



# Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention Monitoring Report

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# Glossary and abbreviations

## Legal terms

<b>Affected family member</b>	A person who is the subject of an application for a family violence intervention order under the <i>Family Violence Protection Act 2008</i> (Vic).
<b>Breach</b>	In this report, a contravention of a family violence intervention order made under the <i>Crimes (Family Violence) Act 1987</i> (Vic).
<b>Case</b>	In this report, one or more charges against a person that are sentenced at the one hearing.
<b>Charge</b>	In this report, a single proven count of an offence.
<b>Community orders</b>	In this report, community-based orders, intensive correction orders and community correction orders.
<b>Co-occurring offence</b>	An offence sentenced in the same case as the offence of interest.
<b>FVIO</b>	Family violence intervention order.
<b>FVSN</b>	Family violence safety notice.
<b>FVPA</b>	<i>Family Violence Protection Act 2008</i> (Vic).
<b>Low-end order</b>	A category of sentence types that includes adjourned undertakings, conviction and discharge, and dismissal.
<b>Minimum immediate custodial term</b>	For partially suspended sentences, the non-suspended portion of the total effective sentence length. For youth justice centre orders, no minimum is set. For imprisonment sentences, see 'minimum imprisonment term'.
<b>Minimum imprisonment term</b>	The length of the non-parole period for imprisonment sentences that have a non-parole period, or the length of the total effective sentence for imprisonment sentences that do not have a non-parole period.
<b>Non-parole period</b>	The non-parole period is the minimum period of time that an offender sentenced to imprisonment must spend in custody before becoming eligible for parole.
<b>Principal charge</b>	The charge of an offence that receives the most severe sentence in a case. Where offences have an equal sentence, the offence with the lowest ranking on the National Offence Index is the principal offence.
<b>Protected person</b>	A person who is protected by a family violence intervention order or a family violence safety notice.
<b>Recidivist</b>	An offender convicted of at least one offence after the imposition of a sentence.
<b>Reoffending</b>	The extent to which an adult person, having been sentenced in any Victorian court, returns to court and is convicted for a subsequent offence or subsequent offences.
<b>Respondent</b>	A person against whom an application for a family violence intervention order has been made, a family violence intervention order has been made or a family violence safety notice has been issued.
<b>Total effective sentence</b>	In a case involving a single charge, the sentence imposed for that charge, and in a case involving multiple charges, the final sentence resulting from orders of cumulation or concurrency for each of the sentencing orders for each charge in the case.

## Sentence types

<b>Adjourned undertaking (ADU)</b>	A sentence type that involves the adjournment of a criminal matter and the release of an offender, with or without conviction, for a specified period provided the offender gives an undertaking with attached conditions.
<b>Community-based order (CBO)</b>	A now abolished sentence that involved the release of an offender, with or without conviction, for a period of up to 2 years on an order with attached mandatory and program conditions.
<b>Community correction order (CCO)</b>	A sentence type that involves the release of an offender, with or without conviction, for a period of up to the length of the maximum term of imprisonment for the sentenced offence on an order with attached mandatory and program conditions.
<b>Convicted and discharged (CAD)</b>	A sentence type that involves the conviction of an offender and discharge without conditions.
<b>Dismissal (DIS)</b>	An order that involves the dismissal of the charge without conviction of an offender and without conditions.
<b>Diversion (DIV)</b>	In this report, an order that allows the court to adjourn proceedings against a person for a period of up to 12 months under a diversion plan with attached conditions. Although this disposition is not a sentencing order and operates prior to any finding of guilt and/or sentence, it is treated in this report as a sentence type because it is a disposition available for particular offenders as an alternative to the imposition of a sentencing order.
<b>Fine (FIN)</b>	A sentence that involves a court-ordered monetary penalty requiring an offender to pay a sum of money to the state.
<b>Imprisonment (IMP)</b>	In this report, a sentence of imprisonment that is served immediately, as distinct from a sentence of imprisonment that is partially or wholly suspended.
<b>Intensive correction order (ICO)</b>	A now abolished sentence that involved imprisonment of not more than 12 months being served by way of release and the intensive correction of an offender for a period of not more than 12 months on an order with attached mandatory and program conditions.
<b>Partially suspended sentence of imprisonment (PSS)</b>	A sentence of imprisonment that involves an offender serving a specified part of the sentence immediately and a specified part of the sentence by way of release on limited conditions.
<b>Wholly suspended sentence of imprisonment (WSS)</b>	A sentence of imprisonment that involves an offender serving the whole of the sentence by way of release with limited conditions.



# Chapter 1

## Introduction

### Background

- 1.1 Since 1987, a victim of family violence<sup>1</sup> in Victoria has been able to apply to the Magistrates' Court (or the Children's Court)<sup>2</sup> for a family violence intervention order (FVIO). Such orders are intended to provide protection from further family violence by prohibiting certain behaviour by the perpetrator of the violence, or excluding the perpetrator from the family residence.
- 1.2 Since 2008, Victorian police have been able to issue a family violence safety notice (FVSN) outside court hours to provide similar, short-term protection until an FVIO can be obtained.
- 1.3 It is a criminal offence to contravene the conditions of an FVIO or an FVSN.
- 1.4 This report presents an analysis of sentencing for FVIO contravention over two three-year periods: from July 2004 to June 2007, and from July 2009 to June 2012. It also presents an analysis of sentencing for FVSN contravention from July 2009 to June 2012.
- 1.5 The Council produced its first report on this topic in June 2009 ('2009 report').<sup>3</sup> That report presented an analysis of sentencing outcomes from July 2004 to June 2007, prior to the introduction of the *Family Violence Protection Act 2008* (Vic) (FVPA).
- 1.6 In its previous report, the Council found that sentences at the low end of the sentencing hierarchy – such as fines and adjourned undertakings – were the most common sentences for breach of an FVIO from July 2004 to June 2007. Mid- to high-end sentences – such as community-based orders and custodial orders – were less common. As part of its report, the Council consulted with magistrates, Victoria Police, legal practitioners and specialist service providers. Among stakeholders, there was a general view that sentencing outcomes rarely reflected the seriousness of the breach offence.
- 1.7 In response to stakeholder concerns about the predominance of low-end orders, the Council produced *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* ('the Guiding Principles').<sup>4</sup> The Guiding Principles suggest that community protection – which includes victim protection – should be the primary purpose of sentencing for contravention, as the function of an intervention order is to protect the victim from future harm. The Guiding Principles also comment on the appropriateness of particular sentence types in this context. An extract of the Guiding Principles is set out in Appendix A.

<sup>1</sup> The meaning of 'family violence' is discussed at [2.11]–[2.17].

<sup>2</sup> If the affected family member, the protected person or the respondent is a child at the time the application is made, the Children's Court and the Magistrates' Court each have jurisdiction to deal with the application; however, if the respondent is a child, the application should be dealt with by the Children's Court, if practicable: *Family Violence Protection Act 2008* (Vic) s 146.

<sup>3</sup> Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders*, Final Report (2009). The report was prepared pursuant to terms of reference issued in April 2008 by the then Attorney-General, Mr Robert Hulls. The Council was asked to examine the sentencing of defendants and the penalties imposed for breach of FVIOs, the appropriate maximum penalties for breach of FVIOs and FVSNs (the Council reported on this matter in May 2008) and sentencing practices following the commencement of the FVPA.

<sup>4</sup> Sentencing Advisory Council, *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* (2009). Available at <<http://www.sentencingcouncil.vic.gov.au/content/publications/guiding-principles-sentencing-contraventions-family-violence-intervention-order>>.

- 1.8 This report presents data on sentencing for contravention of FVIOs and FVSNs following the commencement of the FVPA, and examines whether sentencing outcomes have changed since the publication of the 2009 report.
- 1.9 In summary, the Council's analysis reveals that sentencing outcomes have changed considerably. Across most categories of sentencing for FVIO contravention, the use of fines has declined, and the use of adjourned undertakings and community orders has increased. In the case of repeat FVIO contravention, the use of custodial sentences has increased.

## Scope of this report

- 1.10 This report is primarily a monitoring and statistical study, and does not make any policy recommendations. Based on its consultations, however, the Council discusses in Chapter 5 some of the likely reasons for the sentencing outcomes observed.
- 1.11 The analysis of sentencing outcomes covers two reference periods. The first, from 1 July 2004 to 30 June 2007, was the period examined in the 2009 report. The second, from 1 July 2009 to 30 June 2012, captures the sentences imposed for contraventions of FVIOs and FVSNs under the FVPA.
- 1.12 The report focuses on sentencing outcomes in the Magistrates' Court, as the overwhelming majority (approximately 95%) of proven FVIO contravention charges are sentenced by that court. The report does not examine sentencing for contravention of personal safety intervention orders, as those orders are not imposed under the FVPA.<sup>5</sup>
- 1.13 The *Justice Legislation Amendment (Family Violence and Other Matters) Act 2012* (Vic) introduced into the FVPA two new aggravated contravention offences,<sup>6</sup> which came into effect on 17 April 2013. At present, there are insufficient data to examine any sentencing outcomes in relation to the new offences.
- 1.14 The Council's analysis is divided into three subsequent chapters. Chapter 2 contains an examination of trends in the use of FVIOs and FVSNs. Chapter 3 provides an overview of contravention offences under the FVPA, and the rates of FVIO and FVSN contravention. Chapter 4 presents a comparison of sentencing outcomes over the two reference periods. Chapter 5 contains discussion about the likely reasons for the sentencing outcomes observed by the Council.

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<sup>5</sup> Personal safety intervention orders are made under the *Personal Safety Intervention Orders Act 2010* (Vic) where a person fears for his or her safety because of the behaviour of a non-family member.

<sup>6</sup> The two new offences are contravention of a notice or order intending to cause harm or fear for safety (*Family Violence Protection Act 2008* (Vic) ss 37A, 123A) and persistent contravention of notices and orders (*Family Violence Protection Act 2008* (Vic) s 125A).

## Sentencing in context: changes to law and practice

- 1.15 The law and practice relating to family violence protection measures have changed markedly over the past decade. The program of reform has influenced recent sentencing practices for FVIO contravention (as discussed in Chapter 5). Many of these reforms followed a review of family violence laws by the Victorian Law Reform Commission in 2005–06,<sup>7</sup> and form part of the integrated system of family violence services introduced by the Victorian Government in 2005. For the purposes of this report, the main reforms have been:
- the introduction of the Victoria Police *Code of Practice for the Investigation of Family Violence* ('Family Violence Code of Practice') in 2004, and the revision of the Family Violence Code of Practice in 2010;
  - the introduction, in 2005, of a specialist Magistrates' Court Division and integrated family violence support services at certain venues of the Magistrates' Court – the Family Violence Court Division sits at Heidelberg and Ballarat, and the Specialist Family Violence Service operates at Melbourne, Frankston, Sunshine and Werribee;
  - the introduction of a shared family violence risk assessment and risk management framework in 2007 (otherwise known as the 'common risk assessment framework') – this framework is followed by Victoria Police, among other agencies, and informs decision-making by police about FVIO applications (a second edition was published in 2012);<sup>8</sup> and
  - the introduction of the FVPA in December 2008 (the main features of which are described in Chapter 2) – the FVPA replaced the *Crimes (Family Violence) Act 1987* (Vic) and created a more comprehensive system of family violence protection measures.

## Data

- 1.16 The data on sentencing outcomes were obtained by the Council from the criminal component of Courtlink, the Magistrates' Court case management system. The Council receives regular data extracts from this system and uses these extracts to maintain a database of sentences.
- 1.17 This report focuses on sentencing during the period July 2009 to June 2012 but uses, as a baseline, sentencing in the period from July 2004 to June 2007 (examined in the 2009 report).
- 1.18 An issue pertaining to the July 2004 to June 2007 data is worth highlighting. Prior to the introduction of the FVPA, the criminal component of the Courtlink system did not distinguish between breaches of family violence intervention orders and stalking intervention orders under the *Crimes (Family Violence) Act 1987* (Vic). Information relating to the original intervention order is held in the civil Courtlink system, but there is no identifier that links sentenced charges to the original intervention order. Therefore, the Council used names and dates of birth to match charge records to records in the civil Courtlink system. This exercise resulted in 88% of charges being matched; the type of intervention order was able to be determined for these charges.
- 1.19 With the introduction of the FVPA, contravention of an FVIO is recorded as a distinct offence in the Courtlink system. Therefore, for the period from July 2009 to June 2012, the Council is confident that all FVIO contravention charges are distinguished in the data used for analysis.

<sup>7</sup> See Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006).

<sup>8</sup> Department of Human Services, *Family Violence Risk Assessment and Risk Management Framework and Practice Guides 1-3* (2nd ed., 2012).

- 1.20 The Council was unable to obtain quantitative data on the nature of the contravention charges sentenced in both reference periods. The Council attempted to retrieve these data by sampling a selection of Magistrates' Court recordings; however, it could not obtain a representative sample.
- 1.21 The Council was also unable to obtain quantitative data on the conditions attached to adjourned undertakings in both reference periods.
- 1.22 Given these limitations in the quantitative data, the Council consulted with stakeholders about the nature of the contravention charges sentenced, and the nature and extent of the conditions attached to adjourned undertakings. The Council therefore makes only tentative observations about each of these matters.

## Consultation

- 1.23 In the course of preparing this report, the Council conducted two roundtables<sup>9</sup> and met with the supervising family violence magistrates, the former and current managers of the Family Violence Service at the Magistrates' Court of Victoria, the Victorian Coroner and representatives of the Coroners Court of Victoria and representatives of the inTouch Multicultural Centre Against Family Violence.<sup>10</sup>

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<sup>9</sup> The attendees are listed in Appendix B.

<sup>10</sup> The inTouch Multicultural Centre Against Family Violence was formerly known as the Immigrant Women's Domestic Violence Service.

## Chapter 2

# Use of family violence intervention orders and safety notices

- 2.1 There are two types of protection measures available under the *Family Violence Protection Act 2008* (Vic) (FVPA):
- a family violence intervention order (FVIO) – an interim<sup>11</sup> or final order<sup>12</sup> made by either the Magistrates' Court or the Children's Court; and
  - a family violence safety notice (FVSN) – a temporary measure that may be issued by police until an FVIO application can be decided by the court.<sup>13</sup>
- 2.2 As discussed in Chapter 4, sentencing outcomes in relation to FVIO contravention have changed considerably since publication of the 2009 report. Underlying trends in the use of FVIOs and FVSNs have influenced this change in sentencing outcomes. This chapter therefore examines in some detail the extent of FVIO and FVSN imposition from 2004–05 to 2011–12, and the key features of these measures.

## Family violence intervention orders

- 2.3 Under the FVPA, the court may make an FVIO on an interim or a final basis. The court may make an interim FVIO where it is satisfied that protection is required pending a final decision about the FVIO application.<sup>14</sup> These circumstances include where police have issued an FVSN and the court considers that protection should continue until it makes a final decision about the FVIO application.<sup>15</sup> An interim order may be made in the absence of the respondent.<sup>16</sup> There is no time limit on an interim order; it will continue in effect until a final FVIO is made or refused, the application for a final FVIO is withdrawn or the interim order is revoked by the court.<sup>17</sup>
- 2.4 The court may make a final FVIO where it is satisfied that the respondent has committed family violence against a family member and is likely to do so again.<sup>18</sup> While an FVIO is a civil order, contravention of an FVIO is a criminal offence with a maximum penalty of Level 7 imprisonment (2 years) and/or a Level 7 fine (240 penalty units).<sup>19</sup>
- 2.5 Sentencing outcomes in relation to the contravention of interim and final FVIOs are considered in Chapter 4.<sup>20</sup>

<sup>11</sup> *Family Violence Protection Act 2008* (Vic) s 53.

<sup>12</sup> *Family Violence Protection Act 2008* (Vic) s 74.

<sup>13</sup> *Family Violence Protection Act 2008* (Vic) ss 24, 26.

<sup>14</sup> *Family Violence Protection Act 2008* (Vic) s 53.

<sup>15</sup> *Family Violence Protection Act 2008* (Vic) s 53(1)(c).

<sup>16</sup> *Family Violence Protection Act 2008* (Vic) s 54.

<sup>17</sup> *Family Violence Protection Act 2008* (Vic) s 60.

<sup>18</sup> *Family Violence Protection Act 2008* (Vic) s 74.

<sup>19</sup> *Family Violence Protection Act 2008* (Vic) s 123(2). A penalty unit equates to \$144.36 in the 2013–14 financial year. As at 1 July 2013, 240 penalty units equate to approximately \$34,646.

<sup>20</sup> Sentencing outcomes in relation to each type of order could not be separated in the data.

## Family violence safety notices

- 2.6 FVSNs were introduced in December 2008 upon commencement of the FVPA. FVSNs are issued by police without application to the court.<sup>21</sup> An FVSN is taken to be an application for an FVIO.<sup>22</sup> Police may issue an FVSN if they have reasonable grounds for believing that the notice is necessary to ensure the safety, or preserve the property, of the affected family member, or to protect a child who has been subjected to family violence.<sup>23</sup>
- 2.7 FVSNs may only be applied for outside court hours;<sup>24</sup> should an immediate protection measure be required within court hours, police will consider applying for an interim FVIO. Broadly speaking, FVSNs last until the first mention date for the FVIO application. Prior to 4 February 2013, the first mention date had to be within 72 hours after service of the FVSN; under recent amendments to the FVPA, the first mention date now has to be within 120 hours after service of the FVSN.<sup>25</sup>

## The scope of a family violence intervention order or a family violence safety notice

- 2.8 The FVPA has several distinguishing features that set it apart from its predecessor, the *Crimes (Family Violence) Act 1987* (Vic). These concern the purpose of the FVPA, the meaning of 'family violence', the meaning of 'family member' and the conditions of an FVIO or an FVSN.

### The purpose of the *Family Violence Protection Act 2008* (Vic)

- 2.9 The sole purpose of the *Crimes (Family Violence) Act 1987* (Vic) was to 'provide for intervention orders in cases of family violence'.<sup>26</sup> It otherwise contained no explicitly stated aims, objectives or principles. By contrast, it is an express purpose of the FVPA to:
- maximise safety for children and adults who have experienced family violence;
  - prevent and reduce family violence to the greatest extent possible; and
  - promote the accountability of perpetrators of family violence for their actions.<sup>27</sup>
- 2.10 This express purpose guides the interpretation of the FVPA and the making of FVIOs.<sup>28</sup> The FVPA aims to achieve this purpose by:
- providing an effective and accessible system of FVIOs and FVSNs; and
  - creating offences for contraventions of FVIOs and FVSNs.<sup>29</sup>

<sup>21</sup> *Family Violence Protection Act 2008* (Vic) ss 24, 26.

<sup>22</sup> *Family Violence Protection Act 2008* (Vic) s 31.

<sup>23</sup> *Family Violence Protection Act 2008* (Vic) s 26.

<sup>24</sup> *Family Violence Protection Act 2008* (Vic) s 24(f).

<sup>25</sup> *Family Violence Protection Act 2008* (Vic) ss 30, 31(3).

<sup>26</sup> *Crimes (Family Violence) Act 1987* (Vic) s 1 (now repealed).

<sup>27</sup> *Family Violence Protection Act 2008* (Vic) s 1.

<sup>28</sup> A purposive approach to statutory interpretation is followed in Australia. The construction of an Act that promotes the purpose or object of the Act is to be preferred to a construction that does not promote that purpose or object: *Interpretation of Legislation Act 1984* (Vic) s 35(a).

<sup>29</sup> *Family Violence Protection Act 2008* (Vic) s 2.

## The meaning of ‘family violence’

- 2.11 The FVPA adopts a broader definition of ‘family violence’ than the *Crimes (Family Violence) Act 1987* (Vic).
- 2.12 That Act did not expressly define family violence; instead, it contained only a limited description of the grounds that might have justified the making of an intervention order. Those grounds were assault, damage to property, threats of assault or damage to property, harassment or offensive behaviour.<sup>30</sup>
- 2.13 In contrast, the FVPA contains an express definition of ‘family violence’. The FVPA definition captures the breadth of physical and non-physical violence that may occur within family or ‘family-like’ relationships. The violent behaviour does not need to constitute a criminal offence in order to qualify as family violence.<sup>31</sup> Family violence includes behaviour by one family member to another that is:
- physically, sexually, emotionally, psychologically or economically abusive;
  - threatening or coercive; or
  - controlling or dominating, such that a family member fears for his or her own or another’s safety or wellbeing.<sup>32</sup>
- 2.14 The FVPA also:
- clarifies the meaning of emotional or psychological abuse and economic abuse, and provides examples of each form of abuse;<sup>33</sup> and
  - expressly identifies certain forms of behaviour as family violence, including unlawful deprivation of liberty, sexual assault, and the harm of animals in order to control, dominate or coerce a family member.<sup>34</sup>
- 2.15 Another important distinction is that the FVPA expressly recognises that the exposure of children to family violence constitutes family violence in itself. The FVPA provides a non-exhaustive list of behaviours that may constitute a child’s exposure to family violence, including seeing or hearing an assault, overhearing threats of physical abuse, comforting or providing assistance to a victim of physical abuse, or being present when police attend a family violence incident.<sup>35</sup>
- 2.16 The *Crimes (Family Violence) Act 1987* (Vic) broadly provided for the protection of children exposed or subjected to family violence, but this behaviour was not an express ground for the making of an intervention order.<sup>36</sup>
- 2.17 Further, unlike the *Crimes (Family Violence) Act 1987* (Vic), it is an overarching purpose of the FVPA to maximise safety for children who have experienced family violence. The FVPA recognises that:
- children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children’s current and future physical, psychological and emotional wellbeing.<sup>37</sup>

<sup>30</sup> *Crimes (Family Violence) Act 1987* (Vic) s 4(1) (now repealed).

<sup>31</sup> *Family Violence Protection Act 2008* (Vic) s 5(3).

<sup>32</sup> *Family Violence Protection Act 2008* (Vic) s 5(1).

<sup>33</sup> *Family Violence Protection Act 2008* (Vic) ss 6, 7.

<sup>34</sup> *Family Violence Protection Act 2008* (Vic) s 5(2).

<sup>35</sup> *Family Violence Protection Act 2008* (Vic) s 5(1)(b).

<sup>36</sup> *Crimes (Family Violence) Act 1987* (Vic) s 4(1) (now repealed).

<sup>37</sup> *Family Violence Protection Act 2008* (Vic) Preamble, s 1(a).

## The meaning of ‘family member’

- 2.18 ‘Family member’ is broadly defined under the FVPA and includes a person’s current or former partner, relatives, children who reside with the person, or children of the person’s current or former partner. It also encompasses relationships that are ‘family-like’ by virtue of the social and economic ties between the parties, the parties’ living arrangements, any cultural recognition of the relationship as family-like (such as within Indigenous communities) or a relationship of responsibility or care (among other factors).<sup>38</sup>
- 2.19 An application for an FVIO may be made by the affected family member, a police officer, persons who have the consent of the adult family member to apply on the family member’s behalf, or persons acting on behalf of a child where a child is the affected family member.<sup>39</sup>
- 2.20 Where the applicant for an FVIO is a police officer, the FVIO may be made without the consent of the affected family member, but a more limited range of conditions is available (unless, for example, the family member is a child or cognitively impaired).<sup>40</sup> Where an application is made without the consent of the affected family member, the conditions of an FVIO may only:
- prohibit the respondent from committing family violence against the protected person;
  - prohibit the respondent from causing another person to engage in conduct prohibited by the order;
  - revoke or suspend a weapons approval held by the respondent; or
  - cancel or suspend a firearms authority held by the respondent.<sup>41</sup>
- 2.21 Under the FVPA, the court may make an order for the protection of children on its own initiative.<sup>42</sup> The court did not have this power under the *Crimes (Family Violence) Act 1987* (Vic).

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<sup>38</sup> *Family Violence Protection Act 2008* (Vic) s 8.

<sup>39</sup> *Family Violence Protection Act 2008* (Vic) s 45.

<sup>40</sup> *Family Violence Protection Act 2008* (Vic) s 75(3).

<sup>41</sup> *Family Violence Protection Act 2008* (Vic) ss 75, 81(2)(a), (f)–(h).

<sup>42</sup> *Family Violence Protection Act 2008* (Vic) s 77.

## Order or notice conditions

- 2.22 The court has a wide discretion in determining the conditions of an FVIO. Similar to the *Crimes (Family Violence) Act 1987* (Vic), the FVPA allows the court to include any conditions that appear necessary or desirable in the circumstances.<sup>43</sup> The FVPA also contains a non-exhaustive list of permissible conditions, which are broader in scope than those listed under the *Crimes (Family Violence) Act 1987* (Vic). Under the FVPA, the conditions of an FVIO may:
- prohibit the respondent from committing family violence against the protected person;
  - exclude the respondent from the protected person's residence (see [2.23] below);<sup>44</sup>
  - require the return of personal property;
  - prohibit the respondent from contacting the protected person;
  - prohibit the respondent from being within a specified distance of the protected person;
  - revoke or suspend a weapons approval, or cancel or suspend a firearms authority, held by the respondent; and
  - revive, vary, discharge or suspend an order made pursuant to the *Family Law Act 1975* (Cth).<sup>45</sup>
- 2.23 Under the FVPA, the court is obliged to consider whether the respondent should be excluded from the protected person's residence. That was not the case under the *Crimes (Family Violence) Act 1987* (Vic). The FVPA sets out the factors that the court must have regard to in making this determination, including the possibility of disruption to the social and support networks of the protected person if the protected person were required to leave his or her residence.<sup>46</sup>
- 2.24 The respondent may be ordered to attend counselling if the FVIO is made by the Family Violence Court Division.<sup>47</sup> As noted in Chapter 1, the Family Violence Court Division currently sits at only two locations (Heidelberg and Ballarat) – as a result, the court's capacity to order counselling as part of an FVIO is relatively limited. Under recent amendments to the FVPA, the power to order counselling as part of an FVIO has been extended to include courts outside the Family Violence Court Division, once gazetted.<sup>48</sup>
- 2.25 The same conditions that may be attached to an FVIO may also be attached to an FVSN, with the exception of conditions relating to the revocation or suspension of a weapons approval or the cancellation or suspension of a firearms authority.<sup>49</sup> Further, counselling cannot be required by police as part of an FVSN; it can only be mandated by the court as part of an FVIO.

<sup>43</sup> *Family Violence Protection Act 2008* (Vic) s 81(1); *Crimes (Family Violence) Act 1987* (Vic) s 4(2) (now repealed).

<sup>44</sup> The court must take into account a number of matters if the excluded respondent is a child: *Family Violence Protection Act 2008* (Vic) s 83.

<sup>45</sup> *Family Violence Protection Act 2008* (Vic) ss 81(2), 90.

<sup>46</sup> *Family Violence Protection Act 2008* (Vic) s 82(2).

<sup>47</sup> *Family Violence Protection Act 2008* (Vic) pt 5.

<sup>48</sup> *Family Violence Protection Act 2008* (Vic) ss 126, 130.

<sup>49</sup> *Family Violence Protection Act 2008* (Vic) ss 29, 81(2)(a)–(f).

## Commencement of orders

2.26 An FVIO may commence through the use of:

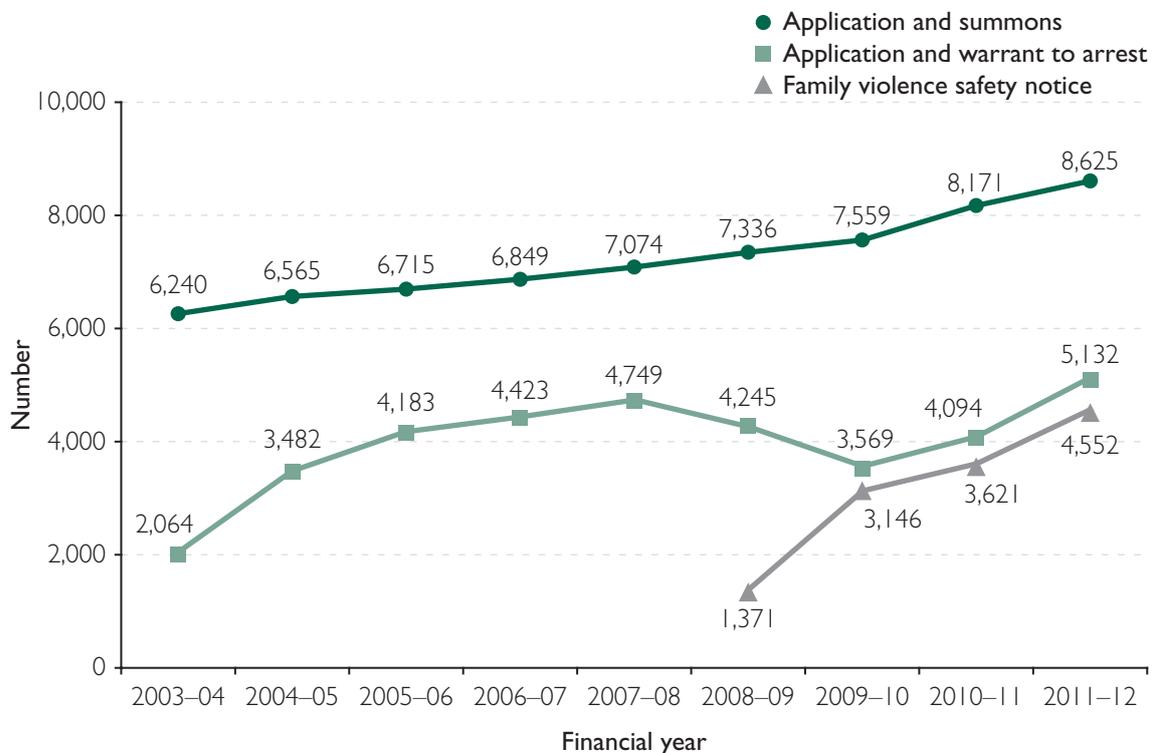
- an application and summons, which require the respondent to attend at court for the hearing of the FVIO application;<sup>50</sup>
- an application and warrant to arrest the respondent;<sup>51</sup> or
- an FVSN, which is taken to be an application for an FVIO and a summons for the respondent to attend at the first mention date for the FVIO application.<sup>52</sup>

2.27 The Family Violence Code of Practice states that police should seek an application and summons where there is no immediate danger to the person or property of the affected family member, but action is otherwise required to protect the family member from the behaviour of the respondent.<sup>53</sup>

2.28 The court may issue a warrant for the arrest of the respondent if it is necessary to ensure the safety or preserve the property of the affected family member, protect a child who has been subjected to family violence, or ensure that the respondent attends court for the hearing of the FVIO application.<sup>54</sup>

2.29 Figure 1 shows the number of FVIOs made by the Magistrates' Court by mode of issue from 2003–04 to 2011–12. By 2011–12, just over half (52.9%) of all FVIOs commenced by way of either an FVSN or application and warrant. The remaining 47.1% commenced by way of application and summons. This represents a marked change. In 2003–04, the majority (75.1%) of FVIOs commenced by way of application and summons, and only 24.9% commenced by way of application and warrant.

**Figure 1:** Number of family violence intervention orders made, by mode of issue and financial year, 2003–04 to 2011–12



<sup>50</sup> *Family Violence Protection Act 2008 (Vic)* s 49.

<sup>51</sup> *Family Violence Protection Act 2008 (Vic)* s 50.

<sup>52</sup> *Family Violence Protection Act 2008 (Vic)* s 31(1).

<sup>53</sup> Victoria Police, *Code of Practice for the Investigation of Family Violence* (2nd ed., 2010) [5.6].

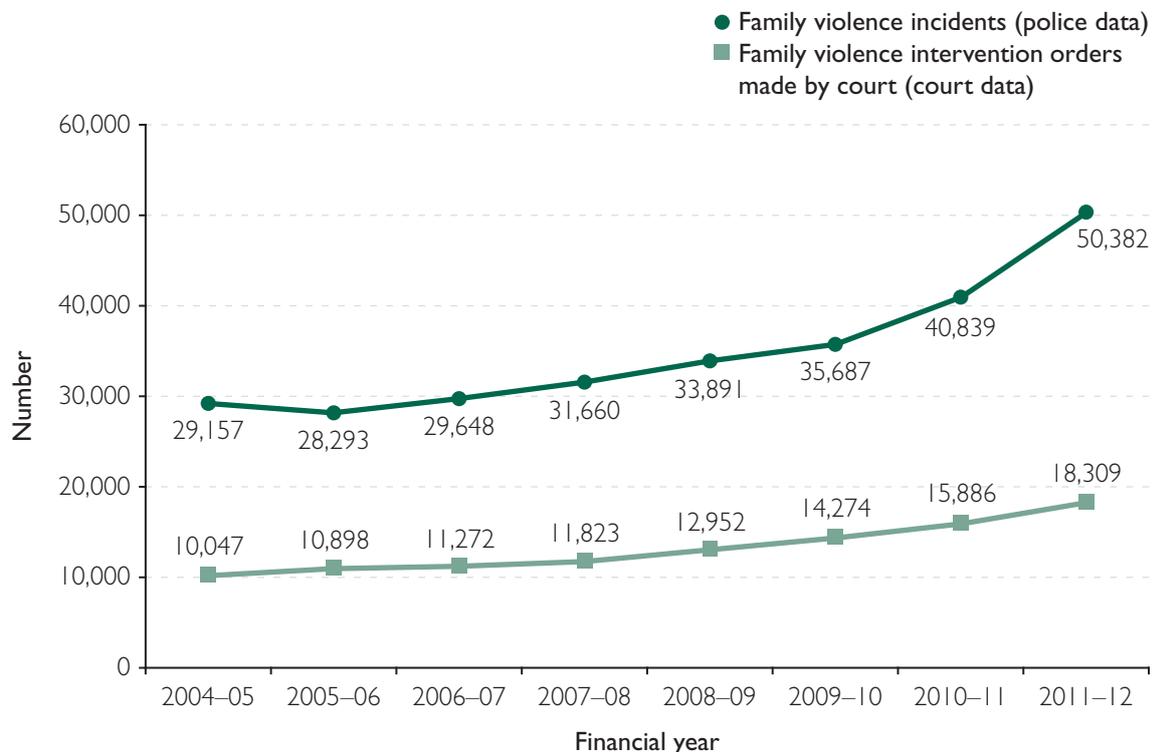
<sup>54</sup> *Family Violence Protection Act 2008 (Vic)* s 50.

- 2.30 The number of FVIOs commencing by way of application and warrant declined between 2007–08 and 2009–10. This was likely influenced by the introduction in December 2008 of FVSNs, which appear to have supplanted the application and warrant process to some extent during that time.
- 2.31 It is notable that the majority of FVIOs now commence by way of an FVSN or an application and warrant. This indicates that a considerable number of family violence incidents require the immediate protection of affected family members through the arrest of the respondent or the imposition of an FVSN. It is unclear whether this is due to an increase in incidents of this nature, or whether a greater level of protection is being afforded to victims of family violence.

## Number of orders

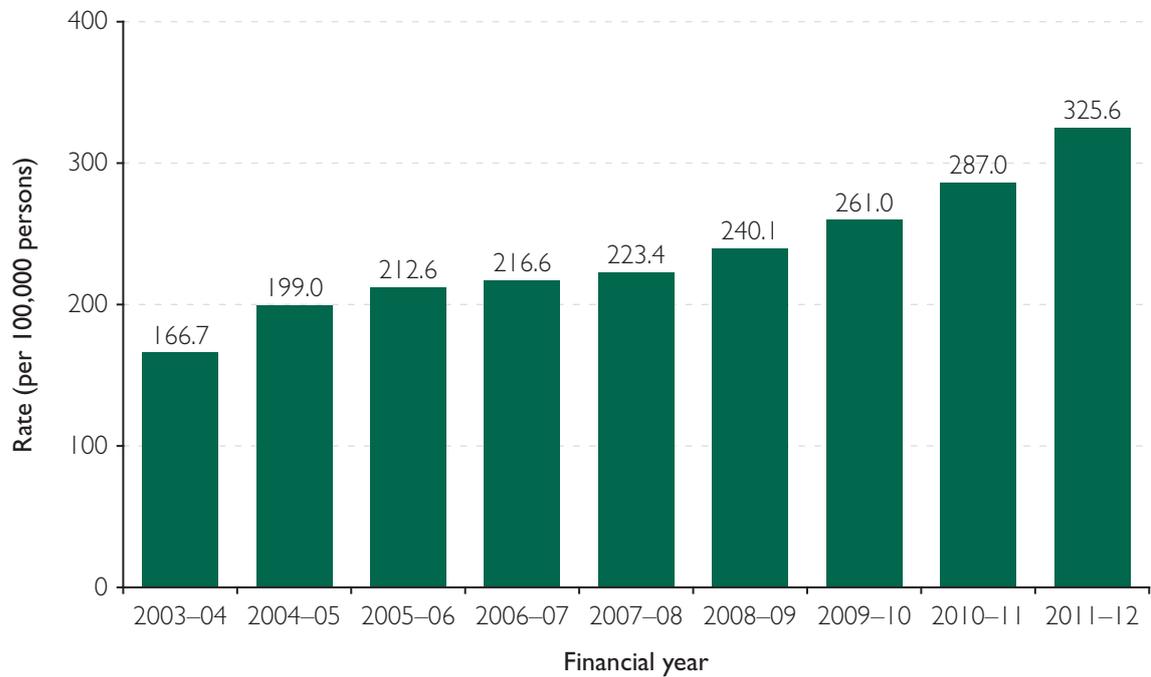
- 2.32 Figure 2 shows the number of FVIOs made by the Magistrates' Court compared to the number of family violence incidents reported to police between 2004–05 and 2011–12. The rate at which family violence incidents are reported has some influence on the number of FVIOs made, as discussed below at [2.37] and following. Family violence incidents are classified by Victoria Police in accordance with the definition of family violence in the FVPA.
- 2.33 Between 2004–05 and 2011–12, there was an 82.2% increase in FVIOs, with the most pronounced growth occurring since 2008–09. Over the same period, there was a 72.8% increase in reported family violence incidents.

**Figure 2:** Number of family violence intervention orders made by the Magistrates' Court of Victoria and number of family violence incidents reported to Victoria Police, 2004–05 to 2011–12



- 2.34 The significant increase in FVIOs – especially since 2008–09 – cannot be explained by Victorian population growth alone. This is demonstrated by Figure 3, which controls for population change by presenting the rate of FVIOs per 100,000 persons in the Victorian population from 2003–04 to 2011–12.<sup>55</sup>
- 2.35 Figure 3 shows that the rate of FVIO imposition almost doubled within just under a decade, from 2003–04 to 2011–12. Consistent with the data presented in Figure 2, the rate of imposition increased markedly between 2008–09 and 2011–12. Over that three-year period, the rate of FVIOs per 100,000 persons increased by 35.6%.
- 2.36 Taken together, Figures 2 and 3 demonstrate a clear trend of annual growth in the use of FVIOs and, in particular, substantial growth in FVIOs since 2008–09.

**Figure 3:** Family violence intervention order rates (orders per 100,000 persons), Magistrates' Court of Victoria, 2003–04 to 2011–12



<sup>55</sup> The population figures used to calculate rates are the estimated resident population (ERP) of Victoria in the June quarter of each year: Australian Bureau of Statistics, *Australian Demographic Statistics*, cat. no. 3101.0 (2012).

## Explanations for the increase in FVIOs

- 2.37 Stakeholders provided the Council with two main explanations for the increase in FVIOs. The first was improved police procedure in cases of family violence. The second was legislative, court and support sector reforms. Each of these developments has in turn influenced the rate of family violence reporting.
- 2.38 Over the last 10 years, Victoria Police has introduced two strategies aimed specifically at family violence reduction. The most recent strategy, addressing the period from 2009 to 2014, includes initiatives such as the revised Family Violence Code of Practice and provides for a state-wide network of specialist family violence officers and teams.<sup>56</sup> Taken together, these initiatives may have led to an increase in FVIOs. As a matter of policy, in addition to criminal enforcement, FVIOs are to be pursued by Victoria Police in a wide range of circumstances, with police required to:
- apply for an FVIO wherever the safety, welfare or property of a family member appears to be endangered by another family member (this assessment is guided by the common risk assessment framework referred to in Chapter 1);
  - apply for an FVIO even without the agreement of the affected family member if necessary (including where the family member is fearful of the consequences of initiating an application her- or himself);
  - apply for an FVIO alongside any criminal action, provided there are grounds for the application and regardless of any bail conditions aimed at the protection of family members;
  - assess separately the needs of any children and apply for an FVIO to protect children specifically where necessary; and
  - upon contravention of an FVIO, apply for a further FVIO if necessary (this provision is new to the 2010 edition of the Family Violence Code of Practice and implements a recommendation made by the Council in the 2009 report).<sup>57</sup>
- 2.39 The suggested link between improved police procedure and the increase in FVIOs appears to be reflected in the data. Figure 2 shows that the trend in FVIO imposition broadly mirrors the trend in reports of family violence to police. The reporting of family violence is likely to be a significant factor in the making of FVIOs, given that police now initiate the majority of FVIOs (see Figure 4 below).
- 2.40 Alongside Victoria Police reforms, the second explanation offered by stakeholders for the increase in FVIOs is the legislative, court and support sector reforms of the past five to ten years. As noted in Chapter 1, the key reforms include the introduction of the FVPA, the development of a specialist Family Violence Court Division and support services in the Magistrates' Court, and the implementation of integrated family violence services in Victoria, including the adoption of the common risk assessment framework by police, service providers and other organisations.

<sup>56</sup> Victoria Police, *Living Free from Violence – Upholding the Right: Victoria Police Strategy to Reduce Violence Against Women and Children 2009–2014* (2009). The previous strategy was Victoria Police, *Violence Against Women Strategy: The Way Forward* (2002), which covered the period from 2002 to 2007.

<sup>57</sup> Victoria Police (2010), above n 53, [4.1.1], [4.3.4], [4.8.2.3], [5.2.2], [5.10].

- 2.41 Stakeholders reported that the cumulative effect of these reforms has been to raise community awareness of the protection measures available to victims of family violence, and to bring more incidents of family violence to the attention of police and specialist service providers. As a consequence, there is now 'huge demand' for support services and protection measures.<sup>58</sup>
- 2.42 Figures 2 and 3 show an especially marked increase in FVIOs from 2008–09 onwards. This corresponds with the commencement of the FVPA in December 2008, the reform of police procedure pursuant to the Family Violence Code of Practice (which was introduced in 2004 and revised in 2010) and the further implementation of court and support sector reforms.
- 2.43 It is clear that at least some of the increase in FVIOs (particularly since 2008–09) is due to increased reporting of family violence. There may also have been an actual increase in the prevalence of family violence, although it is not possible for the Council to determine any such increase.

### Applications that did not result in an order

- 2.44 In 2011–12, approximately one-third of all FVIO applications did not result in an order being made by the court.
- 2.45 Approximately 6% of all FVIO applications involved the applicant (ordinarily the affected family member) withdrawing the FVIO application in exchange for the respondent giving an undertaking to do, or not do, certain things. Although this constitutes a relatively small proportion of all FVIO applications, one service provider working with culturally and linguistically diverse (CALD) victims of family violence expressed concern about the circumstances in which undertakings may be given.
- 2.46 In the experience of the inTouch Multicultural Centre Against Family Violence, undertakings are often entered into where the victim is not legally represented. inTouch reported that CALD victims, in these circumstances, do not always appreciate the difference between an FVIO and an undertaking, and may fail to understand that police cannot prosecute non-compliance with an undertaking under the FVPA.<sup>59</sup> The police may prosecute, however, if the non-compliance behaviour includes other offending.<sup>60</sup>

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<sup>58</sup> Roundtable 2 (23 May 2013).

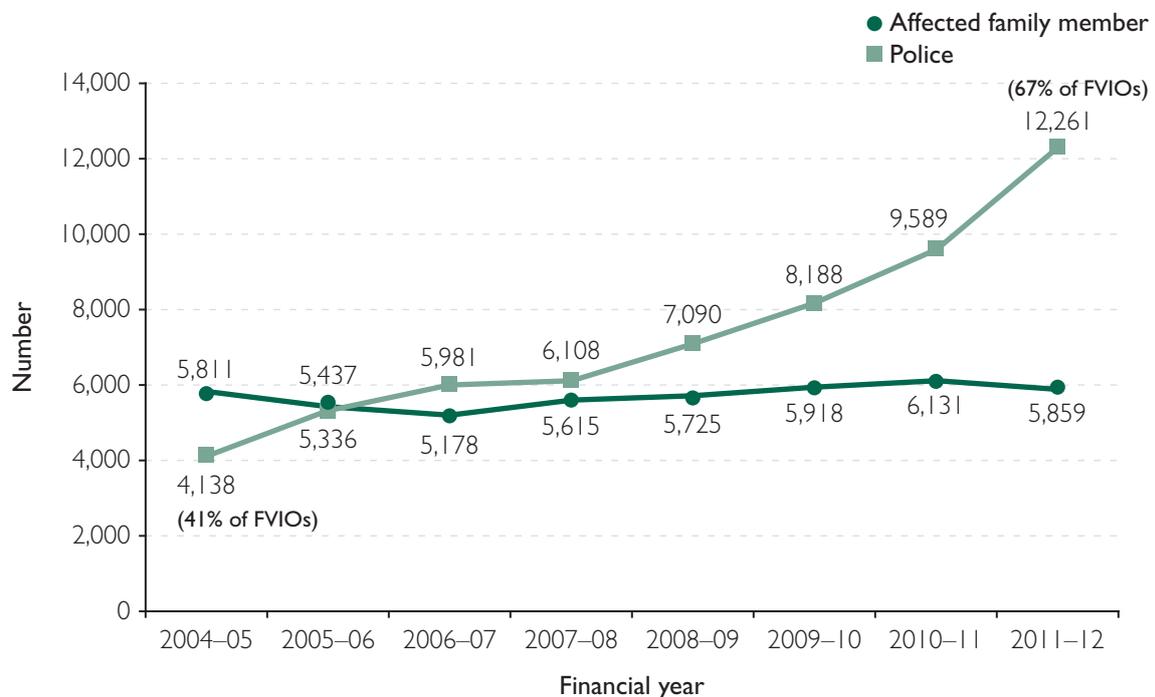
<sup>59</sup> Meeting with inTouch Multicultural Centre Against Family Violence (19 June 2013).

<sup>60</sup> Non-compliance with an undertaking may also constitute a contempt of court.

## Applicants

- 2.47 Figure 4 shows the number of FVIOs made by the Magistrates' Court from 2004–05 to 2011–12 by applicant (it excludes a negligible 'miscellaneous' applicant category).
- 2.48 As discussed above, applications for FVIOs may be made by police, affected family members or persons acting on behalf of affected family members in certain circumstances (such as where the affected family member is a child). In practice, the majority of FVIOs are now initiated by police.
- 2.49 Between 2004–05 and 2011–12, the number of FVIOs initiated by affected family members remained relatively stable. By contrast, the number of FVIOs initiated by police increased by 196.3% (the increase was most discernible between 2007–08 and 2011–12). The majority (67.0%) of FVIOs in 2011–12 were initiated by police.<sup>61</sup> In 2004–05, a minority (41%) of FVIOs were initiated by police.
- 2.50 The increase in police-initiated FVIOs is consistent with the Family Violence Code of Practice, which envisages that police will make a significant proportion of all FVIO applications.<sup>62</sup> Perhaps most significantly, the Family Violence Code of Practice requires police to make an FVIO application without the agreement of affected family members if necessary.
- 2.51 As Figure 4 demonstrates, the number of FVIOs initiated by family members has remained stable. When population increases are also considered, the rate of applications by affected family members has in fact declined. Although the increase in police-initiated FVIOs is likely to capture a substantial proportion of FVIOs that would have otherwise been initiated by family members, this increase is also likely to reflect applications made without the agreement of affected family members.

**Figure 4:** Number of family violence intervention orders by applicant, Magistrates' Court of Victoria, 2004–05 to 2011–12



<sup>61</sup> This percentage was calculated by comparing the data in Figures 2 and 4.

<sup>62</sup> Victoria Police (2010), above n 53, [5.2].

## Duration of orders

2.52 Figure 5 shows the percentage of FVIOs made between 2004–05 and 2011–12 by the duration of the order.

2.53 Between 2004–05 and 2011–12, the majority of FVIOs lasted for 12 to less than 24 months. In 2011–12, the vast majority (98%) of those FVIOs lasted for exactly 12 months.

2.54 As a proportion of all FVIOs, orders that last for more than 24 months have consistently declined, from 19.1% in 2004–05 to 9.4% in 2011–12. FVIOs that last for less than 12 months comprised approximately 11% of all FVIOs from 2004–05 to 2011–12.

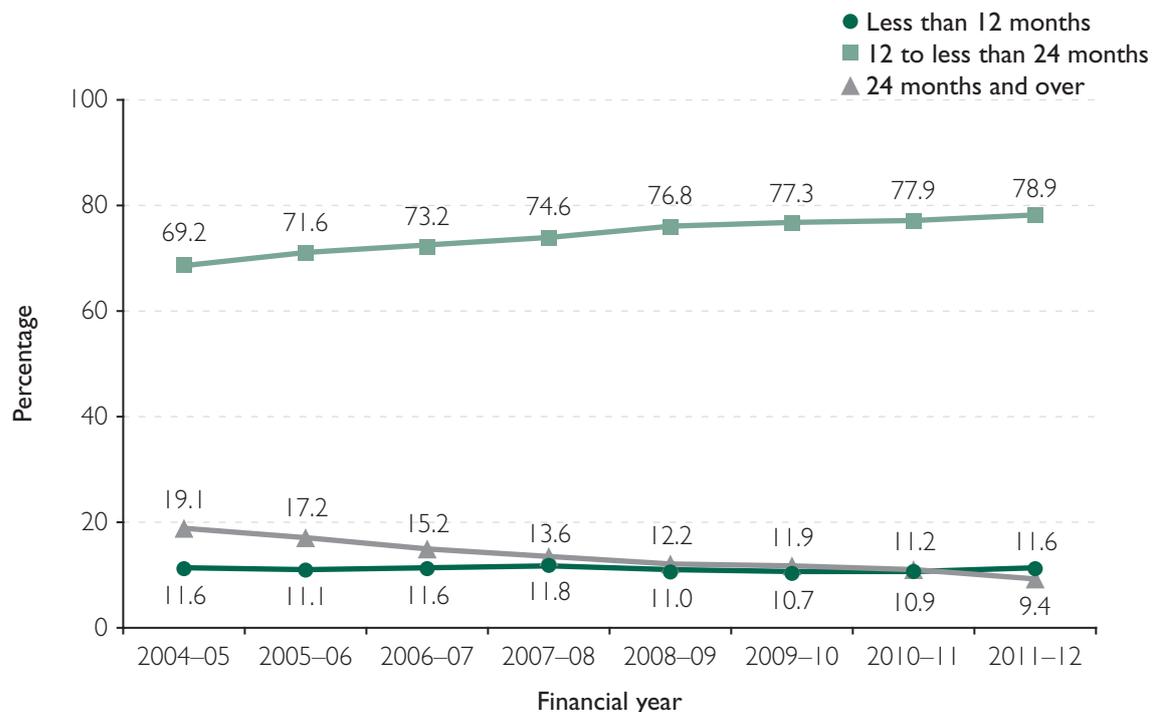
2.55 The Council suggested in its 2009 report that the court may need to impose FVIOs of more than 12 months' duration in the first instance, given that the risk of further violence may not always abate over the first year.<sup>63</sup> The Council noted that orders of this duration may be more likely under the FVPA than under the *Crimes (Family Violence) Act 1987 (Vic)*. The FVPA sets out mandatory considerations for the court in determining the length of an FVIO. The *Crimes (Family Violence) Act 1987 (Vic)* did not provide any guidance on this matter.

2.56 When considering the duration of a final FVIO, the court must take the following into account:

- that the safety of the protected person is paramount;
- any assessment by the applicant of the level and duration of risk from the respondent; and
- if the applicant is not the protected person, the protected person's views, including his or her assessment of the level and duration of risk from the respondent.<sup>64</sup>

2.57 The increase in the percentage of FVIOs that last for 12 to less than 24 months may reflect the court's consideration of these matters under the FVPA.

**Figure 5:** Percentage of family violence intervention orders by duration of order, Magistrates' Court of Victoria, 2004–05 to 2011–12



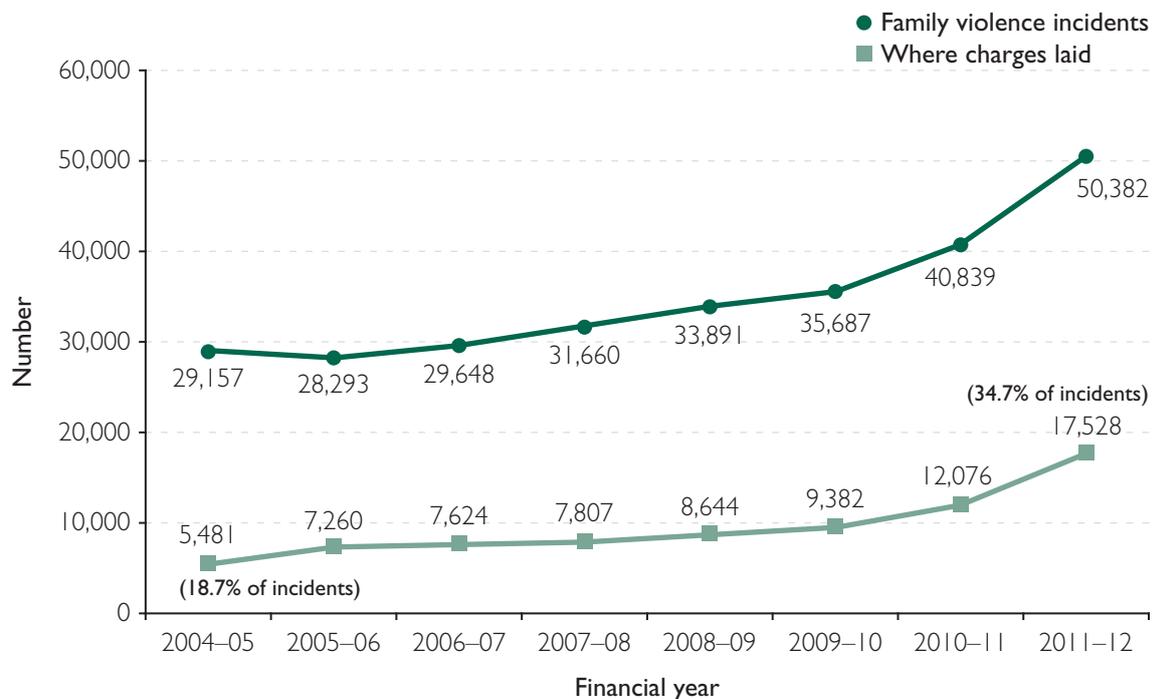
<sup>63</sup> Sentencing Advisory Council (2009), above n 3, [4.55]–[4.78].

<sup>64</sup> *Family Violence Protection Act 2008 (Vic)* s 97(2).

## Charging practices

- 2.58 Figure 6 shows the number of family violence incidents reported to police between 2004–05 and 2011–12 alongside the number of family violence incidents where police laid charges.
- 2.59 In 2004–05, charges were laid in 18.7% of family violence incidents. In 2011–12, charges were laid in 34.7% of family violence incidents.
- 2.60 As with the increase in FVIOs, improved police procedure and victim reporting – rather than an increase in the actual level of criminality – appear to be partly responsible for the increase in the charge rate. However, as with the increase in FVIOs, the Council is of the view that an actual increase in offending cannot be entirely discounted as a potential explanation for the increase in the charge rate.
- 2.61 Victoria Police commented that improvements in police procedure, particularly through the Family Violence Code of Practice, are responsible for the increase in the charge rate. Some stakeholders spoke of particularly thorough investigation and charging in their local areas.<sup>65</sup>
- 2.62 The increase in the charge rate may also partly reflect the increasing availability of certain forms of evidence of FVIO contravention. According to the practitioners consulted by the Council, social media usage, SMS messages and CCTV recordings are increasingly being used to establish FVIO contraventions (see [5.17]).
- 2.63 The increase in the charge rate is likely to reflect both family violence-related offending (including FVIO and FVSN contravention offences) and more general offending. Several stakeholders commented that the more thorough investigation of family violence by police is resulting in the increased detection of general offending that is unrelated to family violence.<sup>66</sup>

**Figure 6:** Number of family violence incidents reported to police and number of family violence incidents where charges were laid, 2004–05 to 2011–12



<sup>65</sup> Roundtable 2 (23 May 2013).

<sup>66</sup> Roundtable 1 (20 May 2013).

## Protected persons

2.64 As discussed at [2.18] and following, a wide range of family members can be protected by an FVIO. While adult women – particularly the current or former partner of the respondent – continue to feature as protected persons, the most stark development in recent years is the increase in the number of protected children (being those aged under 18).

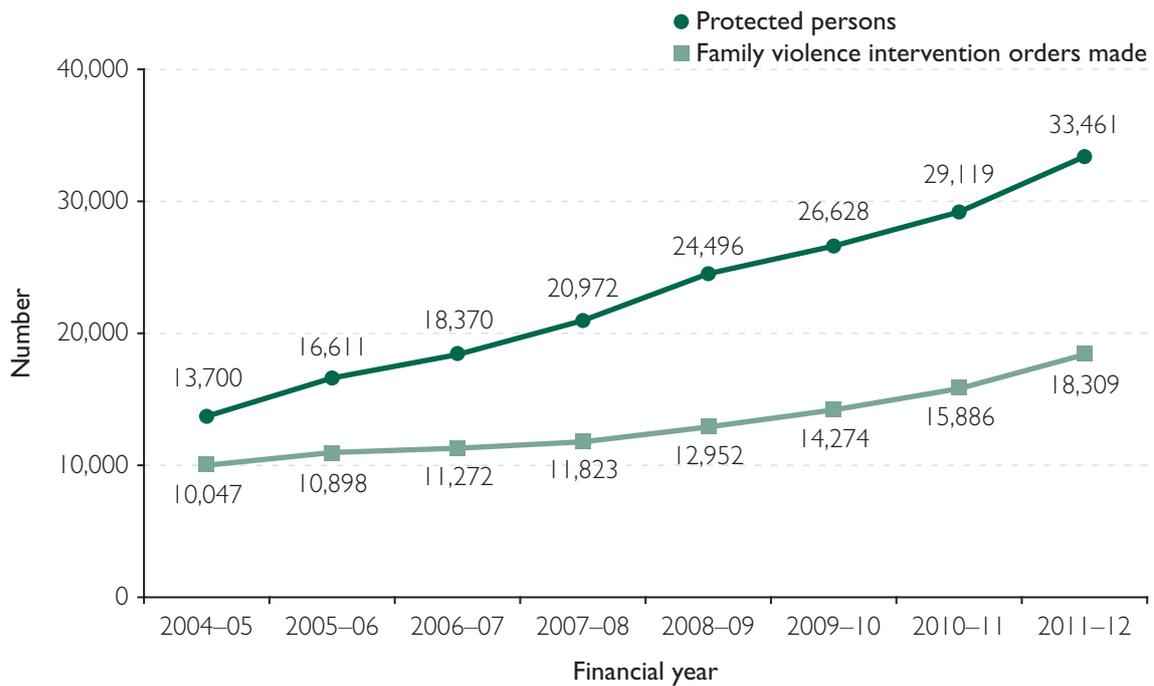
### Number of protected persons

2.65 Figure 7 shows the total number of protected persons included on an FVIO between 2004–05 and 2011–12. It also shows the number of FVIOs made by the Magistrates' Court over the same period.

2.66 The total number of protected persons has increased consistently since 2004–05. This is not only an outcome of the increase in FVIOs; the average number of protected persons per FVIO has also grown, from an average of 1.4 persons in 2004–05 to 1.8 persons over the period from 2007–08 to 2011–12.

2.67 As Figures 8 and 9 (pages 19 and 20) demonstrate, the main cause of the increase in the number of protected persons is the substantial increase in the number of protected children.

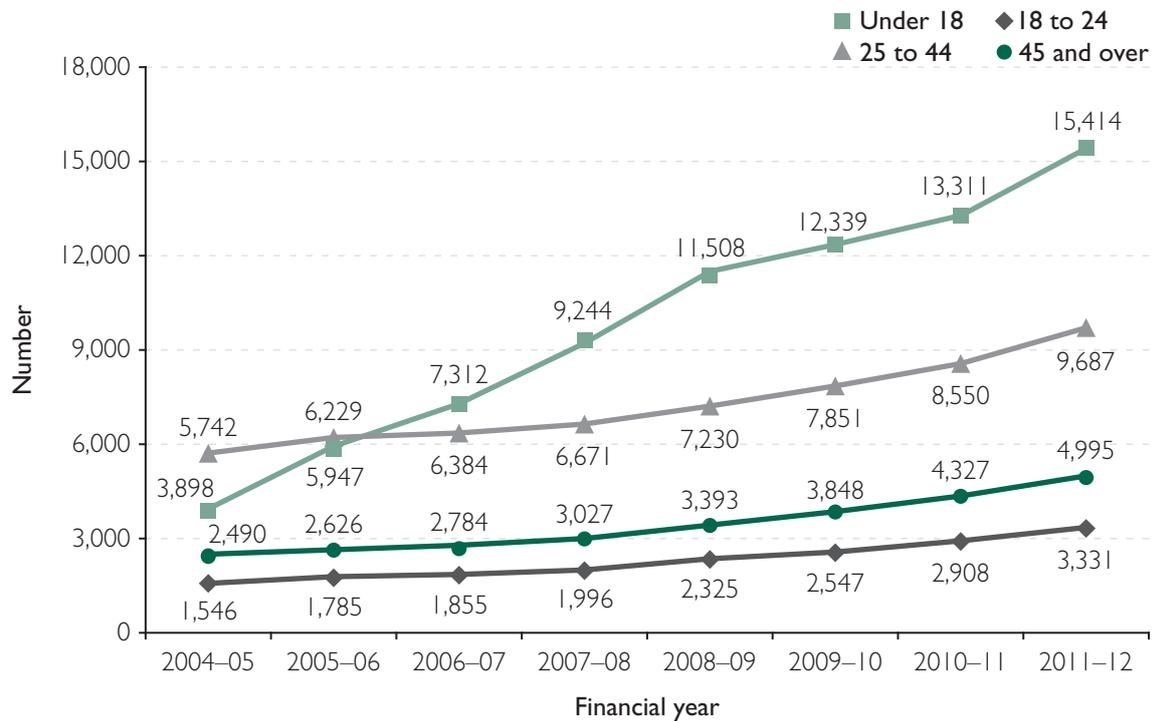
**Figure 7:** Number of protected persons and number of family violence intervention orders, Magistrates' Court of Victoria, 2004–05 to 2011–12



### Age of protected persons

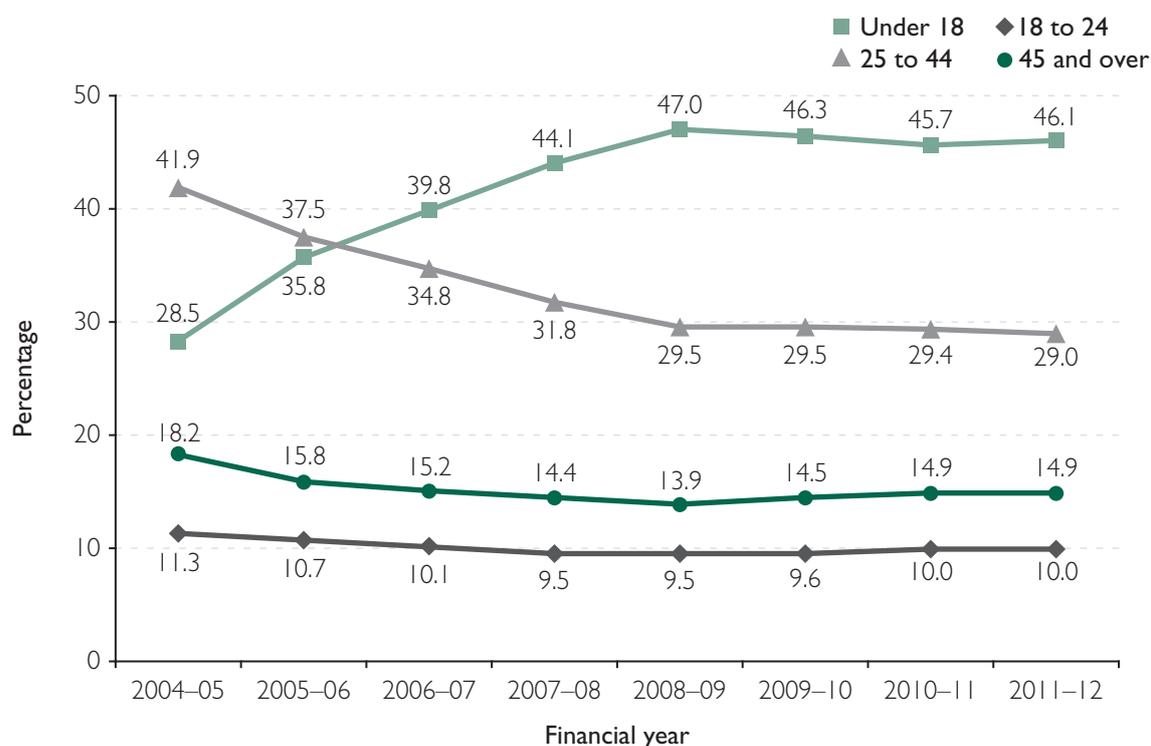
- 2.68 Figure 8 shows the number of protected persons from 2004–05 to 2011–12 separated into four age groups: under 18 years, 18 to 24 years, 25 to 44 years and 45 years and over.
- 2.69 The number of protected children increased by 295.4% between 2004–05 and 2011–12. This rate far exceeds the increase in the number of FVIOs over the same period (82.2%), even allowing for multiple protected children per order.
- 2.70 There was steady – though relatively less substantial – growth in the adult population of protected persons; for example, the number of protected adults aged 25 to 44 increased by 68.7% between 2004–05 and 2011–12.

**Figure 8:** Number of protected persons by age group, Magistrates' Court of Victoria, 2004–05 to 2011–12



- 2.71 Figure 9 shows the proportion of protected persons by age group from 2004–05 to 2011–12.
- 2.72 By 2011–12, children represented the largest single age group (46.1%) of protected persons; in 2004–05, they represented one of the smallest single age groups (28.5%) of protected persons. Over the same period, there was a corresponding decline in the proportion of protected persons aged 25 to 44. In 2004–05, adults aged 25 to 44 comprised 41.9% of protected persons; in 2011–12, they comprised 29.0% of protected persons. However, as Figure 8 shows, despite representing a smaller proportion, the number of protected persons in the 25 to 44 age group has not declined.
- 2.73 The representation of children (those aged under 18), and adults aged 25 to 44, has stabilised since 2008–09.
- 2.74 Adults aged 18 to 24, and adults aged 45 and over, both represented the smallest proportions of protected persons from 2004–05 to 2011–12.
- 2.75 Several factors may explain the increase in the number of protected children. First, the FVPA expressly provides that family violence includes not only the direct perpetration of violence against children but also children's exposure to family violence. Several stakeholders reported that police are now more conscious of the effects of family violence on children, and of the need to advocate for the protection of children where necessary.<sup>67</sup> The Family Violence Code of Practice requires police to consider the safety needs of any children separately to other affected family members.<sup>68</sup>
- 2.76 Second, the increase in protected children may partly reflect an administrative change in how protected persons are recorded on FVIOs following the introduction of the FVPA. One practitioner noted that under the *Crimes (Family Violence) Act 1987* (Vic), there would often only be one protected person for the purposes of the order (typically an adult), even if several children were protected by the conditions of the order. This practitioner observed that, under the FVPA, all persons requiring protection are likely to be individually named as protected persons on an FVIO.<sup>69</sup>

Figure 9: Percentage of protected persons by age group, Magistrates' Court of Victoria, 2004–05 to 2011–12



<sup>67</sup> Roundtable 1 (20 May 2013).

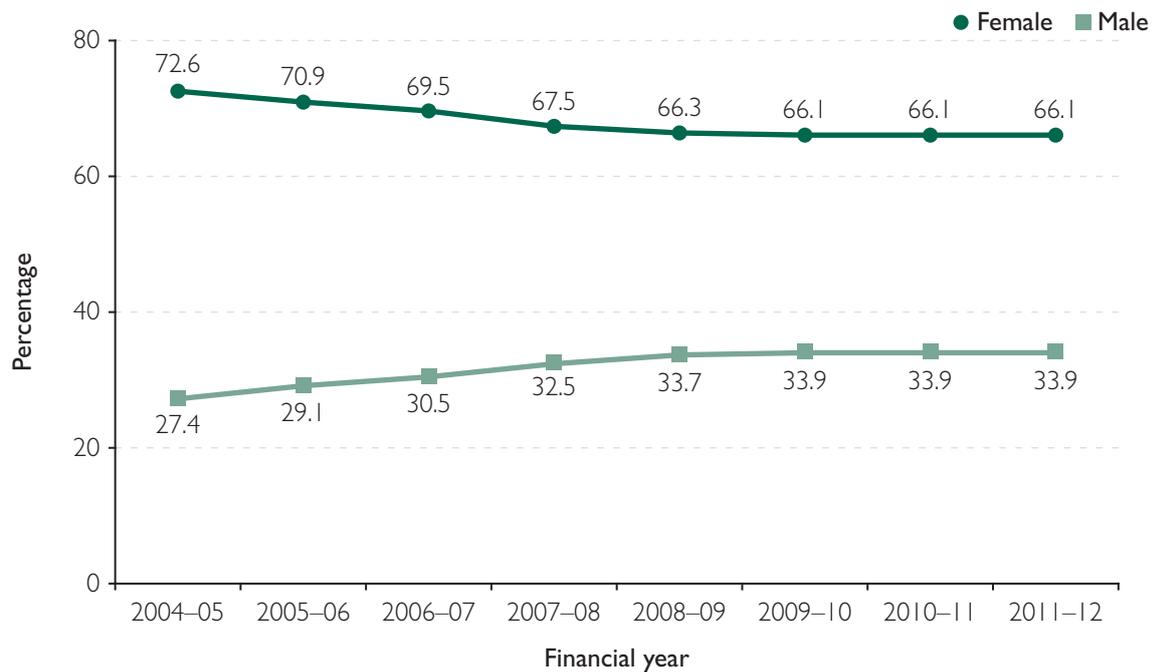
<sup>68</sup> Victoria Police (2010), above n 53, [5.10].

<sup>69</sup> Roundtable 2 (23 May 2013).

## Gender of protected persons

- 2.77 Figure 10 shows the percentage of protected persons by gender from 2004–05 to 2011–12.
- 2.78 Since 2004–05, there has been a slight decline in the percentage of protected persons who are female, and a slight increase in the percentage of protected persons who are male; however, the *number* of female protected persons has not declined (in fact, it has more than doubled, rising from 1,529 in 2004–05 to 3,237 in 2011–12).
- 2.79 The increase in the percentage of protected persons who are male is most likely due to the increase in protected children, which inherently captures a larger proportion of male protected persons.

**Figure 10:** Percentage of protected persons by gender, Magistrates' Court of Victoria, 2004–05 to 2011–12

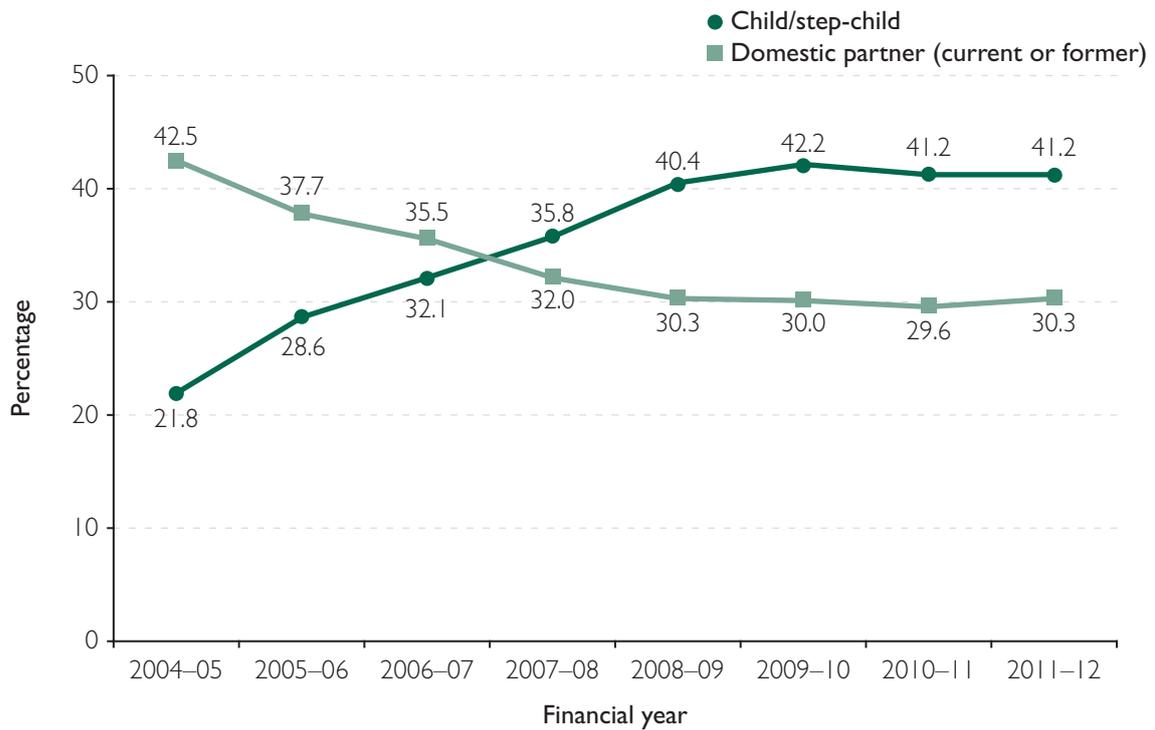


Relationship of protected persons to respondent

2.80 Figure 11 shows the percentage of protected persons from 2004–05 to 2011–12 by their relationship to the respondent.

2.81 Since 2007–08, the largest proportion of protected persons has comprised the child or step-child of the respondent (by 2011–12, this proportion was 41%, representing 13,796 people). Prior to 2007–08, protected persons were most commonly the current or former partner of the respondent. This transformation is explained by the considerable growth in protected children since 2004–05, and the less substantial growth in adult protected persons since that time.

Figure 11: Percentage of protected persons by relationship to respondent, Magistrates’ Court of Victoria, 2004–05 to 2011–12<sup>70</sup>



<sup>70</sup> A number of relationship types are not presented in this graph due to their relatively small volumes. These include intimate personal relationship (ranging from 7% to 10% of relationships over the 8 years), parent/step-parent (6% to 9%), sibling (4% to 5%), in-law (2% to 5%), other relative (5% to 7%) and other relationship (0% to 3%).

## Respondents

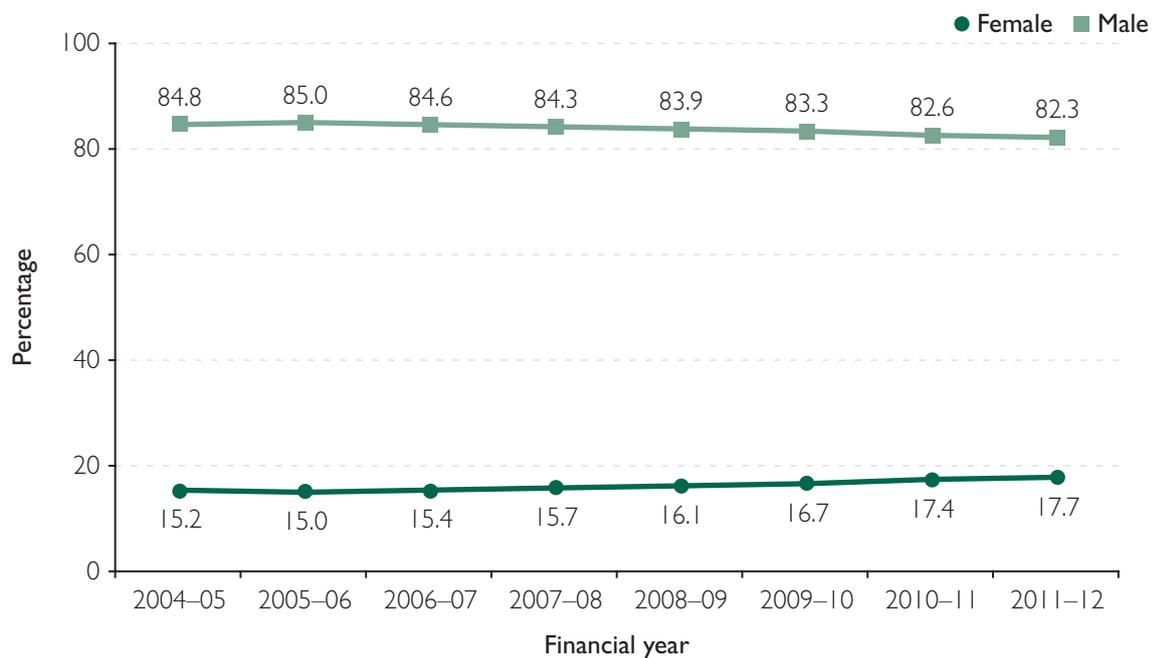
2.82 There has been little variation in the characteristics of respondents, with men aged 25 to 44 consistently the most common respondents between 2004–05 and 2011–12.

### Gender of respondents

2.83 Figure 12 shows the percentage of respondents by gender from 2004–05 to 2011–12.

2.84 Unlike a number of other measures in this report, the gender profile of respondents has not changed since 2004–05. From 2004–05 to 2011–12, men comprised the majority (approximately 83%) of FVIO respondents. This is consistent with other reports showing that family violence is predominantly, though not exclusively, committed by men.<sup>71</sup>

Figure 12: Percentage of respondents by gender, Magistrates' Court of Victoria, 2004–05 to 2011–12

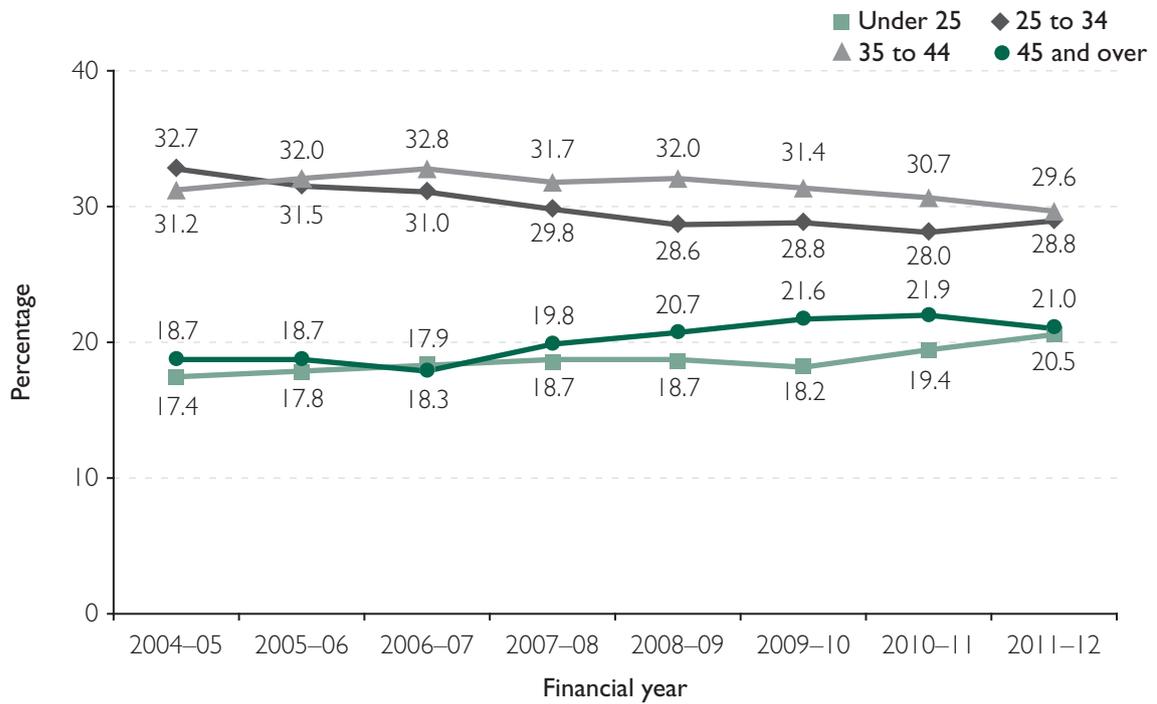


<sup>71</sup> Victims Support Agency, *Measuring Family Violence in Victoria: Victorian Family Violence Database Volume 5 – Eleven-Year Trend Analysis 1999–2010* (2012) [6.2] (Table 18).

Age of respondents

- 2.85 Figure 13 shows the percentage of respondents by age group from 2004–05 to 2011–12.
- 2.86 There has been little change in the age profile of respondents since 2004–05. The majority of respondents (approximately 60%) were aged 25 to 44 years, a trend that remained broadly constant from 2004–05 to 2011–12.
- 2.87 The age profile of respondents is consistent with the data on the relationship of protected persons to respondents, as presented in Figure 11 above. The largest proportion of protected persons comprised the child or step-child of the respondent, and those in the age group most likely to have children within their care (persons aged 25 to 44) were the most common respondents to FVIOs.

Figure 13: Percentage of respondents by age group, Magistrates' Court of Victoria, 2004–05 to 2011–12



# Chapter 3

## Contraventions

- 3.1 Contravention of a family violence intervention order (FVIO) or a family violence safety notice (FVSN) is a criminal offence proscribed by the *Family Violence Protection Act 2008* (Vic) (FVPA).<sup>72</sup> In addition to a general contravention offence, two aggravated contravention offences commenced on 17 April 2013.
- 3.2 The new aggravated forms of contravention are:
- contravention of a notice or order intending to cause harm or fear for safety;<sup>73</sup> and
  - persistent contravention of notices and orders.<sup>74</sup>
- 3.3 The data in this report relate to the general contravention offence; however, for completeness, the new aggravated contravention offences are also discussed below.

### Contravention offences

#### General contravention offence

- 3.4 The FVPA contains a general prohibition against contravention of an FVIO or an FVSN.<sup>75</sup> The *Crimes (Family Violence) Act 1987* (Vic) contained a similar prohibition in respect of the intervention orders governed by that legislation. The maximum penalty for the general contravention offence under the FVPA is Level 7 imprisonment (2 years) and/or a Level 7 (240 penalty unit) fine.<sup>76</sup>

#### Aggravated contravention offences

##### Contravention of notice or order intending to cause harm or fear for safety

- 3.5 This offence specifically prohibits contravention of an FVIO or an FVSN where a person intends to cause physical or mental harm to, or fear for safety in, the protected person.<sup>77</sup> The offence aims to capture contraventions that are particularly harmful to the victim but do not involve forms of offending other than the contravention.<sup>78</sup> The maximum penalty for this offence is Level 6 imprisonment (5 years) and/or a Level 6 (600 penalty unit) fine.<sup>79</sup>

##### Persistent contravention of notices and orders

- 3.6 This offence penalises repeat contravention. It targets offenders who contravene an FVIO or an FVSN and have committed at least two other contravention offences within the preceding 28 days.<sup>80</sup>

<sup>72</sup> *Family Violence Protection Act 2008* (Vic) ss 37, 123.

<sup>73</sup> *Family Violence Protection Act 2008* (Vic) ss 37A, 123A.

<sup>74</sup> *Family Violence Protection Act 2008* (Vic) s 125A.

<sup>75</sup> *Family Violence Protection Act 2008* (Vic) ss 37, 123.

<sup>76</sup> See above n 19. As at 1 July 2013, 240 penalty units equate to approximately \$34,646.

<sup>77</sup> *Family Violence Protection Act 2008* (Vic) ss 37A, 123A. The offence is also established where the person knows that the contravention will probably cause physical or mental harm to, or fear for safety in, the protected person.

<sup>78</sup> Explanatory Memorandum, Justice Legislation Amendment (Family Violence and Other Matters) Bill 2012 (Vic).

<sup>79</sup> See above n 19. As at 1 July 2013, 600 penalty units equate to \$86,616.

<sup>80</sup> *Family Violence Protection Act 2008* (Vic) s 125A.

Parliament regards such contraventions as particularly egregious because they occur within a short space of time and therefore demonstrate disregard for the law.<sup>81</sup> The maximum penalty for this offence is Level 6 imprisonment (5 years) and/or a Level 6 (600 penalty unit) fine.<sup>82</sup>

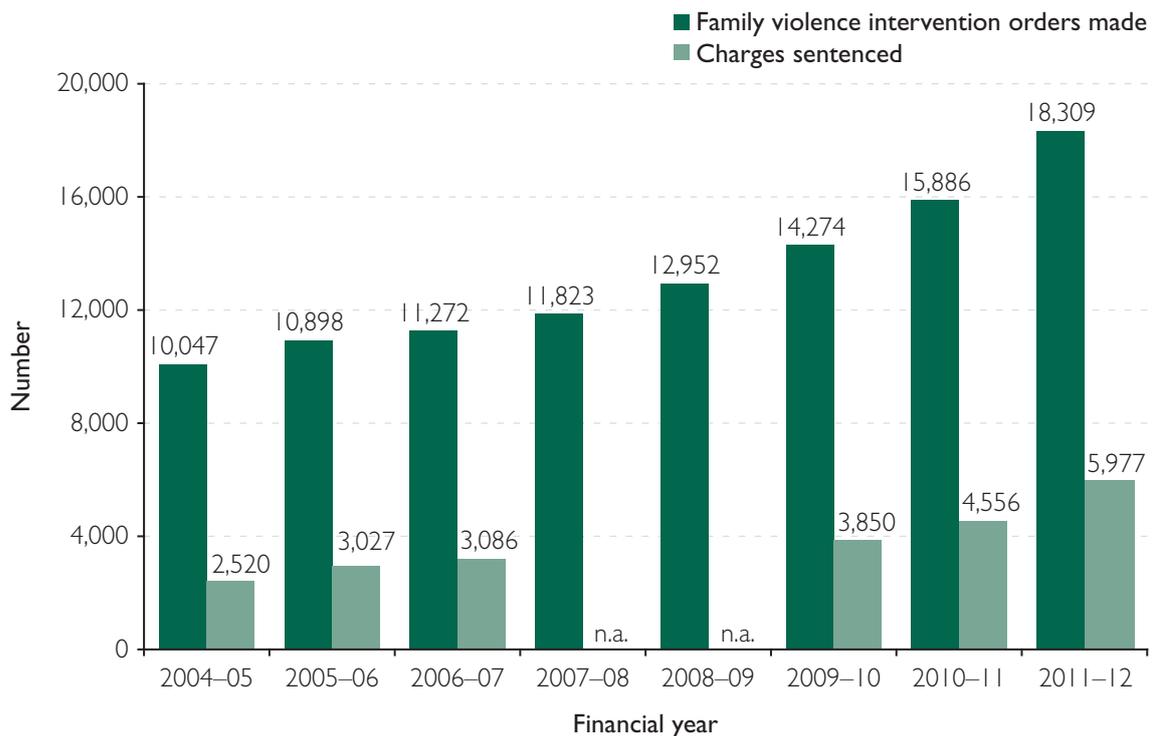
- 3.7 As the aggravated contravention offences have been only recently introduced, there are insufficient data at present to perform an analysis of sentencing outcomes, but this analysis may be possible in a future monitoring report.
- 3.8 Given the community and parliamentary interest in the sentencing of recidivist family violence offenders,<sup>83</sup> in this report the Council has specifically examined sentencing outcomes in relation to repeat FVIO contraventions under the general contravention offence (see Chapter 4).

## Rate of contravention

### Family violence intervention orders

- 3.9 Figure 14 shows the number of sentenced FVIO contravention charges, compared with the number of FVIOs made, over the two reference periods.

**Figure 14:** Number of family violence intervention orders made and number of sentenced charges of contravention of a family violence intervention order, Magistrates' Court of Victoria, 2004–05 to 2011–12<sup>84</sup>



<sup>81</sup> Explanatory Memorandum, Justice Legislation Amendment (Family Violence and Other Matters) Bill 2012 (Vic).

<sup>82</sup> See above n 76.

<sup>83</sup> Victoria, 'Justice Legislation Amendment (Family Violence and Other Matters) Bill 2012', *Parliamentary Debates*, Legislative Council, 11 December 2012 (Sue Pennicui).

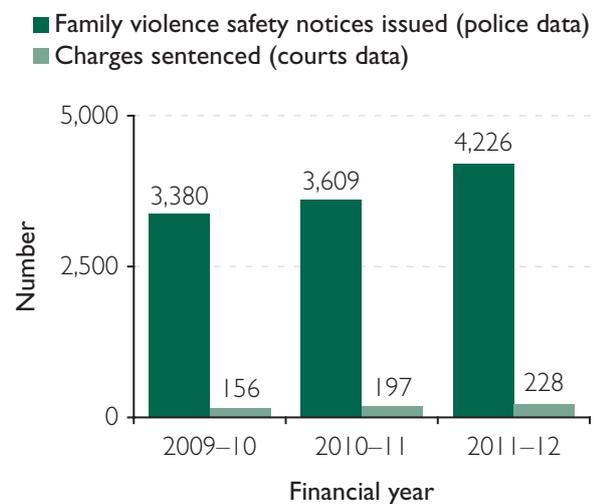
<sup>84</sup> In Figure 14, charges sentenced in 2004–05 to 2006–07 are a slight undercount due to difficulty in determining the type of intervention order breached (family violence or stalking) in sentencing data prior to the introduction of the FVPA (see [1.18]). The Council undertook a lengthy exercise to determine the type of intervention order breached during these years. Such an exercise was not undertaken for data in 2007–08 and 2008–09; therefore, data for these years are unavailable and not presented in Figure 14. The issue of distinguishing the type of intervention order breached was resolved with the introduction of the FVPA in 2008.

- 3.10 There may be multiple contravention charges in relation to a single FVIO, which will increase the total number of contravention charges in one year. Further, an FVIO contravention charge in one year may relate to an FVIO made in another year. Accordingly, the Council makes only tentative conclusions about the rate of contravention charges over these periods.
- 3.11 With these qualifications in mind, over the two reference periods there was approximately one sentenced contravention charge for every three to four FVIOs made. Although the sentenced charge rate changed slightly in each financial year, the rate was broadly consistent across the two periods.

## Family violence safety notices

- 3.12 Figure 15 shows the number of sentenced FVSN contravention charges, compared with the number of FVSNs issued, between 2009–10 and 2011–12. Over this period, there was approximately one sentenced contravention charge for every 20 FVSNs issued. Given the limited duration of FVSNs, it is likely that this figure reflects the average rate of FVSN contravention over the period examined. An FVSN contravention charge will almost always relate to an FVSN issued in the same year.
- 3.13 Victoria Police suggested that the lower rate of FVSN contravention (in comparison with FVIO contravention) is most likely explained by the limited time in which a respondent can contravene an FVSN.<sup>85</sup> Between 2009–10 and 2011–12, FVSNs lasted for a maximum of 72 hours (that is, the first mention date for the FVIO application would occur within 72 hours after service of the FVSN).

**Figure 15:** Number of family violence safety notices issued by Victoria Police and number of sentenced charges of contravention of a family violence safety notice, Magistrates' Court of Victoria, 2009–10 to 2011–12



## Contravention investigations

- 3.14 As one specialist remarked during the Council's consultations, FVIOs do not provide a 'magic shield' against further violence.<sup>86</sup> The rate of sentenced FVIO contravention charges attests to this. As an injunctive remedy, an FVIO will have limited value unless compliance with the order is strictly enforced. This was emphasised by the Court of Appeal in *Director of Public Prosecutions v Johnson* (quoting the 2006 report of the Victorian Law Reform Commission on the reform of family violence laws) where Neave JA stated:

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 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' [Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006) [10.67]].<sup>87</sup>

<sup>85</sup> Meeting with Victoria Police (27 May 2013).

<sup>86</sup> Meeting with inTouch Multicultural Centre Against Family Violence (19 June 2013).

<sup>87</sup> *Director of Public Prosecutions v Johnson* (2011) 213 A Crim R 262 [5] (Neave JA).

- 3.15 The Victoria Police Family Violence Code of Practice requires a full investigation of all reported contraventions, regardless of the perceived seriousness of the contravention. It states:
- FVIOs and FVSNs must be strictly interpreted and enforced. There is no such lawful term as a 'technical' contravention and police should consider laying charges for any contravention. Ignoring the contravention conveys to the respondent and the AFM [affected family member] that the order is not taken seriously. An outcome of this could be continued abuse, further police involvement in subsequent contraventions, and possible harm to the AFM and/or their children.<sup>88</sup>
- 3.16 There are other relevant requirements under the Family Violence Code of Practice. For example, when preparing witness statements, police must ask protected persons about the personal impact of the alleged contravention. Should the matter be prosecuted, it is intended that this information 'will assist Magistrates in assessing the seriousness of the offence by placing the contravention in context'.<sup>89</sup> The requirement to collect this information is new to the second edition (2010) of the Family Violence Code of Practice.
- 3.17 Further, during the course of the investigation, police must assess whether the existing FVIO meets the ongoing safety needs of the protected person. As part of this assessment, police must consider whether there is any need to extend an existing FVIO, apply for a variation to the conditions of an FVIO, ensure any children are included on an FVIO if they are not already or apply for another FVIO.<sup>90</sup> This provision of the Family Violence Code of Practice implements a recommendation made by the Council in its 2009 report.<sup>91</sup>
- 3.18 In its 2009 report, the Council found that the original FVIO was sometimes no longer in force at the time of sentencing. This raises potential risks for victims where the sentence imposed for contravention does not directly protect the victim by prohibiting certain behaviour by the offender. In addition, the full risk of harm to the victim may only become apparent upon contravention. It is therefore important for police to consider, when investigating an alleged contravention, whether an FVIO requires extension or whether a new FVIO needs to be made.<sup>92</sup>
- 3.19 The FVPA provides a power of arrest without warrant for contravention of an FVIO or an FVSN.<sup>93</sup> Where a person is arrested on suspicion of either of the new aggravated contravention offences, that person will be required to show cause why bail should not be denied.<sup>94</sup>

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<sup>88</sup> Victoria Police (2010), above n 53, [4.8]. This is consistent with the original edition of the Family Violence Code of Practice: Victoria Police, *Code of Practice for the Investigation of Family Violence* (2004) [4.6.1].

<sup>89</sup> Victoria Police (2010), above n 53, [4.8.2.2].

<sup>90</sup> Victoria Police (2010), above n 53, [4.8.2.3].

<sup>91</sup> Sentencing Advisory Council (2009), above n 3, xiii.

<sup>92</sup> Sentencing Advisory Council (2009), above n 3, [4.75]–[4.78].

<sup>93</sup> *Family Violence Protection Act 2008* (Vic) ss 38, 124.

<sup>94</sup> This requirement is subject to certain qualifications: *Bail Act 1977* (Vic) s 4(4)(ba).

## Chapter 4

# Sentencing

- 4.1 Sentencing outcomes in relation to family violence intervention order contravention have changed considerably since publication of the Council's 2009 report into this topic. This chapter presents a comparison of sentencing outcomes over the two reference periods: July 2004 to June 2007 and July 2009 to June 2012.
- 4.2 The Council's analysis reveals that between the two reference periods:
- the use of fines declined by 30.5% and the use of adjourned undertakings increased by 27.1% in FVIO contravention cases as a whole;
  - the use of fines declined by 34.1% in cases where the contravention offence was the only offence sentenced, and by 32.3% in cases where co-occurring offences were sentenced alongside the contravention offence;
  - the use of fines declined by 44.4% in cases involving a second or subsequent FVIO contravention ('repeat contravention cases');
  - custodial sentences<sup>95</sup> increased in repeat contravention cases – immediate terms of imprisonment increased by 34.0% and wholly suspended sentences of imprisonment increased by 68.5%; and
  - in repeat contravention cases, sentences escalated to a greater extent following the imposition of a fine for the first contravention offence.

## The sentencing framework

- 4.3 The sentencing of adults in Victoria is governed by the provisions of the *Sentencing Act 1991* (Vic) and sentencing principles developed at common law. The *Family Violence Protection Act 2008* (Vic) (FVPA) does not set out any sentencing principles that are specific to family violence intervention order (FVIO) or family violence safety notice (FVSN) contravention.
- 4.4 The *Sentencing Act 1991* (Vic) provides that sentences in Victoria may only be imposed for one or more of the following purposes:
- to punish the offender;
  - to denounce the offender's conduct;
  - to facilitate the offender's rehabilitation;
  - to protect the community by reducing the offender's capacity to commit further offences; and
  - to deter the offender or other people from committing the same or similar offences (otherwise known as 'specific' and 'general' deterrence).<sup>96</sup>
- 4.5 In seeking to achieve any of these purposes, a court must ordinarily apply sentencing principles such as totality (if an offender is being sentenced for multiple offences, the total sentence imposed must reflect the overall criminality of the offending behaviour), proportionality (the sentence must be proportionate to the seriousness of the offending behaviour) and parsimony (the court must use the least severe sentencing option that will achieve the purpose or purposes of sentencing in each particular case).<sup>97</sup>

<sup>95</sup> Custodial sentences comprise immediate terms of imprisonment and partially or wholly suspended sentences of imprisonment.

<sup>96</sup> *Sentencing Act 1991* (Vic) s 5(1).

<sup>97</sup> *Sentencing Act 1991* (Vic) s 5(3).

- 4.6 The sentencing process is therefore a balancing exercise. The sentence imposed by the court will not be a direct response to any single factor, such as the nature and gravity of the offence, or any single purpose, such as rehabilitation. Rather, a judge or magistrate will determine the sentence ultimately imposed after balancing all of the factors that may be present in the circumstances of a case.<sup>98</sup>
- 4.7 The Council suggested in its 2009 report that community and victim protection should be the paramount purpose of sentencing for FVIO contravention offences. As the primary function of an FVIO is to protect the victim from future harm, the Council proposed that the four other purposes of sentencing should be balanced against the purpose of community and victim protection.<sup>99</sup> The purposes of specific and general deterrence may assume particular importance where the offender has contravened an FVIO on multiple occasions.<sup>100</sup>

## Available sentences

- 4.8 The full range of sentencing dispositions under the *Sentencing Act 1991 (Vic)*, up to and including the maximum penalty provided in the FVPA, is available for the general contravention offence.

### Community-based sentences

- 4.9 The type and availability of community-based sentences changed in January 2012. Prior to January 2012, two main types of community-based sentences were imposed for FVIO contravention over the two reference periods. These were community-based orders (CBOs) and intensive correction orders (ICOs).
- 4.10 CBOs were available until 16 January 2012. CBOs generally required the performance of unpaid community work. The court could also order offender attendance at rehabilitative or treatment programs. In the case of FVIO contravention, one potential rehabilitative condition was the offender's attendance at a behavioural change program. CBOs permitted varying degrees of offender supervision. As a minimum, offenders would report to a community corrections officer during the term of the order. Offenders with a high risk of reoffending could be subject to a greater level of monitoring and supervision.<sup>101</sup>
- 4.11 ICOs were available until 16 January 2012. An ICO was technically considered a custodial sentence and was imposed where the court considered that sentencing the offender to a term of imprisonment was justified, but that it was desirable for that sentence to be served by way of supervised intensive correction in the community. ICOs involved a number of required conditions, in addition to a similar range of conditions to CBOs. The option of imprisonment remained available to the court if, for example, the offender could no longer, or would not, comply with the ICO.<sup>102</sup>
- 4.12 CBOs and ICOs were abolished under the *Sentencing Amendment (Community Correction Reform) Act 2011 (Vic)* and replaced with community correction orders (CCOs), which have been available since 16 January 2012. Accordingly, relatively few CCOs have been issued during the second reference period (which ended in June 2012).

<sup>98</sup> *Markarian v The Queen* (2005) 228 CLR 357.

<sup>99</sup> Sentencing Advisory Council (2009), above n 3, [6.9]–[6.14], Appendix I.

<sup>100</sup> *Director of Public Prosecutions v Johnson* (2011) 213 A Crim R 262 [42]–[43] (Redlich JA).

<sup>101</sup> *Sentencing Act 1991 (Vic)* pt 3 div 3 (Division now repealed).

<sup>102</sup> *Sentencing Act 1991 (Vic)* pt 3 div 2 sub-div (2) (Subdivision now repealed).

- 4.13 CCOs permit a broader range of rehabilitative, supervisory, monitoring and offender behaviour conditions than CBOs and ICOs. These conditions allow for treatment and rehabilitation in relation to health, education or employment; supervision and management by community corrections officers; and/or court monitoring of CCO compliance. In addition, a CCO may prohibit the offender from contacting certain persons, exclude the offender from a particular residence or impose a curfew on the offender – each of these conditions may be particularly relevant to sentencing for FVIO contravention. The Magistrates' Court may impose a CCO for a maximum period of 2 years. The County and Supreme Courts may impose a CCO for a maximum period of 2 years or the maximum period of imprisonment available for the offence, whichever is greater.<sup>103</sup>

### Suspended sentences

- 4.14 A suspended sentence is a term of imprisonment that is suspended for a specified period (described as the 'operational period'), subject to the offender not being convicted, during that operational period, of an offence for which the maximum penalty includes a sentence of imprisonment.<sup>104</sup>
- 4.15 Although suspended sentences are being progressively abolished in Victoria,<sup>105</sup> suspended sentences were available for the general contravention offence during both reference periods.

## Sentencing outcomes

### Family violence intervention orders

- 4.16 Figure 16 (page 32) compares the sentences imposed for FVIO contravention over the two reference periods. These are the sentencing outcomes for all cases that included a proven charge of FVIO contravention, regardless of whether the contravention offence was the only offence sentenced, or whether other offences were sentenced alongside the contravention offence. The Council has separately analysed the sentencing outcomes in contravention-only cases and co-occurring offence cases at [4.29] and following.<sup>106</sup>
- 4.17 Across all FVIO contravention cases, the use of fines declined by 30.5% and the use of adjourned undertakings increased by 27.1% between the two reference periods. Community orders (comprising CBOs, ICOs or CCOs) increased by 9.1%. Diversions and dismissals also increased, but these remain very uncommon orders for FVIO contravention.
- 4.18 The use of custodial sentences remained essentially stable over the two periods, with imprisonment imposed in approximately 11% of cases, and wholly or partially suspended sentences of imprisonment imposed in approximately 13% of cases.<sup>107</sup>
- 4.19 In summary, Figure 16 shows a shift away from financial penalties to sentences with greater potential for some form of intervention in the lives of offenders. As discussed in Chapter 5, this appears to have resulted from a change in sentencing practices, rather than a change in the nature of the contravention behaviour.

<sup>103</sup> *Sentencing Act 1991* (Vic) pt 3A.

<sup>104</sup> *Sentencing Act 1991* (Vic) ss 27(2B), 143(6), (9).

<sup>105</sup> Suspended sentences are no longer available for 'serious' or 'significant' offences: *Sentencing Act 1991* (Vic) s 3. The *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) will remove the availability of suspended sentences for all offences; however, at the time of publication, the relevant sections of this Act had not yet been proclaimed.

<sup>106</sup> Where there were multiple proven FVIO contravention charges in a case, Figure 16 records the sentence imposed for the principal contravention charge, that is, the contravention charge that received the most severe sentence in the case.

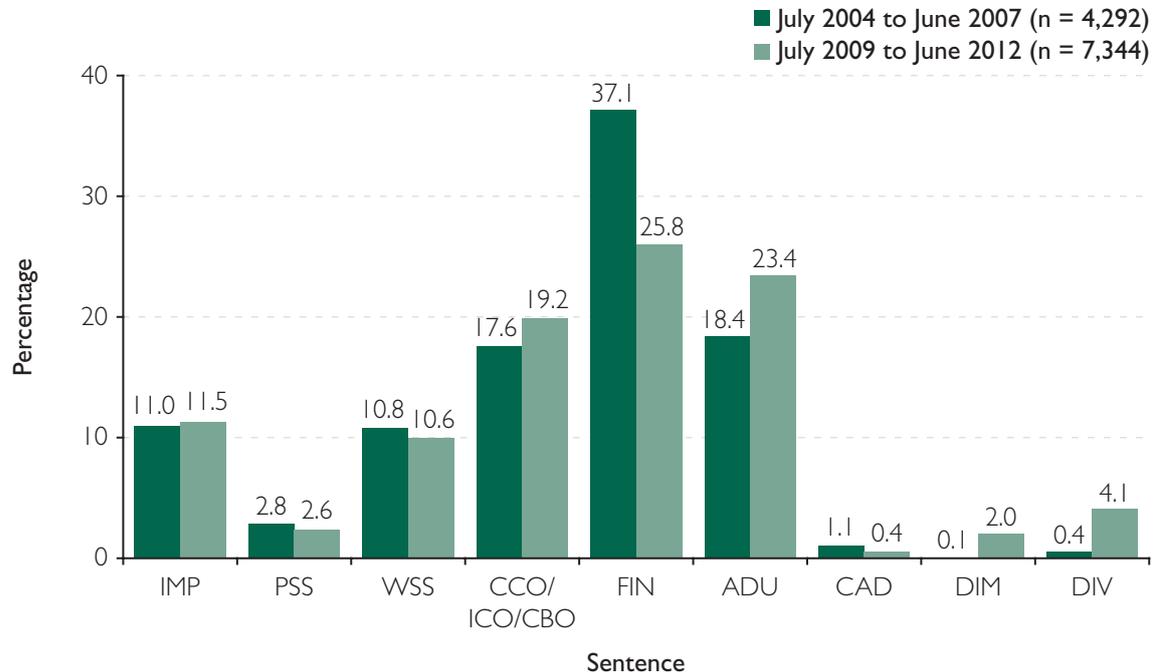
<sup>107</sup> The availability of suspended sentences in all Victorian courts is being progressively abolished: see above n 105. Future datasets will likely identify which sentences are being used in the place of suspended sentences.

- 4.20 The average (mean) fine amount increased from \$433.10 to \$550.10 between the two periods, and the median fine amount increased from \$400 to \$500 (an average annual inflation rate of 2.8% may partly account for these increases).
- 4.21 Across all measures, there have been increases in the length of imprisonment imposed. Between the two periods, the median length of imprisonment increased from 1 month to 1.8 months, and the average (mean) length of imprisonment increased from 2 months to 2.9 months. The longest term of imprisonment increased from 15 months to 18 months (the statutory maximum for the general contravention offence is Level 7 (2 years) imprisonment).
- 4.22 The sentences outlined in Figure 16 are those imposed for contravention of either interim or final FVIOs. The Council was not able to separate the sentencing data in respect of each order. It is possible that the sentences imposed for interim FVIO contravention may differ from those imposed for final FVIO contravention. An interim FVIO is more likely to be contravened in close proximity to the making of the order. A proximate contravention is likely to be regarded as an aggravating factor in sentencing, which may result in a greater proportion of mid- to high-end orders for interim FVIO contravention than for final FVIO contravention.

#### Wider sentencing trends

- 4.23 In order to determine whether the sentencing trends for FVIO contravention were consistent with sentencing trends across the Magistrates' Court as a whole, the Council examined the sentences imposed in all cases in the Magistrates' Court over the two reference periods.

**Figure 16:** Percentage of principal contravention of family violence intervention order charges by sentence type, Magistrates' Court of Victoria, 2004–05 to 2006–07 and 2009–10 to 2011–12<sup>108</sup>



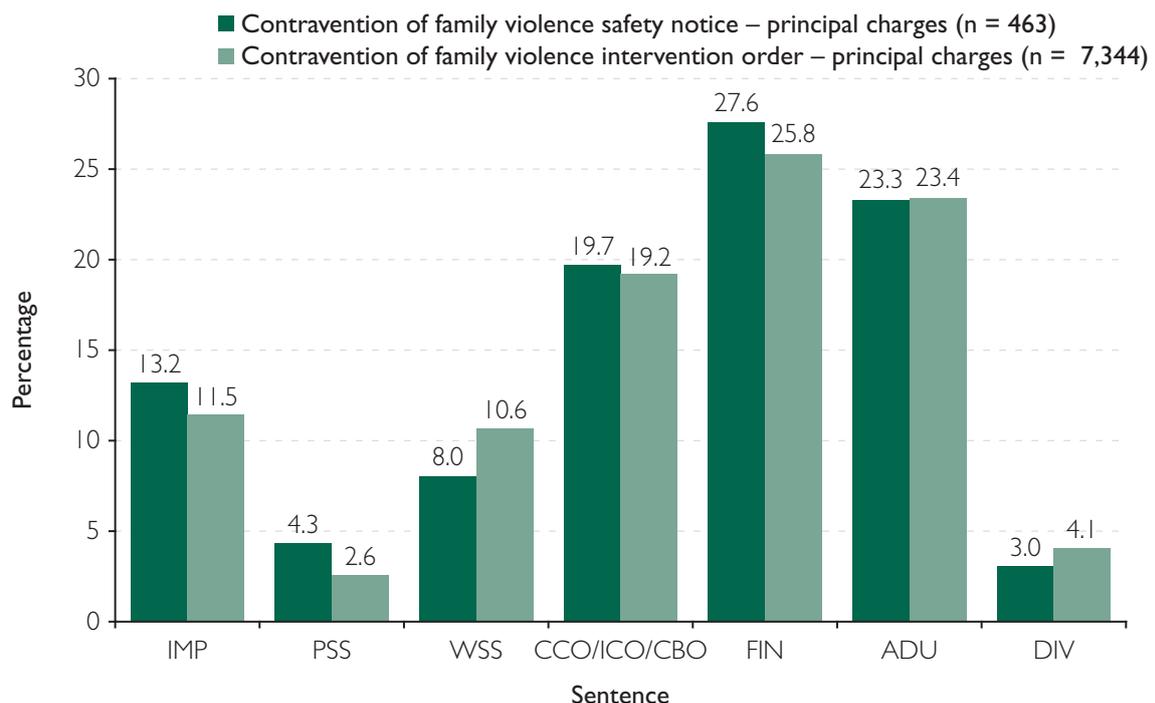
<sup>108</sup> The percentages for each period may not total 100% as 'other' sentences are not shown. Less than 1% of sentences fell into the 'other' category for both periods. The sentences presented in Figure 16 are the sentences imposed for the principal FVIO contravention charge (i.e. the FVIO contravention charge that received the most severe sentence in a case). An alternative analysis would be to examine the total effective sentence imposed in a case, i.e. the final sentence resulting from orders of cumulation or concurrency for each of the sentencing orders in a case. For the period from July 2009 to June 2012, the total effective sentences imposed in FVIO contravention cases and the sentences imposed for the principal FVIO contravention charge were broadly similar.

- 4.24 Across the Magistrates' Court as a whole, there was little variation in sentencing outcomes between the two periods. On a court-wide basis, fines were imposed in 58.4% of cases between 2004–05 and 2006–07, and in 55.9% of cases between 2009–10 and 2011–12. Over both periods, fines were the most common sentence by a very substantial margin. The second most common sentence – adjourned undertakings – was imposed in less than 13% of cases. Over the two reference periods, there was a small decline in the use of fines and a small increase in adjourned undertakings, which may be largely attributable to the changes in sentencing for FVIO contravention over the most recent period.
- 4.25 Accordingly, the sentencing trends for FVIO contravention are not consistent with sentencing trends across the Magistrates' Court as a whole. This suggests that factors unique to the contravention offence are responsible for the change in sentencing outcomes shown in Figure 16.

## Family violence safety notices

- 4.26 Sentenced FVSN contravention charges are relatively rare ( $n < 250$  per annum). Accordingly, only tentative observations can be made about the distribution of sentences for this offence.
- 4.27 Figure 17 compares the sentences imposed for FVSN contravention with the sentences imposed for FVIO contravention.
- 4.28 The sentence distribution for FVSN contravention and FVIO contravention is broadly similar, implying that the factors underlying the sentencing of each offence are also broadly similar. One area of difference may be the timing of FVSN contraventions. Prior to 4 February 2013, FVSNs lasted for 72 hours (they now last for 120 hours). Since an FVSN contravention occurs only a short time after issue of the notice, this proximate contravention in disregard of the notice is likely to be considered an aggravating factor.<sup>109</sup> That factor may explain the greater use of imprisonment and partially suspended sentences for FVSN contravention.

**Figure 17:** Percentage of principal contravention of safety notice and contravention of intervention order charges by sentence type, Magistrates' Court of Victoria, 2009–10 to 2011–12



<sup>109</sup> Meeting with Magistrates' Court of Victoria (12 June 2013).

## Contravention-only and co-occurring offence cases

- 4.29 The Council has separately analysed sentencing outcomes in two scenarios: first, where the FVIO contravention offence was the only offence sentenced ('contravention-only cases'), and second, where other offences were sentenced alongside the contravention offence ('co-occurring offence cases'). This analysis was conducted in order to determine whether:
- there has been, over the most recent period, an increase in co-occurring offence cases (which may lead to the imposition of more severe sentences for FVIO contravention);
  - the decline in the use of fines and the increase in the use of adjourned undertakings was observable in contravention-only cases (i.e. when controlling for the effects of wider criminality); and
  - there were ongoing differences in sentencing outcomes between contravention-only cases on the one hand and co-occurring offence cases on the other hand.
- 4.30 Generally speaking, the sentencing outcomes in co-occurring offence cases will be more severe, given the higher level of criminality shown by the offender, than those in contravention-only cases. Co-occurring offences may relate directly to the contravention offence; for example, the contravention may involve threats to kill, criminal damage or assault. Alternatively, co-occurring offences may be unrelated to the contravention offence, as it is common for the Magistrates' Court to sentence several, sometimes unrelated offences during the one hearing.
- 4.31 Table 1 presents the number and proportion of contravention-only cases and co-occurring offence cases over the two reference periods.

**Table 1:** Number and percentage of family violence intervention order contravention cases with other offences or with no other offences, Magistrates' Court of Victoria, 2004–05 to 2006–07 and 2009–10 to 2011–12

	July 2004 to June 2007		July 2009 to June 2012	
	No.	%	No.	%
Contravention cases with no other offences	2,430	56.6	4,017	54.7
Contravention cases with other offences	1,862	43.4	3,327	45.3
Total	4,292	100.0	7,344	100.0

- 4.32 There has been little change in the proportion of FVIO contravention cases that comprise contravention-only cases or co-occurring offence cases. Between the two reference periods, contravention-only cases declined slightly, from 56.6% to 54.7% of all FVIO contravention cases, while co-occurring offence cases increased slightly, from 43.4% to 45.3% of all FVIO contravention cases.
- 4.33 Although these are relatively small differences in percentage points, the Council's statistical analysis has found that differences of those magnitudes for groups of this size are unlikely to have occurred simply through random variation, and in that sense they have some statistical significance.<sup>110</sup>
- 4.34 Nevertheless, these variations are not sufficiently large to have appreciably contributed to the substantial decline in the use of fines for FVIO contravention.
- 4.35 Further, over the two reference periods, there has been little change in the nature of the most common co-occurring offences sentenced alongside the FVIO contravention offence, as Table 2 shows. Any appreciable change in the nature of the most common co-occurring offences might have partly explained the decline in the use of fines; however, this was not observed.

**Table 2:** Most frequently occurring offences in cases containing at least one count of contravention of a family violence intervention order, July 2004 to June 2007 and July 2009 to June 2012

Rank	July 2004 to June 2007			July 2009 to June 2012		
	Offence	%	No.	Offence	%	No.
1	Breach of family violence intervention order	100.0	4,273	Contravention of family violence intervention order	100.0	7,588
2	Unlawful assault	17.5	746	Unlawful assault	20.4	1,549
3	Criminal damage	16.6	710	Criminal damage	15.0	1,137
4	Fail to answer bail	11.0	469	Fail to answer bail	10.2	776
5	Causing injury recklessly	10.8	463	Causing injury recklessly	10.0	760
6	Theft	9.2	395	Theft	8.2	622
7	Make threat to kill	7.5	319	Make threat to kill	6.6	503
8	Assault police	6.3	271	Drive while disqualified	4.8	363
9	Drive while disqualified	5.0	212	Stalking	4.6	352
10	Possession of a drug of dependence	4.3	182	Resist police	3.9	295

<sup>110</sup> Chi-square = 3.466 with one degree of freedom; p = 0.062 (note that this is close to the conventional p-value threshold of 0.05 for statistical significance).

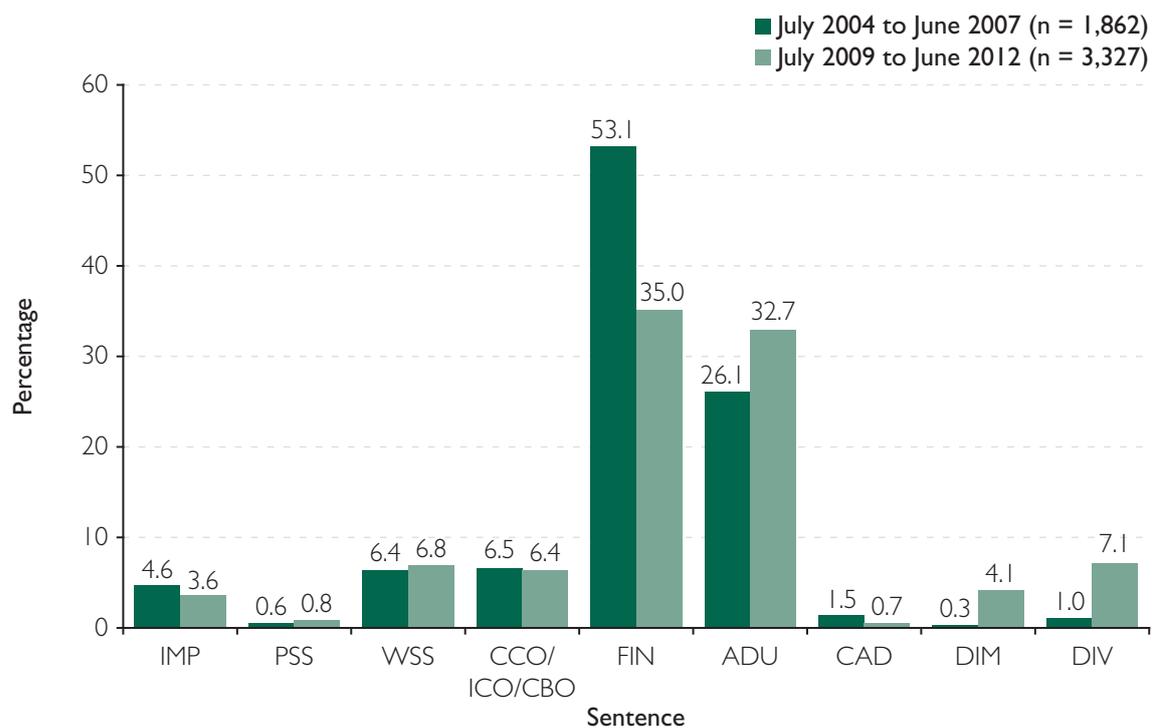
### Contravention-only cases

4.36 Figure 18 compares the sentences imposed in contravention-only cases over the two reference periods.

4.37 The use of fines declined by 34.1% and the use of adjourned undertakings increased by 25.3% between the two periods. The use of community orders was similar over the two periods. The use of suspended sentences was also similar over the two periods, while the use of imprisonment declined by 21.7%. Fines and adjourned undertakings remained the most common sentences in contravention-only cases by a very substantial margin. Over the second reference period, diversions became the third most common sentence in contravention-only cases.

4.38 These findings confirm that there has been a shift away from fines in FVIO contravention cases, even when controlling for wider criminality. The findings also confirm that contravention-only cases rarely result in mid- to high-end sentences, based on the orders imposed over the two reference periods.

**Figure 18:** Contravention cases with no other offences – percentage of principal contravention of family violence intervention order charges by sentence type, Magistrates' Court of Victoria, 2004–05 to 2006–07 and 2009–10 to 2011–12<sup>iii</sup>

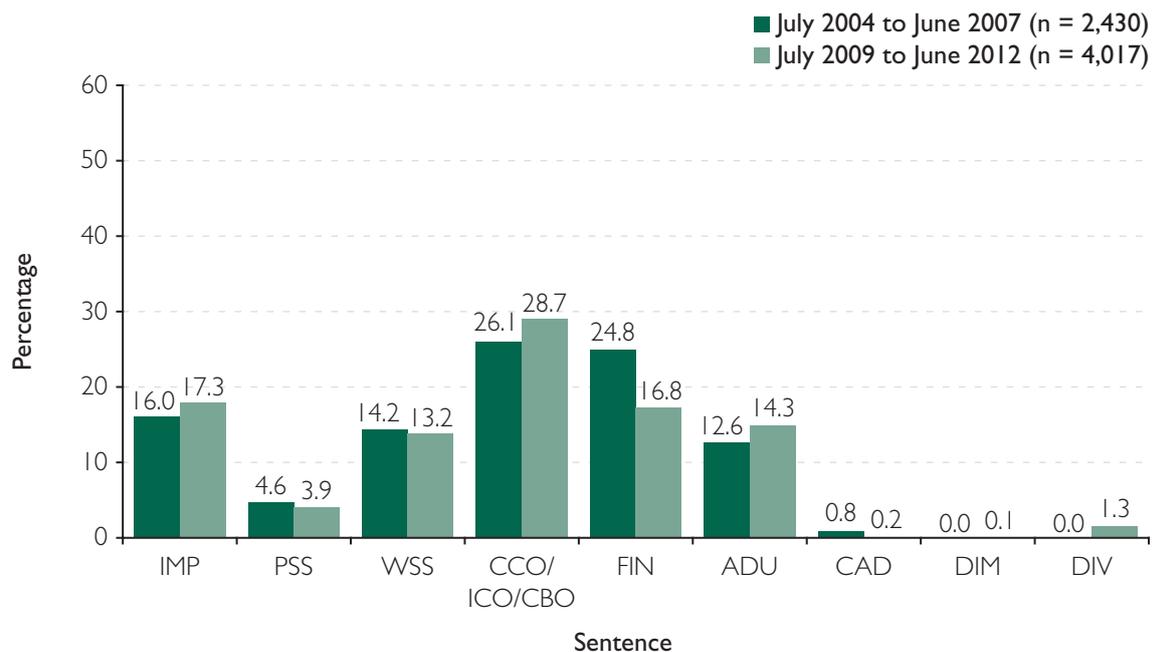


<sup>iii</sup> The percentages for each period may not total 100% as 'other' sentences are not shown. Less than 1% of sentences fell into the 'other' category for both periods.

## Co-occurring offence cases

- 4.39 In this report, the Council has analysed the sentences imposed for FVIO contravention where there are co-occurring offences in the same case (a 'same case' analysis). An alternative analysis would be to analyse sentencing outcomes only where the co-occurring offences occurred on the same date as the contravention offence (a 'same date' analysis).
- 4.40 On one view, offences occurring on the same date as the contravention offence may be more likely to relate to the contravention behaviour. However, contravention-related offending, and any other relevant acts of family violence, may occur over the course of several days or weeks. Accordingly, a 'same date' analysis may not capture that offending. The Council therefore considers that a 'same case' analysis is a reliable measure of the effects of wider criminality on sentencing for FVIO contravention.
- 4.41 Figure 19 compares the sentences imposed in co-occurring offence cases over the two reference periods.
- 4.42 The use of fines declined by 32.3% between the two periods. There were small increases in adjourned undertakings, community orders and imprisonment. The use of suspended sentences declined slightly. Community orders remained the most common sentence in co-occurring offence cases over the second reference period. Imprisonment marginally displaced fines as the second most common sentence over the same period.
- 4.43 These findings confirm that the increase in community orders in FVIO contravention cases overall has been predominantly driven by cases where there is wider criminality, rather than the contravention offence alone. There remains a stark difference between the frequent use of community orders and imprisonment in co-occurring offence cases and the infrequent use of these sentences in contravention-only cases.

**Figure 19:** Contravention cases with at least one other offence – percentage of principal contravention of family violence intervention order charges by sentence type, Magistrates' Court of Victoria, 2004–05 to 2006–07 and 2009–10 to 2011–12<sup>112</sup>



<sup>112</sup> Ibid.

## Repeat contravention

4.44 The sentences imposed for repeat contravention warrant separate examination. Prior offending is one of the most influential factors in sentencing and is a key predictor of sentencing outcomes.<sup>113</sup> The court considers prior offending in assessing the 'offender's previous character'.<sup>114</sup> Prior offending may lead to a more severe sentence for a second or subsequent offence of the same type – this is known as 'escalation' in sentencing. However, there is no general principle requiring an automatic escalation of sentence upon repeat contravention. As the High Court of Australia stated in *Veen v The Queen [No 2]*:

The antecedent criminal history is relevant ... to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.<sup>115</sup>

4.45 The sentencing outcomes in relation to repeat contravention have changed markedly. Sentences have become more severe in this category, with the use of fines almost halving, and the use of custodial sentences increasing. Imprisonment was the most common sentence for repeat contravention over the second reference period.

### Identifying repeat contravention

4.46 In order to examine repeat contraventions, the Council identified those offenders sentenced for an FVIO contravention charge within either of the reference periods who had been previously sentenced for a contravention charge within the preceding 2 years.

4.47 Given this temporal limitation, the Council has been unable to identify whether a first identified offence within the reference period is the offender's first contravention offence. An offender may have been charged and sentenced for multiple contravention offences prior to the reference period. The Council can therefore only determine that the second identified offence is an offender's second or *subsequent* offence.

4.48 Further, the Council could not identify if the second or subsequent offence related to a contravention of the same order or a different order. As one stakeholder noted during the Council's consultations, whether an offender has contravened the same order multiple times, or separately contravened different orders, will be an important consideration for the court when sentencing.<sup>116</sup>

### Prior offending rates

4.49 Figure 20 presents the rate of recent prior offending by persons sentenced for FVIO contravention. The data are separated according to whether the person has previously been sentenced for the *contravention* offence or for *any* offence.

4.50 The rate of recent prior sentences for the contravention offence has declined marginally. In 2011–12, 13.1% of offenders sentenced for contravention had received a sentence for the same offence within the previous 2 years. In 2006–07, the rate was 15.0%. Although this represents a decline, statistical tests run by the Council found that it may have been due to random variation (that is, the change was not found to be statistically significant).<sup>117</sup>

<sup>113</sup> Sentencing Advisory Council, *Reoffending Following Sentencing in the Magistrates' Court of Victoria* (2013) 15. By 'prior offending' the Council means prior proven charges for which a sentence is imposed. References to prior sentences, prior convictions and prior offending are used interchangeably in the discussion.

<sup>114</sup> *Sentencing Act 1991* (Vic) ss 5(2)(f), 6(a)–(c).

<sup>115</sup> *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477–8 (Mason CJ, Brennan, Dawson and Toohey JJ).

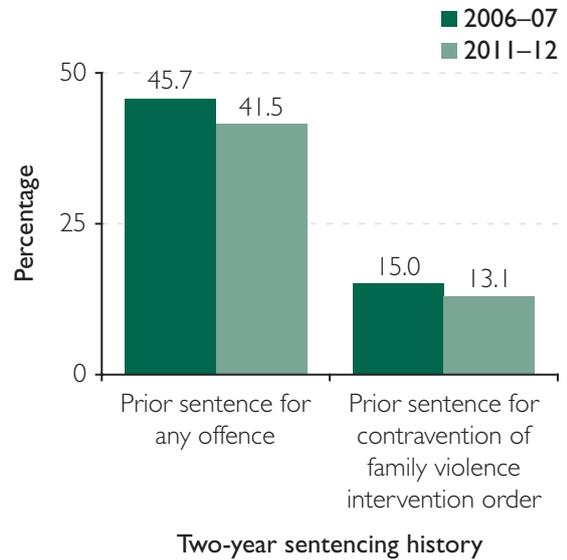
<sup>116</sup> Roundtable I (20 May 2013).

<sup>117</sup> Chi-square = 7.77, p = 0.10.

4.51 The rate of recent prior sentences for any offence has declined. In 2006–07, 45.7% of offenders sentenced for contravention had received a sentence for any offence within the previous 2 years. The rate declined to 41.5% in 2011–12. This decline is statistically significant.<sup>118</sup>

4.52 Ordinarily, a change in the rate of prior offending would influence sentencing outcomes, particularly given the positive association between prior offending and the use of custodial sentences.<sup>119</sup> However, these findings indicate that the imposition of more severe sentences for repeat contravention is not due to any increase in prior offending; indeed, these types of sentences have been imposed despite a small but statistically significant decrease in prior offending.

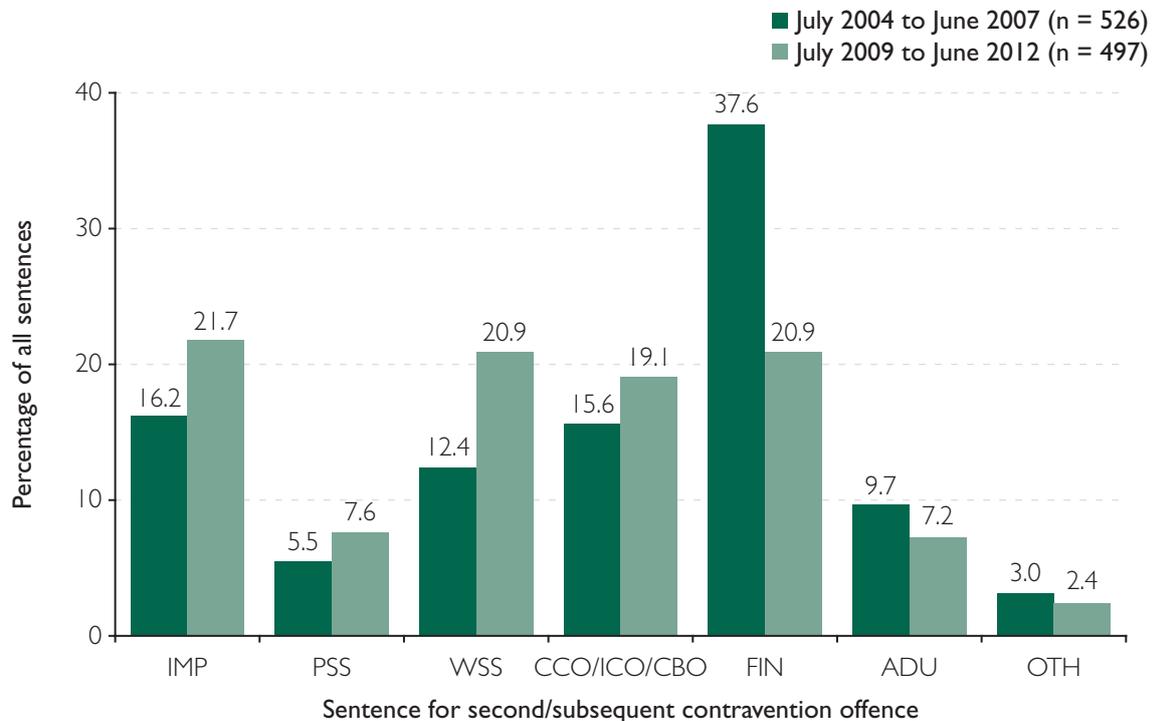
**Figure 20:** Percentage of people sentenced for contravention of a family violence intervention order by recent prior sentencing/offending history, Magistrates’ Court of Victoria, 2006–07 and 2011–12



**Sentencing outcomes**

4.53 Figure 21 compares the sentences imposed for repeat FVIO contravention over the two reference periods.

**Figure 21:** Percentage of cases sentenced for a second/subsequent contravention of a family violence intervention order by selected sentence attached to the principal charge of this offence, Magistrates’ Court of Victoria, 2004–05 to 2006–07 and 2009–10 to 2011–12



<sup>118</sup> Chi-square = 13.56, p < 0.01.

<sup>119</sup> Sentencing Advisory Council (2013), above n 113, 15.

- 4.54 The sentence distribution for repeat contravention changed considerably between the two periods. The use of fines almost halved (a decline of 44.4%) and the use of adjourned undertakings declined by 25.8%. Alongside these declines was a rise in the use of custodial sentences – imprisonment increased by 34.0%, partially suspended sentences increased by 38.2% and wholly suspended sentences increased by 68.5%. The use of community orders increased by 22.4%. Over the second reference period, imprisonment was, by a small margin, the most common sentence for repeat contravention. This represents a marked change, given that, over the first reference period, fines were the most common sentence for repeat contravention by a very substantial margin.
- 4.55 In order of occurrence, the main sentences for repeat contravention from 2009–10 to 2011–12 were imprisonment, suspended sentences (particularly wholly suspended sentences), fines and community orders.

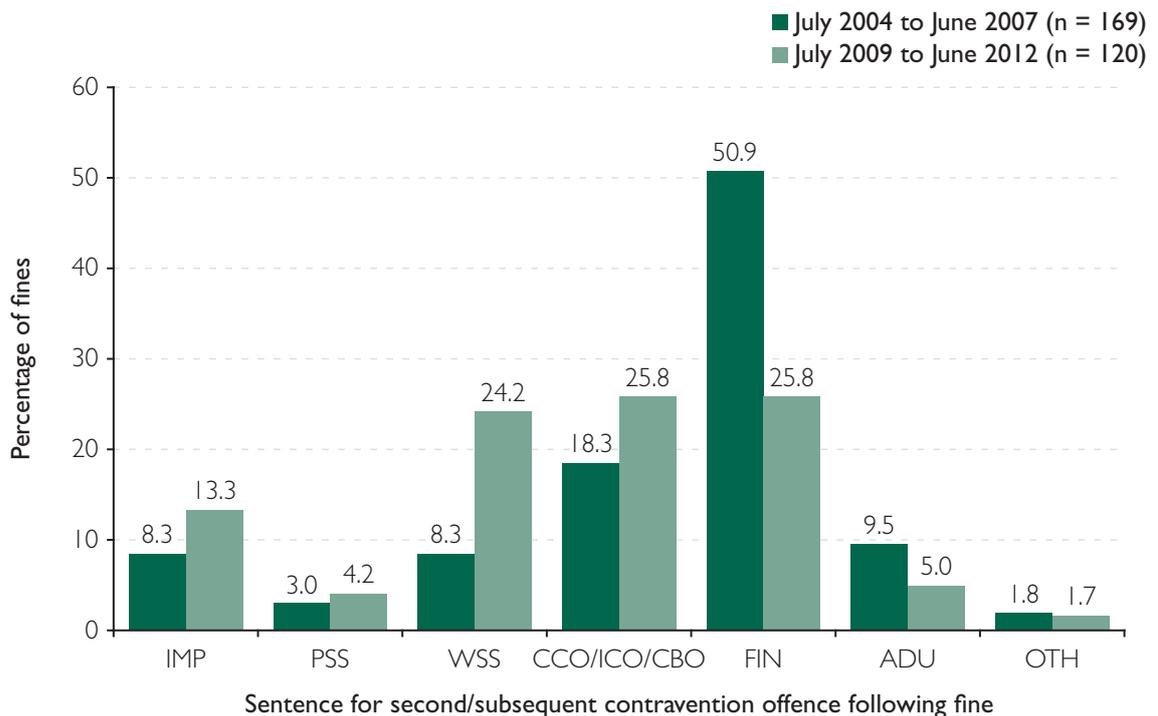
**Sentence transitions**

- 4.56 There is some evidence of greater escalation in sentencing over the second reference period. As noted above, escalation involves the imposition of a more severe sentence for a second or subsequent contravention than that imposed for the first contravention.
- 4.57 The Council has sought to analyse sentence transitions across four categories of repeat contravention. These four categories are the sentences imposed for a second/subsequent contravention after the first contravention received a fine, an adjourned undertaking, a community-based order or imprisonment. The data in the last three categories did not contain a sufficient number of sentences for a reliable analysis to be conducted. The Council therefore has concentrated on the sentence transitions following imposition of a fine for the first contravention offence.

**Sentence transitions after a fine**

- 4.58 Figure 22 compares the sentences imposed, over the two reference periods, in second/subsequent contravention cases where the first contravention received a fine.

**Figure 22:** Percentage of cases sentenced for a second/subsequent contravention of a family violence intervention order after fine, by selected sentence attached to the principal charge of this offence, Magistrates’ Court of Victoria, 2004–05 to 2006–07 and 2009–10 to 2011–12



- 4.59 There is evidence of greater escalation in sentencing following the imposition of a fine for the first contravention. Over the first reference period, sentences generally did not escalate upon repeat contravention, with a further fine issued in 50.9% of cases. The distribution of sentences has changed markedly since that time. Between the two reference periods, the use of fines halved (a decline of 49.3%) and the use of community orders increased by 41.0%. The use of wholly suspended sentences increased by 191.6%, and the use of immediate sentences of imprisonment increased by 60.2%.
- 4.60 These findings suggest that, compared with the first reference period, in the second reference period the court more commonly considered the imposition of a fine to be an inappropriate response to repeat contravention.

## Recording a conviction

- 4.61 Under Victorian law, there is a distinction between a finding of guilt and the recording of a conviction. A court generally retains the discretion, after a charge has been proved, to determine whether or not a conviction should be recorded. When ordering a custodial sentence, the court must record a conviction as part of the sentence. But in other cases – such as where a fine, an adjourned undertaking or a community correction order is imposed – the court may decide whether to record a conviction or not.<sup>120</sup>
- 4.62 In exercising its discretion whether to record a conviction or not, the court must have regard to all the circumstances of the case, including the nature of the offence, the character and past history of the offender and the potential impact of the recording of a conviction on the offender's economic or social wellbeing or employment prospects.<sup>121</sup>
- 4.63 The distinction between sentences recorded 'with conviction' and 'without conviction' is perhaps less meaningful in practice, since it is Victoria Police policy to disclose all findings of guilt in criminal history records, including findings of guilt 'without conviction'.<sup>122</sup>

## Convictions for contravention offences

- 4.64 Figure 23 (page 42) shows the percentage of FVIO contravention charges that received a formal conviction by sentence type in 2006–07 and from 2009–10 to 2011–12. Over both periods, convictions were very frequently attached to fines and community orders, and relatively infrequently attached to adjourned undertakings.
- 4.65 There has been a decline in recorded convictions for FVIO contravention. In 2006–07, a conviction was attached to 77.2% of principal contravention charges; this declined to 70.8% over the period from 2009–10 to 2011–12.<sup>123</sup>
- 4.66 It appears that the decline in recorded convictions is partly attributable to the reduction in the use of fines and the increase in the use of adjourned undertakings for FVIO contravention overall. According to the Magistrates' Court data analysed by the Council, the court generally attaches convictions to fines, and less commonly attaches convictions to adjourned undertakings. The same pattern is also observed for FVIO contravention, as demonstrated by Figure 23.

<sup>120</sup> *Sentencing Act 1991 (Vic)* ss 7(1), 8.

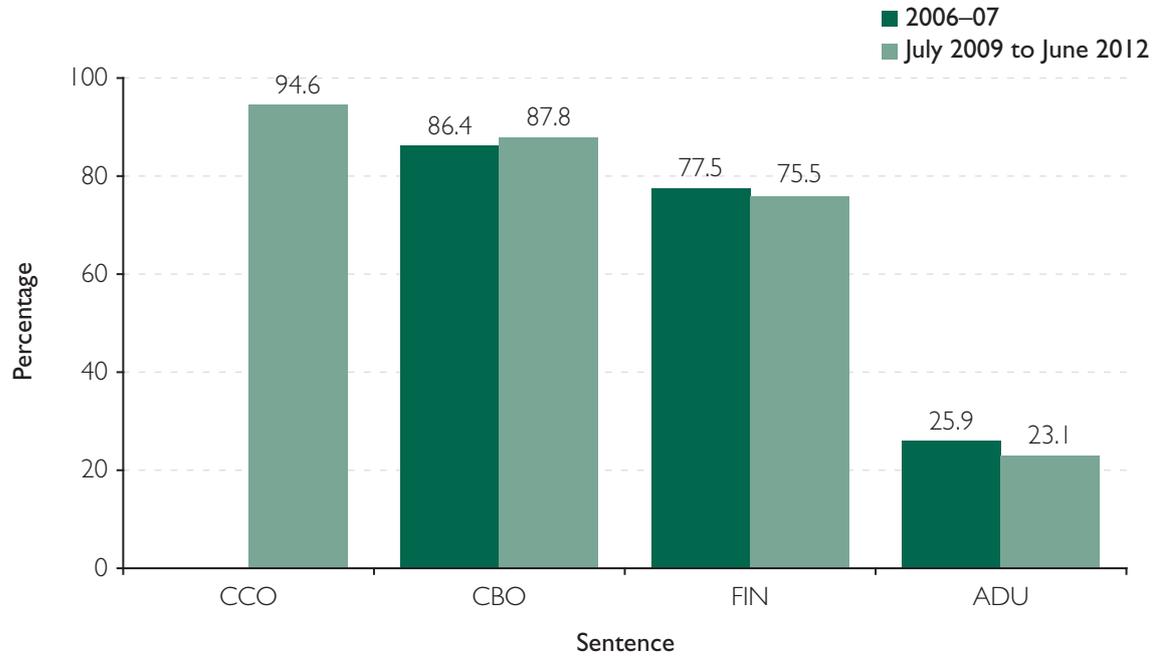
<sup>121</sup> *Sentencing Act 1991 (Vic)* s 8.

<sup>122</sup> Victoria Police, *Information Release Policy*, Information Sheet (Victoria Police, 2013) <[http://www.police.vic.gov.au/retrievemedias.asp?Media\\_ID=38447](http://www.police.vic.gov.au/retrievemedias.asp?Media_ID=38447)> at 3 July 2013.

<sup>123</sup> Despite this decline, the rate of recorded convictions for FVIO contravention remains higher than the general Magistrates' Court rate. From July 2009 to June 2012, a conviction was attached to 57.7% of charges sentenced by the Magistrates' Court.

4.67 The small but statistically significant decline in the percentage of FVIO contravention offenders with recent prior sentences (as discussed at [4.51]) may also partly explain the decline in recorded convictions for FVIO contravention. The absence of prior offending will be a significant mitigating factor and may be an influential reason for the imposition of a sentence without conviction.

**Figure 23:** Percentage of principal contravention of family violence intervention order charges that received a conviction, by sentence type, Magistrates' Court of Victoria, 2006–07 and 2009–10 to 2011–12



# Chapter 5

## Discussion

- 5.1 In order to gain a better appreciation of the factors underlying sentencing outcomes in this area, the Council conducted a number of consultations with specialist stakeholders.<sup>124</sup> While the qualitative data to emerge from these consultations are necessarily limited in scope, the majority of stakeholders attributed the most recent sentencing outcomes to a change in sentencing practices, rather than a change in the nature of contravention behaviour. Stakeholders considered that this change in sentencing practices reflected a ‘cultural shift’ among key criminal justice institutions.

### The nature of the contravention behaviour

- 5.2 As noted at [1.20], the Council was unable to obtain quantitative data on the nature of the contravention charges sentenced in either reference period. The Council attempted to retrieve these data by sampling a selection of Magistrates’ Court recordings; however, it could not obtain a representative data sample. The Council was also unable to obtain data identifying those contravention cases that involved ‘rolled up’ charges, which would influence the court’s consideration of the nature of the contravention behaviour.<sup>125</sup>
- 5.3 It is possible that the change in sentencing outcomes over the second reference period – particularly the use of more severe sentences for repeat contravention – may be due, in part, to changes in the nature of the contravention behaviour. It is expected that more severe sentencing outcomes would be observed if, for example, the contravention behaviour had, on average, increased in severity. However, certain data suggest that the nature of the contravention behaviour between the two reference periods was essentially unchanged.
- 5.4 First, an increase in the severity of the contravention behaviour is likely to be reflected in an increase in the number of cases with co-occurring offences, and/or an increase in the average number of charges of serious offences. However, as discussed at [4.32]–[4.35], from 2004–05 to 2011–12, the proportion of FVIO cases that comprised co-occurring offence cases only increased by 1.9 percentage points, and the nature of the most common co-occurring offences was broadly unchanged.
- 5.5 Second, stakeholders have generally not perceived any change in the nature of the contravention behaviour over the past five years.<sup>126</sup>

<sup>124</sup> See Appendix B for details of stakeholder roundtables and meetings.

<sup>125</sup> ‘The “rolled-up” charge ... is a mechanism by which the Crown can charge numerous individual indictment charges in a convenient form. It involves a form of drafting that would ordinarily be bad for duplicity, but with the consent of the offender, may be adopted on a plea.’ Judicial College of Victoria, ‘Rolled-Up Charge’, *Victorian Sentencing Manual* (2005–) [9.3.5] <<http://www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual>> at 27 August 2013.

<sup>126</sup> Roundtable I (20 May 2013).

## Cultural change among criminal justice institutions

- 5.6 The operation of the criminal justice system – up to and including sentencing – is influenced by prevailing institutional understandings of family violence. In this respect, stakeholders consistently remarked on a cultural shift in the response to family violence among key criminal justice institutions, particularly the courts and police.
- 5.7 The legislative and procedural reforms of the past five to ten years have brought about this process of cultural change. These reforms include the introduction of the *Family Violence Protection Act 2008* (Vic) (FVPA), procedural changes by Victoria Police (particularly 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. Stakeholders commented that there is now a deeper understanding of the nature of family violence on the part of magistrates and police, which has in turn affected the sentences imposed for family violence intervention order (FVIO) and family violence safety notice (FVSN) contravention.

## The Victoria Police response to family violence

### Specialist services

- 5.8 Over the past five to ten years, Victoria Police has developed an increasingly comprehensive system for responding to family violence.<sup>127</sup> Family violence liaison officers are attached to all 24-hour police stations throughout Victoria (there are 180 liaison officers in total), and 27 specialist family violence teams operate throughout the state. A current initiative of Victoria Police is to align FVIO, bail and remand processes where family violence is present.
- 5.9 As discussed in Chapter 2, police are required under the Family Violence Code of Practice to pursue both civil (FVIO) and criminal action in response to family violence incidents, where required. The data indicate that police now play a more proactive role in relation to FVIO applications: by 2011–12, 67.0% of all FVIOs were initiated by police.
- 5.10 Two particular improvements in the police response to family violence are likely to have influenced sentencing for contravention offences: one is the decline in the notion of the 'technical' contravention, and the other is improved evidence collection. Some stakeholders indicated that the dynamics of family violence are now better understood by police, and better conveyed to the court when FVIO applications are made and FVIO contraventions are sentenced.<sup>128</sup>
- 5.11 As discussed in the Council's 2009 report, the nature and breadth of the information available to the court will have some bearing on the sentence imposed. Given the unique dynamics of family violence, contextual material may be necessary in order to communicate fully the nature of the offence and the character of the offender, and in turn procure an appropriate sentencing response that reflects the seriousness of the offence.<sup>129</sup>

<sup>127</sup> Roundtable 1 (20 May 2013); Roundtable 2 (23 May 2013).

<sup>128</sup> Roundtable 1 (20 May 2013); Roundtable 2 (23 May 2013).

<sup>129</sup> Sentencing Advisory Council (2009), above n 3, [5.16]–[5.65]. This is provided that there are no barriers at law to the reception of this evidence or plea material.

### A decline in the notion of the ‘technical’ contravention

- 5.12 As a matter of policy, police are required to investigate all alleged FVIO or FVSN contraventions, regardless of their perceived seriousness. The Family Violence Code of Practice emphasises that there ‘is no such lawful term as “technical” contravention’.<sup>130</sup> In undertaking a risk assessment and determining whether criminal proceedings should be commenced, police must consider the context of the alleged contravention, including any history of violence in the relationship, the victim’s own assessment of his or her level of fear, and evidence-based risk and vulnerability indicators (including any prior FVIO contravention and/or escalation in the severity or frequency of violence).<sup>131</sup> Stakeholder feedback suggests that there has been improved compliance with these policies in practice.<sup>132</sup>
- 5.13 These are important developments. Family violence is typically characterised by a series of acts – which often increase in severity – rather than a single instance of offending. A seemingly innocuous contravention may cause considerable fear for safety in the victim when considered in light of the offender’s previous behaviour, and/or may form part of an escalating cycle of violence that may culminate in particularly serious offending.<sup>133</sup>

### Improved evidence collection

- 5.14 Alongside these developments, some stakeholders remarked on improvements in the level and quality of evidence presented to the court. This applies to both the evidence put before the court for the initial FVIO application and the evidence put before the court for the contravention offence.<sup>134</sup>
- 5.15 The magistrates consulted for this report have observed the implementation of Victoria Police training in the ‘narrative’ approach to evidence collection in cases of sexual and/or family violence.<sup>135</sup> Briefly, a narrative approach to evidence collection encourages the victim to provide a ‘whole story’ account of the nature of the relationship between the perpetrator and the victim, and the events leading to and following the alleged offence. This contrasts with an investigatory focus on discrete incidents of violence and physical evidence. A ‘traditional’ approach to evidence collection may mean that the context of violent behaviour and common features of family violence – such as patterns of coercive control, domination and/or manipulation within the relationship – are not communicated to the court.<sup>136</sup>
- 5.16 In terms of future investigations, the introduction of an indictable persistent contravention offence (see [3.6]) provides an opportunity for Victoria Police to present more information on family violence dynamics, rather than presenting evidence for each contravention in isolation.<sup>137</sup>
- 5.17 Stakeholders also reported that the work of victim support agencies has raised the level and quality of evidence put before the court. Agencies such as Women’s Health West provide detailed information to victims about evidence collection in cases of FVIO contravention.<sup>138</sup> Moreover, tangible forms of evidence of contravention – such as social media usage, SMS messages and CCTV recordings – are increasingly available to police.<sup>139</sup>

<sup>130</sup> Victoria Police (2010), above n 53, [4.8].

<sup>131</sup> Victoria Police (2010), above n 53, [3.1].

<sup>132</sup> Roundtable 1 (20 May 2013); Roundtable 2 (23 May 2013); Meeting with inTouch Multicultural Centre Against Family Violence (19 June 2013).

<sup>133</sup> Roundtable 1 (20 May 2013); Roundtable 2 (23 May 2013).

<sup>134</sup> Roundtable 1 (20 May 2013).

<sup>135</sup> Meeting with Magistrates’ Court of Victoria (12 June 2013).

<sup>136</sup> Elli Darwinkel, Martine Powell and Patrick Tidmarsh, ‘Improving Police Officers’ Perceptions of Sexual Offending Through Intensive Training’ (2013) 40(8) *Criminal Justice and Behaviour* 895; Jane Wangmann, ‘Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?’ (2012) 34 *Sydney Law Review* 695.

<sup>137</sup> *Family Violence Protection Act 2008* (Vic) s 125A.

<sup>138</sup> Meeting with Victoria Police (27 May 2013).

<sup>139</sup> Roundtable 1 (20 May 2013).

## The Magistrates' Court response to family violence

### Specialist courts and services

- 5.18 It was suggested during consultations that the magistracy has broadened its understanding of family violence. This has reportedly resulted from the introduction of the FVPA and the increase in FVIO matters coming before the court, community scrutiny of sentencing practices for family violence and specialist professional development among magistrates. As a consequence, magistrates may be now less inclined to view a financial penalty as an appropriate sentence for FVIO contravention.<sup>140</sup> However, in the experience of several stakeholders, the level of specialisation and service provision remains uneven across the court.<sup>141</sup>
- 5.19 Since 2005, the Magistrates' Court has operated the Family Violence Court Division in Ballarat and Heidelberg, and a Specialist Family Violence Service in Melbourne, Frankston, Sunshine and Werribee.
- 5.20 The Family Violence Court Division brings together specialist magistrates and registrars, and offers tailored advocacy, referral and legal services for victims of family violence. Magistrates sitting in this Division are able to determine bail applications and criminal pleas alongside FVIO applications. During the two reference periods, only magistrates in this Division had the power to order counselling as a condition of an FVIO (following amendments to the FVPA, the power to order counselling has been extended to include courts outside the Family Violence Court Division, once gazetted).
- 5.21 The Specialist Family Violence Service operates along broadly similar lines to the Family Violence Court Division, except it does not have the power to simultaneously hear FVIO applications with bail applications and/or pleas in criminal matters.
- 5.22 Aside from the Specialist Service and the Division, magistrates are frequently exposed to family violence matters in the daily business of the court. Alongside FVIO applications and FVIO/FVSN contravention hearings, magistrates commonly deal with family violence matters in the course of 'general' criminal pleas and bail hearings.
- 5.23 The data in Chapters 2 and 3 reveal the volume of FVIO matters determined by the court. Between 2004–05 and 2011–12, the number of FVIOs increased by 82.2%. There has been a consequent increase in the number of FVIO contravention charges sentenced by the court (though the rate of sentenced contravention charges remained broadly constant over the two reference periods). In 2011–12, almost 6,000 FVIO contravention charges were sentenced by the Magistrates' Court.
- 5.24 As a consequence, the issues surrounding family violence are an important component of judicial education. Magistrates participate in ongoing professional development about family violence matters, such as the effects of family violence on children. This includes an extensive evidence base concerning the neurological, psychological and social effects of family violence on children, as noted at [5.40]. As part of their induction materials, magistrates receive exposure to guiding information in the *Family Violence Bench Book*, a sentencing resource produced by the Judicial College of Victoria.<sup>142</sup> The Bench Book contains a wealth of material on the sentencing of contravention offences, and incorporates information from the Council's *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders*.

<sup>140</sup> Roundtable 2 (23 May 2013); Meeting with Magistrates' Court of Victoria (12 June 2013).

<sup>141</sup> Roundtable 2 (23 May 2013).

<sup>142</sup> Meeting with Magistrates' Court of Victoria (12 June 2013). See Judicial College of Victoria, *Family Violence Bench Book* (2010–) <<http://www.judicialcollege.vic.edu.au/eManuals/FVBBWeb/index.htm#34143.htm>>.

## The use of adjourned undertakings and community orders

- 5.25 As discussed in Chapter 4, there was a decline in the use of fines and an increase in the use of adjourned undertakings and community orders between the two reference periods. This was apparent across all measures of sentencing examined (i.e. sentencing outcomes for all FVIO contraventions, sentencing outcomes in contravention-only and co-occurring offence cases, and sentencing outcomes for repeat FVIO contravention).
- 5.26 In its 2009 report, the Council concluded that fines were generally unable to fulfil purposes of community protection and rehabilitation in relation to FVIO contravention. Further, fines may compound the harm experienced by the victim by withdrawing resources from the family as a whole. Fines may be particularly inappropriate where family law property disputes also exist; in those circumstances, the imposition of a fine may exacerbate the risk of further violence if the offender is already aggrieved about financial matters.<sup>143</sup>
- 5.27 Where a low-end order is under consideration, the court may decide to impose an adjourned undertaking rather than a fine. The Council concluded in its 2009 report that adjourned undertakings may be suitable for FVIO contravention if rehabilitative conditions are attached (such as attendance at a behavioural change program) and the offender's participation in any such program is supervised. Adjourned undertakings do not necessarily require the completion of a behavioural change program and may simply require the offender to comply with the conditions of the FVIO.<sup>144</sup>
- 5.28 Where a behavioural change program was warranted, the Council previously concluded that it might be preferable to impose a community-based order rather than an adjourned undertaking, in order to reflect the gravity of the offence and to ensure that the offender's participation in the program was supervised.<sup>145</sup>
- 5.29 Based on the Council's consultations, there are at least two possible explanations for the decline in the use of fines, and the increase in the use of adjourned undertakings and community orders, between the two reference periods.
- 5.30 First, in some cases, magistrates may have imposed adjourned undertakings in preference to fines for offenders without criminal histories.<sup>146</sup> As noted at [4.50]–[4.51], there has been a small but statistically significant decline in the percentage of FVIO contravention offenders with recent prior offending histories (in 2006–07, 45.7% of people sentenced for FVIO contravention had received a recent prior sentence for any offence; this percentage declined to 41.5% in 2011–12). Consistent with this finding, some practitioners have suggested that, as a result of the more comprehensive FVIO regime under the FVPA and greater reporting of family violence, a broader cross-section of offenders is now subject to FVIOs and sentenced for contravention, including offenders without criminal histories.<sup>147</sup> The Council's previous research suggests that the absence of a criminal history is likely to have a significant influence on the type of sentence imposed (see [4.44] above).
- 5.31 Second, in some cases, magistrates may have imposed adjourned undertakings and community orders as a way of intervening in offender behaviour. The supervising family violence magistrates observed that principles of 'therapeutic jurisprudence' influence the use of adjourned undertakings and community orders for FVIO contravention.<sup>148</sup> Broadly speaking, therapeutic jurisprudence seeks

<sup>143</sup> Meeting with inTouch Multicultural Centre Against Family Violence (19 June 2013).

<sup>144</sup> Sentencing Advisory Council (2009), above n 3, [3.84]–[3.106].

<sup>145</sup> Sentencing Advisory Council (2009), above n 3, [3.117]–[3.119]. Community-based orders were supervised by Corrections Victoria. These orders were replaced in January 2012 by community correction orders, which are also supervised by Corrections Victoria and are a more stringent order than community-based orders: see Chapter 4 above at [4.9]–[4.13].

<sup>146</sup> Roundtable 2 (23 May 2013); Consultation with Sentencing Advisory Council Member.

<sup>147</sup> Roundtable 2 (23 May 2013).

<sup>148</sup> Meeting with Magistrates' Court of Victoria (12 June 2013).

to engage with the underlying causes of offending and avoid sanctions that may have criminogenic effects on offenders.<sup>149</sup> The purposes of rehabilitation – and the pursuit of community protection through offender rehabilitation – are central to this approach. While the court does not explicitly follow a therapeutic jurisprudence model in relation to family violence (unlike, for example, the Drug Court Division of the Magistrates' Court), it appears that the general principles of behavioural intervention are being adopted more readily in relation to family violence offending.

- 5.32 A behavioural change program is presently the main form of intervention into the behaviour of family violence offenders (at least in the case of FVIO contravention). Behavioural change programs are conducted by Corrections Victoria (where a community correction order is made) or by specialist family violence services such as the Men's Referral Service. In its 2009 report, the Council discussed some of the issues surrounding the use of behavioural change programs.<sup>150</sup> While there was considerable support for behavioural change programs among the stakeholders consulted for this report,<sup>151</sup> the Council notes that there is no publicly available research on the effectiveness, or otherwise, of behavioural change programs conducted in Victoria.
- 5.33 To the extent that behavioural intervention is being pursued through adjourned undertakings and community orders, stakeholders were generally supportive of the increase in these sentences and the decline in the use of fines, with some qualifications (see [5.35]–[5.38] below).<sup>152</sup> The Council was unable to obtain data on the extent to which behavioural change program conditions are being attached to adjourned undertakings and community orders. Based on its consultations with stakeholders, however, the Council makes some tentative observations in this regard.
- 5.34 Practitioners and service providers reported a significant increase in the use of behavioural change programs as part of an FVIO counselling condition.<sup>153</sup> It is not certain whether this increase in counselling conditions represents an actual increase in conditions of this nature, or whether it results from the increase in FVIOs. Further, several stakeholders reported that where an FVIO counselling condition is already in place or has been fulfilled, it is common for this regime to be extended or renewed by requiring completion of a behavioural change program as a condition of an adjourned undertaking or a community order.<sup>154</sup> It is therefore possible that an increase in counselling orders as part of an FVIO may have given rise to an increase in program conditions as part of a sentence for FVIO contravention.
- 5.35 Even when program conditions are attached to an adjourned undertaking, the majority of stakeholders expressed qualified support for this sentence in preference to fines. There remains some concern that adjourned undertakings do not provide for sufficient offender accountability or monitoring.<sup>155</sup>
- 5.36 Prior to discharge of the undertaking, the court confirms whether the offender has complied with any rehabilitative or other conditions. In the case of a behavioural change program, the offender is required to provide evidence of program completion. If the offender does not provide evidence of compliance, he or she will be required to appear in court, and Victoria Police may also be notified. Some stakeholders suggested that the court should additionally enquire about the quality of offender participation in behavioural change programs when assessing whether there has been compliance.<sup>156</sup>

<sup>149</sup> Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32(3) *Melbourne University Law Review* 1096; Michael King, Arie Freiberg, Becky Batagol and Ross Hyams (2009) *Non-Adversarial Justice*.

<sup>150</sup> Sentencing Advisory Council (2009), above n 3, [4.1]–[4.78].

<sup>151</sup> Roundtable 2 (23 May 2013); Meeting with inTouch Multicultural Centre Against Family Violence (19 June 2013).

<sup>152</sup> Roundtable 1 (20 May 2013); Roundtable 2 (23 May 2013).

<sup>153</sup> Roundtable 1 (20 May 2013); Roundtable 2 (23 May 2013).

<sup>154</sup> Roundtable 1 (20 May 2013).

<sup>155</sup> Roundtable 1 (20 May 2013); Roundtable 2 (23 May 2013).

<sup>156</sup> Roundtable 2 (23 May 2013).

- 5.37 Representatives of Victoria Police considered that rehabilitation and community protection should be primarily pursued through community correction orders, which provide for a broader and more flexible range of rehabilitative and supervisory conditions than adjourned undertakings and community-based orders (community-based orders were replaced by community correction orders in January 2012). As discussed at [4.13], these conditions may include offender monitoring by Corrections Victoria or the courts, and restrictions on the offender's movement in the community. Victoria Police also stated that community correction orders allow for inter-agency offender management by Corrections Victoria, Victoria Police and specialist family violence services.<sup>157</sup>
- 5.38 A full examination of these issues is beyond the scope of this report. The increase in adjourned undertakings raises complex questions about the extent to which FVIO contravention offenders should be monitored during the period of sentence, the accountability of offenders subject to adjourned undertakings, and the capacity for communication between the court and service providers about offender participation in behavioural change programs. In this respect, the Council recommended in the 2009 report that formal communication protocols be established between the courts, Corrections Victoria and service providers, in order to ensure that offender participation is closely supervised. This formed part of a wider recommendation for the establishment of a state-wide behavioural change program for family violence offenders.<sup>158</sup>

#### A focus on the effects of family violence on children

- 5.39 As discussed in Chapter 2, children have represented the largest proportion (approximately 46%) of protected persons since 2008–09.
- 5.40 Over the past two decades, there has been international research that demonstrates unequivocally that infants, young children and adolescents experience significant neurological, psychological, social and/or developmental effects on their wellbeing as a result of exposure to family violence.<sup>159</sup>
- 5.41 It is possible that the most recent sentencing outcomes have been partly influenced by legislative and judicial statements about the effects of family violence on children. Several stakeholders suggested that fines will not be considered where a child has been exposed to family violence in the course of an FVIO contravention.<sup>160</sup>
- 5.42 The Council's Guiding Principles recommend that, where the original FVIO was imposed to protect children, any contravention of the order will generally be more serious, regardless of whether children are exposed to the contravening behaviour.<sup>161</sup> However, the mere presence of children at the time of an FVIO or an FVSN contravention will not automatically result in a more severe sentence than would otherwise be imposed.
- 5.43 The courts and police are increasingly aware of the need to protect children from family violence. As discussed in Chapter 2, it is an express purpose of the FVPA to maximise safety for children who have experienced family violence. The FVPA recognises that children who are exposed to family violence are particularly vulnerable, and that exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing. Accordingly, children may be included as protected persons on an FVIO on the court's own initiative.<sup>162</sup> Under the Family Violence Code of Practice, Victoria Police must consider the safety needs of children separately

<sup>157</sup> Meeting with Victoria Police (27 May 2013).

<sup>158</sup> Sentencing Advisory Council (2009), above n 3, [4.1]–[4.78]; see especially [4.47]–[4.53], Recommendation I.

<sup>159</sup> See the literature reviewed in Kelly Richards, 'Children's Exposure to Domestic Violence in Australia', *Trends and Issues in Crime and Criminal Justice* 419 (2011).

<sup>160</sup> Roundtable I (20 May 2013).

<sup>161</sup> Sentencing Advisory Council (2009), above n 4, [2.7].

<sup>162</sup> *Family Violence Protection Act 2008* (Vic) Preamble, s 77.

to the needs of any other affected family members and, where required, make applications for FVIOs or FVSNs specifically for the protection of children.<sup>163</sup> Magistrates have received specialist professional training about the effects of family violence on children, as noted at [5.24].

- 5.44 The Court of Appeal noted in *Director of Public Prosecutions v Johnson* that, where the contravening behaviour involves the exposure of a child to family violence (behaviour that constitutes family violence in itself), this may increase the gravity of the offence and may be regarded as an aggravating feature in sentencing. In that case, the child in question was specifically protected under the FVIO. This fact, and the fact of exposure to the contravention behaviour, rendered the contravention offence particularly grave.<sup>164</sup>

#### A focus on recidivist family violence offending

- 5.45 As discussed in Chapter 4, the sentencing outcomes in relation to repeat FVIO contravention have changed considerably. Sentences have tended to become more severe in this category of offending. Between the two reference periods, the use of fines almost halved and the use of custodial sentences increased. This is possibly due to a more thorough appreciation by the court of the seriousness of family violence recidivism.

- 5.46 The sentencing outcomes in relation to repeat FVIO contravention require careful interpretation. Sentence escalation upon repeat contravention will not always be warranted. For example, the nature of the contravention, or any co-occurring offences, may warrant a less severe sentence than that imposed for the first contravention. Conversely, escalation may be warranted if reoffending signifies the offender's contempt for the FVIO regime and the law more generally. As discussed at [5.10]–[5.13] above, repeat contravention may reveal an increased level of risk on the part of the offender and provoke fear for safety in the victim, regardless of the nature of the contravention.

- 5.47 In *Director of Public Prosecutions v Johnson*, the Court of Appeal stated that repeat contravention was an aggravating factor, and that a sentence directed towards specific and general deterrence may assume particular importance in this respect. The court reiterated its previous statement in *R v Cotham*:

The observations in [*R v Cotham*] ... are particularly pertinent:

Intervention orders must be strictly adhered to, and it is very much in the interests of the community that those against whom such orders are made be under no misapprehension that the courts will punish severely those who breach such orders. The applicant's actions suggest that he believed he could breach the intervention order with impunity. Only by appropriately severe penalties can the courts make clear to the applicant and the broader community that such conduct will not be tolerated.<sup>165</sup>

- 5.48 Several stakeholders attributed the increase in mid- to high-end orders for repeat contravention to the broader process of 'cultural change' discussed throughout this chapter. In particular, one stakeholder commented that, as a result of profession-wide education about family violence, the court is more likely to escalate the sentence in order to denounce the offender's behaviour.<sup>166</sup> The increase in immediate terms of imprisonment for FVIO contravention is consistent with the experience of several practitioners, who have observed a greater willingness by magistrates to impose this sentence for repeat contravention.<sup>167</sup>

<sup>163</sup> Victoria Police (2010), above n 53, [5.10].

<sup>164</sup> *Director of Public Prosecutions v Johnson* (2011) 213 A Crim R 262 [45]–[47].

<sup>165</sup> *Director of Public Prosecutions v Johnson* (2011) 213 A Crim R 262 [42]–[43]; citing *R v Cotham* [1998] VSCA 111 (17 November 1998) [14].

<sup>166</sup> Roundtable I (20 May 2013).

<sup>167</sup> Roundtable I (20 May 2013).

## Concluding remarks

- 5.49 This analysis reveals substantial change in sentencing for contravention of FVIOs. In summary, there has been a shift from financial penalties to sentences with greater potential for intervention in the lives of offenders and, in turn, community and victim protection. These changes have been generally well received by stakeholders, though concerns remain about potential deficiencies in offender accountability and monitoring when adjourned undertakings are imposed.
- 5.50 Victoria's system of family violence protection measures has undergone extensive reform over the past five years. FVIOs are now issued under the FVPA, which (among other things) provides a broad definition of family violence and extends greater protection to children. The extent and nature of FVIO imposition have changed significantly since 2004–05, and particularly since the introduction of the FVPA in 2008. Since 2004–05, there has been an 82.2% increase in the number of FVIOs made by the Magistrates' Court, and a 72.8% increase in reports of family violence incidents to Victoria Police. By 2011–12, the majority (67.0%) of FVIOs were initiated by Victoria Police. Children now represent the single largest category of protected persons under FVIOs. Since 2004–05, there has been a 295.4% increase in the number of protected children (those aged under 18).
- 5.51 A wider program of policy and procedural reform accompanied the introduction of the FVPA. These reforms have brought about a more thorough understanding, among police and the magistracy, of the nature of family violence. This renewed understanding of family violence has directly influenced sentencing practices for contravention of FVIOs and FVSNs.
- 5.52 Over the period from 2004–05 to 2006–07, the most common sentence for the contravention offence was a fine (imposed in 37.1% of cases), followed by adjourned undertakings (imposed in 18.4% of cases) and community orders (imposed in 17.6% of contravention cases). Fines were also the most common sentence in cases of repeat contravention. Fines were imposed in 37.6% of repeat contravention cases.
- 5.53 Over the period from 2009–10 to 2011–12, fines, adjourned undertakings and community orders remained the most common sentences for the contravention offence, but the distribution of these sentences changed markedly. Fines were imposed in 25.8% of cases (a decline of 30.5%), adjourned undertakings were imposed in 23.4% of cases (an increase of 27.1%) and community orders were imposed in 19.2% of cases (an increase of 9.1%). The shift away from fines was apparent even when controlling for wider criminality (i.e. there has been a decline in the use of fines in contravention-only cases).
- 5.54 Further, the distribution of sentences for repeat FVIO contravention changed considerably. The use of fines almost halved and the use of custodial sentences increased. As a result of these changes, imprisonment became, by a small margin, the most common sentence in this category of offending (imprisonment was imposed in 21.7% of repeat contravention cases).
- 5.55 The change in sentencing outcomes was unique to FVIO contravention offending, and was not consistent with sentencing trends in the Magistrates' Court as a whole.
- 5.56 During consultations for this report, many participants remarked that the most recent sentencing data were 'encouraging' and 'positive'.<sup>168</sup> This represents a significant transformation. Only four years ago, similar stakeholders were concerned about the prevalence of fines for FVIO contravention, including repeat contravention. While family violence remains an ongoing challenge for the criminal justice system, recent sentencing for FVIO contravention attests to the progress being made in this difficult area of practice.

<sup>168</sup> Roundtable 1 (20 May 2013); Roundtable 2 (23 May 2013); Meeting with Coroners Court of Victoria (28 May 2013).

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## Legislation and Bills

*Bail Act 1977* (Vic)

*Crimes (Family Violence) Act 1987* (Vic)

*Family Law Act 1975* (Cth)

*Family Violence Protection Act 2008* (Vic)

*Interpretation of Legislation Act 1984* (Vic)

*Justice Legislation Amendment (Family Violence and Other Matters) Act 2012* (Vic)

*Justice Legislation Amendment (Family Violence and Other Matters) Bill 2012* (Vic)

*Personal Safety Intervention Orders Act 2010* (Vic)

*Sentencing Act 1991* (Vic)

*Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic)

*Sentencing Amendment (Community Correction Reform) Act 2011* (Vic)

## Cases

*Director of Public Prosecutions v Johnson* (2011) 213 A Crim R 262

*Markarian v The Queen* (2005) 228 CLR 357

*R v Cotham* [1998] VSCA 111 (17 November 1998)

*Veen v The Queen [No 2]* (1988) 164 CLR 465

## Quasi-legislative materials

Victoria, *Parliamentary Debates*, Legislative Council, 11 December 2012 (Sue Pennicuik)

# Appendices

## Appendix A: Guiding Principles

The following is reproduced from the Sentencing Advisory Council's *Sentencing Practices for Breach of Family Violence Intervention Orders* (2009), pp. 150–151. The complete *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* (2009) is available at <<http://www.sentencingcouncil.vic.gov.au/content/publications/guiding-principles-sentencing-contraventions-family-violence-intervention-order>>.

### 3. The Sentencing Range and the Appropriateness of Particular Sanctions

- 3.1 The following section is intended to be a guide to the relevant sentencing range and the use of sentencing dispositions for contraventions of family violence intervention orders, based on the presence of particular factors. The link between the sentencing ranges identified and the sanctions grouped with them should not be read prescriptively. The identification of certain factors within one of the sentencing ranges does not mean that the suggested sanctions will be the only 'correct' sentences in any given case.
- 3.2 The ranges are simply intended to provide some assistance to magistrates by grouping the factors discussed into a cohesive framework within which the individual circumstances of each case can be considered.
- 3.3 The most common sanctions in the sentencing hierarchy are all included in the table opposite. However, considering the Council's reservations about the use of suspended sentences generally, despite its place in the hierarchy, there would be very few cases in which a suspended sentence would be the appropriate sentence for breach of a family violence intervention order.

## Sentencing Range and Factors

## Considerations for Each Sanction

### Low

Nature of the breach is not serious and it has minimal impact on the victim

Single instance offending

Offender has no prior family violence convictions (or very few non-family violence convictions)

In considering whether it is appropriate to attach a program condition, the court should take into account whether there are adequate mechanisms in place to ensure compliance. If there are no adequate mechanisms in place to ensure compliance, the court should consider ongoing court supervision of the undertaking.

The court should also consider attaching a condition directed at protecting the victim, for example if there is not a continuing intervention order on foot, a restraint on the offender approaching or contacting the victim.

### Fine (Low)

The court should consider whether a fine will impact negatively on the victim, for example if imposing a fine may affect the offender's ability to pay child support payments or provide other financial support that the offender would normally provide to the household.

### Medium

Nature of breach is moderate and it has a moderate impact on the victim

More than one instance of offending

Breach occurs in or near the victim's home

Breach is in the presence of children

Breach occurs only a short time after the making of the order or an earlier breach

Offender has some relevant prior convictions

Victim is particularly vulnerable

### Community-Based Order (Low and Medium)

When imposing a community-based order, a court could consider attaching:

- a condition directed at the offender's conduct such as a men's behavioural change program;
- the possibility of a community service order, fixing the number of hours (up to 20 hours per week) according to the gravity of the offence;
- a supervision order, for those offenders who demonstrate a high risk of re-offending; or
- a condition directed at protecting the victim, for example if there is not a continuing intervention order on foot, a restraint on the offender approaching or contacting the victim.

### Intensive Correction Order (Medium)

When imposing an intensive correction order, a court could consider attaching a special condition directed at the offender's conduct such as a men's behavioural change program; programs that are not based within Corrections Victoria may be attached to the order.

### High

Nature of breach is serious and it has a serious impact on the victim (not limited to physical violence)

Persistent or regular offending

Breach occurs only a short time after the making of the order or an earlier breach

Breach directly involves children

Offender has many relevant previous convictions

Victim's ongoing safety is compromised

Breach involves a home invasion

Victim is particularly vulnerable

### Wholly (Medium) and Partially (High) Suspended Sentence

In deciding whether a suspended sentence is an appropriate sanction for a breach of an intervention order, the court should consider whether the offender requires some level of intervention to prevent further offending (such as a men's behavioural change or other rehabilitative or treatment program). If so, a suspended sentence would not be the appropriate sanction.

Further, if the court is of the view that the immediate safety of the victim is an issue, a suspended sentence is unlikely to be an appropriate sanction.

### Immediate Custodial (High)

Given the potentially serious and long-lasting effects of both physical and non-physical breach behaviour, immediate terms of imprisonment should not be confined to breaches involving physical violence. Where any non-physically violent behaviour caused or was intended to cause a high degree of harm and anxiety, a court should consider an immediate custodial sentence.

## Appendix B: Consultation

### Roundtables

#### Roundtable 1, 20 May 2013

Carmel Arthur, Sentencing Advisory Council

Federation of Community Legal Centres

Geoff Wilkinson, Sentencing Advisory Council

Judicial College of Victoria

Law Institute of Victoria

Lewenberg & Lewenberg Solicitors

Magistrates' Court of Victoria

Office of Public Prosecutions

Victoria Legal Aid

Victoria Police

Women's Legal Service Victoria

#### Roundtable 2, 23 May 2013

Berry Street

Carmel Arthur, Sentencing Advisory Council

Department of Justice

Domestic Violence Victoria

Dr Renata Alexander

No to Violence/Men's Referral Service

Victorian Centre Against Sexual Assault Forum

Women's Domestic Violence Crisis Service

### Meetings

Victoria Police, 27 May 2013

Coroners Court of Victoria, 28 May 2013

Magistrates' Court of Victoria, 12 June 2013

inTouch Multicultural Centre Against Family Violence, 19 June 2013