Centre for Innovative Justice, RMIT University
Submission to the Sentencing Advisory Council

Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders 2017

Introduction

The Centre for Innovative Justice (CIJ) welcomes the opportunity to make a submission to this important review. The CIJ also commends the Sentencing Advisory Council (SAC) on a comprehensive Discussion Paper which reflects the challenge of this kind of reform in the Victorian criminal justice context.

Rather than start from an analysis of existing Swift, Certain and Fair (SCF) approaches and then investigate whether they can be applied to family violence (FV) offenders, however, the CIJ submits that the SAC's review should start by developing a deep understanding of the complexities of FV perpetration and *then* examine how responses to it can become more swift and certain. This includes whether specific SCF approaches are appropriate in certain circumstances.

This submission therefore proposes to address what the CIJ views as the *broader* challenge inherent in the relevant recommendation by the Royal Commission before responding to a *selection* of the questions in the SAC's Discussion Paper in more detail.

This submission also seeks to position this discussion within the wider evidence base concerning perpetrators of family violence (FV) – that is, what is known (and not known) about people who use FV[1] - which can then inform the development of approaches which are most effective.

When this understanding forms the basis of a response to the SAC's reference, it can be seen that a broader and more nuanced approach to 'swift, certain and fair' sentencing may be more appropriate than simply replicating models adopted in other jurisdictions.

Understanding the context – what the CIJ said about swift and certain sanctions

Certainly, the context in which swift and certain approaches are discussed – and applied – is crucial. Absolutely, the CIJ has encouraged the exploration of swift and certain approaches in the Australian setting, given that they might complement and strengthen current responses to a range of offending, including drug and alcohol related offences.

This is a slightly different context, however, from the CIJ's exploration of the concept of 'swift and certain' in relation to FV offending. Despite this, the SAC Discussion Paper refers to commentary in the CIJ's 2015 report, *Opportunities for early intervention,* and then observes:

> *In its report, the CIJ concluded that systems that utilised swift and certain sanctioning for non-compliance with court orders had significantly reduced re-arrest rates for convicted offenders, and recommended that Australian courts develop swift and certain protocols such as 'flash incarceration' of 24 hours for non-compliance. The CIJ further recommended that a swift and certain approach be coupled with ongoing monitoring and assessment, preferably by the same judge. [references removed]*

In fact, the CIJ's commentary around swift and certain approaches throughout its report involved more nuance and variation than the above paragraph suggests.

[1] It should be noted that, for the purposes of this Submission, the term 'perpetrators' is generally intended to refer to the majority cohort of people who use family violence, being adult males.

For example, having noted the evidence concerning the value of increased judicial monitoring, the CIJ observed:

> *Jurisdictions should therefore explore additional opportunities for courts to increase ongoing monitoring of family violence offenders, including by being brought back repeatedly before the same judge, and by employing swift and certain sanctioning where offenders have failed to comply with orders. That being said, it is important that these opportunities do not place further burden or pressure upon victims to attend court or revisit their experiences. Rather, the role of the court is to step in and assume this burden – keeping the victim informed, but engaging directly with the perpetrator to hold him more effectively to account.*

Also noted in the SAC's Discussion Paper, the CIJ's report highlighted the example of the Marin County Family Violence Court in the US as follows:

> *…The Marin County program offers graduated incentives, such as certificates and other forms of recognition. It also delivers sanctions, such as 'flash incarceration' without offenders being brought back for court hearing; admonishment by the judge, as well as other measures sometimes connected with MBCPs, such as submission of an accountability essay.*[2]

Important to note is that this program was highlighted in a section of the CIJ's report promoting more flexible use of a court's authority. The emphasis in this section was on the *targeted* application of therapeutic sanctions as agreed in a behavioural contract with the offender. This section of the CIJ's report also focused on leveraging the more personalized sense of accountability which is a key feature of many therapeutic models.

In a different section again, the CIJ advocates for investigating whether FV perpetration is more prevalent in individuals convicted of *other* offences than the system currently recognises. It highlighted the fact that 'the merits of taking this broader view are mirrored in a program which, conversely, seems to have an effect on the perpetration of family violence while targeting other offending'.[3]

Accordingly, the CIJ report described South Dakota's 24/7 Sobriety Project which, as the SAC Discussion Paper also indicates, is a SCF program targeted at offenders who have committed alcohol or drug related offences and which:

> *…has contributed to a significant reduction in drink-driving arrests (and collisions) in jurisdictions where it is used, while ensuring that offenders can continue in their employment and contribute to their family's income. Most relevantly, however, it has also been noted to have resulted in a 10% decrease in domestic violence arrests in the jurisdictions where it has operated, leading to suggestions that it may have merits for trial in the Australian context as well.*[4]

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[2] Centre for Innovative Justice (2015) *Opportunities for early Intervention: bringing perpetrators of family violence into view*, RMIT University, Melbourne. p 65. See also http://wwww.marincourt.og/therapeutic_fam_violence.htm

[3] Ibid, p 71

[4] Ibid, p 72

The CIJ then goes onto note that:

> *The question then becomes what intervention in other categories of other offences may have an associated effect on the perpetration of family violence. Certainly, commentators note that some victims of family violence feel able to alert police to other violations or offences, such as drink driving rather than further assaults, as the disclosure will be less likely to be attributed to them.*[5] *Where perpetrators are on probation, this is sufficient to bring them back to the attention of police and therefore offer the victim a period of safety….*

Whether in the context of judicial monitoring; therapeutic sanctioning or models which have associated impacts on family violence in the context of other offending, the underlying theme in these various sections of the CIJ's 2015 report is that prompt and consistent consequences are crucial if any system is to be effective in terms of holding FV offenders accountable.

This is not the same, however, as the blanket endorsement of a specific SCF model in the context of FV offending. It is not even the same as suggesting that custody is the sanction which should always apply in these cases, given that custodial sanctions were just one of the options described in the *suite* of interventions applied in the case of the Marin County Family Violence Court.

Rather, what the CIJ report attempts to do is to draw to policy makers' attention the fact that a swift and certain response of *some* kind is an ingredient in these various models which are seen to be effective. The principle that underlies this approach, regardless of the specific setting, is that the system needs to respond more rapidly to address risk, and do so in a way that is coherent, both to people working in the system *and* to perpetrators. This means that perpetrators need to see a clear, fast and predictable relationship between their behaviour - being their choice to use violence against their family members - and the system's associated response.

For this relationship between action and consequence to be clear, it does not necessarily require a rigid adherence to the formula of existing SCF approaches. Instead it needs to focus on how the sentencing process can send consistent messages, as well as get better results. This in turn requires a better understanding of FV offenders.

What do we know about perpetrators of family violence?

<u>Countering denial and minimisation</u>

The first, and perhaps most crucial, point about FV offending is that most perpetrators will put great effort into denying or minimizing their behaviour. This is arguably reflected in the statistics cited by the SAC in its Discussion Paper, which indicate that FV offenders are less likely than other offenders to pay fines imposed by the court.

[5] J Smith, *Literature Review: Overview of research & Evaluations of MBCPs,* March 2009. At www.cfecfw.asn.au/default/files/Smith_2009-Lit_Review-MBC.pdf

Regrettably, the mainstream adversarial system often inadvertently assists perpetrators in their campaign of denial by churning through FV matters, adjourning or delaying consequences and bouncing perpetrators off the system, rather than keeping them within view.[6]

In fact, laudable attempts in the civil context to focus on victim safety mean that Family Violence Intervention Orders are often made with a respondent's consent but without admissions. Here the emphasis is on getting the Order in place for the family members' protection, making it crucial that this option remain available. An unfortunate by-product of this approach, however, is that many perpetrators do not feel compelled to take responsibility for their behaviour or acknowledge that the Order is justified. Instead, they brush it off as the victim inventing allegations, or as the system being against them.[7]

Once the Order is in place, this denial and minimisation can contribute to breaches of the Order. As research indicates, many respondents do not accept the authority of the court to impose an Order.[8] Many others, of course, simply do not understand the terms of the Order, a lack of understanding compounded by the brief and fairly anonymous exchange that many respondents have with the Magistrate in court.[9]

While this exchange is likely to become far more meaningful following the expansion of Specialist Family Violence Courts, the reality remains that the relative anonymity of the court experience and the capacity to deny responsibility, despite an Order being in place, can entrench a perpetrator's view that he is simply a victim of the system or of his partner's manipulation.

Though many perpetrators experience the consequence of being removed from their home, as well as the confronting consequence of not being able to spend time with their children, where these immediate consequences are not followed up by any further exchange with the justice system, this can then mean that a perpetrator's sense of crisis or responsibility can soon evaporate.

In fact, research indicates that the first two to three weeks following a FV incident is a crucial opportunity for effective intervention.[10] Certainly, experts indicate that participants who enter MBCPs within two to three weeks after first contact with police are more likely to engage with behaviour change.[11]

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[6] Centre for Innovative Justice, above note 2.

[7] Curtin University, Communicare and Department for Child Protection and Family Support (2014) *Breaching Safety: Improving the effectiveness of violence restraining orders for victims of family and domestic violence.* At http://ntv.org.au/wp-content-uploads/2014-Breaching-Safety-Final-Report.pdf . The CIJ has also recently conducted research for the Magistrates' Court of Victoria in the context of a project to re-develop the standard conditions of Family Violence Intervention Orders. This theme of the 'system being against me' was a consistent one amongst perpetrators who participated in the research. Centre for Innovative Justice, *Setting the Foundation for Compliance* (forthcoming, 2017), RMIT University, Melbourne.

[8] Curtin University, above note 7; Centre for Innovative Justice, above note 7.

[9] Research suggests that the average time spent on FVIVO matters is three minutes. R Hunter, *Domestic violence law reform and women's experience in court: the implementation of feminist reform in civil proceedings*, Cambria Press 2008.

[10] Centre for Innovative Justice, (forthcoming 2017) *Pathways towards accountability: mapping the journeys of perpetrators of family violence*, Report for the Victorian, Department of Premier & Cabinet, November 2016.

[11] J Edleson, *Promising practices with men who batter: report to King County Domestic Violence Council*, January 2008.

Professor Ed Gondolf, perhaps the most respected commentator in this area, similarly emphasises that early connection with and entry into treatment has a greater impact on behaviour change than length of programs.[12] Gondolf therefore recommends providing programs as early as possible after charges and the CIJ urges the SAC review to Professor Gondolf's more recent and acclaimed 2012 longitudinal study of perpetrator programs in this regard.[13]

As indicated above, however, this intervention does not necessarily need to mean a sentence of imprisonment, but rather that the offender experiences a *consequence* – something with a direct relationship between their behaviour and the responses that they receive, including consistent and repeated messaging that their behaviour is not acceptable.[14]

Echoing studies in this area, practitioners suggest that this period of opportunity exists:

- One to three days following police attendance, at which stage a man is likely to be in a state of crisis and may be in immediate need of housing if police have imposed an exclusion order;

- Within a few to several days after attending court, at which point the reality of the situation may have sunk in and the man has heard a Magistrate reinforce the unacceptability of his behaviour;

- Two to three weeks after police attendance, at which point any openness to change might be closing.[15]

After this period, the door starts to close as perpetrators work hard to restore their lives to what they view as 'normal'. Where breaches of an FVIVO are not followed up by police, or where a referral to a Men's Behaviour Change Program (MBCP) does not become relevant for a substantial period of months due to significant waiting lists, perpetrators start to believe that they will not experience any further consequences for their behaviour.

Recognised in the SAC Discussion Paper through the reference the Victoria Police Code of Conduct,[16] this delay and lack of response can in fact *increase* the risk that perpetrators present to their family members – entrenching their sense of entitlement, that they are above the law or have been victimised by it. [17]

[12] E Gondolf, *The Future of Batterer Programs: Reassessing Evidence-Based Practice*, Northeastern University Press, 2012.
[13] Ibid.
[14] Centre for Innovative Justice, above note 2, p 48
[15] Edleson, above note 11.
[16] SAC Discussion Paper, 3.39, p 38.
[17] T Brown & R Hampson (2009) *An Evaluation of Interventions with Domestic Violence Perpetrators,* Monash University, p 40. See also Gondolf, above note 12.

For this reason, jurisdictions in some Canadian provinces have begun to focus on swift connections to services for low risk or (to the system's knowledge) first time offenders. In these programs, perpetrators are connected with a relevant intervention, such as an MBCP, within two weeks of the matter first coming to the attention of the court.[18] As will be further discussed below, this swift connection to services means that those whose offending behaviour is not as entrenched are more likely to respond to an intervention if delivered early. Meanwhile those who in fact *do* represent a greater risk to their families than first assessed - or who are not going to respond to a therapeutic option because of their entrenched denial – can be quickly identified and channeled into a more punitive stream.[19] Similarly, evaluations of Batterer Intervention Programs have found that they are most effective when connected to an intensive system of judicial monitoring which can deliver swift consequences for further offending behaviour.[20]

So what does this mean in relation to the SAC's current review? While the SAC may understandably be focused on sentencing regimes, it is vital that this broader and fundamental point underpins its response, being that FV offenders (or respondents to FVIVOs) need to experience prompt and consistent consequences if they are to start to understand that their behaviour is unacceptable.

The questions then become, what kind of response should this be, and which offenders should receive it?

What do we know about risk in relation to FV perpetrators?

The answer to the latter question needs to be founded on a deep understanding of risk in relation to FV offenders. To this end, the CIJ is concerned by the implication in the SAC Discussion Paper that intervention with low risk offenders, or those with pro-social connections, should be avoided given the criminogenic nature of custodial environments.

Absolutely, there is no better school for offending than a custodial setting. This *does not mean*, however, that low risk perpetrators should not receive *some* kind of intervention. As the above evidence indicates, interventions or consequences are found to be most effective when they are experienced *as soon as possible* after a perpetrator of FV comes into contact with the justice system.

What's more, the evidence referred to above also indicates that a prompt, clear and proportionate intervention is *most* effective with those with little previous contact with the criminal justice system, although as the discussion below will highlight, responsiveness to treatment should not just be assumed.[21] Here the CIJ notes that the references used in the SAC Discussion Paper to support this assertion are studies in relation to other kinds of offending, which sit at odds with the established evidence base in relation to FV offending.[22]

[18] L Tutty, J Ursel & F Douglas, 'Specialised Domestic Violence Courts: A Comparison of Models', in J Ursel, L Tutty & Lemaistre (eds) *What's Law Got to Do With It? The Law, Specialist Courts and Domestic Violence in Canada*, 2011.
[19] Ibid.
[20] K Minns, *To investigate men's domestic violence behaviour change programs*, Churchill Trust 2012.
[21] Gondolf, above note 12.
[22] Ibid. See also Edleson above note 11 and M Salter, 'Managing Recidivism Amongst High Risk Violent Men', Australian Domestic & Family Violence Clearinghouse, Issues Paper No. 23, January 2012.

That said, the CIJ does not assert that the system should weigh in heavily with custodial sentences or severe consequences with *all* offenders. Rather, a better understanding of the risk that an *individual* FV perpetrator poses needs to be established and then an *individually targeted* response applied.

To this end, the CIJ challenges the reliance in the SAC Discussion Paper on the LS/RNR assessment tool. Yes, the RNR model is well established. However, the CIJ disagrees with the assertion in the SAC Discussion Paper (and in the consultation which the CIJ attended) that the RNR model is universally accepted, for this is definitely not the case in the context of FV perpetration.

In fact, while this tool may be useful in the context of assessing the likelihood that an individual offender may reoffend *in some form* – backed, of course, by evidence about the factors which increase the likelihood of reoffending, such as anti-social associates or homelessness – it does little to tell us about the specific *family violence* risk that an individual poses. Rather, the nature of risk as it relates to family violence can be very different from that of generalised offending. This means that an assessment by the LS/RNR tool and an assessment by the pending Multi-Agency Risk and Management Tool (developed in response to the Royal Commission recommendations) may yield quite different results.

Typologies of FV perpetrators.

It is important, therefore, that the SAC delve a little deeper into research about the nature of different FV offenders. To this end the CIJ has provided a background briefing paper to the Department of Premier and Cabinet on this issue which the SAC may be able to request.[23]

Drawing broadly on that paper, however, the SAC may be aware that attempts have been made to differentiate cohorts of FV perpetrators through a 'typology' approach.[24] This typology assumes three categories:

- *generally violent (GV)* perpetrators who commit acts of violence both within and outside the family context;
- *family only (FO)* perpetrators who commit family violence only; and
- a third group characterised by significant psychopathy and personality disordered traits.

A recent Australian study by the Crime Statistics Agency (CSA) found that 60% of FV perpetrators identified through the Victoria Police LEAP database over a period of five years were classified as having offences confined to family violence, with the remaining 40% having additional types of offences during this period.[25]

[23] R Vlais for Centre for Innovative Justice, *Cohorts of Family Violence Perpetrators,* Background Briefing Paper for Department of Premier & Cabinet, February 2017.

[24] Wangmann, J. (2011). Different types of intimate partner violence: An exploration of the literature. Australian Domestic and Family Violence Clearinghouse, Issues Paper 22. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2361189

[25] See https://www.crimestatistics.vic.gov.au/media-centre/news/research-paper-released-identifying-the-differences-between-generalist-and

It is not possible to tell from this report, however, how many of these additional offences by the 40% classified as 'generalist perpetrators' were crimes against the person. If the additional offending of many GV offenders relates to administrative or property offences, rather than crimes against the person, this may indicate issues of poverty, chaotic lifestyle, Acquired Brain Injury or other determinants of low level criminal activity, rather than a 'pointy end' of offenders who should attract more resources.

Meanwhile the third (and relatively small) cohort, being perpetrators with particularly high psychopathy traits, frequently have extensive criminal histories and entrenched antisocial or narcissistic beliefs. A key defining feature is their *inability* to empathise, which differs from the way in which other perpetrators *make a choice* not to empathise with those who they are violent towards. US research demonstrates that standard MBCPs are generally inappropriate for psychopathic perpetrators, and in fact might increase the risk they pose,[26] because the focus on empathy-building, interpersonal skills and emotional literacy can be used to *increase* their repertoire of tactics. That said, interventions which focus on monitoring and ongoing risk assessment can still be useful tools for keeping this cohort of perpetrators within view. [27]

Differentiation by risk level

More directly relevant to the use of the LS/RNR tool, Correctional and probation services in many jurisdictions classify violent offenders (including those with FV related offences) into high, medium and low risk categories. This classification is often based on the assumption that the degree of FV risk is highly correlated with the offender's *general recidivist risk* of physically violent and associated criminal behaviour, irrespective of the context of this behaviour (that is, whether it occurs against family members or in other settings).

In this sense, FV perpetrators who use an extensive array of coercive controlling tactics could potentially be deemed as 'low risk' if they have chosen to use physical violence infrequently (or if their use of it is simply not known to the system); have not engaged in other criminal behaviour; and have at least an average 'stake in conformity' with many social norms.

This may be true in many situations and, more relevantly, make a justice system's intervention potentially more effective, particularly where a specialist Magistrate and other court workers can leverage this 'stake in conformity' to maximum effect. However, it is equally possible that, despite this stake in conformity, a perpetrator with particularly entrenched denial will give little credence to a FVIVO or other consquence.

More broadly, it is crucial to recognise that not all high-risk perpetrators have significant violent offending behaviour histories, or even substance abuse or anti-social behaviour histories. Some high-risk perpetrators – particularly those with more stable lives and some level of socio economic advantage – have had little or no criminal justice system involvement, and might present to MBCPs as a result of child protection, civil justice system or other referral mechanisms. A sub-cohort of these can be identified as particularly likely to kill their children – seemingly out of the blue – to 'punish' their former partner.[28]

[26] C Huffine, (2015). In a class by themselves: Intervening with psychopathic DV perpetrators. Presentation for the *Advancing the Narrative* Batterer Intervention Services Coalition of Michigan conference 15-17 April 2015.
[27] Salter, above note 22.
[28] D Kirkwood, D, *Just Say Goodbye: Parents who kill their children in the context of separation*, Domestic Violence Resource Centre, Discussion Paper No. 8, 2012.

Meanwhile, other perpetrators who may be viewed as moderate to high risk may cycle through the system several times before experiencing an encounter with a Magistrate in which responsibility finally sheets home. This may also result from the Magistrate's skills and ability to get them to see that they have an interest in changing their behaviour.

All of this means that we must be wary of perpetrators being assessed as low risk and then either dropping off the radar or receiving no intervention. On the contrary, intervention at this point is crucial, as it may be that during this intervention it becomes clear that the perpetrator poses more of a threat than indicated by the initial assessment. If this is the case, it is crucial that there are immediate and responsive transition points to increase the intervention's intensity.

In fact, further significant information about the perpetrator's patterns of coercive control often becomes available through the course of his participation in an intervention, both through more extensive victim reports and disclosures (for example, as her trust in services builds over time). It also includes observation of how he responds to situations or 'triggers' of acute dynamic risk – being spikes in dynamic risk which occur as a result of such things as a pending court hearing, or another event in a perpetrator's life.

So what approaches *are* effective with FV perpetrators?

As described above, a prompt and clear consequence for violent behaviour is essential if a system is going to be effective in response to FV perpetration. What's more, early connection with a consequence of some kind is most effective with those who have minimal previous criminal justice system involvement, although this should not just be assumed. Meanwhile, other interventions are simply not going to be effective with perpetrators who have entrenched denial or view themselves as victims; or who have psychopathy traits.

Rather than apply a model which was designed for a different and specific setting, therefore, we need to take what we know about family violence offenders and work backwards. What is clear in the evidence about effective responses to FV perpetrators is that, as well as being swift, this consequence must be:

- experienced in the form of consistent messages from different parts of the system;
- be linked through various service provision and justice settings;
- be based on an expectation that an offender will work towards assumption of some kind of individual responsibility, rather than just mere compliance to avoid punishment;
- involve a sense of accountability to an individual in authority.

Judicial monitoring and procedural justice

To this end, the CIJ urges the SAC to make increased judicial monitoring a central platform of its recommendations, rather than an optional extra as it is currently conceived in the SAC Discussion Paper. The CIJ also urges the SAC to make therapeutic responses an equally central platform of its response. In fact, in the CIJ's view the SAC has mistakenly distinguished SCF approaches from the therapeutic, solution-focused court-based models which the CIJ was attempting to highlight in its 2015 report.

While much is still to be learned about FV perpetrators, what *is* known is that an individualised, meaningful and therapeutic encounter with a judicial officer is more likely to encourage desistance from violence or the assumption of responsibility than an anonymous, administrative or purely compliance based approach. This can be the case with offenders with a high stake in conformity *and* with those with little to lose, though psychopathic offenders require a different approach.

As noted above, however, a substantial flaw of the current system is that most encounters between family violence offenders and the justice system are anonymous, one-off exchanges in overcrowded court lists. These exchanges – which, as referred to earlier, can average three minutes in the civil context of Family Violence Intervention Order hearings[29] - do little to encourage a sense of accountability on the part of the offender. In fact, the anonymity of the court hearing and the detached manner of a busy Magistrate can sometimes *compound* the perception of the perpetrator that the 'system' is against him; that the court has little authority; and that he is likely to get away with disobeying any Order that has been made.

By contrast, return appearances before the same judicial officer who has ongoing involvement and knowledge of the case means that the judicial officer can:

- develop a deeper understanding of the offender's overall profile;
- develop an understanding of the offender's responsiveness to supervision and therefore the ongoing risk that the individual offender represents;
- identify and respond to the acute dynamic risk which can spike at various times
- understand what does and *does not* work with *particular* offenders in terms of behaviour change.

To this end, the CIJ's 2015 Report described pre-court reviews in the WA Magistrates' Court, in which a Magistrate ensures that a 'choreographed exchange leads to offenders feeling more accountable to the court as they know that the same Magistrate will hear of any non-compliance and that they will have to answer to that same Magistrate about it on their next appearance'.[30] The CIJ notes that reforms to the *Family Violence Protection Act* which are currently flagged will perform a similar function, including judicial officers being supplied with detailed risk assessments of the parties.

[29] Centre for Innovative Justice, above note 2. Hunter, above note 9.
[30] Centre for Innovative Justice, above note 2.

Similarly, an emphasis on judicial monitoring in New York's Integrated Family Violence Courts sees all matters dealt with by the same judge and dedicated court planning teams to ensure that information about compliance with court mandated programs is occurring. As explained above, respected evaluations of behaviour change programs in the US have suggested that they are most effective when linked with a strong criminal justice response and rigorous probation supervision.[31] This includes being able to apply a 'swift and sure' response, such as an immediate, short-term period of imprisonment. However, studies indicate that it is the certainty, not the severity, nor even the form, of the penalty which is important.[32]

This combination – being the certainty of a sanction of some kind plus the consistency of the judicial officer who will impose it – is crucial. It is crucial because evidence clearly shows that offenders are far more likely to comply with an Order or decision of the Court, regardless of the outcome, if they feel that they have been treated fairly and respectfully. To this end, the CIJ's 2015 report also noted that:

> *A crucial part of being effective is ensuring that a Magistrate engages meaningfully with a perpetrator in court and that judicial authority is leveraged to maximum effect. Research concerning procedural fairness confirms that the way in which a defendant is treated in the courtroom – including whether he feels heard and respected, and whether communication is clear – has a profound effect on his perception of the process, as well as the likelihood of him complying with court orders and the law generally.*[33]

Conversely, the dismissive manner of those more disinterested judicial officers can, on occasion, 'replicate family violence' for the victim and entrench a perpetrator's sense of entitlement.[34] Instead, perpetrators need to leave the courtroom feeling respected as an individual, but having no misconceptions about the fact that they will remain visible and accountable to the court.

Beyond the effect on the perpetrator, ongoing judicial monitoring is also an effective way of ensuring that information is shared between the agencies involved with the offender. This is because a judicial monitoring approach involves a central authority who can make sure that agencies deliver support or accountability. Without this central authority, offenders may fall through the cracks, as they may be seen as ineligible for participation in specific services. Alternatively, they may be discounted as unwilling to participate, simply because their ongoing engagement or participation was not followed up. In other words, without this central authority, the potential for blame-shifting exists, with no individual service prepared to take complete responsibility for the offender.

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[31] Gondolf, above note 12, Edleson, above note 11.

[32] J Breckenridge and J Hamer, *Traversing the Maze of 'Evidence' and 'Best Practice' in Domestic and Family Vioelnce Service Provision in Australia,* Issues Paper 26, May 2014, Australian Domestic & Family Violence Clearinghouse

[33] P Bowen & E Gold LaGratta, *To Be Fair: Procedural Fairness in Courts*, Policy Briefing 24 November 2014, Criminal Justice Alliance. At http://justiceinnovation.org/better-courts/publications/be-fair-procedural-fairness-courts.

[34] A George & B Harris, (2014) *Landscapes of Violence: Women Surviving Family Violence in Regional and Rural* Victoria, Centre for Rural and Regional Law and Justice, Deakin University p 107.

In this way, a judicial monitoring approach is as much about the accountability of the system overall as it is about the accountability of the offender. Just as crucially it is also about keeping the legal response visible to the community. By stark contrast, administrative reviews by Corrections Victoria as described by the SAC Discussion Paper do not generally allow for legal representation of the offender. The CIJ suggests that this focus on mere compliance would do little to convey to the offender the *reasons* for complying with the Order or the severity with which the community views their violent behaviour.

What's more, a focus on administrative compliance risks making the task of complying with an Order a full time job for an offender, with the original reason for the imposition of the Order eclipsed by the day to day demands of its administrative requirements. To this end, offenders need to be reminded on a regular basis by someone in authority *why* they have received a consequence and what they need to do to change.

Compliance based approaches

For this reason, the CIJ questions the value of models which are purely compliance based. While SCF approaches as described in the SAC Discussion Paper can be effective for drug or alcohol related offending, clearly FV offending is more complex. This is partially because, as the SAC Discussion Paper recognises, drug and alcohol abuse are *detectable* – and unequivocally so – through the employment of testing of various kinds. Just as importantly, however, it is because offenders are better able to recognise this tangible form of behaviour – as well as to assume responsibility and to seek help - than they are in relation to the use of violent or controlling tactics against their family members.

Certainly, in previous research, the CIJ has noted reports from service providers and Corrections case managers that offenders are far more likely to accept referrals for alcohol or drug treatment than for FV perpetration.[35] Ironically, research also suggests that, in some cases, being charged with a FV offence is an opportunity for some perpetrators to be referred to services for co-occurring issues such as alcohol abuse, and often for the first time.[36]

However, a purely compliance based model in the context of sanctioning *FV offending* is not necessarily going to be effective if it is seen to be indiscriminate or does not distinguish between administrative offending and the perpetration of further abuse. This means that a more adaptable and targeted approach needs to be taken. It also means that a custodial sanction should not be assumed.

This is particularly the case in relation to particular sectors of the population. As the SAC rightly notes, people with Acquired Brain Injury (ABI) will be disproportionately impacted by any regime which increases punishment of administrative breaches.[37] Equally, any regime which *increases* the contact of Aboriginal communities with custodial environments would have disastrous results, as the SAC has also acknowledged.

[35] Centre for Innovative Justice, (forthcoming, 2017) *Pathways towards accountability*, above note 10.
[36] Centre for Innovative Justice, above note 2, pp 50 and 55.
[37] Centre for Innovative Justice, *Enabling Justice Discussion Paper,* (2016), RMIT University.

Just as importantly, the imposition of short periods of custody on mothers should be avoided. Given that women are more likely to be the primary carers of their children, even a short period in custody would risk their children being taken into care (particularly where they are already on the radar of Child Protection because of their FV history), which in turn has disastrous consequences in the short and longer term.

In this context it should also be remembered that most women who are identified and charged as FV offenders are, in fact, victims of FV themselves who have been wrongly identified as the primary aggressor or who have been charged in the context of defending themselves. What's more, Aboriginal women are more likely than other cohorts of women to be charged as FV offenders, while women with ABIs are more likely than others to be repeat 'breachers' of FVIVOs.[38]

The use of custodial sanctions generally

With these very clear qualifications in mind, the imposition of brief custodial sanctions can be useful in some contexts, though evidence remains mixed. For example, while one early study found that perpetrators who were arrested were significantly less likely to reoffend six months later than those not arrested (based on police records or partner interviews), later studies found that arrest had only a modest impact on reducing domestic violence reoffending and that it could in fact lead to an *increase* in violence in the long-term.[39]

While swift arrest could build confidence in the consistency of police response, including making perpetrators take police response and court processes more seriously, some have cautioned against pro-arrest policies because they may have the unintended consequence of deterring women from reporting family violence.[40]

Similarly, the SAC Discussion Paper points to studies which indicate that short terms of imprisonment do not seem to have a positive effect on reducing FV offending. It is worth noting, however, that these studies have not been of prison terms of 24 hours or less imposed in the context of an agreed behavioural contract as per SCF programs. Nor is it clear whether they have been in the context of specialist court responses in which offenders are then connected with MBCP or ongoing case management, a crucial distinction.

Nevertheless, Victoria Police argue that a short period in custody can be highly effective. Under its pro-arrest policy in Dandenong, for example, suspected perpetrators are arrested and detained in custody for four hours, allowing police time to provide support to the victim and investigate whether to lay charges.[41] Assistant Commissioner Cornelius reports that the policy has a 'positive effect' on the perpetrator as it 'takes control away from them and makes clear that their conduct is criminal'.[42]

[38] Victoria Legal Aid, (2015), *Characteristics of respondents charged with breach of family violence intervention orders*, Melbourne.
[39] Centre for Innovative Justice (forthcoming 2017), above note 10.
[40] Ibid.
[41] Royal Commission into Family Violence, Witness statement of Assistant Commissioner Cornelius, 27 July 2015, 16 [62].
[42] Ibid.

He told the Commission:

> *It's the difference between a suspected offender sitting in the comfort of an interview room or that person spending time in a police cell alongside a drug dealer and a car thief. If we do this stuff to car thieves and drug dealers, we should absolutely be doing it to family violence offenders. They need to be in the same boat as any other common suspected criminal.*[43]

Victoria Police report that the pro-arrest approach has also seen a 'highly significant reduction in recidivism and repeat victimisation' in Dandenong.[44] The Royal Commission suggested Victoria Police consider expanding the pro-arrest policy to other divisions, but only after it has been evaluated and the effect on police resources has been considered.[45] It is important to recognise, however, that this pro-arrest policy is delivered in a very different context from that which is contemplated by this Review, being a swift, certain and fair regime which is imposed as in the context of a criminal sentence.

Flexible approaches

Given what is known about the complexity of FV offenders, including what is effective and what is not – the CIJ suggests that a response which is as flexible as possible, and which increases the options available to the legal system, rather than limits them, is appropriate. This means assessing perpetrators on an individual basis, rather than belonging to a certain cohort, whether this be a sector of the community, or a certain 'type' of offender. To this end, one of the most promising perpetrator intervention system approaches based on differentiation according to risk is found in Colorado.[46]

The Colorado Domestic Violence Offender Management Board streams perpetrators referred through the criminal justice system into low, medium and high intensity interventions based on the locally designed Domestic Violence Risk and Needs Assessment (DVRNA).[47] This instrument assesses both the level of risk *and* the complexity of criminogenic needs that require addressing to reduce this risk. Each intervention intensity stream is associated with a particular minimum of group and supplementary individual sessions per week. For example, the lowest intensity stream requires a minimum of one groupwork session per week, while the high intensity stream requires a minimum of one groupwork session and one individual session.

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[43] Royal Commission into Family Violence, Final report and recommendations, March 2016, Volume III, 60.
[44] Ibid.
[45] Ibid, 100.
[46] Vlais for Centre for Innovative Justice, above note 23. See also Colorado Domestic Violence Offender Management Board (2016). Standards for treatment for court ordered domestic violence offenders. Lakewood, CO: State of Colorado. https://cdpsdocs.state.co.us/dvomb/Standards/standards01.pdf
Hansen, J. (2016). Standards for Treatment with Court Ordered Domestic Violence Offenders: A Process Evaluation. Colorado Domestic Violence Offender Management Board. https://cdpsdocs.state.co.us/dvomb/Research/Evaluation.pdf
Gover, A., Richards, T., & Tomsich, A. (2015). Colorado's Innovative Response to Domestic Violence Offender Treatment: Current Achievements and Recommendations for the Future. Denver, CO: Buechner Institute for Governance. Retrieved 18/1/17. https://cdpsdocs.state.co.us/dvomb/Research/UCDDV.pdf
[47] This instrument is currently undergoing validation research.

The Colorado minimum standards for perpetrator program work do not specify minimum intervention lengths (number of group sessions or number of weeks) for each of these intervention intensity categories. The rationale is that intervention length needs to be based on a comprehensive case-by-case assessment and intervention plan, rather than a rigid program length regime being prescribed for all.

Decisions about the perpetrator's treatment plan, changing intensity categories or when to end the intervention are made by Multidisciplinary Treatment Teams (MTT) consisting at a minimum of the program provider, a victim's advocate and the justice system agency that has referred the perpetrator to the program. Treatment plan reviews are conducted by the MTT at least every 2-3 months over the course of a perpetrator's participation in a program, with the frequency higher for higher intensity streams.

The Colorado model has undergone process evaluation studies to determine the extent to which the approach is implemented with integrity by program providers. These evaluations are available at the Colorado Domestic Violence Offender Management Board website.[48]

Conclusion – A web of interventions

While the SAC's Review is obviously contemplating the merits of a specific sentencing regime (and one imposed in the Victorian context, rather than one overseas), it is nevertheless important to draw lessons from other approaches to inform its recommendations. Certainly, no approach can work in isolation. As work that the CIJ has conducted for the Department of Premier and Cabinet argues:

> *…all points of the system should function as doors to participation in an appropriate intervention, or at the very least as windows to the risk that a perpetrator may pose.* [49]

As referred to at the outset of this submission, it is also vital that:

> *As interveners, every action we take and every statement we make can and should be aimed at an efficient, consistent, coherent clear message that strips the abuser of his most powerful weapon: his message that 'they can't and won't help you'" …* [50]

It is crucial, however, that this task is approached with an understanding of the steps that a perpetrator of FV must generally take in order to start to increase his family's safety in any sustainable way. [51] In other words, a reality check is important, because to get to this place, a perpetrator must (amongst other things):

- Acknowledge that he is using violence
- Start to recognise the patterns of violence he is using, rather than a few 'signature' examples

[48] See http://dcj.dvomb.state.co.us/
[49] Centre for Innovative Justice, (forthcoming 2017), above note 10.
[50] Community Services Directorate *ACT Domestic Violence System – Final Gap Analysis Report,* May 2016, ACT Government.
[51] Noting that many do not arrive at this place, and remain posing a risk to family members despite the best efforts of service system interventions

- Develop an internal motivation to change and understand *what it is* exactly he's supposed to change
- Have a capacity to change (ie issues like homelessness can act as a significant barrier)
- Shift deeply seated attitudes and start to think differently
- Apply these new attitudes in behaviour towards family
- Discard influences which might work against these revised attitudes
- Start to make some amends for some of the damage caused
- Maintain any change in attitudes and behaviour achieved.[52]

In other words, it is a mistake to assume that a perpetrator's journey towards accountability will be a linear one. Equally, it is a mistake to assume that a justice-system consequence, or referral to a service, is the same as 'holding perpetrators to account'.

Instead, accountability must be about *all* points of the service system taking responsibility for the way in which their interactions with the perpetrator can potentially make families safer, ensuring that they do not inadvertently increase the risk he poses instead.

It is also about understanding that no service in isolation - whether a new sentencing regime, or MBCPs, which have borne a crushing burden of expectation that they can 'change' a lifetime of attitudes and behaviour in only months - are likely to make the necessary difference on their own.

Rather, 'perpetrator accountability' is about delivering a combined community and justice response which, in the case of intimate partner violence, 'is more powerful than the man's power in the relationship'.[53] For this to occur, this means every part of the service system response being held accountable for the way in which they respond and interact with any perpetrator; for the way in which they open doors or build bridges to other interventions; and for the way in which they support that perpetrator's path towards his own accountability.

What this means for this Review is that the SAC should consider how a sentencing response for FV offenders can become more prompt and clear, but also more targeted. For many perpetrators of gendered violence, blunt and indiscriminate responses will only entrench their sense that the system is against them and that it is everybody's fault but theirs. For other perpetrators – such as those with ABI, those wrongly identified as primary aggressors, or those from highly criminalised populations – blunt and indiscriminate responses will only entrench their inability to maintain or establish a stable life.

[52] Centre for Innovative Justice, (forthcoming 2017), above note 10.

[53] Prof C Humphreys, Dr C Laming & D K Diemer, 'Are Standalone MBCPs dangerous?', Workshop Presentation, NTV 2012 Australasian Conference on Responses to Men's Domestic and Family Violence: Experience, Innovation and Emerging Directions, 2012.

By contrast, a response which:

- makes perpetrators feel known and visible – but also that they have the potential and room to work towards change;
- which is targeted to be appropriate for the risk posed by *individual* perpetrators; and
- which can deliver prompt; clear and reliable consequences

is more likely to help perpetrators work towards our collective goal, being greater safety for their families and a more effective system overall.