection Act 2008* (Vic) s 70(2).

⁶²⁵ *Family Violence Protection Act 2008* (Vic) s 70(3)(c).

⁶²⁶ *Family Violence Protection Act 2008* (Vic) ss 70(3)(a)-(b).

⁶²⁷ *Family Violence Protection Act 2008* (Vic) s 70(3)(d).

⁶²⁸ *Personal Safety Intervention Orders Act 2010* (Vic) ss 52(2)-(3).

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