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**USING THE “FAMILY VIOLENCE FLAG” TO BETTER IDENTIFY
HARM WITHIN FAMILIES**

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“Did you have a choice about what family you were born into?”

Question posed to the audience, Dr Ian Lambie, 2019

“The violence is normal, the drugs is normal, the crime is all normal and that’s my life, how I’ve lived for 24 years, how I was raised, how all my family are, generations, and generations, and generations.”

Dr Bronwyn Morrison, Marianne Bevan, “For me it was normal” Some initial findings from the family violence perpetrator study” Practice: The New Zealand Corrections Journal (Volume 6 Issue 2: November 2018)

“She’s gone and her eight babies have lost a mum a month before Christmas. It’s cruel. It’s so cruel.” “We need to be loud and we need to scream from the rooftops that it’s not okay.”

Sister-in law of Crystal Selwyn, who was beaten to death in front of her six youngest children
Reported in Newshub, 27 November 2019

Abstract

This thesis looks at how the identification and recording of family violence offending in the criminal justice system could be improved. In doing so it examines s 16A of the Criminal Procedure Act 2011, which was introduced in 2019 to ensure “family violence offences” are identified as such on charging documents and on the offender’s criminal record. This provision is known operationally as the “family violence flag”.

The role of the family violence flag in relation to risk assessment is considered, particularly its ability to reveal a perpetrator’s prior family violence offending. Research has shown that a history of family violence is the most consistently identified risk factor for intimate partner lethality and risk of re-assault. The potential of the family violence flag to improve the evidence-base of family violence offending in New Zealand is also considered, which is important given the prevalence and detrimental impact of family violence in New Zealand.

Analysis suggests that despite its recent introduction, changes could be made to s 16A to increase its utility. Accordingly, reform options to s 16A are proposed to better achieve the policy intent of the family violence flag, strengthening both its application and subsequent use.

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Word length

The text of this paper (including abstract, table of contents, footnotes, appendices and bibliography) comprises approximately 45,364 words.

Subjects and Topics

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Criminal Law
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Public Policy

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Chapter I: Introduction

I Research Argument

Family violence is not normal, but it is unfortunately common. It is one of the most pressing social issues facing New Zealand and has been described as a “scourge” in New Zealand society.¹ New Zealand has the highest reported rate of family violence offending in the developed world, although it has been estimated that almost 80 per cent of family violence still goes unreported.² Even when family violence is reported, research into victims’ experiences has found that criminal justice processes often add to the trauma already experienced.³

This thesis looks at how the identification and recording of family violence offending in the criminal justice system can be improved. In doing so, I examine the new provision in s 16A of the Criminal Procedure Act 2011, which commenced 1 July 2019. This provision was introduced to ensure that “family violence offences” are identified as such on charging documents and, upon conviction, on an offender’s criminal record.⁴ This provision is known operationally as the “family violence flag”.⁵ The full text of s 16A is set out in the appendices.

Offending that occurs in a family context (“family violence offending”) differs from other forms of criminal offending. Unlike other offending, family violence offending inherently concerns the relationship between the parties. Family violence can be physical, sexual, psychological, or emotional abuse and often manifests as a combination of different forms of abuse. Research has established that family violence is not a series of isolated incidents that affects an individual. Rather, it is a pattern of abusive behaviours that can have multiple victims – both adults and children – and is often intergenerational.⁶

The family violence flag enables family violence offending to be distinguished from other forms of offending that did not occur in a family context. In its review of New Zealand’s family violence laws, the Ministry of Justice noted the family violence flag will facilitate the

¹ *Solicitor General v Hutchison* [2018] NZCA 162, [2018] 3 NZLR 420 at [27].

² New Zealand Police *Our Data – You Asked Us* (June 2019).

³ Heather Douglas “The Criminal Law” Response to Domestic Violence: What’s Going On” (2008) 30 Sydney Law Review 439.

⁴ Criminal Procedure Act 2011, s 16A. Section 16A was introduced by the Family Violence (Amendments) Act 2018 and commenced on 1 July 2019.

⁵ Ministry of Justice “Family Violence (Legislation) Training Material – Criminal” (Obtained under Official Information Act Request to the Family Violence Implementation Team, Ministry of Justice).

⁶ Office of the Minister of Justice to the Cabinet Social Policy Committee “Family Violence Legislation – A modern Act with a greater focus on victims”, at 2.

consistent identification of family violence in criminal proceedings.⁷ It stated this will enable the court to use that information throughout the criminal justice process, allowing it to place more restrictions on the perpetrator and alerting it to the safety needs of victims.⁸

In explaining the need for this process, the Ministry said:⁹

It's difficult to consistently identify or record family violence in the criminal justice system. Family violence may occur in many different forms and can be prosecuted under a wide range of offences. This means family violence cases are not always treated as such and gathering information about family violence rates is difficult.

The Ministry further advised that the flag will remain on criminal records and may serve to inform future court decision-making, including decisions about parenting orders made in the Family Court.¹⁰

One of the meanings of the word “flag” is to mark an item for attention or treatment in a specified way. It is also a way to signal to someone (particularly a driver) to slow down, use caution, or to stop.¹¹ Throughout this thesis I take this concept of a “flag” and examine how it can apply to family violence offending.

Consider, for example, that a man is charged with intentional damage.¹² The background to the charge is that the defendant had got into a verbal argument with his partner, grabbed the keys to her four-wheel drive and drove it into the side of her house, causing extensive damage.¹³ The matter is set down for a bail hearing. Police do not oppose bail and the defendant's criminal and traffic conviction history reveals one conviction for dangerous driving.

Flagging this offence as a family violence offence on the charging document sends, firstly, a symbolic message that family violence does not just involve physical violence. The meaning of family violence in the Family Violence Act 2018 (the “FVA”) includes physical abuse, sexual abuse and psychological abuse.¹⁴ Section 9(1)(c) of the FVA includes damage to property as an example of psychological abuse. Despite this expanded definition, there remains

⁷ Ministry of Justice “Review of family violence laws: Paper 2 – Prosecuting family violence” at 4 (Obtained under Official Information Act Request to the Family Violence Implementation Team, Ministry of Justice).

⁸ Ministry of Justice *Departmental Disclosure Statement: Family and Whanau Violence Legislation Bill* (3 March 2017).

⁹ Ministry of Justice *Safer Sooner: Strengthening New Zealand's Family Violence Laws* (September 2016) at 12.

¹⁰ At 3.

¹¹ Oxford University Press *Oxford English Dictionary* (2020) OED <www.oed.com>.

¹² Crimes Act 1961, s 269.

¹³ This was the factual scenario of one of the charges in *R v Edwards* [2019] NZHC 2148.

¹⁴ Family Violence Act 2018, ss 9 – 11.

a tendency both in the courts and the media to view the level of seriousness of psychological abuse as being much less than physical violence.¹⁵

Secondly, the family violence flag can act as a prompt to the criminal court registrar to consider requesting information from the Family Court about any related FVA or Care of Children Act 2004 proceedings involving the defendant.¹⁶ Knowing whether there are other proceedings relating to the same family taking place can provide important contextual information about the risk the defendant poses and the likelihood of reoffending.¹⁷

Relatedly, the family violence flag can assist judges to consider what additional information they need to help them determine bail. This could include asking the prosecutor whether there have been any recorded Police family harm call-outs involving the defendant.¹⁸ It could also include examining the summary of facts for any family violence risk factors, such as strangulation, threats of harm or evidence of coercive or controlling behaviours. In this sense, the family violence flag is like a red light. It is a signal to stop, ask questions of the prosecutor and—if necessary—take a short break to enable this information to be provided.

Fourthly, when applied to the conviction for intentional damage, the family violence flag can help make visible patterns of offending that might otherwise have been invisible. In the example I give, the defendant has a limited criminal history; one offence for dangerous driving. But what if the circumstances of that offence were that the defendant deliberately drove into a power pole during an argument with his partner and immediately after she had asked him to stop and let her out? If this conviction had been flagged as a family violence offence the judge could have requested details about the nature of the offending. Flagging it would also help show a pattern and (potentially) escalation in the defendant's behaviour, indicating a propensity towards threatening and controlling behaviour when challenged by his partner.

As with the conviction for dangerous driving, there is nothing in the description of an intentional damage offence that marks it out as family violence. Ensuring the flag applies to this offence in the offender's criminal history helps build up a much clearer picture of their family violence offending. In this sense, the family violence flag acts as a mark on the

¹⁵ Australasian Institute of Judicial Administration *National Domestic and Family Violence Bench Book* (2019) <www.dfvbenchbook.aija.org.au> at 4.1. See also Law Commission *Maximum Penalties for Criminal Offences* (NZLC SP21, 2013) at 10.

¹⁶ Family Court Rules 2002, r 432 and r 432A.

¹⁷ Margaret Jackson and Donna Martinson "Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts" (discussion paper presented to the Canadian Observatory on the Justice System Responses to Intimate Partner Violence, January 2015).

¹⁸ See s 20 of the Bail Act 2000. A court dealing with a bail application may receive any information it considers relevant, whether or not it would otherwise be admissible (except when assessing the strength of the prosecution case).

offender's record. It identifies them as a family violence perpetrator and enables their offending trajectory to be tracked, providing opportunities for more targeted and effective interventions.¹⁹

While there is a wealth of information about the risk factors for family violence, and about the impacts of family violence on victims and children, there is limited discussion about how to ensure judges know what sort of case they are dealing with. In the family violence space, court events are "rich opportunities for intervention and compliance and accountability",²⁰ but those opportunities can be missed if judges do not have the full picture of information before them. What this thesis does is look at ways the family violence flag can be strengthened to ensure judges have access to as much relevant and admissible information as possible about the circumstances of the family.

II Scope of the Research

This thesis is limited to the narrower issue of identifying and recording family violence offences in charging documents and on the offender's permanent court record. In taking this position, I acknowledge this comprises only a small proportion of family violence abusive behaviours. I am not, for example, looking at recording family violence offending that has been dealt with by way of Police safety order, diversion or Youth Court disposition order.

In focussing on the criminal response to family violence, I acknowledge the interconnectedness of the criminal and civil jurisdictions in responding to family violence. Although the burden of proof and applicable legal principles can be different in the two jurisdictions, the decisions reached in each proceeding apply to the same people and the focus is usually on the same allegations of violence.²¹ In this respect, the family violence flag can play an important role in identifying related proceedings.

While outside the scope of this thesis, there are several post-sentence issues associated with use of the family violence that would be worthy of further research. For example, the family violence flag enables statistical research to be done about the number of family violence offences charged and convicted in New Zealand and their sentencing outcomes. It also enables further research to be done about the offending profile of family violence offenders, their recidivism rates and the effectiveness (or otherwise) of different sentencing options. Improving

¹⁹ Centre for Innovative Justice *Opportunities for Early Intervention: Bringing perpetrators of family violence into view* (RMIT University, March 2015).

²⁰ State of Victoria *Royal Commission into Family Violence: Report and recommendations, Vol III* (Parl Paper No 132 2014-16) submission of Deputy Chief Magistrate Felicity Broughton, at 153.

²¹ Jackson and Martinson, above n 17, at 8.

our knowledge about family violence offenders is particularly important for Māori, who are over-represented as both perpetrators and victims of family violence.

III Methodology and Sources of Information

To understand why the family violence flag was introduced, I looked at the Ministry of Justice's *Family Violence Review*,²² associated Cabinet Papers²³ and the Family and Whānau Violence Legislation Bill.²⁴ Government reviews and Commission reports from Australia contained useful discussion on the role and limits of the criminal law in responding to family / domestic violence. Family violence death review reports, both nationally and internationally, provided me with information about the prevalence of family violence and risk factors for future family violence. I located relevant journal articles on family violence criminal offending using online databases, though these articles tended to focus on the need for a specific family violence offence. I did not find any texts or articles discussing the specific function or operation of a "family violence flag".

The Ministry of Justice provided a copy of its briefing *Review of family violence laws: Paper 2 – Prosecuting family violence* (referred to throughout this thesis as the "Briefing Paper") in response to an Official Information Request.²⁵ I also received a copy of the Ministry's training materials for criminal court registrars on the family violence flag as part of this request. I referred to relevant criminal legislation and related family violence regulations to help me understand how the family violence flag is – and could be – used to trigger a differentiated response to family violence offending.

In developing my proposed amendments for reform, I compared the wording of s 16A to equivalent family violence flag provisions in Queensland and New South Wales legislation. I searched for relevant case law from these jurisdictions using Westlaw NZ, LexisNexis and through publicly available Australian case databases. Queensland case law was particularly useful in informing my discussion regarding retrospective application of the family violence flag. Useful information was also sourced through the websites of the Departments of Justice in New South Wales and Queensland. Citations of all materials referred to can be found in the bibliography.

Because the statutory family violence flag has only recently been introduced in New Zealand, the method of research for this thesis involved considering why family violence offending

²² Ministry of Justice, above n 9.

²³ Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 6; Office of the Minister of Justice to the Cabinet Social Policy Committee "Paper Three: Prosecuting family violence."

²⁴ Family and Whānau Violence Legislation Bill 2017 (247-1).

²⁵ Ministry of Justice, above n 7.

needs to be identified and recorded, the value of this process and how application of the family violence flag could be strengthened. I have read a number of family violence criminal cases to consider the implications of not identifying the family violence context of an offence, both to the outcome of the case at hand and to later cases involving the same offender. This has involved a degree of supposition because, as at the date of writing, there is no reported case law on s 16A.

IV Outline of Thesis

This introductory chapter sets out my research argument, namely that family violence offending needs to be identified and recorded (“flagged”) in order to differentiate it from other types of criminal offending.²⁶ I argue that the family violence flag is a prompt for decision-makers to stop, consider the dynamics and unique risk profile of family violence offending,²⁷ obtain further relevant information, and then ensure the flag is recorded on the offender’s criminal history. This latter step is necessary to build up and reveal a pattern of family violence offending.

Chapter II sets out the framework for my discussion of family violence. The chapter looks at contemporary understandings of what constitutes family violence and the current civil definition of family violence.²⁸ I argue that for the family violence flag to have any meaning, decision-makers across the justice system need to understand what family violence is and why they should know about it.

In Chapter III I discuss why it is important to identify family violence offending, outlining the policy background to the introduction of s 16A and the new legislative definition of a “family violence offence”. I link this chapter with Chapter II, arguing for greater awareness and training of family violence to ensure the flag is consistently applied to the charging document and the permanent court record.

In Chapter IV I examine whether s 16A, as the provision is currently drafted, can serve to better recognise and address the serious and repeat nature of family violence. This analysis suggests some amendments could be made to s 16A. I then give some practical examples of why and how the family violence flag could be strengthened so that it applies to all “proven” family violence offending.

²⁶ Ministry of Justice, above n 7, at 1.

²⁷ *Noble v Police* [2014] NZHC 562 at [21].

²⁸ Family Violence Act 2018, ss 9 – 11.

Chapter V looks at whether the family violence flag can, and should, apply retrospectively. Upon reviewing comparable case law, I argue there is no principled reason why s 16A should not apply to family violence offences for which the offender was convicted prior to 1 July 2019.

Chapters VI and VII consider how the family violence flag could be used to trigger a differentiated response to sentencing. In doing so, I reflect on the policy statement by the Ministry of Justice that “the presence of a family violence flag will serve to guide decision-makers, allowing them to place more restrictions on the perpetrator and alerting them to the safety needs of victims.”²⁹ In these Chapters I go beyond the reform recommendations proposed by the Ministry and look at the applicability of a family violence flag to the court’s ability to impose a civil protection order at sentencing.

Chapter VIII considers how the family violence flag can improve the evidence base relating to family violence offending. The chapter brings together arguments raised throughout the thesis about the importance of increasing our knowledge about family violence offending and family violence perpetrators.

Chapter IX brings together my proposals for reform. These include suggested amendments to s 16A to strengthen the application of the family violence flag, as well as amendments to the Sentencing Act 2002 to enhance victim safety when the case is identified as a family violence case. More general options to increase awareness of family violence offending are also considered.

Chapter X summarises the conclusions reached about the value and importance of the family violence flag, and how the proposals outlined in this thesis could contribute to safer decisions for victims, their children, their families affected by family violence.

V Terminology

The terms “perpetrator” and “victim” are used broadly to refer to the person who perpetrated the family violence and the person who was subjected to the family violence. I acknowledge that the term “victim” has attracted criticism for implying powerlessness or failing to resonate with those who do not feel helpless,³⁰ but adopt it here as the term most commonly used across government and the criminal justice system.

Throughout this thesis I refer to “intimate partner violence” and “intra-familial violence”. Offences by family members can be grouped into those by an intimate partner (partner or ex-partner) or by another family member (intra-familial). Other family members include a parent

²⁹ Ministry of Justice, above n 7, at 8.

³⁰ Australasian Institute of Judicial Administration, above n 15, at 3.

or step-parent, parent's partner, boyfriend or girlfriend; son or daughter including in-laws; sibling or step-sibling; and other family members including extended family.³¹ Depending on the circumstances, family violence can also occur between people who share a household or between carers and recipients of care.³²

When talking about specific civil proceedings, I use the terms “applicant” and “respondent”.³³ When discussing criminal proceedings, I use the terms “complainant” and “defendant” in relation to un-proven charges and bail hearings. The terms “victim” and “offender” are used in relation to proven charges and post-sentencing.³⁴

This thesis adopts the meaning of family violence as set out in the FVA.³⁵ In taking this position, I acknowledge there is no universally agreed definition of “domestic violence/family violence”. The use of the terms “family” or “domestic” is contested between theorists, notably between those who are concerned with violence as a reflection of power and control in intimate partner relationships (feminist researchers) and those who are more concerned with measuring all violence that occurs within family relationships (family conflict researchers).³⁶ Furthermore, the definition of “family violence” is not the same as “whānau violence”, which has been defined as “the compromise of te ao Māori values and ... an absence or disturbance of tikanga and transgressions against whakapapa.”³⁷

It is not the intent of this thesis to explore all the arguments relating to the cause or response to family violence. My focus is to ensure all offending that takes place in a family context – whether that is a manifestation of power and control between intimate partners or a one-off intra-familial incident – is identified. This at least alerts decision-makers to the fact there may be increased risk factors associated with the offending. The relevance or extent to which those risk factors are applicable then becomes an evaluative decision based on the circumstances of the particular case.

In line with New Zealand legislation, this thesis adopts a gender-neutral approach to terminology. However, it is accepted that family and sexual violence are gendered in terms of victimisation, perpetration and impacts of violence.³⁸ Women are nearly twice as likely as men

³¹ Ministry of Justice *New Zealand Crime and Victims Survey: Topical report: Offences against New Zealand adults by family members* (2020) at 7.

³² Family Violence Act 2018, ss 13 – 14.

³³ Family Violence Act 2018, s 8.

³⁴ Victims' Rights Act 2002, s 4.

³⁵ Family Violence Act 2018, ss 9 – 11.

³⁶ Rochelle Braaf and Isobelle Barrett Meyering *The Gender Debate in Domestic Violence: The Role of Data* (Australian Domestic & Family Violence Clearinghouse, Issues Paper 25, May 2013) at 19.

³⁷ Te Puni Kokiri *Rangahau Tūkino Whānau: Māori Research Agenda on Family Violence* (2009) at 4.

³⁸ Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 6, at 8.

to suffer partner abuse in their lifetime, and experience more cumulative harm from family violence. Men are more likely to perpetrate sexual violence, serious assaults on adults and children, and to be arrested for family violence.³⁹

The next chapters of this thesis further explore what family violence is and why it is so important that judges – and other decisions-makers – know about it; both in relation to the charges in front of them and when they are considering the perpetrator’s history of violence.

³⁹ At 8.

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Chapter II: What is Family Violence and Why Do We Need to Know About It?

My thesis is that family violence offending differs from other types of offending and needs to be accurately identified as such. As noted in my introduction, the family violence flag applies when a perpetrator commits an offence against any enactment and their offending behaviour involves family violence.⁴⁰ For this flag to have any meaning, decision-makers across the justice system need to understand what family violence is and why they should know about it.

In this chapter I set out the statutory meaning of family violence as defined in the Family Violence Act 2018 (“the FVA”). I briefly discuss how the meaning of family violence has expanded in line with current understandings about the dynamics of family violence, and how this has been recognised in case law. I then look at the impact of family violence on victims, children and society, arguing that the family violence flag can help build the evidence base about family violence offending in New Zealand. In the third section of this chapter I outline evidence-based risk factors for future family violence and discuss how the family violence flag can be used to inform assessment of risk.

I The Family Violence Act 2018: A “Modern and Victim Focussed” Act

The legislative definition of “domestic violence”/“family violence” has broadened since it was first introduced in the Domestic Protection Act 1982, with greater emphasis now placed on the risks associated with – and the impact of – psychological abuse, as well as the impact of family violence on children.⁴¹ On 1 July 2019 the FVA came into force, introducing a change in terminology from “domestic violence” to “family violence” in all legislative reform. The Minister of Justice explained the change in terminology by saying “the title ‘Family Violence Act’ reflects our modern understanding that violence can be present in a wide range of family relationships.”⁴²

In exercising any power under the FVA, the court must be guided by the Act’s purpose: by recognising that family violence in all its forms is unacceptable; by stopping and preventing perpetrators from inflicting family violence; and keeping victims, including children, safe from family violence.⁴³ The FVA also includes a new principles section to guide decision-making

⁴⁰ Criminal Procedure Act 2011, s 16A.

⁴¹ The Domestic Violence Act 1995 widened the relationship which came within the Act’s protective powers, changed the definition of ‘violence’ to include ‘psychological abuse’. As part of the Family Court Reform Package 2013, the definition of ‘psychological abuse’ was changed to include reference to ‘financial and economic abuse’.

⁴² Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 6, at 6.

⁴³ Family Violence Act 2018, s 3(1).

in order to achieve the purpose of the Act.⁴⁴ The principles are not confined to intimate partner violence, which is presumably in keeping with the FVA's focus on addressing family violence that occurs in a wide range of family relationships.

The purpose and principles of the FVA, and the broad meaning of family violence, have been recognised by the courts in respect of whether a final protection order is necessary and whether abusive behaviour amounts to a breach of a protection order. This jurisprudence dates back at least to 1997, when Hammond J in *Takiari v Colmer* discussed the intent and purpose of the new Domestic Violence Act 1995. In his oft-cited quote, Hammond J was clear that “[t]he central feature of the statute, properly understood, is that protection from domestic violence is directed towards the elimination of abusive power and control in domestic relations.”⁴⁵

A Meaning of Violence

The FVA includes an expanded meaning of family violence in ss 9 - 11 (reproduced in the Appendices). Section 9(1) defines “family violence” to mean violence inflicted against that person, by any other person with whom that person is, or has been, in a family relationship.⁴⁶ Violence is defined in s 9(2) to mean all or any of the following: physical abuse: sexual abuse: psychological abuse. Subsections (3) and (4) of s 9 introduce two new additions to the definition: coercive or controlling behaviour, and dowry abuse. Under s 10, the violence referred to in s 9(2) can either be a one-off act or a pattern.⁴⁷

Section 9(3) provides that violence against a person includes a pattern of behaviour that may be coercive and controlling (because it is done against the person to coerce or control, or with the effect of coercing or controlling, the person) and/or it causes the person, or may cause the person, cumulative harm.⁴⁸

Among social scientists, family violence is almost universally described as an ongoing pattern of behaviour motivated by the perpetrator's desire for power and control over the victim.⁴⁹ Psychological abuse frequently forms part of the pattern of controlling behaviours, and what constitutes psychological abuse is highly contextual as between the perpetrator and victim. The

⁴⁴ Family Violence Act 2018, s 4.

⁴⁵ *Takiari v Colmer* [1997] NZFLR 538 at 540.

⁴⁶ Family Violence Act 2018, s 9(1).

⁴⁷ Family Violence Act 2018, s 10.

⁴⁸ Family Violence Act 2018, s 9(3).

⁴⁹ Evan Stark *Interpersonal Violence: Coercive Control: The Entrapment of Women in Personal Life* (Cary, US: Oxford University Press, Incorporated, 2007. ProQuest eLibrary); Heather Douglas “Do we Need a Specific Domestic Violence Offence?” (2015) 39 M Uni L Rev 434 at 447.

Office of the Minister of Justice noted that “coercive or controlling behaviour is a purposeful pattern of behaviour, focused on exerting power and control or coercion over another.”⁵⁰

However, while the meaning of family violence includes patterns of harm that constitute coercion or control, the definition does not require this to be present for an act to constitute family violence.⁵¹

B Meaning of Psychological Abuse

Section 11 sets out the meaning of psychological abuse. The FVA amends the previous definition of psychological abuse by including two additional examples of abuse: hurting pets/animals; and the denial of aid, a device, medication or support that affects a person’s quality of life when that person is a vulnerable adult.⁵² This is especially designed to address elder abuse.⁵³ The definition also provides examples of behaviour that could constitute intimidation and harassment, such as watching, loitering near, or preventing or hindering access to or from a person’s place of residence, business or employment, or education institution. Psychological abuse includes abuse of a child.⁵⁴

The courts have taken a broad interpretation as to what abusive behaviour constitutes family violence (specifically psychological abuse). In *G v C* (FC) Judge Walsh identified some characteristics of psychological abuse, including behaviour which chips at a person’s confidence or is designed to “put a person down” or humiliate that person.⁵⁵ In *M v Police* Gendall J expanded on what amounts to psychological abuse, noting “[psychological] abuse may take an infinite variety of forms ... it is to be determined in the context of the surrounding circumstances, historical as well as proximate or present, as they relate to the abuser and victim.”⁵⁶

More recently, the Court of Appeal in *Cooper v R* took a broad interpretation to the infliction of financial abuse, acknowledging it as psychological abuse irrespective of whether psychological distress actually results from it.⁵⁷ In *Carrington v Carrington*, the High Court recognised a pattern of behaviour from a son toward his elderly mother (ignoring her wishes,

⁵⁰ Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 23, at 21.

⁵¹ Family Violence Act 2018, ss 9(3) and 9(5).

⁵² Family Violence Act 2018, s 11.

⁵³ See *Carrington v Carrington* [2018] NZHC 505.

⁵⁴ *Ibid.*

⁵⁵ *G v C* (1997) 16 FRNZ 201 (FC) at 208.

⁵⁶ *M v Police* [2007] NZFLR 160 at [15]. See also *M v M* (2005) 7 HRNZ 971 (HC) Miller J at [21]: “[it] is doubtful whether any single definition could encapsulate all forms of behaviour affecting the protected person’s emotional or mental state, still less the circumstances in which such behaviour will amount to abuse.”

⁵⁷ *Cooper v R* [2018] NZCA 159, [2018] NZFLR 442.

dominating behaviour) as a form of psychological abuse.⁵⁸ In *K v Police*⁵⁹ and *McGregor v R*,⁶⁰ both of which involved contravention of the protection order, it was found that the respondent's actions in deliberately encountering his ex-partner, even though there was no evidence of verbal or physical interaction between the parties, amounted to psychological abuse.

C Meaning of “Family Relationship”

There must be a “family relationship” between the parties for the abuse (physical, sexual or psychological) to constitute family violence. The general meaning of family relationship is set out in s 12 of the FVA:

12 Meaning of family relationship: general

For the purposes of this Act, a person (A) is in a **family relationship** with another person (B) if A—

- (a) is a spouse or partner of B; or
- (b) is a family member of B; or
- (c) ordinarily shares a household with B (*see also* section 13); or
- (d) has a close personal relationship with B (*see also* section 14).

“Partner of the other person” has a broad definition to include a civil union partner, including an ex-civil union partner, a de facto partner (including LGBTTTQIA+ partners), and the non-cohabiting parents of a child.⁶¹ A “family member” is any person related by blood, marriage, civil union, de facto relationship, adoption and a person who belongs to the same whānau or “other culturally recognised family group.”⁶² The meaning of sharing a household and close personal relationship is further defined in ss 13 and 14 respectively. Section 14 explicitly refers to the relationship between carers and recipients of care in the definition of family relationship, acknowledging that both can be particularly vulnerable and at risk of family violence when there is a relationship of dependence.⁶³

⁵⁸ *Carrington*, above n 53. See also *Police v Hawley* [2019] NZDC 11552, in which the District Court Judge found that child abduction may amount to psychological abuse.

⁵⁹ *K v Police* [2019] NZHC 1258.

⁶⁰ *McGregor v R* [2019] NZHC 1069.

⁶¹ Family Violence Act 2018, s 8.

⁶² *Ibid.*

⁶³ Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 6, at 5.

II Impact of Family Violence

Family violence is prevalent, complex, and has detrimental and long-lasting impacts on victims, their children and society more broadly. Part of responding to and preventing family violence relates to improving the evidence-base of family violence offending in Aotearoa/New Zealand; knowing more about the perpetrators who inflict family violence – their histories and offending trajectories; and knowing more about the victims who experience it.

In its Briefing Paper, the Ministry of Justice considered that the family violence flag could increase the accuracy of data about the prevalence of family violence offending, and the offences used to prosecute it.⁶⁴ This is an important benefit as New Zealand has the worst reported rates of family violence in the OECD.⁶⁵ In 2018, Police attended 133,022 family harm investigations – up from 118,926 investigations in 2016 – although it is estimated that 76 per cent of family violence goes unreported.⁶⁶ Police data for the last three years shows that approximately 30% of all family harm investigations involved an identified offence, although this is likely to under-represent the full scale of family violence offending.⁶⁷

The past 30 years have seen significant efforts to respond to family violence. The current reform landscape has been influenced by findings and recommendations from the Family Violence Death Review Committee (the “FVDRC”), which have been influential in improving knowledge about the dynamics of family violence and risk factors for future violence.⁶⁸ Alongside the FVDRC’s work, the Law Commission released two significant reports examining family violence offending: *Strangulation: The Case for a New Offence*⁶⁹ and *Understanding family violence: Reforming the Criminal Law relating to Homicide*.⁷⁰

The prevalence and impact of family violence informed the Ministry of Justice’s *Family Violence Review* and the introduction of the Family and Whānau Violence Legislation Bill. One of the Cabinet Papers accompanying the Bill noted that it (the Bill) is an important part of

⁶⁴ Ministry of Justice, above n 7, at 4.

⁶⁵ New Zealand Police, above n 2.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Family Violence Death Review Committee *Fourth Report: January 2013 to December 2013* (Health Quality & Safety Commission, 2014); and Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality & Safety Commission, 2016).

⁶⁹ Law Commission *Strangulation: The case for a new offence* (NZLC R138, 2016).

⁷⁰ Law Commission *Understanding Family Violence: Reforming the Criminal Law relating to Homicide* (NZLC R139, 2016).

the legislative framework that supports the collective work to stop family violence.⁷¹ The Paper summarised the impact of family violence on victims and society, noting:⁷²

Between 2009-2015, 194 people were killed as a result of family violence and over half a million New Zealanders were directly affected by family violence each year. This violence has lasting impacts on victims, their families and communities, and wider society. Family violence is one of the largest drivers of violent crime. Young people who grow up in homes with family violence make up almost 80% of youth offenders. The trauma of family violence is intergenerational, with family violence being experienced during childhood as the largest indicator of a future perpetrator. With the right institutional and funding arrangements, we can disrupt this cycle of family violence.

Similar comments have been made by the courts. In *R v Toru Dobson* J acknowledged the impacts of family violence extend beyond the physical scars resulting from the violence.⁷³

Domestic violence is a pervasive scourge affecting New Zealand society. The victims are not only those, mostly women, who suffer physical, psychological and sexual abuse within a relationship, but also the extended families and especially children who are psychologically and emotionally, if not physically, scarred by it as well.

In *Solicitor-General v Hutchison*,⁷⁴ the Court of Appeal cited *Every Four Minutes*, which identified intimate partner violence as the leading cause of female homicide death in New Zealand and the most common type of violence that New Zealand women experience.⁷⁵

Victims of family violence frequently experience a range of mental health difficulties. Family violence increases a person's risk of developing depression, post-traumatic stress disorder, substance abuse and suicidality as well as a range of other chronic health conditions.⁷⁶ Some of the social and economic impacts include social isolation, inability to work and long-term problems in the formation of new relationships. Many of these problems and their associated social and economic costs are known to persist long after the abuse ends.⁷⁷

The intergenerational impact of family violence (or the "victim-offender cycle") is well-documented. This cycle bears heavily on Māori and Pasifika involved in the criminal justice system, with sentencing decisions for serious family violence offending frequently detailing

⁷¹ Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 6, at 1.

⁷² At 1.

⁷³ *R v Toru* [2018] NZHC 1144 at [25].

⁷⁴ *Solicitor-General v Hutchison*, above n 1, at [27].

⁷⁵ Ian Lambie *Every 4 minutes: A discussion paper on preventing family violence in New Zealand* (Office of the Prime Minister's Chief Science Advisor, November 2018).

⁷⁶ At 18.

⁷⁷ Office of the Minister of Justice to the Cabinet Social Policy Committee "Paper One: Context and supporting integrated responses" at 10.

horrific childhood abuse and normalised violence in the offenders’ backgrounds.⁷⁸ Māori and Pasifika are disproportionately represented in family violence statistics, including criminal proceedings, youth justice proceedings and care and protection notifications. Māori and Pasifika also face higher rates of criminal victimisation.⁷⁹

Children can be both the direct victims of violence and witnesses of violence against others, most likely a parent.⁸⁰ Both forms of abuse have serious negative psychological developmental consequences for children.⁸¹ Of particular concern is neuroscience research that has proved that exposure to family violence can affect the emerging architecture of a young child’s brain, rendering them less able to regulate their emotions, as well as tending to act more aggressively.⁸² Accordingly, it is unsurprising that children who have experienced abuse and trauma are at higher risk of involvement in the criminal justice system. Young people who grow up in homes with family violence make up almost 80% of youth offenders.⁸³

Recently, there have been concerted efforts by criminal justice agencies to identify and record family violence to help improve the statistical evidence base. For example, in 2017 New Zealand Police rolled out a comprehensive approach to addressing and responding to family violence.⁸⁴ Police have been trained to take a more holistic view of the issues occurring within a family, the nature and dynamics of family violence and how to identify patterns of harm.⁸⁵ It is expected that this will lead to greater awareness of all forms of family violence offending — not just breach of protection order or assault on a family member — and improved flagging of family violence offences.

III Risk Factors for Family Violence

It is well recognised that family violence has features that demand additional caution in respect of bail decisions and determining risk of further offending.⁸⁶ For the purposes of family

⁷⁸ See *R v Edwards* [2019] NZHC 2784; *S v New Zealand Police* [2019] NZHC 2784; and *R v Pohipi* [2019] NZHC 3048.

⁷⁹ Lambie, above n 75, at 16. Julia Ioane, Ian Lambie, Teuila Percival “A comparison of Pacific, Maori and European violent youth offenders in New Zealand” (2016) 60(6) *International Journal of Offender Therapy and Comparative Criminology* 657.

⁸⁰ Family Violence Act 2018, s 11(2).

⁸¹ Ministry of Justice *Family Violence Risk Assessment Management Framework* (2017) at 5.1.6.

⁸² Lambie, above n 75, at 18 – 20.

⁸³ Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 6, at 1.

⁸⁴ New Zealand Police “Family Harm approach (with resources)” <www.police.govt.nz>.

⁸⁵ *Ibid.*

⁸⁶ *Noble v Police*, above n 27.

violence risk assessment and management, “risk” can be generally understood as assessing the likelihood of future harm and/or lethality based on information pertaining to past behaviours.⁸⁷

The family violence flag can assist the family violence risk assessment and management process by identifying those matters where a family violence context is present. It can also bring greater visibility to a perpetrator’s family violence history by identifying which convictions involved family violence. As I discuss below, the most consistently identified risk factor for intimate partner lethality and risk of re-assault is the previous history of violence by the perpetrator against the victim.⁸⁸

A Assessment of Risk in Civil Jurisdiction

In the civil context, the Court of Appeal in *Surrey v Surrey*⁸⁹ and *SN v MN*⁹⁰ considered that the court will assess the risk of family violence (for the purpose of determining necessity for a protection order) on the basis of past conduct, informed by the subjective views of the victim and any other relevant factors.

Section 79 of the FVA empowers the making of final protection orders and provides a two-pronged test for the court to apply in doing so. The court must first be satisfied that the respondent is using, or has used, family violence against the applicant, or a child of the applicant’s family, or both.⁹¹ Secondly, the court must be satisfied the order is necessary for the protection of the applicant, or a child of the applicant’s family, or both.⁹²

Regarding the “necessity” test, the court is bound to consider if there is a pattern of behaviour in respect of which the applicant, or a child of the applicant’s family, or both, need protection – even if the behaviour in respect of which the application is made appears to be minor or trivial when viewed in isolation, or unlikely to recur.⁹³ The single most robust predictor of future violence is a history of multiple offences, but a serious one-off episode may still pose sufficient risk to justify an order.⁹⁴

⁸⁷ Corina Backhouse and Cherie Toivonen *National Risk Assessment Principles for domestic and family violence: Companion resource* (ANROWS, Insights Issue 09/2018, 2018) at 9.

⁸⁸ Corina Backhouse and Cherie Toivonen *National Risk Assessment Principles for domestic and family violence* (ANROWS, Insights Issue 07/2018, 2018) at 12.

⁸⁹ *Surrey v Surrey* [2008] NZCA 565, [2010] 2 NZLR 581.

⁹⁰ *SN v MN* [2017] NZCA 289 at [24].

⁹¹ Family Violence Act 2018, s 79(a).

⁹² Family Violence Act 2018, s 79(b).

⁹³ Family Violence Act 2018, s 82.

⁹⁴ *SN v MN*, above n 90, at [24(a)].

The court must also have regard to the perception of the applicant, or a child of the applicant's family, or both, of the nature and seriousness of the behaviour in respect of which the application is made.⁹⁵ While the effect of the respondent's behaviour on the applicant can be exacerbated by vulnerability of the applicant,⁹⁶ the applicant's perception is only one relevant factor to consider (albeit a relatively fundamental one).⁹⁷

Once the court is satisfied that the applicant has a reasonable held fear of future violence, the onus shifts to the respondent to demonstrate why an order should not be granted.⁹⁸ In *KFW v KBW*,⁹⁹ the Family Court Judge had declined a final order because of three countervailing factors: the respondent had a new partner; the interactions between the parties were good; and the respondent had complied with the temporary order. The decision was reversed on appeal, with Jagose J highlighting the importance of the respondent's previous pattern of violence in rendering the protection order necessary:¹⁰⁰

Reliance on past behaviour is the most reliable guide to future conduct. It can be reasonable to have fears for the future solely on the basis of past behaviour, depending on the nature and seriousness of that past behaviour. KBW has been both verbally and physically abusive to KFW in the past.

B Assessment of Risk in Criminal Proceedings

Family violence occurs in the context of a family relationship; the perpetrator will know the victim, they may have children together, they may live in the same home.¹⁰¹ Even if they do not, the victim and perpetrator may continue to have contact well after the perpetrator has been dealt with.¹⁰² In the bail context, this background increases the likelihood that the defendant will interfere with the complainant (victim) or any person in a family relationship with the complainant (for example, children or partner).¹⁰³ It also increases the risk of reoffending, both against the complainant and people in a family relationship with the complainant.¹⁰⁴

In *Noble v Police* – a family violence bail decision – Katz J observed that “domestic violence has its own unique features. Due to the particular context in which such offending occurs, its

⁹⁵ Family Violence Act 2018, s 83; *Surrey v Surrey* above n 89.

⁹⁶ Family Violence Act 2018, s 83(1)(b); *H v W* [2019] NZHC 616 at [52].

⁹⁷ *KFW v KBW* [2019] NZHC 2621 at [27].

⁹⁸ *Surrey v Surrey*, above n 89, at [43]. See also *KFW v KBW* at [27].

⁹⁹ *KFW v KBW* above n 97.

¹⁰⁰ At [27], footnotes omitted.

¹⁰¹ Ministry of Justice, above n 7, at 2.

¹⁰² *Ibid.*

¹⁰³ Bail Act 2000, s 8(1)(a)(ii).

¹⁰⁴ Bail Act 2000, s 8(1)(a)(iii).

risk profile differs in some respects to other forms of violent offending.”¹⁰⁵ This context is defined by the relationship between the perpetrator of the violence and the victim, not by the violence itself. Since Katz J’s decision in *Noble*, judges determining bail in family violence cases have looked to evidence-based risk factors to inform their assessment of the risk the defendant poses.¹⁰⁶

Similarly, in *JV v R*, a family violence case in which the defendant sought removal of a non-association order, Palmer J said:¹⁰⁷

In addition, I bear in mind that family violence cases present complex risk factors in terms of reoffending. Family violence dynamics have been the subject of judicial notice.¹⁰⁸ Family violence is often repeated and is known often to escalate in severity. I take the victim’s views seriously. And her support is the only reason there is a question about this application. But I am also aware the dynamics of family violence mean it is not uncommon for a victim to support a defendant’s return to the family home, even when there is a significant risk of re-offending. This allows an offender to escape from confronting their own responsibility for what happened.

Evidence-based risk factors for family violence have been the subject of much academic literature. The evidence base for risk factors in New Zealand is detailed in the following reports: *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006*;¹⁰⁹ the Law Commission’s Report *Strangulation – The Case for a New Offence*;¹¹⁰ and the Fourth and Fifth Annual Reports of the Family Violence Death Review Committee.¹¹¹ These reports, along with police records, have identified a range of evidence based factors that are associated with a higher likelihood of serious or lethal family violence.

The factors identified include both static factors (those factors which *statistically* increase the risk of family violence) and dynamic factors (this refers to the risk associated with an event or incident that may trigger further violence). The New Zealand reports have found – and this is backed up by international research – that a history of family violence, either with the same or previous partners, is the most consistently identified risk factor for intimate partner lethality

¹⁰⁵ *Noble v Police*, above n 27, at [21]. See also *S v Police* [2018] NZHC 2916.

¹⁰⁶ Section 8(1) of the Bail Act 2000 sets out the three mandatory considerations the court must take into account in determining whether there is just cause for continued detention of the defendant: whether there is a risk the defendant may fail to appear, interfere with a witness or re-offend while on bail.

¹⁰⁷ *JV v R* [2017] NZHC 264 at [22].

¹⁰⁸ *Noble v Police*, above n 27, at [22] and *Turnbull v New Zealand Police* [2016] NZHC 2159 at [24].

¹⁰⁹ Jennifer Martin and Rhonda Pritchard *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006* (Ministry of Social Development, April 2010).

¹¹⁰ Law Commission, above n 69.

¹¹¹ Family Violence Death Review Committee, above n 68.

and risk of re-assault.¹¹² Factors frequently found to be present at the time of the family violence episode are threats, imminent or recent separation, jealousy and strangulation.¹¹³

The most recent FVDRC report emphasises that intimate partner violence should be understood as a pattern of harmful behaviour that belongs to an abusive person, viewed in the context of their entire pattern of behaviour and history of abuse. It acknowledges “past patterns of behaviour (including abusive behaviour that does not involve physical violence and which does not result in a conviction) are highly relevant in assessing future risk.”¹¹⁴

A recent Australian literature review found that the commission of a violent offence in the context of family violence increases the likelihood that the offender will reoffend sooner, in comparison with a person who has committed a violent offence in a non-family violence context.¹¹⁵ The review also found that having a prior breach offence was a risk factor for committing a further family violence offence or a violent family violence offence. People who reoffended were significantly more likely to have a violent offending history than those who did not reoffend.¹¹⁶

In bail proceedings, judges will look to the defendant’s past record of offending to help determine their risk of re-offending. This includes both prior relevant convictions and Police family violence call-outs (which can be considered under s 20 of the Bail Act 2000).¹¹⁷ In *Clifton v Police* Mander J considered the defendant’s family violence history in circumstances where he was charged with threatening to kill and strangulation against his intimate partner.¹¹⁸ Having regard to information provided by the prosecutor, Mander J observed:¹¹⁹

.. the 2016 conviction for violence while on bail, coupled with his convictions for speaking threateningly in that same year and in 2013, and multiple assaults committed in 2012, one of which is noted as an offence of family violence, are troubling.

To help provide context about a defendant’s family violence history, Police have been piloting a practice whereby they prepare “family violence bail packs” for the court in matters identified

¹¹² Backhouse and Toivonen, above n 87, at 12.

¹¹³ Ministry of Social Development, above n 109; Law Commission, above n 69, Family Violence Death Review Committee, above n 68.

¹¹⁴ Family Violence Death Review Committee, above n 68, at 93.

¹¹⁵ Shann Hulme, Anthony Morgan & Hayley Boxall *Domestic violence offenders, prior offending and reoffending in Australia* (Australian Institute of Criminology, no. 580, September 2019).

¹¹⁶ Ibid.

¹¹⁷ Section 20 of the Bail Act 2000 allows a court dealing with a bail application to receive any information it considers relevant, whether or not it would otherwise be admissible (except when assessing the strength of the prosecution case).

¹¹⁸ *Clifton v New Zealand Police* [2019] NZHC 2926.

¹¹⁹ At [13].

as involving family violence.¹²⁰ Among other information, including the defendant's bail history and the complainant's views, the bail packs contain the Police Family Violence Summary. This summary lists all previous family violence call-outs involving the defendant, irrespective of whether they resulted in charges or convictions.¹²¹ The family violence bail packs also contain any relevant information from the Family Court, including FVA and Care of Children Act proceedings.¹²²

If an offence involves family violence but is not flagged as such on the charging document, a judge may not receive the additional information contained in the family violence bail packs. Furthermore, if a relevant conviction is not flagged as family violence, the defendant's conviction history may not reveal their full history of family violence offending. In this sense, the family violence flag plays two roles in relation to risk assessment: Firstly, it identifies those cases where additional information about the defendant's background and circumstances may be relevant. Secondly, it can help identify patterns of abusive behaviour and whether those patterns are escalating.

IV Concluding Comments

Family violence can encompass a broad spectrum of behaviour within a range of family relationships. Offending that is reported to Police and prosecuted is usually physical violence between intimate partners, although family violence offending is not limited to this sort of abusive behaviour or to these types of family relationships. Financial abuse, child abuse, or elder abuse can also be family violence. In distinguishing offending that occurs in a family context from other forms of offending, researchers have identified a range of evidence-based risk factors that are associated with a higher likelihood of serious or lethal family violence. The most significant of these risk factors – and the one I focus on for the purpose of this thesis – is the perpetrator's history of family violence.

By its very nature, family violence offending occurs in private. “Young children are powerless to speak out when dependent on and threatened by violent adults; and intimate partnership violence involves complex issues of power and control.”¹²³ Family violence offending has significant adverse impacts on victims, their families/whānau and the wider community. In taking action to address the issue, it is important that family violence offending is made visible. It needs to be flagged in criminal justice data-sets, charging documents and conviction

¹²⁰ Jared Nicoll “Family violence ‘Judge’s Packs’ to inform more judges making bail decisions” *Stuff News* (New Zealand, 3 May 2016).

¹²¹ *Ibid.*

¹²² Family Court Rules 2002, r 432.

¹²³ Lambie, above n 75, at 15.

histories. Judges making bail and sentencing decisions need to know if the offending took place in a family violence context as this raises different risk considerations.

In the next chapters of this thesis I look discuss the practical application of the family violence flag, as well as recommending opportunities to strengthen its use.

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Chapter III: Why is it Important to Identify Family Violence Offending?

Even prior to the introduction of s 16A there has been a system for flagging family violence incidents in Police and court databases.¹²⁴ All Police incidents that are categorised as family violence are identified with a family violence flag (the “Police flag”).¹²⁵ If a charge is filed, information from the National Intelligence Application (NIA) about the charge, including the flag, is transferred into the Court Management System (CMS).¹²⁶ Information on a person’s criminal history is generated from CMS data. When a case has been finally determined by a court, information on the outcome is also put into NIA.¹²⁷

In considering the need to better identify family violence offences the Ministry of Justice ruled out relying on the Police flag, noting that its reliability and robustness is entirely dependent on consistent recording practice amongst Police and court staff.¹²⁸ For example, the Ministry noted that in 2013/14 Police flagged approximately 300 separate types of offences as occurring in a family violence context, but approximately 200 of these were flagged fewer than 10 times.¹²⁹ While the Police flag goes some way in identifying and recording family violence offending, the Ministry considered this objective could be better achieved by legislative provisions that would ensure the process is enduring.¹³⁰

In this chapter I outline the policy background to the introduction of s 16A and how identification of an offence as a “family violence offence” can trigger additional protection for victims. I give some examples of different charges that could involve family violence and consider whether s 16A is a more reliable and robust mechanism for identifying this than the Police flag. I conclude the chapter with a call for increased training for those working within the criminal justice system on identifying the full range of family violence offending.

I Policy Background

In its 2016 report *Strangulation: The case for a new offence*, the Law Commission discussed the need to identify whether incidents of violent offending occurred in family violence circumstances. It noted “a conviction for ‘male assaults female’ gives a strong indication to a judge that the violence occurred in family violence circumstances, but other charges carry no comparable indication.”¹³¹ The Commission considered this particularly concerning in relation

¹²⁴ Law Commission, above n 69, at 25.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ministry of Justice, above n 7, at 4.

¹²⁹ Ministry of Justice, above n 7, at 6.

¹³⁰ At 26.

¹³¹ Law Commission, above n 69, at 25.

to more serious charges, as it means that judges do not have sufficient information to make well-informed decisions.¹³²

In its *Family Violence Review*, the Ministry of Justice agreed with the Commission, stating “it’s difficult to consistently identify or record family violence in the criminal justice system ... family violence cases are not always treated as such and gathering information about family violence rates is difficult.”¹³³ The Ministry recommended “introducing a requirement upon conviction for the court to direct an offence be recorded on a person’s criminal record as a family violence offence, if satisfied this was the case.”¹³⁴

The Ministry acknowledged the above recommendation would require establishing a family violence offence framework to distinguish family violence from other offending.¹³⁵ A “virtual framework” was proposed, which would empower judges to determine that an offence is a family violence offence based on a common definition across the criminal jurisdiction.¹³⁶ The Ministry preferred this option over a standalone framework of family violence offences in the Crimes Act 1961 because it believed it would avoid the difficulties involved in determining which offences are in, out, or on the margins of a standalone framework.¹³⁷

The Ministry also acknowledged a criminal definition of family violence would be required to differentiate between family violence and other forms of offending.¹³⁸ It noted this could be done by focusing either on the nature of the offending (an ongoing pattern of repeat abuse) or on the nature of the relationship (a family relationship).¹³⁹ In preferring the latter option, the Ministry noted “family relationship” could be defined by reference to the civil definition or a narrower definition with clearer demarcations in relationship.¹⁴⁰

While the Ministry considered a narrower definition would help limit the number of cases in which the nature of the relationship is unclear,¹⁴¹ the Minister of Justice and Cabinet preferred aligning the criminal definition with the civil definition.¹⁴² Although there are some

¹³² At 26.

¹³³ Ministry of Justice, above n 9, at 12.

¹³⁴ Ministry of Justice, above n 7, at 21.

¹³⁵ At 2.

¹³⁶ At 5.

¹³⁷ At 8. This is the approach adopted in New South Wales, where the Crimes (Domestic and Personal Violence) Act 2007 (NSW) designates as “domestic violence offences” certain offences committed against persons with whom the offender is in a defined family relationship.

¹³⁸ At 9.

¹³⁹ At 9.

¹⁴⁰ At 10.

¹⁴¹ At 10. The Ministry noted the importance of this in a criminal context because of the volume of prosecutions involved and the potential consequences for the defendant.

¹⁴² Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 23, at 3.

jurisdictions that have criminal definitions of family violence that are narrower than their civil definitions,¹⁴³ both Queensland and New South Wales – which have statutory “domestic violence flag” provisions - align their criminal and civil definitions.¹⁴⁴ This approach is also more in line with the government’s position that recognises family violence can take many forms and occur in a wide range of relationships.¹⁴⁵

The new definition of a “family violence offence”, which appears in the Bail Act 2000, Evidence Act 2006, Sentencing Act 2002 and Criminal Procedure Act 2011, provides:

family violence offence means an offence—

- (a) against any enactment (including the Family Violence Act 2018); and
- (b) involving family violence (as defined in section 9 of that Act).

Once an offence is identified as a family violence offence, s 16A provides that it may be specified as such on the charging document and, if the defendant is convicted, on the offender’s criminal record.¹⁴⁶ In most cases the offence will be flagged as a family violence offence on the charging document, but the court may enter this specification even if it is not flagged on the charging document.¹⁴⁷

It is important to note that a “family violence offence” is not the same as “family violence”. A family violence offence is a subset of family violence. While family violence can encompass a broad range of abusive behaviours (both criminal and non-criminal) occurring between people in a family relationship; a family violence offence only encompasses abusive behaviours occurring between people in a family relationship that have been criminalised by law.

II What Happens When an Offence is Identified as a “Family Violence Offence”?

Identifying an offence as a family violence offence (as per the above definition) triggers additional considerations in relation to bail and sentencing.¹⁴⁸ It also triggers information

¹⁴³ Ministry of Justice, above n 7, at 10. The Ministry noted that England, Wales and South Australia have criminal definitions that are narrower than their civil definitions of family relationship.

¹⁴⁴ Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12; Penalties and Sentences Act 1992 (Qld), s 12A.

¹⁴⁵ Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 6.

¹⁴⁶ Criminal Procedure Act 2011, s 16A.

¹⁴⁷ Criminal Procedure Act 2011, s 16A(4).

¹⁴⁸ Bail Act 2000, ss 8(3A) and 30AAA; Evidence Act 2006, s 106A; Sentencing Act 2002, s 9(1)(ca); Criminal Procedure Act 2011, ss 16A, 168A and 168B.

sharing provisions between the criminal and civil jurisdictions, enabling courts in both jurisdictions to get a fuller picture of a perpetrator’s family violence history.

Section 8(3A) was included in the Bail Act 2000 from 3 December 2018. This provision provides that in deciding whether to grant bail to a defendant charged with a family violence offence, the court’s primary consideration is the need to protect the victim of the alleged offending.¹⁴⁹ Section 30AAA enables the court – in granting bail to a defendant charged with a family violence offence – to impose any additional condition that is reasonably necessary to protect the victim of the alleged offending and any person residing, or in a family relationship with the victim.

The effect of these provisions was recently considered by Katz J in *Kohu v Police*, who stated “[these] new provisions represent a clear directive from Parliament that victim safety must be prioritised when making bail decisions in the context of alleged family violence offending.”¹⁵⁰ In order to make decisions that prioritise victim safety, judges need to have background information about the family. This includes the existence of any past or current protection orders, as well as the presence of other family violence risk factors (such as strangulation, assault or controlling behaviours).

In addition to strengthening protection afforded to victims of family violence at bail, the Ministry of Justice looked at ways to recognise the additional harm and culpability associated with family violence offending at sentencing. This included making provision for aggravated offences¹⁵¹ or new family violence aggravating factors¹⁵² and for labelling convictions as family violence offending.¹⁵³

The option to introduce aggravated offences was rejected on the basis that it could lead to inconsistent charging practices and provide more opportunities for defence counsel to negotiate charges down to the non-aggravated form of the offence.¹⁵⁴ The Ministry’s preferred option was to introduce a set of family violence specific aggravating sentencing factors.¹⁵⁵ Cabinet

¹⁴⁹ Family Violence (Amendments) Act 2018, s 7. Section 8(3A) uses the phrase “primary consideration”, while s 8(3C), which applies in family violence cases where there is a breach of a protection order, uses the phrase “paramount consideration”. Section 8(3A) is subject to s 8(3C).

¹⁵⁰ *Kohu v Police* [2018] NZHC 3364 at [22].

¹⁵¹ Ministry of Justice, above n 7, at 23. Aggravated offences would increase maximum penalties by attaching a sentencing premium to family violence cases.

¹⁵² At 24. New family violence aggravating factors would be taken into account by sentencing judges.

¹⁵³ At 23.

¹⁵⁴ At 24.

¹⁵⁵ The aggravating factors proposed were: the offender was subject to a protection order at the time of the offending; strangulation against a family member was a feature of the offending; the offending was part of a pattern of behaviour; or the offending involved violence witnessed by children.

ultimately agreed to one new aggravating factor, namely an “offender being subject to a protection order at the time of the offending.”¹⁵⁶ The subsequent amendment to s 9(1)(ca) of the Sentencing Act 2002 (which is reproduced in the Appendices) took effect on 1 July 2019.

The Family Court and criminal court data systems are maintained separately. Mechanisms to obtain additional information from the Family Court to support bail and sentencing decisions are triggered when an offence is identified as a family violence offence.¹⁵⁷ If an opposed bail or sentencing hearing has been scheduled for a family violence proceeding (which means a proceeding for a family violence offence), rule 432 of the Family Court Rules 2002 enables the Criminal Court Registrar to request information from the Family Court about whether the defendant has, or has had, a protection order against him or her in favour of any person. This information is supplied in hard copy only.

If the Family Court is dealing with a family violence proceeding,¹⁵⁸ regs 7 and 7A of the Criminal Procedure (Transfer of Information) Regulations 2013 enable the Family Court Registrar to request information from the criminal court about the respondent’s family violence history. These regulations apply if the respondent is charged with, or has been convicted of, a family violence offence. This information can be used to inform consideration of whether a final protection order is “necessary” and whether any special conditions are needed in the protection order.

Similarly, if the Family Court is dealing with a Care of Children Act 2004 proceeding and a party to the proceeding is charged with, or has been convicted of a family violence offence, reg 6A of the Criminal Procedure (Transfer of Information) Regulations 2013 enables the Family Court Registrar to request information from the criminal court about that criminal proceeding.¹⁵⁹ This information can be used by the court to help it determine whether the child or children will be safe in the care of the person against whom family violence offence charges have been made or convictions entered.¹⁶⁰

¹⁵⁶ Office of the Minister of Justice to the Cabinet Social Policy Committee, above n 23, at 3.

¹⁵⁷ Family Court Rules 2002, r 432 and r 432A.

¹⁵⁸ Criminal Procedure (Transfer of Information) Regulations 2012, reg 3. “Family violence proceeding means a proceeding in the Family Court under the Family Violence Act 2018 in which an application for a protection order – (a) is pending; or (b) has been granted.”

¹⁵⁹ Criminal Procedure (Transfer of Information) Regulations, regs 6A(2) and (3).

¹⁶⁰ See Care of Children Act 2004, s 5(a). The existence of family violence offence charges or convictions must be taken into account when the Court is considering the s 5 principles relating to children’s welfare and best interests, specifically s 5(a) which mandates that the child’s safety must be protected.

III What is a Family Violence Offence?

The family violence flag is a useful legislative tool for identifying and recording family violence offending; however, legislative tools are still just that. The efficacy and utility of the family violence flag depends on Police, prosecutors, court staff and judges being alert to the nature of the relationship between the perpetrator and the victim and ensuring this is identified.

In the following sections, I discuss some of the challenges in identifying different forms of family violence offending and offer some suggestions as to how this might be addressed.

A Family Violence Offending: Is it Always Obvious?

Family violence may occur in many different forms and can be prosecuted under a wide range of offences.¹⁶¹ In many cases, the family violence context will be evident from the charges laid (for example, assault on a person in a family relationship) or the summary of facts. However, this is not always the case. Offences like dangerous driving, wilful damage or digital abuse can occur in a family violence context, but unless the charges are flagged as involving family violence it may not be evident to later decision-makers that these offences were family violence related.

For example, in *Cooper v R* the Court of Appeal dealt with an appeal against sentence by Mr Cooper against charges of obtaining by deception or causing loss of deception¹⁶² and dishonestly taking or using document.¹⁶³ There is nothing to suggest, on the face of these charges, that they occurred in a family violence context. The agreed facts however record that Mr Cooper and his wife were estranged and that Mrs Cooper had a protection order in force against Mr Cooper. They attended mediation to try to resolve their relationship property matters. No final settlement was agreed but Mr Cooper, without authority and with deception, withdrew \$70,000 from their family trust-term deposit and deposited it into his own account.

In this case, Mr and Mrs Cooper are clearly in a family relationship. In its reasoning, the Court of Appeal noted that denying or limiting access to financial resources is an example of psychological abuse (a form of family violence). Significantly, the Court went on to conclude that there is nothing that says actual psychological distress needs to result from this: “[the] abusive aspect of such conduct can be seen to arise from the exertion of control over a protected person’s financial means.”¹⁶⁴ If this case was heard after 1 July 2019 Mr Cooper’s charges, and subsequent convictions, should be flagged as family violence offences under s 16A.

¹⁶¹ Ministry of Justice, above n 7, at 11.

¹⁶² Crimes Act 1961, ss 240(1)(c).

¹⁶³ Crimes Act 1961, s 228(1)(a).

¹⁶⁴ *Cooper v R*, above n 57, at [39].

In *Police v Witehira* Mr Witehira appeared for sentence, having pleaded guilty to one charge of wilfully ill-treating an animal under s 28(1)(c) of the Animal Welfare Act 1999.¹⁶⁵ He was also for sentence on one charge of driving with excess breath alcohol on a third or subsequent occasion and one of driving whilst disqualified.

The sentencing notes record that Mr Witehira was upset with the victim, his son, as the food that the victim wanted to have for lunch was not available. In response to this upset, Mr Witehira said to his son, “I’m going to kill your dog.” Mr Witehira then took a hammer and bashed his son’s puppy eight times on the head, fatally injuring it.¹⁶⁶ The Judge did not specifically describe the offending as family violence offending.

The definition of psychological abuse in the FVA now includes the examples of ill-treatment of household pets and other animals whose welfare significantly affects a person’s wellbeing.¹⁶⁷ Ill-treatment of household pets or other animals may give rise to criminal charges under the Crimes Act 1961 or the Animal Welfare Act 2011. There is emerging empirical evidence, both nationally and internationally, that cruelty against animals is often part of a wider pattern of offending. Perpetrators may use threats and actual harm to pets or companion animals as a mechanism to attain and maintain control over the family.¹⁶⁸

A further example of offending that occurred in a family context can be found in *R v Ropitini*.¹⁶⁹ Mr Ropitini and the deceased (his stepfather) had been drinking along with other family members. Mr Ropitini and the deceased got into an argument when no one would take the deceased to the bottle-shop. Despite being intoxicated, the deceased attempted to drive himself. In the ensuing “melee” Mr Ropitini punched the deceased with a single punch and he fell to the ground and hit his head on the concrete driveway. He was later pronounced dead.¹⁷⁰

The Judge commented on the s 27 cultural report provided for Mr Ropitini noting that “there was clearly a culture (both at the time you were growing up and subsequently), where there was, at the very least, a normalised level of violence and abuse of alcohol and drugs The type of confrontation that occurred at what was a family gathering can only really occur where

¹⁶⁵ *Police v Witehira* [2017] NZDC 16476.

¹⁶⁶ At [3].

¹⁶⁷ Family Violence Act 2018, s 11(1)(d).

¹⁶⁸ Dr M Roguski *Pets as Pawns: The Co-Existence of Animal Cruelty and Family Violence* (RNZSPCA, Auckland, 2012); Anita Killeen “Animal cruelty and family violence” [2018] NZLJ 254.

¹⁶⁹ *R v Ropitini* [2019] NZHC 2836.

¹⁷⁰ At [4] – [7].

those types / that way of dealing with people is accepted and large amounts of alcohol and perhaps other drugs have been consumed.”¹⁷¹

This is a case of intra-familial offending and there does not appear to be any evidence of coercive and controlling behaviours between Mr Ropitini. However, there is clearly a family relationship and an act of violence. This type of offending also needs to be identified as a family violence offence, firstly because it falls within the new legislative definition introduced by Parliament, but also so that it is included in the evidence-base about offending within families to show the links and impacts of inter-generational violence .

IV How Does the Court Know an Offence is a Family Violence Offence?

Although s 16A was introduced because of perceived deficiencies with the Police flag, entering the family violence flag is still a manual process. The difference between the Police flag and the legislative family violence flag is that from 1 July 2019 when a defendant is charged with a family violence offence, the charging document will have the words “being a family violence offence” added below the body of the charge. This is done automatically when Police tick that the offence is “family violence related”.¹⁷²

To improve consistency and reliability in identification, the legislative definition of a “family violence offence” needs to be widely understood. I suggest this could be achieved by having a simple and consistent explanation across the justice system. For example, “when someone commits an offence by using physical, sexual or psychological abuse against someone with whom they have or have had a family relationship, it is known as a **family violence offence**.” This explanation could then cross-reference the meaning of family violence and family relationship in the FVA.¹⁷³

The explanation could also be accompanied by examples of different types of family violence offending, such as digital abuse,¹⁷⁴ ill-treatment of a child or vulnerable adult,¹⁷⁵ ill-treatment of an animal,¹⁷⁶ or financial abuse.¹⁷⁷ The explanation and examples should be supported by training that reinforces the message that any violence that occurs in a family context needs to be identified and taken seriously, both to improve the evidence-base and to inform risk assessment.

¹⁷¹ At [21] – [22].

¹⁷² Ministry of Justice, above n 5.

¹⁷³ Family Violence Act 2018, ss 9 – 11 and ss 12 - 14.

¹⁷⁴ Harmful Digital Communications Act 2015, s 22.

¹⁷⁵ Crimes Act 1961, s 195.

¹⁷⁶ Animal Welfare Act 1999, s 28(1)(c).

¹⁷⁷ Crimes Act 1961, s 240(1)(c).

Further mechanisms to ensure the family violence flag gets on the charging document could include IT prompts, which “pop-up” when the recorded relationship between defendant and complainant falls within the definition of a “family relationship”, or a check list for police officers to consider in respect of all charges.

A What if the Charging Document Does Not Have the Family Violence Flag?

Under s 16A(2) the court may, at any time after a charging document is filed and before the delivery of the verdict or decision of the court, amend the document to add, confirm, or remove a specification that the offence charged is a family violence offence. This power may be exercised by a judge on their own motion, or by a registrar if both the defendant and the prosecutor agree.¹⁷⁸ This specification can be challenged at the point of bail,¹⁷⁹ although at the time of writing there have been no reported cases that mention the family violence flag or challenges to it.

In Australia, Queensland and New South Wales have both introduced “domestic violence flag” provisions.¹⁸⁰ Section 12(1) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) provides that “[the] charge in respect of an offence may indicate that the offence is a domestic violence offence.” If a person pleads guilty to an offence or is found guilty of an offence and the court is satisfied that the offence was a domestic violence offence, the court is to direct that the offence be recorded on the person’s criminal record as a domestic violence offence.¹⁸¹ The Queensland provision is drafted in similar terms.¹⁸²

Section 12(5) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) provides “[the] court may require the prosecutor to provide further information in support of the request to enable the court to make a decision as to whether such a recording is appropriate.” Similarly, s 12A(11) of the Penalties and Sentences Act 1992 (Qld) provides that “[for] this section, proof that an offence is a domestic violence offence lies on the prosecutor.” The full text of the New South Wales and Queensland provisions are set out in the Appendices.

Case law from Queensland suggests that in cases where the judge is of the view that the circumstances of the offence meet the definition for a “domestic violence offence”, but where

¹⁷⁸ Section 16A(3). Section 16A(3)(c) provides that the ability to add or remove a specification is not an amendment under s 133 of the Criminal Procedure Act 2011 as that provision operates independently of s 16A(2).

¹⁷⁹ Criminal Procedure Act 2011, s 16A(1).

¹⁸⁰ Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12; Penalties and Sentences Act 1992 (Qld), s 12A.

¹⁸¹ Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12(2).

¹⁸² Penalties and Sentences Act 1992 (Qld), s 12A.

this is not indicated as such on the charge, the judge will call for further submission on whether it is open to the court to make a declaration to this effect.¹⁸³

The Queensland and New South Wales provisions also acknowledge the dynamics at play in family violence matters and the risk of further traumatising the victim if they were required to give evidence to prove the applicability of the domestic violence flag. For example, s 12(7) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) states that “[a] victim of an offence is not compellable in any proceedings before the court to determine whether the court should make a direction under this section to record an offence as a domestic violence offence.” This is important as it prevents bail proceedings from turning into “mini trials” in which the complainant is challenged about the nature of their relationship with the defendant.

In its training materials, the Ministry of Justice states that the family violence flag is not an element of the charge but rather a particular that describes the context of the charge.¹⁸⁴ The list of particulars in s 16(2) of the Criminal Procedure Act 2011 include particulars of the defendant, particulars of the person commencing the proceeding, a statement by the person commencing the proceeding that he or she has good cause to suspect that the defendant has committed the offence specified in the charge, and particulars of the charge that satisfy the requirements of s 17.¹⁸⁵

Unlike the list of particulars in s 16, it may not be at all clear whether the offence is a family violence offence. As noted earlier, the meaning of family relationship is broadly defined and may require consideration of broader kinship networks or the nature and intensity of the relationship between the parties.¹⁸⁶ Likewise, whether it can be said that the actions of the defendant amount to family violence—particularly psychological abuse or family violence against third parties—must be determined in the context of the surrounding circumstances as they relate to the abuser and the victim.¹⁸⁷

In New Zealand, s 18 of the Criminal Procedure Act 2011 enables the court to order the prosecutor to provide further particulars of any matter relevant to setting out the charge against the defendant. The court may make an order under s 18 on its own motion or on the defendant’s application. In determining the “matters relevant to setting out the charge”, s 16(2)(d) states that the charging document must include particulars of the charge that satisfy the requirements of s 17.¹⁸⁸ Section 17(4) relevantly provides that “[a] charge must contain sufficient particulars

¹⁸³ *Queensland Police Service v Hoey* [2018] QMC 5 at [68].

¹⁸⁴ Ministry of Justice, above n 5.

¹⁸⁵ Criminal Procedure Act 2011, s 16(2).

¹⁸⁶ See generally *A v P* [1997] NZFLR 878; *T v H* [1996] NZFLR 865.

¹⁸⁷ *M v Police*, above n 56, at [15].

¹⁸⁸ Criminal Procedure Act 2011, s 16(2).

to fully and fairly inform the defendant of the substance of the offence that it is alleged that the defendant has committed.”

If, as the Ministry states, the family violence flag is not something that goes to the substance of the offence, an argument could be made that the court does not have the ability to order the prosecutor to provide further particulars under s 18 about the family violence context.¹⁸⁹ This argument is further strengthened by the fact there is no reference in s 16A to the court “being satisfied that the offence is a family violence offence” before amending the charging document. In contrast, when the equivalent Queensland provision was introduced, s 572 of the Criminal Code 1899 (Qld) was amended to include a new subsection (1A):¹⁹⁰

(1A) Without limiting subsection (1), if the court considers the offence charged in the indictment is also a domestic violence offence, the court may order that the indictment be amended to state the offence is also a domestic violence offence.

In practice, questions over the court’s ability (whether under legislation or its inherent jurisdiction) to request further information about the family violence context of a charge is unlikely to give rise to much argument. The Ministry of Justice acknowledged this when considering the possibility of challenges to the family violence flag. It noted that the consequences for the defendant of a determination that an offence is family violence are limited to specific circumstances and that “because of that specific context, the defence may be less likely to challenge the determination”.¹⁹¹

Despite this conclusion, I suggest there is still value in amending s 16A to include a provision for the court to seek further information to satisfy itself that the offence charged is also a family violence offence. This could be modelled on the equivalent New South Wales provision, namely that “the court may require the prosecutor to provide further information to enable it to determine whether to order that the offence be entered in the permanent court record as a family violence offence.”¹⁹² This could be followed by a new provision clarifying that a victim of an offence is not compellable to give evidence about whether the family violence flag should apply.

¹⁸⁹ Criminal Procedure Act 2011, s 18. The A to Z Statutes of New Zealand, Criminal Procedure (online ed) note “the requirement for particulars to be included in a charging document are for the purpose of fairly informing the defendant of the conduct which is alleged to constitute the offence, and unfairness may result if a charge is found to be proved for reasons different from those particularised, if no adequate notice of the proposed change had been given.”

¹⁹⁰ Criminal Law (Domestic Violence) Amendment Act 2015 (Qld).

¹⁹¹ Ministry of Justice, above n 7, at 9.

¹⁹² Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12(5).

The full text of these suggested amendments is reproduced and discussed further in Chapter IX – Recommendations.

V Concluding Comments

In responding to the Coroner’s inquest findings into the death of Christie Marceau, the Chief District Court Judge said: ¹⁹³

To make sound, safe decisions that protect people from further harm, judges need as much information as possible. We rely on everyone across the system to capture that detail to the best of their ability and bring it to the court’s attention.

In this chapter I have argued the family violence flag is a valuable tool for ensuring judges are aware of the family violence context of a charge or a conviction. However, legislative reform in and of itself does not effect change. The implementation of s 16A should be accompanied by a robust training programme with a clear and consistent explanation of what a family violence offence is, along with examples. Police officers, prosecutors, court staff and judges need to understand the importance of flagging all forms of family violence offending in NIA, CMS and the permanent court record – for both current and future risk assessment. This must extend beyond just flagging physical violence that occurs in intimate partner relationships.

In the next chapters of this thesis I build on this argument and look at ways the application of the family violence flag can be strengthened through further legislative amendment.

¹⁹³ Judge Jan-Marie Doogue “The Coroner’s inquest findings into the death of Christie Marceau” (press release, 7 March 2018).

Chapter IV: Should the Family Violence Flag be a Mandatory Order of the Court?

In this chapter I examine whether the current drafting of s 16A(4) meets the policy objective of ensuring all family violence related convictions are flagged in the permanent court record as family violence offences. I look at the background to s 16A and compare the New Zealand position to the approach taken in New South Wales and Queensland. In those jurisdictions entering the family violence flag is treated as a discrete order of the court and is mandatory if the court is satisfied that the offence is a “domestic violence offence”.¹⁹⁴

I Policy Background to Section 16A(4)

In proposing s 16A, the Ministry of Justice explained that it would “require, at the point of conviction, the court to record on the person’s criminal record that the conviction was family violence related.”¹⁹⁵ The proposal was based on the Law Commission’s recommendation that strangulation offences be noted on the offender’s criminal record as a family violence offence. This Ministry agreed with this recommendation though proposed it apply more broadly to all offending that occurred in a family violence context.¹⁹⁶ The Commission’s specific recommendation was that:¹⁹⁷

[if] a person pleads guilty or is found guilty of the strangulation offence, and the court is satisfied that the offence was a family violence offence, the court must direct that the offence be recorded on the person’s criminal record as a family violence offence.

The Commission’s recommendation adopted the wording of New South Wales’ domestic violence notation provision. Section 12(2) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) relevantly provides:

“12 Recording of domestic violence offences

...

- (2) If a person pleads guilty to an offence or is found guilty of an offence and the court is satisfied that the offence was a domestic violence offence, the court is to direct that the offence be recorded on the person’s criminal record as a domestic violence offence.”

The equivalent Queensland legislation also takes a directory approach to entering the domestic violence notation. In Queensland, if the complaint or indictment states the offence is also a domestic violence offence and the offender is convicted of the offence, the offence must be

¹⁹⁴ Crimes (Domestic and Personal Violence) Act 2007, s 12.

¹⁹⁵ Ministry of Justice, above n 7, at 9.

¹⁹⁶ At 26.

¹⁹⁷ Law Commission, above n 69, at 55.

recorded as a conviction for a domestic violence offence.¹⁹⁸ If no conviction is recorded, the offence must be entered in the offender’s criminal history as a domestic violence offence.¹⁹⁹ The effect of these provisions is that the notation is entered automatically unless the judge makes an order to the contrary (i.e., they are not satisfied the offence is also a domestic violence offence).²⁰⁰

While there is nothing in the commentary to the Family and Whānau Violence Legislation Bill explaining the intent or operation of the new s 16A,²⁰¹ the statements of the Law Commission and the Ministry of Justice suggest s 16A was always intended to be a directory rather than discretionary provision. Despite this, the wording of s 16A(4) that was enacted provides (emphasis added):

- (4) If the defendant is convicted (even if the charging document does not specify that the offence charged is a family violence offence), *the court may enter* in the permanent court record of the proceeding a specification that the conviction is for a family violence offence.”

Because the wording of s 16A(4) refers to “*may enter*” there is no requirement for the court to make a specific direction or order that the offence is, in fact, a family violence offence. This is surprising given the power in s 16A(4) may be exercised “even if the charging document does not specify that the offence charged is a family violence offence”. Presumably the court would only enter the family violence flag if satisfied that the offence is a family violence offence, this being a question of fact that needs to be determined on the evidence. However, s 16A is silent as to this issue.

In the six months the family violence flag has been in operation I have not been able to find any reported case where the judge has made any reference to the offence being entered in the permanent court record as a family violence offence. While the family violence flag may be being entered as an administrative process, it is concerning that there is no evidence of judges drawing attention to s 16A and noting the importance of clearly identifying and recording all offences that occur in a family violence context.

A How is the Family Violence Flag Entered on the Permanent Court Record?

There is no reference in s 16A to regulations being made regarding the entering of the family violence flag, such as the manner and time such specifications are to be made.²⁰² Accordingly,

¹⁹⁸ Penalties and Sentences Act 1992 (Qld), s 12A(2).

¹⁹⁹ Section 12A(3).

²⁰⁰ Section 12A(4).

²⁰¹ Family and Whānau Violence Legislation Bill 2017 (247 – 1).

²⁰² Compare s 12(9) of the Crimes (Domestic and Personal) Violence Act 2007 (NSW).

it can be assumed that the general procedures set out in rules 7.1 and 7.2 of the Criminal Procedure Rules 2012 apply. These rules set out the administrative process for entering matters in the permanent court record and what particulars must be entered.

Rule 7.2 lists the particulars relating to each charge (as applicable) that *must be* recorded in the permanent court record. The family violence flag is not a particular that *must be* recorded nor is it a particular that falls within the description of the charge or the determination of the charge.²⁰³ Registry training materials obtained from the Ministry of Justice under an Official Information Request suggest the process for entering or confirming the family violence flag is done by the Registrar through confirming or amending the charging document in the CMS.²⁰⁴ However, it is unclear from the training materials how the family violence flag is entered if “the charging document does not specify that the offence charged is a family violence offence”.²⁰⁵

As discussed in the previous chapter, the Ministry ruled out relying on the Police flag, stating that its reliability and robustness is entirely dependent on consistent recording practice amongst Police and court staff.²⁰⁶ Yet s 16A as enacted carries over those same issues by not making it clear that the family violence flag is a particular that *must be entered* in the permanent court record.

II Making the Family Violence Flag a Mandatory Order of the Court

Having regard to the above, I argue s 16A(4) should be amended from a discretionary to a mandatory provision. This could be achieved by amending s 16A(A) as follows (changes italicised):

- (4) If the defendant is convicted *of the offence and the court is satisfied that the offence is a family violence offence* (even if the charging document does not specify that the offence charged is a family violence offence), *the court must order that the offence be entered in the permanent court record of the proceeding as a family violence offence.*

There are a number of advantages to this amendment:

A Show an Offender’s Pattern of Offending

Firstly, it is important that judges – when making decisions about the offender at bail or sentencing proceedings – know whether a previous offence was committed in family violence

²⁰³ Criminal Procedure Rules 2012, r 7.2(7) and r 7.2(20).

²⁰⁴ Ministry of Justice, above n 5.

²⁰⁵ Criminal Procedure Act 2011, s 16A(4).

²⁰⁶ Ministry of Justice, above n 7, at 4.

circumstances.²⁰⁷ For the purpose of assessing risk, a perpetrator’s criminal history needs to clearly illustrate any pattern, or increased frequency or escalation, in family violence offending. Framing s 16A(4) in discretionary terms runs the risk that the family violence flag might be overlooked or not entered due to an administrative oversight. If the court is satisfied that the offence was a family violence offence there should be a positive obligation on the court to direct that it be entered as such.

B Clarify Administrative Processes

Secondly, the proposed amendment would clarify administrative processes for entering the family violence flag in the permanent court record. Rule 7.1(3) states that “[entries] about a matter that are required to be made in the permanent court record must be made by the judicial officer who presided over the matter or by a Registrar.” Amending s 16A(4) to require the court to enter the family violence flag if satisfied that the offence is a family violence offence would make it a matter *required to be made*.²⁰⁸ This would bring the order to enter the family violence flag within the ambit of r 7.2(27), which requires “any other judgment or order (other than the reasons for the judgment or order)” to be entered in the permanent court record.

The registry training materials note that if someone is convicted of a family violence offence, and subsequently a certified copy of conviction is applied for, the registrar will need to manually type the words “being a family violence offence” on the certified copy of conviction in the offence box.²⁰⁹ That this is a manual rather than automated process is concerning, and heightens the risk the family violence flag will be omitted on records used by other agencies (such as Corrections) when making decisions about the risk a perpetrator person poses.

C Improve Awareness of Family Violence Offences

Putting a positive obligation on the court to be satisfied the offence is a family violence offence requires a judge to turn their mind to the nature of family violence offending. One of the issues with family violence is that it is often undetected. Psychological abuse and emotional abuse may not be identified as violence; victims may not recognise or know that what they are experiencing is family violence. The Ministry of Justice’s recent topical report from the *New Zealand Crime and Victims Survey* reported that victims of offences by an intimate partner were twice as likely to have an incident become known to Police (45%) than victims of offences by another family member (20%).²¹⁰ The report notes that “this finding could indicate that

²⁰⁷ Law Commission, above n 69, at 55.

²⁰⁸ Criminal Procedure Rules 2012, r 7.1(3).

²⁰⁹ Ministry of Justice, above n 5.

²¹⁰ Ministry of Justice, above n 31, at 25.

campaigns have been more successful in changing New Zealanders' attitudes towards intimate partner violence than violence by other family members.”²¹¹

As discussed, the family violence reforms introduced a new statutory definition of a family violence offence.²¹² This definition comprises a subset of all family violence abusive behaviours, but it is still a broad definition covering offences between family members that may not fall within what is commonly reported or understood as “family violence”.

As suggested in the previous chapter, ongoing education for judges and court staff on family violence should include a focus on identifying family violence offences. This could involve the development of a consistent explanation of what a family violence offence is across agencies, as well as a prompt sheet or check list for staff and/or judges to consider in respect of all charges. For example, what is the relationship between the defendant and the complainant? Is it a family relationship as per the definition in ss 12 – 14 of the FVA? Did the offence involve family violence as defined in s 9 of the FVA? This process would help improve knowledge and awareness of family violence offending across the judiciary, as well as sending a message to the community that family violence is not just something that happens between intimate partners.

D Declaration that the Offence is a Family Violence Offence

Related to the above is the important symbolic and denunciatory message conveyed when a judge states in open court that “this offence is a family violence offence”. This message is evident in New South Wales and Queensland case law, where the recording of the domestic violence flag is treated as a specific direction of the court.²¹³ For example, domestic violence cases in New South Wales frequently end with an order from the judge that “I direct that pursuant to s 12 of the Crimes (Domestic and Personal Violence) Act 2007 the conviction is a domestic violence offence.”²¹⁴

The process of identifying that an offence involves family violence and then ordering it be entered as such in the permanent court record is a powerful way of communicating to the public that the courts take family violence offending seriously.²¹⁵ It can also perform an educative function, highlighting the myriad forms family violence can take. A pronouncement by a judge in court that it is not just physical assault that is family violence, but that property damage or

²¹¹ Ibid.

²¹² Criminal Procedure Act 2011, s 16A(5).

²¹³ Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12(2); Penalties and Sentences Act 1992 (Qld), s 12A.

²¹⁴ See generally *R v Benjamin Hayward* [2016] NSWDC 67 at 59(6).

²¹⁵ Ministry of Justice, above n 7, at 1.

harassment or digital abuse are also family violence, sends a strong message to perpetrators, victims and the public about the sort of behaviour that is unacceptable in our society. This may lead to greater reporting of non-physical forms of family violence.

III The Family Violence Flag Does Not Usurp the Judge's Evaluative Function

Making the family violence flag a mandatory order of the court does not, of itself, say anything about the offender's level of risk or dictate a different bail or sentencing outcome. As I have argued throughout this thesis, the family violence flag is a prompt to judges to consider family violence risk factors and dynamics. It also ensures that all offending that occurs in a family context is recorded, which is crucial to improving the evidence base of family violence offending in New Zealand.

Flagging a charge as a family violence offence will not always be directly relevant to the bail or sentencing decision. For example, in *R v Patangata* Ms Patangata was sentenced for manslaughter of her intimate partner, Mr Savage.²¹⁶ Counsel for Ms Patangata contended the offending occurred in the context of a violent relationship; involved "excessive self-defence"; provocation on Mr Savage's part because of his violence against Ms Patangata that day; or some amalgam of all three.²¹⁷ The Crown disputed this analysis.²¹⁸ The two court reports tendered contained contradictory statements from Ms Patangata about the nature of her relationship with Mr Savage and whether or not it was abusive.²¹⁹

Downs J noted that Ms Patangata had not given evidence at trial and that a defendant may not testify through others. He adjourned sentencing and offered Ms Patangata a disputed-facts hearing on the basis that a family violence history, if correct, may mitigate her offending. Ms Patangata declined a disputed-facts hearing. She subsequently wrote a letter to the court describing Mr Savage as "very caring".²²⁰

Downs J then summarised what he saw as the nature of the relationship between the parties:²²¹

To summarise, I do not accept your offending involved "excessive self-defence". Nor do I accept it is mitigated by a context of domestic violence in the sense this term is usually used and understood: violence by a male against a female partner, typically with an associated dynamic of dominance and control. Your fights with Mr Savage cannot be neatly compartmentalised because you hit each other, ordinarily without causing apparent

²¹⁶ *R v Patangata* [2019] NZHC 744.

²¹⁷ At [23].

²¹⁸ At [24].

²¹⁹ At [25].

²²⁰ At [26].

²²¹ At [30].

harm, absent any obvious power imbalance. As I said earlier, the evidence revealed Mr Savage as an excellent step-father to your children. All this suggests a difficult and occasionally violent relationship, but one distinguishable from the all-too-many in this country in which women are subjugated and battered by men.

Accordingly, Downs J did not take into account the suggestion of family violence in the end sentence. Ms Patangata was sentenced to a term of five-years' imprisonment.

In this case, Downs J recognised that there was a family relationship between the parties and that the offending involved the infliction of violence.²²² He looked at the relationship context in light of what is known about the dynamics of family violence and who (as between Ms Patangata and Mr Savage) was the primary victim and who was the predominant aggressor.²²³ Ultimately he concluded that the family violence context was not relevant to his sentencing decision. But herein lies the potential value of the family violence flag; when judges are aware the offending occurred in a family relationship they can turn their mind fully to the factors that can increase risk of future offending or that can mitigate the offending. This process brings greater nuance and consideration into judicial decision-making.

If decided today, and despite Downs J being satisfied that the family violence context was not relevant to his sentencing decision, this offence should be recorded as a family violence offence on Ms Patangata's criminal record. It contributes to the evidence base of how much violence is occurring within families and may inform the types of programmes Ms Patangata is offered in prison. It may also be relevant in subsequent family violence cases where Ms Patangata is the defendant to counter argument that she does not have a family violence history.

IV Concluding Comments

This chapter has argued that for the family violence flag to achieve what it was introduced to do, namely address deficiencies in the identification and recording of family violence offences, the court should be directed to enter it. This would remove any uncertainty around whether entering the family violence flag is a discretionary power and would bring an element of formality to the process. Making the family violence flag a mandatory order of the court has the related benefits of increasing awareness of all family violence offending and sending an educative message to the public that the court recognises and takes seriously this type of offending.

²²² Family Violence Act 2018, s 9.

²²³ FVDRC, *Fourth Annual Report*, above n 68, at 74 – 6.

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Chapter V: Can the Family Violence Flag Apply Retrospectively?

As noted in Chapter II, there is a range of evidence-based risk factors associated with increased risk of family violence. Of those risk factors, a history of family violence (a pattern of behaviour) is the strongest indicator of a perpetrator's potential to cause lethal or serious harm.²²⁴ Risk assessment strategies look to past patterns of behaviour in determining what kind of behaviour the perpetrator is capable of and what protective measures are necessary to manage that risk.²²⁵

One way a perpetrator's family violence history is revealed to the court is by identifying which of their prior convictions (if any) involved family violence. From 1 July 2019, such convictions will be identified through the statutory family violence flag.²²⁶ For convictions entered prior to 1 July 2019, the family violence context might be able to be identified through the Police flag (though as noted, there are issues with its robustness and reliability), the nature of the charges laid, or by information presented to the court by the prosecutor.

Mechanisms to identify family violence convictions entered prior to 1 July 2019 are not full-proof. This is problematic because prior family violence convictions are relevant to assessing risk in bail proceedings and can be an aggravating factor in family violence sentencing. The existence of prior family violence convictions is also a relevant consideration in related civil proceedings, informing the assessment of whether a protection order is necessary²²⁷ or in determining the safety of proposed parenting arrangements under the Care of Children Act 2004.²²⁸

In this chapter I look at whether the court can – and should – order that a prior family violence offence for which the offender has been convicted also be flagged in the permanent court record as a family violence offence.

I Are There Any Transitional Arrangements in Section 16A?

Section 16A took effect on 1 July 2019. There are no transitional arrangements in the Family Violence (Amendments) Act 2018 guiding whether the provision applies retrospectively to family violence offending that occurred prior to 1 July 2019 but prosecuted after 1 July 2019. It may be that Police and court staff have continued to identify and flag family violence offences in NIA and CMS respectively, but this would be under their internal operational processes – not the statutory mechanism provided for in s 16A.

²²⁴ Ministry of Justice, above n 81; ANROWS, above n 88, at 12.

²²⁵ ANROWS, above n 88, at 3.

²²⁶ Criminal Procedure Act 2011, s 16A.

²²⁷ Family Violence Act 2018, s 79.

²²⁸ Care of Children Act 2004, s 5A.

A Presumption Against Retrospectivity

As at the date of writing, there is no reported case law considering the interpretation or application of s 16A. In terms of retrospective application, the general rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction.²²⁹ This rule is reflected principally by the presumption against retrospectivity in section 7 of the Interpretation Act 1999 and, in respect of criminal offences, in section 10A of the Crimes Act 1961 and section 26(1) of the New Zealand Bill of Rights Act 1990.²³⁰

Legislation might have direct retrospective effect if it, among other things, punishes a person or imposes a burden or an obligation in respect of past conduct.²³¹ These are considered matters of substantive rights. However, s 16A is more in the nature of a procedural amendment, given that it is focussed on identifying and classifying family violence offending. Rather than affecting any substantive rights, the family violence flag acts as a prompt to judges and decision-makers to look for and consider any relevant family violence risk factors. What judges then do with that information is an evaluative process.

B Does Section 16A Offend the Presumption Against Retrospectivity?

Queensland case law provides an example of how the courts in New Zealand could resolve the issue of whether the family violence flag applies to offending that occurred prior to 1 July 2019 but prosecuted after (in the admittedly unlikely event it were to be raised in argument). In Queensland, s 12A of the Penalties and Sentences Act 1991 (Qld) is worded in similar terms to s 16A of the Criminal Procedure Act 2011. In *R v MD* the defendant was charged with a number of counts alleging assaults on his wife.²³² The offending pre-dated the commencement of s 12A, which came into force on 1 December 2015,²³³ but was heard in court on 19 February 2016.

In the case, the Crown made an application to amend the indictment before the court to allege that each of the offences is also a domestic violence offence. The issue in dispute in the case was whether the domestic violence notation provisions in s 12A of the Penalties and Sentences Act 1991 (Qld) are retrospective, specifically whether they are procedural or substantive. The

²²⁹ *Rodway v R* (1990) 169 CLR 515 at 518.

²³⁰ Legislation Design and Advisory Committee *Legislation Guidelines: 2018 edition* (2018) at 59.

²³¹ At 59.

²³² *R v MD* [2016] QDC 61 at [18] – [19].

²³³ Criminal Law (Domestic Violence) Amendment Act 2015 (Qld).

defence argument was that the amendments are substantive, are not therefore retrospective, and the amendment ought not to be permitted.²³⁴

The Judge considered the background to the introduction of s 12A. He was of the view that “the real effect of the amendments is to ensure that the fact an offence is a domestic violence offence is noted on the offender’s criminal history.”²³⁵ The Judge acknowledged that sometimes there is not a bright line between procedural statutes and statutes affecting substantive rights but, that to his mind, the amendment creating the new s 12A is procedural.²³⁶ The Judge went on to say:²³⁷

the effect of the amendment is not to increase the sentence which may be imposed on an offender. The effect of the amendment is to categorise the nature of the offence on the criminal history of an offender. The allegation is not a circumstance of aggravation.

The reasoning in *R v MD* has been adopted in a number of other cases in Queensland and appears to have settled the matter.²³⁸

In my view, it would be open to New Zealand courts to conclude – like the courts have done in Queensland – that s 16A is purely procedural in nature. The family violence flag may trigger different considerations but does not affect any substantive rights.²³⁹

II Should the Family Violence Flag Apply to Convictions Entered Prior to 1 July 2019?

Treating s 16A as a procedural rather than a substantive provision opens the door to arguing that the family violence flag should also apply to convictions entered prior to 1 July 2019. This is a good thing because it would help identify an offender’s past record of family violence offending and repeated family violence.²⁴⁰ While many prior convictions will be identified as family violence by Police’s internal flag and/or the nature of the charges, there will be gaps. In any event, the Police family violence flag does not carry the same weight as a legislatively imposed flag.

²³⁴ *R v MD*, above n 232, at [3].

²³⁵ At [10].

²³⁶ At [18] – [19].

²³⁷ At [19].

²³⁸ *R v BNQ* [2016] QDC 113; *R v CLN* [2016] QDC 111; *R v Poynter* [2016] QDC 82.

²³⁹ *Rodway v R* (1990), above n 229, at 518.

²⁴⁰ See Attorney-General and Minister for Justice and Minister for Training and Skills The Honourable Yvette D’Ath “Palaszczuk Government passes laws to strengthen Queensland’s domestic violence response” (media statement, 15 October 2015).

Unlike New Zealand, both New South Wales and Queensland enable the court to retrospectively classify prior convictions as domestic violence offences. In Queensland, ss 12A(3) – (6) enable the prosecution to apply to the court for an order that an offence for which the offender has previously been convicted also be recorded as a conviction for a domestic violence offence. In New South Wales, s 12(3) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) contains a similar provision enabling the prosecutor to apply for retrospective application of the domestic violence notation. Both jurisdictions confirm that a person against whom the domestic violence offence was committed is not compellable as a witness in proceedings before the court to decide the application.²⁴¹

When the Queensland provision was introduced, the Queensland Law Society and Queensland Bar Association raised concerns about its application.²⁴² The Queensland Law Society stated the approach was “... fraught with danger in that the context in which the earlier offence occurred may not have been explored at the time of the conviction”.²⁴³ The Queensland Law Society recommended that, if the amendments are to apply retrospectively, a more robust process around the prosecution’s application should be established, including what the court must take into account and what information the prosecution must include.²⁴⁴

In response, the Department of Justice and Attorney-General (Qld) said that in practice the prosecution will provide a range of information to the court about the offender’s previous convictions. The Department listed, as examples, police information at the time of the offence, transcripts of evidence from any trial, and sentencing remarks made by the courts when sentencing the offender for previous convictions.²⁴⁵ The Department also stated the defence will be able “to make submissions about whether an offender’s previous convictions are relevant or not.”²⁴⁶

At a public hearing on the amendments, the Department stated:²⁴⁷

Those notations [retrospective notations] do not change in substance the offence that they [the offender] have been convicted of, so it is [for example] an assault occasioning bodily harm. The purpose of the provision is to identify that that assault occasioning bodily harm occurred in a domestic violence context.

²⁴¹ Penalties and Sentences Act 1992 (Qld), s 12A(9); Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12 (7).

²⁴² Criminal Law (Domestic Violence) Amendment Bill 2015 (Qld) (Report No. 6) at 17 (footnotes n 36 – 39).

²⁴³ Ibid.

²⁴⁴ At 18.

²⁴⁵ At 18.

²⁴⁶ At 19 (footnote n 46).

²⁴⁷ At 35 (footnote n 116).

The Queensland Cabinet Committee, which considered and approved the legislation, expressed some concern about the retrospective nature of the provision but was ultimately swayed by the fact that retrospective notation of a previous offence as a domestic violence offence is not automatic.²⁴⁸ The decision to do so is entirely at the discretion of the courts based on the information before the court, including the information provided in the prosecution's application.²⁴⁹

In an Official Information Act request, I asked the Ministry of Justice whether any consideration was given to extending the scope of s 16A to enable prior convictions to be flagged as family violence offences on an offender's criminal record. In response, the Ministry advised that while it considered enabling past family violence to be noted on criminal records, retrospective application of a family violence flag was considered to be inappropriate. The advice noted that this is consistent with section 12.1 of the Legislation Design and Advisory Committee's guidelines.²⁵⁰

Based on my research, I suggest that retrospective application of the family violence flag is not inappropriate. Case law (albeit from Queensland) has determined the effect of the family violence flag is procedural, rather than substantive. There is also precedent in both Queensland and New South Wales to enable retrospective notation of a previous offence as a domestic violence offence. As far as I can determine from review of Queensland and New South Wales case law, the provisions have not caused any issues in practice nor been subject to appeal. The Department of Justice and Attorney-General (Qld) in its briefing paper on the new legislation noted that in 2014, 663 directions were made for prior convictions to be recorded as a domestic violence offence in New South Wales.²⁵¹

III Proposed Amendments to Section 16A

In Chapter IX I suggest proposed amendments to s 16A to enable past offences to be recorded as family violence offences. The drafting draws on the equivalent Queensland and New South Wales provisions, namely:

If the court makes an order under s 16A(4) to enter an offence as a family violence offence, the prosecution may make an application to the court requesting that the court order that an offence for which the offender has previously been convicted (a **previous offence**) be entered in the permanent court record as a family violence offence.

²⁴⁸ At 36.

²⁴⁹ Ibid.

²⁵⁰ Ruth Fairhall, General Manager, Courts and Justice Services Policy (19 June 2018) (Written response to Official Information Act 1982 Request to Courts and Justice Services Policy Group, Ministry of Justice).

²⁵¹ Criminal Law (Domestic Violence) Amendment Bill 2015 (Qld) (Report No. 6) at 19.

The application—

- (a) may be made in writing or orally; and
- (b) must include enough information to allow the court to make a decision whether to order that the offence be entered as a family violence offence.

If the court is satisfied a previous offence is a family violence offence, the court must order that the offence be entered in the permanent court record of the proceedings as a family violence offence.

If amended, the process for making an application that a previous offence be entered as a family violence offence would fall within the general provisions relating to applications in subpart 4 of the Criminal Procedure Rules 2012. No consequential amendments are needed to the Rules to enable such applications.

In terms of a drafting approach, this change may be better incorporated in a new s 16B (rather than new subsections within s 16A) so as to comply with the Parliamentary Counsel Office's principles of clear drafting.²⁵² Section 3.5 of the checklist requires that each section should be restricted to one coherent and related group of ideas with, ideally, no more than 5 subsections.²⁵³

IV Concluding Comments

The value in flagging all relevant prior convictions as family violence offences is that it creates a much clearer record of the perpetrator's family violence history. And although it wasn't proposed as part of New Zealand's family violence reforms, there is precedent in Australia for a history of family violence offence convictions to trigger a differentiated sentencing response. For example, s 177 of the Domestic and Family Violence Protection Act 2012 (Qld) provides that if a person is charged with breach of a protection order and has a history of domestic violence offence convictions they are subject to an increased penalty.²⁵⁴

In the New Zealand context, s 22 of the Criminal Procedure Act 2011 deals with offences where the penalty is greater if the defendant is previously convicted of that offence or of some other offence. The provisions apply where the previous conviction is an essential ingredient of the offence as well as to the more common situation where there is a higher maximum penalty if

²⁵² Parliamentary Counsel Office "Principles of clear drafting" <www.pco.govt.nz>.

²⁵³ Ibid.

²⁵⁴ Section 177 of the Domestic and Family Violence Protection Act 2012 (Qld) provides that if a person has committed a 'domestic violence offence' (as flagged and identified) within the previous 5 years and breaches the protection order, the penalty increases from a maximum of over \$14,000 or 3 years imprisonment to over \$28,000 or 5 years imprisonment.

the defendant has previously been convicted of that offence or of some other offence.²⁵⁵ Sections 56(1) and 56(4) of the Land Transport Act 1998 are examples of the latter. A benefit of ensuring the family violence flag attaches to all relevant convictions is that it may enable future consideration of whether to increase penalties for breach of a protection order (as was done in Queensland) if the offender has a history of family violence offence convictions.

²⁵⁵ *Adams on Criminal Law* (6 December 2014, online ed) Criminal Procedure at CPA22.01.

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Chapter VI: Should the family violence flag apply to all proven offending?

In Chapter IV I argued that s 16A(4) should be amended to make entering the family violence flag a mandatory order of the court. In all cases a judge would need to turn their mind to whether the offence is a family violence offence and, if satisfied, make a declaration to that effect. This has the advantage of increasing visibility and awareness of family violence offences, as well as signalling the court's condemnation of violence within families.

In this chapter I argue that the family violence flag should apply to all proven family violence offending. The value of the family violence flag lies in its ability to identify repeat and escalating family violence offending, alerting judges to the family violence context of offences that – on face value – may appear minor or irrelevant. If the family violence flag is only entered when a conviction is recorded, the flag misses that proportion of cases where the family violence offending is proved but a conviction is not entered (for example, where the offender is discharged without conviction).²⁵⁶

I Family Violence Flag Only Applies When the Offender is “Convicted”?

Section 16A(4) provides that “[if] the defendant is convicted (even if the charging document does not specify that the offence charged is a family violence offence), the court may enter in the permanent court record of the proceeding a specification that the conviction is for a family violence offence.” At the date of writing there are no regulations governing the entry of the family violence flag, such as the manner in which and time within the flag is to be entered.²⁵⁷ Taking a literal interpretation of s 16A(4), one can only assume that if a defendant pleads guilty or is found guilty of a family violence offence, but a conviction is not recorded, the family violence flag is not required to be entered.

When a person applies for a certified extract of the permanent court record under r 7.1(9) of the Criminal Procedure Rules 2012 it will include (among other details) a description of the offence, the plea and the determination of the charge. Training materials obtained from the Ministry of Justice under an Official Information Act request advise that if the offender was *convicted* of a family violence offence the words “being a family violence offence” will be included under the body of the offence description (emphasis added).²⁵⁸ As noted, this process is not automated, and registrars have to manually add the specification into CMS.²⁵⁹

²⁵⁶ Sentencing Act 2002, s 106(2).

²⁵⁷ Compare s 12(9) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW).

²⁵⁸ Ministry of Justice, above n 5.

²⁵⁹ *Ibid.*

In the absence of case law on s 16A it is impossible to tell when the family violence flag is being entered and what triggers its entry. However, given the potential for argument about whether the flag applies to a discharge without conviction, I believe there is value in exploring this issue further and making some recommendations for reform.

A Why is this Problematic?

The issues with only entering the family violence flag when an offender is convicted become apparent when looking at the court's power to grant a discharge without conviction under s 106 of the Sentencing Act 2002.

A discharge without conviction is a sentencing option available to the court if a person is found guilty or pleads guilty, provided the law does not require a minimum sentence for an offence.²⁶⁰ The legal test in s 106 of the Sentencing Act 2002 requires that in order for an offender to be discharged without conviction they must first get through the s 107 threshold.²⁶¹ Section 107 mandates a judge to undertake a three-step analysis and consider: the gravity of the offence; the direct and indirect consequences of a conviction; and whether those consequences are out of all proportion to the gravity of the offence.²⁶² If the offender meets the s 107 threshold, the judge may go on to consider whether to exercise the residual discretion under s 106 to discharge without conviction.²⁶³

A discharge without conviction is a proved charge outcome but is treated as an acquittal and no conviction is entered on a person's criminal record.²⁶⁴ A court discharging an offender under s 106 may, in addition to making an order for payment of costs, restitution of property or compensation, make any of the orders set out at s 106(3) (for example, disqualification from driving).²⁶⁵ On the current wording of s 16A(4), the family violence flag does not come within the category of orders that may be made under s 106(3). Entry of the family violence flag is discretionary ("the court *may enter*"). It is not in the nature of a mandatory order able to be made under s 106(3)(c) and it does not come within the list of orders that might be made under paras 3(a) and (b).²⁶⁶

The Ministry of Justice's data tables report on charge outcomes for family violence offences.²⁶⁷ In 2018/19, 67 per cent of the six family violence offences included in the data tables resulted

²⁶⁰ Sentencing Act 2002, s 106(1).

²⁶¹ Sentencing Act 2002, s 107.

²⁶² *Z (CA477/12) v R* [2012] NZCA 599, [2013] NZAR 142 at [8].

²⁶³ At [9].

²⁶⁴ Ministry of Justice "Data Tables" (17 September 2019) <www.justice.govt.nz>.

²⁶⁵ Sentencing Act 2002, s 106(3).

²⁶⁶ See *Taylor v New Zealand Police* [2019] NZHC 874.

²⁶⁷ Ministry of Justice, above n 264.

in a conviction.²⁶⁸ Seven per cent resulted in an “other proved” outcome. Twenty-six per cent resulted in a “not proved” outcome. The “other proved” outcome includes a s 283 Oranga Tamariki Act 1989 order in the Youth Court, discharge without conviction and adult diversion/Youth Court discharge.²⁶⁹ Anecdotal discussions with court staff suggest that a discharge without conviction is more prevalent in the Family Violence Courts than the seven per cent reported in the Ministry’s data tables.

B Case example: Auton v Police

Auton v Police was an appeal against sentence, the sole issue being whether the District Court Judge gave proper consideration to Mr Auton’s application for a discharge without conviction.²⁷⁰ The agreed summary of facts records that on 6 March 2018, Mr Auton took an air pistol and fired several shots from his kitchen window at his estranger partner’s (referred to in the case as “M”) bedroom window. M and her five-year-old son (son of Mr Auton) were inside at the time. Fearing for her, and her son’s safety, M called the police. As Mr Auton exited the property, he smashed the rear window of M’s car and her bedroom window with a brick.

Those actions gave rise to one charge of discharging a firearm in a dwelling,²⁷¹ and two charges of wilful damage.²⁷² Mr Auton was granted bail. On 31 March 2018, while he was on bail as well as subject to a temporary protection order that was served on him on 12 March 2018, Mr Auton sent cards to M and his son via a friend. On 10 April 2018, Mr Auton sent M a five-page email. As a consequence, Mr Auton was charged with two breaches of a protection order.²⁷³ Mr Auton pleaded guilty to all charges and the District Court Judge sentenced him to 12 months’ supervision.²⁷⁴ The Judge declined Mr Auton’s application for a discharge without conviction. Mr Auton subsequently appealed.

In this case, the charge of discharging a firearm in a dwelling and the two charges of wilful damage are family violence offences. Mr Auton and M (and their son) are in a family relationship and Mr Auton’s actions in firing the air pistol (threatening and intimidating) and smashing the window of M’s car (damage to property) constitute psychological abuse as

²⁶⁸ The offences reported are breach of protection order, common assault (domestic), male assaults female. From 6 December 2018 the data tables have included assault on a family member, coerced into marriage/civil union and strangulation/suffocation.

²⁶⁹ Ministry of Justice, above n 264.

²⁷⁰ *Auton v Police* [2019] NZHC 3178.

²⁷¹ Arms Act 1983, s 48.

²⁷² Summary Offences Act 1981, s 11(1)(a).

²⁷³ Domestic Violence Act 1995, ss 19(2)(e), 49(1)(b) and 49(3).

²⁷⁴ *New Zealand Police v Auton* [2019] NZDC 7711.

defined.²⁷⁵ These actions are also high-risk factors for the reoccurrence of family violence, as evidenced in national and international family violence death reviews.²⁷⁶ Damage to property is often a manifestation of coercive and controlling behaviour and is associated with physical violence.²⁷⁷

On appeal, Clark J was influenced in her consideration of Mr Auton's appeal by medical evidence that was not available to the sentencing Judge. The evidence from a consultant psychiatrist noted that Mr Auton presented with a complex mental health history, characterised by Attention Deficit Hyperactivity Disorder (ADHD) which may have contributed to the offending.²⁷⁸ Clark J considered the link between Mr Auton's mental health and his offending mitigated the "reasonably serious offending" and made no reference to the risk Mr Auton's mental health might pose to his future likelihood of committing family violence.²⁷⁹

In concluding that Mr Auton's mental health mitigated the seriousness of his offending, Clark J was also satisfied that the consequences of a conviction would be out of all proportion to the gravity of the offence.²⁸⁰ Clark J noted that Mr Auton is required to travel overseas as part of his employment with his families' engineering firm and that a conviction for firearm offending would highly likely be a barrier to entry.²⁸¹ The appeal was allowed and Clark J discharged Mr Auton without conviction under s 106 of the Sentencing Act. His sentence and convictions for discharging a firearm, wilful damage and breach of protection order were quashed.

I outline this case in detail to make the point that this case is a family violence case; there is a family relationship between the parties, the offending involved family violence, and the circumstances also evidenced several risk factors that are associated with a higher likelihood of serious family violence reoccurring. Mr Auton pleaded guilty to all charges, so there is no question over whether he committed the offences. This type of case appears to be what the Ministry of Justice had in mind when introducing s 16A, noting "[there] is a wide spectrum of acts that can constitute family violence offending."²⁸²

My concern with this case is that because a discharge without conviction under s 106 of the Sentencing Act 2002 is treated as an acquittal, strictly speaking, the court is not required to

²⁷⁵ Family Violence Act 2018, s 11.

²⁷⁶ FVDRC, above n 68; ANROWS, above n 88.

²⁷⁷ Ministry of Justice, above n 81, at 56.

²⁷⁸ *Auton*, above n 270, at [14]. There was also evidence that Mr Auton had made violent and credible attempts to end his life.

²⁷⁹ FVDRC, above n 68; ANROWS, above n 88. Mental health issues are often present in family violence death reviews, though research has not yet shown a strong causal link between mental health issues and family violence.

²⁸⁰ *Auton*, above n 270 at [25].

²⁸¹ At [28].

²⁸² Ministry of Justice, above n 7, at 3.

enter in the permanent court record of the proceeding a specification that the offences are family violence offences.²⁸³ This does not matter as much in respect of the breach of protection order offence, as the family violence context is evident from the nature of the charge, but it does matter in respect of the wilful damage and discharging a firearm offences.

Another practical issue is what happens to the family violence flag on the offender's record if this is entered when the District Court convicts and sentences them, but then the High Court discharges the offender without conviction? Would the judge need to make an order to amend the permanent court record to remove the flag? This is unclear and potentially messy.

When sentencing, a judge must take into account as an aggravating factor the number, seriousness, recency, relevance and nature of an offender's previous convictions.²⁸⁴ In the family violence context, previous (proven) abusive behaviour – irrespective of whether it resulted in a conviction – can be taken into account as an aggravating factor at sentencing.²⁸⁵ Evidence of an offender's ongoing pattern of abusive behaviour may include offences for which he or she received a discharge without conviction; however, without the family violence flag there may be nothing to indicate that those offences involved family violence.

C Identifying Repeat Offending of the Same Type

While there is a wide spectrum of acts that can constitute family violence offending, the introduction of s 16A reflects Parliament's intent that it be identified as a particular type of offending.²⁸⁶ On principle, a discharge without conviction is to be regarded the same as an acquittal on the merits.²⁸⁷ However, the situation is different when the court is considering a discharge without conviction where there has been a previous discharge for the same type of offending, such as drug possession charges. In such cases, the courts have recognised that a previous discharge without conviction for offending of the same type must count against a discharge on a later occasion.²⁸⁸

The above principle has been applied in respect of breach of protection order charges, where the offender is seeking a further discharge without conviction. For example, in *Swami v Police* Mr Swami appealed against the District Court Judge's refusal to grant him a discharge without

²⁸³ Criminal Procedure Act 2011, s 16A(4).

²⁸⁴ Sentencing Act 2002, s 9(1)(j).

²⁸⁵ See *Everett v R* [2019] NZCA 68 at [38].

²⁸⁶ Ministry of Justice, above n 7, at 2.

²⁸⁷ *Hepburn v Police* [1972] NZLR 92; *Police v McCabe* [1985] 1 NZLR 361.

²⁸⁸ *Police v McCabe*, above n 287, at 364; *Morgan v Police* HC Auckland CRI-2009-404-212, 9 October 2009.

conviction for breach of a protection order in circumstances where he had previously received a discharge for breach of that protection order.²⁸⁹ In declining the appeal, Katz J noted:²⁹⁰

The Domestic Violence Act 1985 is aimed at reducing and preventing violence towards victims through providing effective legal protection. In this context it is important that there be effective sanctions where multiple breaches of a domestic protection order have occurred even if each breach, considered in isolation, might be considered to be relatively minor.

While protection orders can provide an effective legal remedy for victims of family violence, not all victims will have this protection. When there is no protection order in place, the family violence flag can help identify previous abusive family violence behaviour. This may include offending behaviour such as threats, property damage or wilful damage that frequently form the basis for breach of protection order charges. While a judge will necessarily need to examine the circumstances of each case, I argue that repeat “family violence offending” must count against the offender receiving two or more discharges without conviction.

This argument was recognised by France J in *New Zealand Police v Houqe* in which Mr Houqe sought a discharge without conviction for assaulting his wife (he had already received a previous discharge for the same charge).²⁹¹ France J was satisfied that the consequences of conviction were not out of all proportion to the gravity of the offence, but also made obiter comments that:²⁹²

[Had] the test been met, I would have exercised my discretion against the granting of a discharge. There is no formal rule against twice being discharged without conviction. Convincing reasons, however, might be expected and especially so in this area of family domestic violence. I consider generally a second discharge for this offending would very much be to send the wrong message.

D Family Violence Flag Can Help Identify Offences of “Considerable Social Concern”

The preceding discussion talks about the role of the family violence flag in relation to assessing risk and determining appropriate sentencing responses in subsequent family violence offending. This section talks briefly about the importance of flagging a charge as family violence to clearly identify it as an offence of “considerable social concern”. This argument is relevant to those charges that might not immediately be identified as family violence, such as intra-familial offending or offences involving psychological abuse or property damage.

²⁸⁹ *Swami v Police* [2012] NZHC 2725.

²⁹⁰ At [24].

²⁹¹ *New Zealand Police v Houqe* [2018] NZHC 1820.

²⁹² At [16].

There is authority for the proposition that some types of offending should be scrutinised with care before a s 106 discharge is ordered.²⁹³ For example, in both *Ovtcharenko v New Zealand Police*²⁹⁴ and *Linterman v Police*²⁹⁵ (cases involving drink driving offences) the High Court was of the view that the nature of the social problem that the legislation is intended to address is something that goes to an assessment of the gravity of the offending.²⁹⁶ In these cases, drink driving was acknowledged as a significant social problem.

The approach in *Ovtcharenko* was recently considered and confirmed by the Court of Appeal in *Basnyat v Police*.²⁹⁷ In that case, the Court of Appeal observed:²⁹⁸

Drink driving is a moderately serious offence when seen by reference to its potential consequences and to the pervasiveness of alcohol abuse in our society. That means the proportionality scales to be applied at stage three of *Z (CA447/2012) v R* are, to an extent, tipped by that level of seriousness. The consequences of a conviction must also therefore be relatively significant before they are “out of *all* proportion” to the moderate seriousness of the offence. It would be different if drink driving were a minor offence, but it is not.

There is no doubt that family violence is a considerable problem in New Zealand, if not one of the most pressing social problems. Of course, when considering the “type of offence committed”, I acknowledge that what constitutes a family violence offence can encompass a much broader range of offending than drink driving offences. The presence of the family violence flag does, however, indicate that judges should treat the offending with additional caution, given the unique risk profile of family violence cases.²⁹⁹

In *Heketa v Police*, the appellant was convicted of male assaults female and wilful damage and was sentenced to nine months’ supervision.³⁰⁰ Mr Heketa appealed his sentence (and conviction) on the basis that he should have been granted a discharge without conviction.³⁰¹ In the High Court, Cooke J acknowledged the “social problem” of family violence offending when considering the third-stage proportionality test:³⁰²

²⁹³ *Linterman v Police* [2013] NZHC 891 at [9].

²⁹⁴ *Ovtcharenko v New Zealand Police* [2016] NZHC 2572.

²⁹⁵ *Linterman*, above n 293.

²⁹⁶ *Ovtcharenko*, above n 294, at [20].

²⁹⁷ *Basnyat v Police* [2018] NZCA 486.

²⁹⁸ At [19].

²⁹⁹ *Noble v Police*, above n 27.

³⁰⁰ *Police v Heketa* [2018] NZDC 16247.

³⁰¹ *Heketa v New Zealand Police* [2018] NZHC 2204.

³⁰² At [42]. See also *New Zealand Police v Houqe*, above n 291 and *B v Police* [2019] NZHC 2182.

Domestic violence has recently been described by the Court of Appeal as “one of the scourges of New Zealand society”, and the courts will consistently give sentences to reflect the immense social harm caused by such offending.³⁰³ To grant a discharge without conviction in a case of quite a serious incident of domestic violence, where the offender did not plead guilty, would fly in the face of that stance in the absence of factors that very clearly make the conviction disproportionate.

Cases like *Heketa v Police* have involved assault charges where the family violence context was evident from the summary of facts. One of the advantages of the family violence flag (if used) is that it can identify a family violence context in less obvious charges. As awareness of family violence dynamics and risk factors increases, the family violence flag can be used to prompt judges to consider the risk involved in threatening, stalking or digital abuse type offences. It can also be used to trigger information sharing regulations between the civil and criminal courts, which may indicate the existence of an existing protection order between the parties or active care of children proceedings.³⁰⁴

My purpose in making the above points is not to usurp a sentencing court’s discretion to impose a discharge without conviction when appropriate. Rather, my point is that Parliament has introduced a mechanism to clearly identify and differentiate family violence offences. It has done this in recognition of the serious and repeat nature of family violence.³⁰⁵ As the Court of Appeal said in *Basnyat v Police*, this arguably tips the proportionality scales to be applied at stage three of *Z (CA447/2012) v R* by that level of seriousness.³⁰⁶

II Extend the Family Violence Flag to Capture all Proven Family Violence Offending

The previous sections set out the argument for ensuring the family violence flag is entered in the permanent court record when an offender is granted a discharge without conviction. In this part I outline two possible reform options to enable this to be done. These recommendations are replicated and set out in full in Chapter IX.

A Enter the Family Violence Flag When a Person Pleads Guilty or is Found Guilty

Firstly, capturing all proven family violence offending within the scope of s 16A could be achieved by amending s 16A(4) so that it applies “when a person pleads guilty to the offence or is found guilty of the offence.” On this wording, the flag would be entered immediately

³⁰³ *Solicitor-General v Hutchison*, above n 1, at [27].

³⁰⁴ Family Court Rules 2002, r 432.

³⁰⁵ Ministry of Justice, above n 7, at 26.

³⁰⁶ *Basnyat*, above n 297, at [19].

upon the plea or finding of guilt³⁰⁷ and would not be affected by a sentencing option not to enter a conviction.

This wording would appear to be what the Law Commission had in mind when discussing “flagging” family violence offences. In its 2016 report *Strangulation: The case for a new offence*, the Commission recommended that if a person pleads guilty or is found guilty of the new strangulation offence, and the court is satisfied that the offence was a family violence offence, the court must direct that the offence be recorded on the person’s criminal record as a family violence offence.³⁰⁸

In New South Wales, the domestic violence flag applies to all proven family violence offending. Section 12(2) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) relevantly provides (emphasis added):

12 Recording of domestic violence offences

...

- (2) If a person pleads guilty to an offence or is found guilty of an offence and the court is satisfied that the offence was a domestic violence offence, *the court is to direct* that the offence be recorded on the person’s criminal record as a domestic violence offence.

The Queensland legislation is similar in that if no conviction is recorded in relation to the offence (but the offence is proved), the offence must be entered in the offender’s criminal history as a domestic violence offence.³⁰⁹ In explanation, the Queensland Attorney-General noted this would ensure “a perpetrator’s criminal history clearly illustrates any pattern, or increased frequency or escalation, in domestic violence which can then be considered by the court and police when considering matters such as bail and in sentencing the offender.”³¹⁰

In pursuing this option, consideration would need to be given to whether the family violence flag applies to all proven family violence offending, not just offending that resulted in a discharge without conviction. In the Youth Court jurisdiction, a judge has the ability under ss 282 and 283(a) of the Oranga Tamariki Act 1989 to discharge a child or young person from proceedings without any further order or penalty, though in the case of a s 283(a) discharge a record of the child or young person’s offending is still kept by the Ministry of Justice.³¹¹

³⁰⁷ Criminal Procedure Act 2011, s 114.

³⁰⁸ Law Commission, above n 69, at 55.

³⁰⁹ Penalties and Sentences Act 1992 (Qld), s 12A(3).

³¹⁰ Attorney-General and Minister for Justice and Minister for Training and Skills The Honourable Yvette D’Ath “Palaszczuk Government passes laws to strengthen Queensland’s domestic violence response” (press release, 15 October 2015).

³¹¹ Oranga Tamariki Act 1989, ss 282 and 283(a).

Whether the family violence flag should apply to both adult offenders and youth offenders was not discussed in the policy papers, and is outside the scope of this thesis.

B The Family Violence Flag is an Order the Court is Required to Make on Conviction

An alternative approach is to keep reference to *convicted* in s 16A(4) but make the amendment suggested in Chapter IV so that the subsection provides:

If the defendant is convicted of the offence and the court is satisfied that the offence is a family violence offence (even if the charging document does not specify that the offence charged is a family violence offence), the court must order that the offence be entered in the permanent court record of the proceeding as a family violence offence.

This would bring the family violence flag within that category of orders that the court is required to make on conviction. Section 16A(4) could then be read alongside s 106(3)(c) of the Sentencing Act 2002, which provides that “[a] court discharging an offender under this section may ... make any order that the court is required to make on conviction.” Because the family violence flag becomes an order the court is required to make on conviction (if satisfied the offence is a family violence offence), a sentencing court may make an order under s 106(3)(c) that the flag be entered.

One issue with this is that a court discharging an offender *may* make any of the orders listed in s 106(3). In Chapter IV I argued that in order to be effective, and to achieve its policy purpose, the family violence flag needs to be a mandatory order the court is required to make if the pre-conditions in s 16A(4) are satisfied. Without expressly drawing attention to s 16A in s 106 a sentencing judge may fail to turn their mind to this issue and fail to make an order that the family violence flag is to be entered.

One way of getting around this is to include a new subsection (1A) in s 106 to provide:

Despite subsection (1), if the court is satisfied that the offence is a family violence offence (even if the charging document does not specify that the offence charged is a family violence offence), the court must order that the offence be entered in the permanent court record of the proceedings as a family violence offence in accordance with s 16A of the Criminal Procedure Act 2011.

III Concluding Comments

This chapter has highlighted the gap in information available to judges if the family violence flag is only entered upon conviction. In many cases a discharge without conviction will be an appropriate sentencing option in family violence cases, particularly if it is imposed conditional

on an offender completing a stopping violence programme.³¹² However, the purpose of the family violence flag is to identify and capture all family violence offending, on the understanding that it can involve a wide range of acts – some which might appear minor in isolation – that often escalate in severity.³¹³

At least seven per cent of proven family violence offending results in a conviction not being entered.³¹⁴ As currently drafted, an argument can be made that s 16A(4) does not require the court to enter the family violence flag in these cases. In my view, this is a significant gap in recording. If the family violence flag is entered for all proven family violence offending it will be much easier for judges to see an offender's full family violence criminal history, as well as determining whether subsequent discharges without conviction are appropriate.

³¹² This is common sentencing option in the Family Violence Courts, which have a rehabilitative and therapeutic focus.

³¹³ Ministry of Justice, above n 7, at 2.

³¹⁴ Ministry of Justice, above n 264.

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Chapter VII: Using the Family Violence Flag to Enhance Victims' Immediate Safety

Previous chapters argue that the family violence flag must be entered in the permanent court record in respect of all proven family violence offending. The entry of the flag indicates the court was satisfied there is a family relationship between the offender and the victim and that the offence involved family violence (as defined in section 9 of the FVA). In this chapter I focus on the use of the family violence flag in the sentencing context and argue that it can be used to enhance victim's immediate safety by ensuring more victims receive the benefit of a protection order at sentencing.

I Making a Protection Order in Criminal Proceedings

The statutory framework for making a protection order in criminal proceedings is contained in ss 123A—123H of the Sentencing Act 2002. These sections were enacted in 2010 following the assent of the Domestic Violence (Enhancing Safety) Bill 2002. The relevant part of the explanatory note to the Bill states:³¹⁵

The Bill proposes that when the criminal courts are sentencing a person convicted of a domestic violence offence the courts must consider making a protection order on behalf of the victim (if such an order is not currently in force) if it is satisfied that the making of the order is necessary for the protection of the victim, and the victim does not object to the making of the order.

The Minister of Justice, in the First Reading Speech of the Bill, stressed the importance of this power, noting “it does not place the victim in the situation of having to request or seek the order; rather it leaves the court in the position of being able to make the order without putting the victim in a very difficult situation, as is often the case in our courtrooms.”³¹⁶

A Section 123B: Statutory Framework

Section 123B of the Sentencing Act 2002 sets out four matters the court must determine before making a protection order.³¹⁷

1 First matter: The offender is convicted of a family violence offence

Section 123B(1)(a) provides that “[t]his section applies if—(a) an offender is convicted of a family violence offence.” There are two component parts to this first requirement: The offender must be “convicted”, and the conviction must be for a “family violence offence”. As

³¹⁵ Domestic Violence (Enhancing Safety) Bill 2008 (9-2), Explanatory note.

³¹⁶ (16 December 2008) 651 NZPD 979.

³¹⁷ Section 123B of the Sentencing Act 2002 is set out in full in the Appendices.

noted in Chapter VI, s 114 of the Criminal Procedure Act provides the court with the full range of options necessary to deal with a defendant who pleads or is found guilty.³¹⁸ If the court convicts the defendant, it may adjourn the proceeding or sentence immediately. In respect of the family violence flag, this should be entered in the permanent court record as soon as the defendant is “convicted” of a family violence offence.³¹⁹

In reported New Zealand case law on s 123B, the protection order was almost always imposed with the final sentence rather than upon conviction.³²⁰ This process leaves a gap in protection for the victim of the offence if there is adjournment between time the defendant pleads or is found guilty and final sentence. This is concerning because contact with the criminal justice system can be a precipitating risk factor for family violence.³²¹ The offender may blame the victim, the stress of court proceedings may increase conflict within the relationship, or the victim may experience harassment or violent retaliation from the offender’s associates. The imposition of non-contact conditions³²² or bail conditions go some way in providing protection, but do not have the same legal force as a protection order.³²³

In *Police v Curzey*, which was an appeal by Police against a decision of the District Court, Clark J considered whether a protection order is a sentence for the purpose of s 25 of the Sentencing Act 2002.³²⁴ At Mr Curzey’s second appearance he entered a guilty plea to one charge of injuring with intent to injure against his former intimate partner. Mr Curzey was convicted and by consent a protection order was made against him in favour of the victim. Directions for final disposal by way of a sentence were made and a date of 27 May 2019 was set for sentence.³²⁵

Based on their own research and drawing on the recent amendments to s 123H of the Sentencing Act 2002,³²⁶ the District Court Judges involved in the case formed the view that the imposition of a protection order under s 123B is a sentence. They accordingly concluded that

³¹⁸ Criminal Procedure Act 2011, s 114(1)

³¹⁹ Criminal Procedure Act 2011, s 16A(4).

³²⁰ See for example *Bigham-Hill v R* [2019] NZHC 753; *Vohra v New Zealand Police* [2018] NZHC 3192. In *Vohra* there was a gap of 8 months between the offender pleading guilty and sentencing.

³²¹ Hayley Boxall, Dr Jason Payne and Dr Lisa Rosevear *Prior offending among family violence perpetrators: A Tasmanian sample* (Australian Institute of Criminology, no. 493, March 2015).

³²² Criminal Procedure Act 2011, s 168A.

³²³ Section 112 of the Family Violence Act 2018 creates the offence of contravening a protection order (or related property order). This offence is punishable by imprisonment for a term not exceeding three years.

³²⁴ *Police v Curzey* [2019] NZHC 3444. Section 25 of the Sentencing Act 2002 sets out the court’s power of adjournment for inquiries as to suitable punishment.

³²⁵ At [8].

³²⁶ Section 123H now confirms that an appeal against a s 123B protection order proceeds as if it were an appeal against sentence, though the section does not define a protection order as a sentence.

the court's ability to adjourn the proceeding under s 25 of the Sentencing Act 2002 for final sentence was unavailable as this would amount to splitting a sentence.³²⁷

Clark J disagreed with this interpretation, concluding that:³²⁸

With the enactment of s 123B, the criminal courts were empowered to make protection orders against offenders if satisfied it was necessary to do so and the victim did not object. In this way, victims of family violence could be afforded immediate and effective protection without having to resort to making applications under the Family Violence Act. That is the purpose and effect of s 123B. A protection order made under s 123B does not have effect as a sentence and thereby, of itself, conclude the sentencing process.

In respect of the second part of s 123B(1)(a), the Sentencing Act 2002 defines a family violence offence in the same form as that used in other criminal legislation, namely: “a family violence offence means an offence against any enactment (including the Family Violence Act 2018) and involving family violence (as defined in section 9 of that Act).”³²⁹ This should be specified on the charging document, although a judge can determine that an offence is a family violence offence irrespective of whether it is specified as such on the charging document.³³⁰

As discussed earlier, there needs to be ongoing awareness and education about the different forms family violence offences can take, such as digital abuse, economic abuse and harm towards pets. It is also important to focus attention on intra-familial offending – violence that occurs between other family members – rather than just on violence that occurs between intimate partners. Intra-familial offending can cause considerable harm within families but because it is less commonly identified than “intimate partner violence” less is known about its risk factors.

2 *Second matter: There is no protection order currently in force*

Before imposing a protection order the court must be satisfied there is not currently a protection order in force against the offender for the protection of the victim of the offence.³³¹ This

³²⁷ Section 25 of the Sentencing Act 2002 empowers a court, for any of the purposes set out in subs (1)(a) – (e), to adjourn proceedings in respect of any offence “after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with”. Although the power to adjourn is wide, s 25 does not permit the court to impose only part of a sentence followed by an adjournment. All parts of the sentencing process are to be completed on the one occasion. See for example *Patelesio v New Zealand Police* HC Invercargill CRI 2009-425-31, 23 April 2010.

³²⁸ *Police v Curzey*, above n 324, at [24].

³²⁹ Sentencing Act 2002, s 123A.

³³⁰ Criminal Procedure Act 2011, s 16A(1).

³³¹ Sentencing Act 2002, s 123B(1)(a).

information can be obtained from the Family Court, if it is not already contained in the summary of facts.³³²

3 *Third matter: The order is necessary for the protection of the victim of the offence*

Section 123B(2)(a) provides that the court *may make* a protection order against the offender if it is satisfied that the making of the order is necessary for the protection of the victim of the offence.³³³ This wording is substantially the same as that found in s 79 of the Family Violence Act 2018, which empowers the Family Court to make a final protection order if it is satisfied that—

- (a) the respondent has inflicted, or is inflicting, family violence against the applicant, or a child of the applicant’s family, or both; and
- (b) the making of an order is necessary for the protection of the applicant, a child of the applicant’s family, or both.

Section 79 replicates the former s 14 of the Domestic Violence Act 1995. When s 123B was introduced, the explanatory note confirmed that the provision would enable the criminal court to issue a protection order based on the same criteria for protection orders in the Family Court.³³⁴

The leading cases on the “necessity test” are *SN v MN*³³⁵ and *Surrey v Surrey*³³⁶, which are discussed in some detail in Chapter II. These cases have been found applicable to the court’s decision to impose a protection order under s 123B³³⁷. The High Court has noted that while discussion as to the necessity for the order need not be extensive or overly refined,³³⁸ some discussion of the reasons for the conclusion that the order is necessary should be given.³³⁹

A sentencing court’s power to impose a protection order was recently revisited by Jagose J in *Solicitor-General v Karekare*; a prosecutor’s appeal against sentence made on the sole basis that the Judge erred in failing to make a protection order.³⁴⁰ Mr Karekare had pleaded guilty

³³² Family Court Rules 2002, r 423. Section 123B(4) of the Sentencing Act 2002 confirms that a protection order may be made even though family violence proceedings have been filed by the victim of the offence against the offender, and those proceedings have not yet been determined.

³³³ Sentencing Act 2002, s 123B(2)(a).

³³⁴ Domestic Violence (Enhancing Safety) Bill 2008 (9-2), Explanatory note.

³³⁵ *SN v MN*, above n 90.

³³⁶ *Surrey v Surrey*, above n 89.

³³⁷ See *R v Eru* [2018] NZDC 4291 at [34].

³³⁸ *Broderick v Police* [2014] NZHC 133, (2014) 29 FRNZ 789 at [21]; *Taylor v Police* [2018] NZHC 1377 at [13].

³³⁹ *Broderick v Police* at [21] – [23].

³⁴⁰ *Solicitor-General v Karekare* [2019] NZHC 849, [2018] NZFLR 1038 at [26].

to charges of wilful damage, male assaults female, and theft. The victim of the charges was Mr Karekare's ex-partner, against whom Mr Karekare had previously offended. The District Court had sentenced Mr Karekare to ten and a half months' imprisonment but declined to make a protection order under s 123B.³⁴¹ The Crown argument was that the Judge acted contrary to the purpose of s 123B and established authority by placing the onus on the victim to manage her situation and safety [by seeking a protection order herself in the Family Court].³⁴²

In considering necessity, Jagose J said the s 123B(2)(a) requirement that the making of a protection order must be necessary for the protection of the victim of the offence is the same requirement as contained in [the then] s 14(1)(a) of the Domestic Violence Act 1995.³⁴³ Jagose J noted that Mr Karekare had offended against the victim before, and in a serious way. He was satisfied the victim's fears that Mr Karekare would seriously hurt her one day were not without foundation. Relying on the Court of Appeal's reasoning in *Surrey v Surrey*³⁴⁴, Jagose J found there were no persuasive countervailing factors present to justify the Judge's failure to make a protection order in favour of the victim against Mr Karekare.³⁴⁵

Section 123B(2) is drafted in permissive terms, providing that the court *may* make a protection order against the offender if it is satisfied that the making of the order is necessary for the protection of the victim of the offence; and the victim of the offence does not object to the making of the order.³⁴⁶ Yet, in *Solicitor-General v Karekare* Jagose J referred to the purpose behind s 123B and said:³⁴⁷

I acknowledge that finding comes close to being one that a protection order should follow in all but exceptional circumstances on conviction for domestic violence. But then again, I recognise domestic violence is characterised by its ongoing pattern and that is what we are asked to look at, whether there is past violence and a reasonable foundation for a fear of future violence.

These comments are more in line with the New South Wales domestic violence legislation, which mandates the court to make a protection order if a person pleads guilty to, or is found guilty of, certain domestic violence offences.³⁴⁸

³⁴¹ *R v Karekare* [2019] NZDC 1815.

³⁴² *Karekare*, above n 340, at [16].

³⁴³ At [18].

³⁴⁴ *Surrey v Surrey*, above n 89, at [43].

³⁴⁵ *Karekare*, above n 340, at [26].

³⁴⁶ Sentencing Act 2002, s 123B(2).

³⁴⁷ *Karekare*, above n 340, at [26].

³⁴⁸ Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 39. See also s 63A of the Restraining Orders Act 1997 (WA) in respect of certain violent personal offences.

4 Fourth matter: Victim of the offence does not object to the making of the order

The fourth matter the court must determine before making a protection order under s 123B is that the “victim of the offence does not object to the making of the order.”³⁴⁹ The wording of the section permits the court to assume there is no objection unless the victim records one.³⁵⁰ In *Sutherland v Police*, Muir J observed that the complainant’s withdrawal of her protection order application, in separate Family Court proceedings, did not amount to a positive objection in terms of s 123B(2)(b).³⁵¹ In discussing the wording of s 123B(2), Muir J commented:³⁵²

Although it may be customary for the District Court to make inquiries in this respect, I cannot see that s 123B imposes an affirmative obligation on a District Court Judge positively to establish an absence of objection. It is for the victim to record such an objection if the caveat in subs 123B(2)(b) is to apply.

The position in *Sutherland* has been upheld in subsequent cases, most notably *Solicitor-General v Karekare*.³⁵³

B Reforming Section 123B to Enhance Victims’ Safety

The family violence flag is entered when a defendant is convicted of a family violence offence. Similarly, a sentencing court can impose a protection order under s 123B when an offender is convicted of a family violence offence. As Clark J in *Police v Curzey* makes clear, a protection order can be imposed immediately upon conviction to afford victims immediate and effective protection; despite the general practice in case law to impose a protection order at final sentence.³⁵⁴

The usual practice is for a s 123B protection order to be imposed on the request of the prosecutor. The background facts in reported s 123B cases suggest that the offending generally involves physical violence between current or former intimate partners.³⁵⁵ However, this misses a significant number of family violence offence cases involving other family members or other forms of violence, like harassment or property damage. The presence or entry of the family violence flag should be treated as a signal to the judge that there may be ongoing protection needs for the victim, regardless of whether it is an intimate-partner or intra-familial

³⁴⁹ Sentencing Act 2002, s 123B(2)(b).

³⁵⁰ *Te Kani v Police* [2014] NZHC 82 at [16]; *Sutherland v Police* [2017] NZHC 1802 at [18].

³⁵¹ *Sutherland v Police* at [19].

³⁵² At [18].

³⁵³ *Karekare*, above n 340.

³⁵⁴ *Police v Curzey*, above n 324, at [24].

³⁵⁵ See generally *Karekare*, above n 340; *Bowman v Police* [2015] NZHC 2556; *Te Kani v Police* [2014] NZHC 82.

violence case. This is something the judge should turn their attention to in every family violence offence case.

Accordingly, I propose that s 123B(2) should be amended so that the court *must make* a protection order against the offender if it is satisfied that the making of the order is necessary for the protection of the victim of the offence. This is in line with the New South Wales approach and the Government’s original intent when introducing s 123B, reflected in the first reading speech, that “when the criminal courts sentence a person convicted of a domestic violence offence they must also consider imposing a protection order on behalf of the victim.”³⁵⁶ The court would still have the option of declining to make a protection order if satisfied that an order is *not necessary* for the protection of the victim of the offence.

The Australian Law Reform Commission and New South Wales Law Reform Commission looked at discretionary versus mandatory protection orders in criminal proceedings in their review of Australian family violence laws.³⁵⁷ Overall, they found the mandatory provision in New South Wales is working and has not resulted in the issuing of unnecessary orders.³⁵⁸ The Commissions also noted feedback from stakeholders that a “mandatory protection order upon conviction adds weight to the serious nature of the order and results in the victim not being required to make that decision.”³⁵⁹

In the civil context, the reasoning in *Surrey* provides that once an applicant has proved the existence of past violence and his or her reasonable subjective fear of future violence, the evidential burden passes to the respondent to raise countervailing factors that weigh against the need for a protection order.³⁶⁰ Situations where the respondent has met this evidential burden include where the family violence involved low-level psychological abuse in the course of acrimonious child contact arrangements and where the applicant exaggerated their subjective fears of future violence.³⁶¹ Such factors are far less likely to arise in the criminal context given that the range of family violence behaviours criminalised by offences are inherently more serious, thus heightening the need for a protection order.³⁶²

Section 123B(2)(b) currently provides that the court may make a protection order against the offender if the victim of the offence does not object to the making of the order. I suggest this subsection is not necessary and is out of step with how the court treats the views of victims of

³⁵⁶ (16 December 2008) 651 NZPD 979.

³⁵⁷ Australian Law Reform Commission / NSW Law Reform Commission *Family Violence – A National Legal Response* (ALRC R 114 / NSWLRC R 128, 2010) at 11.70.

³⁵⁸ At 11.79.

³⁵⁹ At 11.81.

³⁶⁰ *Surrey*, above n 89, at [43].

³⁶¹ *N v S* [2019] NZHC 2905.

³⁶² *Surrey*, above n 89, at [41]-[42].

family violence in bail and in sentencing. In bail decisions, the courts have repeatedly held that while a judge must take into account a victim's views under s 8(4) of the Bail Act, those views are not determinative.³⁶³ In sentencing, the victim's views are only relevant in so far as they are directed towards establishing the extent of harm resulting from the offence.³⁶⁴ This position better reflects current understandings of the dynamics of family violence (particularly where it involves coercive and controlling behaviour) and its impact on victim behaviour.

I also note that since 1 July 2019, certain approved non-government organisations have been able to apply for protection orders on behalf of people unable to apply personally.³⁶⁵ Under the FVA, and in contrast to the Domestic Violence Act 1995, the victim does not have the ability to object to the continuation of the proceedings taken by the organisation on their behalf.³⁶⁶ Given the civil scheme now explicitly recognises that the court, or the representative applicant, can make a judgement on behalf of the victim as to what is in their best interests and safety, it seems anomalous that protective mechanisms in the criminal jurisdiction could be displaced if the victim objects to the court making the order.³⁶⁷

Recent case law on s 123B further confirms that a victim does not have to consent or agree to a protection order. In *Ray v Police* the defence pointed to the victim's somewhat "forgiving" view of the offender at the restorative justice conference in support of their submission that the court should have sought the victim's views about the protection order at sentencing.³⁶⁸ Fitzgerald J rejected this, observing that "a court considering these matters will be alive to the dynamic that can be present between an offender and the victim of family violence offences, where the victim "retreats" from allegations or earlier statements of concern."³⁶⁹ This case is another step towards recognising that a victim's recantations or objections to a protection order often have more to do with the dynamics of family violence than their need for protection.

Australian States and Territories take a mixed approach to how they deal with victims' objections to the making of a protection order.³⁷⁰ In its review of family violence laws, the ALRC/NSWLRC asked whether it is appropriate for legislation that mandates courts to make

³⁶³ Section 8(3A) of the Bail Act 2000 mandates the victim's protection as the court's primary consideration.

³⁶⁴ Sentencing Act 2002, s 9(1)(f).

³⁶⁵ Family Violence Act 2018, ss 67 – 70. An organisation might apply for a protection order on behalf of the victim (the "protected person") if the victim is prevented by fear of harm from applying.

³⁶⁶ Under s 12(5) of the DVA 1995 (repealed) the protected person could object to the continuation of the proceedings and if they did the proceedings would end.

³⁶⁷ Sentencing Act 2002, s 123B(2)(b).

³⁶⁸ *Ray v Police* [2019] NZHC 2958 at [46].

³⁶⁹ At [47].

³⁷⁰ Restraining Orders Act 1997 (WA) s 63A; Domestic and Family Violence Protection Act 2012 (Qld), s 42; Crimes (Domestic and Personal) Violence Act 2007 (NSW), s 39.

protection orders to contain exceptions for situations when a victim objects.³⁷¹ Stakeholder views were mixed. While some stakeholders submitted that victims should be consulted, others expressed the view that an exception should not be made where a victim objects to the making of an order if there are reasonable grounds to think the victim's safety might be compromised.³⁷² Those who opposed an exception based on a victim's objections argued that a mandatory order relieves a victim of any pressure – including pressure from an aggressor – not to apply for an order.³⁷³

In making this argument, I acknowledge the academic discourse surrounding victim's autonomy and the concern that actions taken by criminal justice agencies can be an extension of the control and disempowerment the victim has experienced at the hands of her (or his) abuser.³⁷⁴ On the other hand, this is an issue judges frequently have to grapple with in the family violence context, whether it be in bail decisions or at sentencing. There are ways judges can make it clear to victims that while they have acknowledged and considered the victim's views, the court is ultimately responsible for determining the sentence and deciding whether to impose a protection order. The option always remains for the respondent or victim to make application to the court for a discharge if the order is no longer necessary.

II Protection Order and Discharge Without Conviction

In Chapter VI, I argued the family violence flag should apply to all proven family violence offending, including when an offender receives a s 106 discharge without conviction. In the following sections I consider the types of order a court may make when discharging an offender without conviction and argue these should be extended to include protection orders made under s 123B.

A Section 106: Statutory Framework

When an offender is convicted of a family violence offence, the court may make a protection order against the offender for the protection of the victim of the offence.³⁷⁵ However, when a person is discharged without conviction (and I note that this means the family violence charge was proved), this is treated as an acquittal. This creates a jurisdictional barrier to the court imposing a protection order under s 123B. If the victim seeks a protection order, they will need to make a separate application to the Family Court.

³⁷¹ ALRC / NSWLRC, above n 357, at 11.85.

³⁷² At 11.91.

³⁷³ At 11.92.

³⁷⁴ See generally C. Hanna "No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions" (1996) 109 *Harvard Law Review* 1850; L. Mills "Killing her Softly: Intimate Abuse and the Violence of State Intervention" (1999) 113 *Harvard Law Review* 550.

³⁷⁵ Sentencing Act 2002, s 123B.

On discharging a person without conviction, the court is empowered to make certain orders.³⁷⁶ Subsection (3) of s 106 of the Sentencing Act 2002 relevantly provides:

- (3) A court discharging an offender under this section may—
 - (a) make an order for payment of costs or the restitution of any property: or
 - (b) make an order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—
 - (i) loss of, or damage to, property; or
 - (ii) emotional harm; or
 - (iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property:
 - (c) make any order that the court is required to make on conviction.

As currently drafted, an order under s 123B imposing a protection order on conviction is a discretionary order. It is clear from the wording of s 106(3) that the court can only make an order under subs (3)(c) if the order is mandatory upon conviction.³⁷⁷ The court may not impose orders that are merely discretionary.³⁷⁸

B Making a Protection Order on a Section 106 Discharge: Taylor v New Zealand Police

This issue was recently considered in the case of *Taylor v New Zealand Police*.³⁷⁹ On 31 January 2019, Ms Taylor pleaded guilty to two charges of wilful damage. The District Court Judge discharged Ms Taylor without conviction under s 106 but imposed a protection order in favour of her former partner whose property Ms Taylor had damaged. Ms Taylor then appealed the imposition of the protection order on jurisdictional grounds.

The High Court allowed the appeal, noting the jurisdiction to make a protection order under s 123B of the Sentencing Act 2002 is grounded in the conviction of the offender for a [domestic violence offence].³⁸⁰ Clark J noted that a discharge without conviction is deemed to be an acquittal, but that even where an offender is discharged without conviction the court may

³⁷⁶ Examples of orders that the court is required to make on conviction include mandatory orders for disqualification from driving under the Land Transport Act 1998, a forfeiture order under the Fisheries Act 1996, and an order confiscating a motor vehicle under s 129 of the Sentencing Act 2002.

³⁷⁷ *Adams on Criminal Law* (6 December 2014, online ed) Sentencing at SA 106.08. “Mandatory upon conviction” means that the order is required in every case or in the absence of any prescribed exceptions.

³⁷⁸ *Ibid.*

³⁷⁹ *Taylor v New Zealand Police* [2019] NZHC 874.

³⁸⁰ At [3(a)].

nevertheless make any of the orders set out at s 106(3) of the Sentencing Act.³⁸¹ However, Clark J concluded that “[a] protection order under s 123B is discretionary. Consequently, it is not in the nature of a mandatory order able to be made under s 106(3)(c) and it does not come within the category of orders that might be made under paras 3(a) and (b).”³⁸²

The New Zealand position contrasts with New South Wales, where if the court deals with a charge under s 10 of the Crimes (Sentencing Procedure) Act 1999 (NSW) – the equivalent of New Zealand’s s 106 discharge without conviction – it is still obliged to make a final apprehended violence order.³⁸³

The inability to impose a protection order in conjunction with a s 106 discharge can pose quite significant issues in practice. As noted in Chapter VI, a discharge without conviction is a useful sentencing option in family violence cases, particularly if the court is taking a rehabilitative focus. However, this focus does not mean that the victim of the offence should be denied the protection of a civil order. Workaround solutions for District Court Judges (where a s 106 discharge is being sought and considered) include deferring sentencing to enable the victim to apply for a protection order³⁸⁴ or – if the sentencing judge holds a Family Court warrant – reconvening as the Family Court immediately following sentencing to issue a temporary protection order.³⁸⁵

A further practical consideration arises in relation to appeals. Consider for example that the District Court convicts an offender of a family violence offence, imposes a protection order under s 123B and imposes a community sentence. The offender then lodges an appeal against sentence. The High Court allows the appeal, sets aside the sentence and grants a discharge without conviction. This would have the result of setting aside the protection order, which is grounded in the *conviction* of the offender for a family violence offence.³⁸⁶ The victim – in the event they were even notified that the protection order had been set aside – would need to apply to the Family Court for a protection order if they wanted this protection to continue.³⁸⁷

³⁸¹ At [3(c)].

³⁸² At [3(d)].

³⁸³ Section 39(1) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) mandates the court to make a final apprehended violence order where a plea of guilty is entered or upon a finding of guilt for a domestic violence offence, regardless of whether an interim apprehended violence order or an application for an apprehended violence order has been made. Section 3(4) provides that “a reference in this Act to a finding of guilt includes a reference to the making of an order under s 10 of the Crimes (Sentencing Procedure) Act 1999 (NSW).”

³⁸⁴ Sentencing Act 2002, s 25.

³⁸⁵ Family Violence Act 2018, ss 75 – 78.

³⁸⁶ See *Ray v New Zealand Police*, above n 368.

³⁸⁷ Interestingly, in *Lata v Police* [2020] NZHC 187 Whata J overturned the sentence and imposed a discharge without conviction, however His Honour stated – without reference to the legislation or any authorities – that the protection order imposed by the District Court judge was not affected by the successful appeal.

C Protection Order is an Order the Court is Required to Make on Conviction

Amending s 123B(2) to provide that “the court must make a protection order against the offender if it is satisfied that the making of the order is necessary for the protection of the victim of the offence” would get around the jurisdictional barrier in *Taylor v New Zealand Police* by making a protection order a mandatory order on conviction as per s 106(3). Alternatively, and to avoid any ambiguity over whether the court can impose a protection order in conjunction with a s 106 discharge, a new subsection (ba) could be included in s 103(3) to provide that “a court discharging an offender under this section may ... make a protection order under s 123B.”

III Concluding Comments

Increased identification of family violence offending, and increased use of the family violence flag has the potential enhance victims’ immediate safety, particularly in cases where the offending falls outside what is typically recognised as family violence. The conviction of an offender for a family violence offence, prima facie establishes the need for ongoing protection for the victim, unless otherwise displaced by the offender.³⁸⁸ Accordingly, the court should *be required* to impose a protection order (unless satisfied such protection is not necessary). Nor is there any reason why a discharge without conviction should act as a jurisdictional bar to the court imposing a protection order if the court is satisfied that this protection is necessary in the context of the case.

Throughout this thesis I have argued that court events are rich opportunities for intervention in family violence matters. Because family violence offending is so often hidden and kept private, when victims or perpetrators do come in contact with criminal justice agencies it is crucial that responses are appropriate, useful and safe. Amending s 123B so that it is a mandatory provision in all criminal cases where there is a family relationship between the victim and the offender will require judges to turn their minds to the circumstances of the family. They will be prompted to consider whether there are any effective interventions, such as through the imposition of special conditions in the protection order³⁸⁹ or referral to a programme, that could address and prevent harm reoccurring in that family.

For completeness, I note that making s 123B mandatory and removing the jurisdictional barrier to the court imposing a protection order when making a discharge without conviction will likely have resource implications for the court and Police in relation to processing and serving orders. Consideration of such issues is outside the scope of this thesis.

³⁸⁸ *Karekare*, above n 340, at [23].

³⁸⁹ Family Violence Act 2018, s 103.

Chapter VIII: How Can the Family Violence Flag Improve the Evidence Base Relating to Family Violence Offending?

This chapter considers how the family violence flag can improve the evidence base relating to family violence offending. In doing so it brings together arguments raised throughout this thesis about the importance of increasing our knowledge about family violence offending; particularly the type of offences being committed, the perpetrator's offending trajectory, and whether any interventions have been successful in interrupting that trajectory.

The purpose of this chapter is to briefly identify some of the key issues relating to family violence data and the sharing of data, flagging them as areas for further research. It is not within the scope of this thesis to explore these issues in detail or to make recommendations as to how they could be addressed.

I What is the Current State of the Family Violence Evidence Base?

There is no comprehensive or centralised repository of data relating to family violence offending. Data about family violence is collected and held by a number of different agencies, including New Zealand Police,³⁹⁰ the Ministry of Justice,³⁹¹ Statistics New Zealand,³⁹² Oranga Tamariki,³⁹³ the Family Violence Death Review Committee,³⁹⁴ and the New Zealand Crime and Victims Survey (administered by the Ministry of Justice).³⁹⁵ The most up-to-date data from these sources is available on the New Zealand Family Violence Clearinghouse website as part of its Family Violence Data Summary series.³⁹⁶

A problem with these different data sets is that they are not well integrated. Differences in reporting and recording practices mean the data cannot be used as indicators of family violence in the population, nor can they be used to comment on trends in the occurrence of family violence over time.³⁹⁷ In his report *Every 4 minutes: A discussion paper on preventing family violence in New Zealand*, Dr Ian Lambie discusses the challenges relating to data gathering in New Zealand.³⁹⁸ He notes police call-outs and child-welfare notifications provide some data but are known to be an under-representation of what occurs. He states that definitions of what

³⁹⁰ New Zealand Police, above n 2.

³⁹¹ Ministry of Justice, above n 264.

³⁹² Stats NZ "Integrated Data Infrastructure" <www.stats.govt.nz>.

³⁹³ Oranga Tamariki "Statistics" <www.orangatamariki.govt.nz>.

³⁹⁴ FVDRC, above n 68.

³⁹⁵ Ministry of Justice *New Zealand Crime and Victims Survey* (2018).

³⁹⁶ New Zealand Family Violence Clearinghouse "Data Summaries" <www.nzfvc.org.nz>.

³⁹⁷ Ibid.

³⁹⁸ Ian Lambie, above n 75, at 14.

is being measured vary, and there are changes over time in reporting practices and data systems within police, child welfare, health and other services.”³⁹⁹

In terms of family violence offence data, the Ministry of Justice points out that “family violence offending can be covered by a range of different offence types that are not easily identifiable as involving family violence” (such as homicide, for example).⁴⁰⁰ Up until December 2018, the Ministry used three offence types to represent family violence offending – breach of protection order, common assault (domestic) and male assaults female.⁴⁰¹ The Ministry acknowledged this was an underestimation, noting “these three offence types represent approximately 50 per cent of all offences related to family violence in court each year.”⁴⁰²

From 3 December 2018, the Ministry has included three new offence types in its “family violence offences data tables.”⁴⁰³ These include “assault on a family member”, “coercing into marriage/civil union” and “strangulation or suffocation.”⁴⁰⁴ At present, the Ministry of Justice does not use the family violence flag to report on general levels of family violence offending.

One of the topical reports produced from cycle one of the *New Zealand Crime and Victims Survey* focuses on offences against New Zealand adults by family members.⁴⁰⁵ The report highlights the finding from the survey that 79,000 New Zealand adults had experienced offences committed by family members over the previous 12 months.⁴⁰⁶ This figure includes both offences reported to Police and those not reported. The offences considered include physical assault, sexual assault, harassment and threatening behaviour, property damage and robbery.⁴⁰⁷ The report freely acknowledges that the offences by family members considered in the report should be seen as a subset of the experiences of family violence by adult New Zealanders.⁴⁰⁸

³⁹⁹ At 14 – 15.

⁴⁰⁰ Ministry of Justice, above n 264. Comments quoted are on the opening contents page of the Ministry of Justice’s Family Violence Offence Dataset. Accessed February 2020.

⁴⁰¹ Ministry of Justice, above n 264.

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ These three new offences were introduced by the Family Violence (Amendments) Act 2018 and commenced 6 December 2018.

⁴⁰⁵ Ministry of Justice, above n 31.

⁴⁰⁶ At 5.

⁴⁰⁷ At 5. The report notes that these offences, when committed by a family member, are forms of family violence. However, many other forms of family violence, such as economic abuse or abuse of pets of importance to someone, are not capture by the offences.

⁴⁰⁸ At 7.

In commenting on the challenges involved in collecting and reporting on family violence offence data, the report notes:⁴⁰⁹

Though the NZCVS collects a rich level of data about experiences of offences committed by family members, many questions have been left unanswered due to a lack of statistical reliability in the results. Indeed, many of the results included in this report are subject to high error and should be used with caution. As data continues to accumulate with each cycle of the survey, richer and more statistically reliable insights will be possible. For this reason, the family violence in-depth module has been selected to be repeated for Cycle 3 of the NZCVS, which is in the field in 2019/2020. More research possibilities about experiences of offending by family members will also become possible with the NZCVS being incorporated into the Statistics New Zealand Integrated Data Infrastructure.

II How Can the Family Violence Flag Help?

Increased and consistent use of the family violence flag has the potential to improve linkages between different data sets. The family violence flag may also make it easier to track perpetrators as they move through different parts of the criminal justice system, from Police through to Corrections.

A Identifying the Scale of Family Violence Offending

“Flagging” the relationship between criminal matters and family violence can go some way in identifying the scale of family violence offending in New Zealand.⁴¹⁰ If used correctly, the family violence flag should help address under-recording of family violence offences. The Australian Bureau of Statistics notes that “under-recording” can occur due to process and procedural variations in recording incidents by authorities or services.⁴¹¹ There is also the possibility that an episode may be classified incorrectly, such as when a victim presents as a general assault victim and a judgement is made by the individual making the record about the nature of the incident.⁴¹²

As argued earlier, s 16A should be amended to make it a mandatory order of the court. This would mean that whenever the relationship between the offender and the victim falls within

⁴⁰⁹ At 32.

⁴¹⁰ State of Victoria *Royal Commission into Family Violence: Report and recommendations, Vol VI* (Parl Paper No 132, 2014-16) at 147.

⁴¹¹ Australia Bureau of Statistics *Defining the Data Challenge for Family, Domestic and Sexual Violence, Australia* (2013) at 15.

⁴¹² *Ibid.*

the definition of family relationship⁴¹³ and the offending involved family violence⁴¹⁴ the offence must be entered in the permanent court record of the proceeding as a family violence offence. This mechanism should lead to improved identification and recording of all forms of family violence offending and reduce the likelihood of under-recording. Of course, it does require Police, court staff and judges to be alert to the issue.

Currently there is an automated process whereby information from Police (via NIA) about a charge, including the family violence flag, is transferred into the Court Management System (CMS).⁴¹⁵ It is unclear whether there is any automated process from CMS back to NIA when the family violence flag is entered on conviction, particularly in circumstances where the family violence context was not noted on the charging document.⁴¹⁶ Future work could look at scoping an integrated IT system between all criminal justice agencies, including from the courts to Corrections.

B Types of Offences

The family violence flag will enable further research to be conducted on the types of offences that are committed in a family context. For example, are they predominantly physical assault offences by an intimate partner or is other intra-familial offending being captured? Along with the New Zealand Crime and Victims Survey, the family violence flag could be used to look at any changes in the types of family violence offences prosecuted and whether more offences by other family members are being identified and recorded. The family violence flag could also help inform scholarship in respect of family violence risk factors, which have almost exclusively been developed using heterosexual intimate partner samples.⁴¹⁷

C Enable Demographic Research

Clearly flagging family violence offending on an offender's criminal history may make it easier to undertake research on family violence perpetrators. To date, studies on family violence perpetrators in New Zealand have been small scale and/or based on non-representative samples.⁴¹⁸ Improving the identification of family violence offenders through use of the family violence flag will make it easier to track family violence perpetrators through the justice system.

⁴¹³ Family Violence Act 2018, ss 12 – 14.

⁴¹⁴ Family Violence Act 2018, ss 9 – 11.

⁴¹⁵ Ministry of Justice, above n 7, at 2.

⁴¹⁶ Criminal Procedure Act 2011, s 16A(4).

⁴¹⁷ ANROWS, above n 88, at 11

⁴¹⁸ Bronwyn Morrison and John Davenne “Family violence perpetrators: Existing evidence and new directions” (2016) 4 Practice: The New Zealand Corrections Journal 3.

For example, in Tasmania, family violence offences are classified and recorded as such in a purpose-built Family Violence Management System.⁴¹⁹ This has enabled research to be conducted on prior offending among family violence perpetrators, with a 2015 study noting that family violence perpetrators are not a homogenous group. The study found statistical evidence of a “generally antisocial/violent” family violence perpetrator group who were engaging in violent behaviours both inside and outside the home on a frequent basis.⁴²⁰ In light of this, the researchers suggested the need for further research on the impact of treatment programmes on different types of family violence perpetrators.⁴²¹

In discussing a proposal to flag family violence offences, the Government of South Australia noted this would help identify high-risk repeat perpetrators of family violence.⁴²² In its discussion paper, it noted:⁴²³

In addition, once this type of offender can be defined and identified, the government will also consider a system such that an application could be made by government (either through the Crown or through SAPOL) for an order to be made that is specifically designed to address any behaviour that is linked to their offending. This may include placing constraints, restrictions or limitations on the offender, requiring the offender to take certain actions or requiring them to report certain information to a supervisory body.

The Government of South Australia further noted that these measures would be specifically designed to address behaviours common to family violence offenders and would be a world first. It stated “[such] information may also have the potential to enhance data collected about common characteristics and behaviours of domestic and family violence perpetrators, to inform future policy.”⁴²⁴

In the New Zealand context, understanding the offending profile of family violence perpetrators is important to improving the effectiveness of family violence interventions. Firstly, if family violence perpetrators are not a homogenous group (for example, generalist offenders versus specific family violence offenders) there may be benefit in ‘matching’ family violence perpetrator’s with treatment programmes that address the underlying causes of their offending.⁴²⁵ Secondly, and related to the first point, is the need to address the over-representation of Māori as perpetrators and victims of family violence. Understanding how

⁴¹⁹ Boxall, Payne and Rosevear, above n 321.

⁴²⁰ At 7.

⁴²¹ At 8.

⁴²² Government of South Australia *Consultation Response: Domestic Violence Discussion Paper* (September 2017).

⁴²³ At 9.

⁴²⁴ At 9.

⁴²⁵ At 8.

Māori perpetrators and victims have moved through the justice system and what, if any, interventions have helped is crucial to the development of effective programmes.

D Measuring Sentencing Outcomes

To date, there has been no comprehensive study on sentencing for family violence offences in New Zealand. In discussing the challenges in undertaking such a study in Victoria, Professor Arie Freiberg, Chair of the Sentencing Advisory Council, described it as ‘impossible’, because it would require manual analysis of a large volume of individual cases.⁴²⁶ He noted:⁴²⁷

... we don’t have a mechanism in Victoria of taking an offence such as infliction of injury, serious injury, and identifying whether that’s a family violence offence or not. Unless you went through all of those cases – and we don’t have the capacity; I don’t think anyone has done that ...

In Tasmania and New South Wales, due to the way family violence offences are classified and recorded in those states, some studies of family violence sentencing trends have been conducted.⁴²⁸ Those studies have produced mixed results as to whether family violence offenders received sterner or more lenient custodial sentences.

The ability to undertake this type of sentencing analysis in New Zealand is important to any future policy work that looks at family violence sentencing options. Measuring the different sentencing outcomes for family violence offences will support a considered discussion of whether any further changes to New Zealand’s sentencing laws to respond to family violence are required.

E Tailoring and Targeting Family Violence Services

Increased data about family violence offending can be used by policy makers when tailoring and targeting family violence services. This could include increasing the availability of stopping violence programmes, developing programmes that address different underlying causes of offending (such as trauma or drug and alcohol use), developing kaupapa Māori services, or focusing attention on high-risk recidivist offenders.⁴²⁹ Improved knowledge about family violence perpetrators may also help in the development of appropriate outcome

⁴²⁶ State of Victoria *Royal Commission into Family Violence: Report and recommendations, Vol III*, above n 20, at 196.

⁴²⁷ Ibid.

⁴²⁸ Boxall, Payne and Rosevear, above n 321. Neil Donnelly and Suzanne Poynton “Prison penalties for serious domestic and non-domestic assault” (Bureau Brief No 110, NSW Bureau of Crime Statistics and Research, October 2015).

⁴²⁹ See generally Government of South Australia, above n 422.

measures for family violence programmes, which tend to have an undue focus on short-term recidivism.

At present, there is no coordinated or collaborative system for collecting and reporting family violence data. While I do not have scope within this thesis to explore how family violence data should be managed and shared, this is something the Families Commission looked at in 2013 as part of its report on family violence indicators.⁴³⁰ The report focussed on whether national administrative data sets can be used to measure trends in family violence in New Zealand, with the Commission making strong recommendations regarding the need to clearly label and categorise family violence. In particular, it recommended:⁴³¹

... that each of the agencies continue to consider coding and recording of the relationship between victim and perpetrator, and the nature of the violence captured by their data sets, as high priority variables and invest in them appropriately. Clear guidelines (or coding schemes) for this purpose should be drawn up and make available, within each agency.

The Australian Bureau of Statistics' 2013 report *Defining the Data Challenge for Family, Domestic and Sexual Violence* also lays out some of the challenges involved as well as setting out a helpful road-map for action.⁴³² In future, this work may be something that falls within the ambit of the Joint Venture on Family Violence and Sexual Violence's work programme.⁴³³

III Concluding Comments

This chapter has briefly considered the current state in relation to family violence data in New Zealand, and how the family violence flag could help improve this evidence base. The family violence flag can identify and render visible what could be otherwise invisible patterns of family violence offending. However, in order for the flag to contribute to a more integrated response to family violence, relevant agencies (including those outside the criminal justice system) need to have timely access to an offender's criminal history.⁴³⁴

Submissions on the equivalent Queensland domestic violence notation argued that notation of an offender's criminal history needs to be done in a way that is accessible for the courts, law commissions and academic researchers.⁴³⁵ Considering these views, and the current state, I suggest the way forward to improve family violence data collection and data sharing involves

⁴³⁰ Families Commission *Family Violence Indicators* (Superu, December 2013).

⁴³¹ At 73.

⁴³² Australia Bureau of Statistics, above n 411.

⁴³³ Ministry of Justice "Family violence and sexual violence work programme" <www.justice.govt.nz>.

⁴³⁴ Criminal Law (Domestic Violence) Amendment Bill 2015 (Qld) (Report No. 6) at 17.

⁴³⁵ *Ibid.*

both investigation into integrated IT systems as well as the development of a national data framework.⁴³⁶

As noted in the South Australian discussion paper, a legislative family violence offence flag is one means by which a person can be identified as a domestic and family violence offender and by which information can be collected and collated about domestic and family violence related criminal offending.⁴³⁷ Other means to enhance the collection of data and information about family violence in our community could include the use of a universal ‘flag’ to identify situations and charges of family violence – and a central repository for this information.⁴³⁸

⁴³⁶ See State of Victoria *Royal Commission into Family Violence: Report and recommendations, Vol III*, above n 20.

⁴³⁷ South Australia, above n 422, at 8.

⁴³⁸ *Ibid.*

Chapter IX: Recommendations

The family violence flag was introduced to better identify family violence criminal offending and facilitate a differentiated court response. However, as the foregoing discussion highlights, there are several areas where both the procedural and substantive application of the family violence flag could be strengthened.

A theme that has emerged in the research for this thesis is the importance of taking every opportunity to intervene where family violence is alleged or suspected. Court events are rich opportunities for intervention,⁴³⁹ but the effectiveness of that intervention depends on judges having a full picture of what has been happening in the family. It also depends on judges being sufficiently alert to family violence dynamics to pick up on that information and apply it.

As argued in the preceding chapters, it is questionable whether s 16A, as currently drafted, enhances current processes for identifying and recording an offender's history of family violence offending. In this chapter I summarise the key arguments made in this thesis and reproduce my recommendations for legislative reform. I also make recommendations on how to improve education and awareness about all forms of family violence offending.

I Reform Proposals

At the time of writing, s 16A has only been in operation for six months. There is no reported case law on the provision and the Ministry of Justice's family violence data tables still categorise offending based on offence descriptions, rather than by reference to the family violence flag.⁴⁴⁰ This in itself is concerning as it suggests that s 16A is being treated purely as an administrative provision and that judges are not referring to it in their bail and sentencing decisions.

In the following sections I suggest amendments to s 16A to strengthen the application of the family violence flag.

⁴³⁹ State of Victoria *Royal Commission into Family Violence: Report and recommendations, Vol III*, above n 20, at 153.

⁴⁴⁰ The explanatory notes on the Ministry's family violence offence data table states that family violence offending can be covered by a range of different offence types that are not easily identifiable as involving family violence or could involve a non-family violence situation. To be able to produce statistics which are robust over time the Ministry of Justice has historically used three specific offence types to represent family violence. These are 'breach of protection order', 'common assault (domestic)' and 'male assaults female'. These offence types represent approximately 50% of all offences related to family violence in court each year. From 3 December 2018, three additional offences were introduced: 'assault on a family member', 'coercion into marriage/civil union', and 'strangulation/suffocation'.

A The Court May Order Further Information about the Family Violence Context

Chapter III looks at how the court satisfies itself that an offence is a family violence offence. Section 16A(2) provides that the court may, at any time after a charging document is filed, and before the delivery of the verdict or decision of the court, amend the document to add, confirm, or remove a specification that the offence charged is a family violence offence. However, s 16A is silent as to the evidential requirements or burden of proof for establishing the family violence flag applies.

In Chapter III I note the Ministry of Justice classifies the family violence flag as a particular that describes the context of the charge, rather than being an element of the charge.⁴⁴¹ This description of the flag seems out of step with the list of particulars in s 16 of the CPA that must be included on a charge. Those particulars relate to factual matters, like the particulars of the defendant or the particulars of the person commencing the proceeding.⁴⁴² In contrast, determining whether an offence is a family violence offence is an evaluative decision, having regard to the nature of the relationship between the parties and the violence involved.

Although s 18 of the CPA enables the court to order the prosecutor to provide further particulars of any document, person, thing, or any other matter relevant to setting out the charge against the defendant,⁴⁴³ this does not easily apply to the family violence flag. As noted, the family violence flag is a mechanism to identify and classify particular types of offending – it is not strictly a matter relevant to setting out the charge.⁴⁴⁴ There is certainly no case law on the relationship between s 18 and s 16A, but an argument could be made that s 18 does not apply in these circumstances.

Given the awkward relationship between s 16A and ss 16, 17 and 18 of the CPA, I suggest s 16A should be amended to clarify that the court can seek further information to satisfy itself that the offence charged is also a family violence offence. I make this suggestion despite concluding that the circumstances in which the court would be required to do this are likely to be rare. This proposal could be achieved by inserting a new subsection in s 16A to provide:

[(4A) The court may require the prosecutor to provide further information to enable it to determine whether to order that the offence be entered in the permanent court record as a family violence offence.]

In line with the New South Wales and Queensland provisions, I also suggest s 16A be amended to clarify that the victim of the offence is not compellable to give evidence about whether the

⁴⁴¹ Ministry of Justice, above n 5.

⁴⁴² Criminal Procedure Act 2011, s 16(2).

⁴⁴³ Criminal Procedure Act 2011, s 18(1).

⁴⁴⁴ Criminal Procedure Rules 2012, r 3.1.

family violence flag applies. This would obviate the (albeit small) risk of the victim being called to appear in bail hearings to testify as to the nature of their relationship with the defendant. This new subsection could provide:

[(4B) A victim of an offence is not compellable in any proceedings before the court to determine whether the court should order that the offence be entered as a family violence offence.]

B Make Entering the Family Violence Flag an Order of the Court

In Chapter IV I examine whether the current drafting of s 16A(4) meets the policy objective of ensuring all family violence related convictions are flagged in the permanent court record as family violence offences. Upon reviewing the administrative process for entering the family violence flag, I conclude that s 16A(4) should be amended from a discretionary to a mandatory provision. This could be achieved by amending subsection (4) of s 16A as follows (changes italicised):

[(4) If the defendant is convicted *of the offence and the court is satisfied that the offence is a family violence offence* (even if the charging document does not specify that the offence charged is a family violence offence), *the court must order that the offence be entered in the permanent court record of the proceeding as a family violence offence.*]

Such a proposal is consistent with the approach taken in New South Wales, where the recording of the domestic violence flag is treated as a specific direction of the court. For example, domestic violence sentencing cases in New South Wales frequently end with an order from the judge that “I direct that pursuant to s 12 of the Crimes (Domestic and Personal Violence) Act 2007 the conviction is a domestic violence offence.”⁴⁴⁵

There are several advantages to making the entering of the family violence flag a mandatory order of the court. Those advantages are set out at pages 45 – 47 of this thesis.

Firstly, making the family violence flag a mandatory order of the court would remove any uncertainty around whether entering the family violence flag is a discretionary power. This would clarify administrative processes for entering the family violence flag in the permanent court record and align s 16A with rules 7.1 and 7.2 of the Criminal Procedure Rules 20012. Amending s 16A(4) to require the court to enter the family violence flag if satisfied that the offence is a family violence offence would make it a matter *required to be made*.⁴⁴⁶ This would bring the order to enter the family violence flag within the ambit of r 7.2(27), which requires

⁴⁴⁵ See for example *R v Benjamin Hayward*, above n 214, at 59(6).

⁴⁴⁶ Criminal Procedure Rules 2012, r 7.1(3).

“any other judgment or order (other than the reasons for the judgment or order)” to be entered in the permanent court record.

A related advantage of removing the court’s discretion in s 16A(4) is that it will help improve the robustness and reliability of the family violence flag. Making the family violence flag a matter the judge must turn their mind to reduces the likelihood that the flag will be overlooked or that it will not be entered in the permanent court record due to administrative oversight.

Secondly, making the family violence flag a mandatory order of the court will help increase awareness of all forms of family violence offending. The process of identifying that an offence involves family violence and then ordering it be entered as such in the permanent record is a powerful way of communicating to the public that the courts take family violence offending seriously.⁴⁴⁷ There is an educative function to this process, highlighting the myriad forms family violence can take. This will increase awareness of family violence across the justice system and may lead to greater reporting of non-physical forms of family violence.

Chapter IV also counters any argument that making the family violence flag a mandatory order of the court usurps the judge’s evaluative function in family violence cases. The family violence flag does not, in and of itself, say anything about the offender’s level of risk or dictate a different bail or sentencing outcome. As I have argued throughout this thesis, the family violence flag is a prompt to judges to consider family violence risk factors and dynamics. It also ensures that all offending that occurs in a family context is recorded, which is crucial to improving the evidence base of family violence offending in New Zealand.

C Apply the Family Violence Flag to Prior Family Violence Offending

In Chapter V I look at whether s 16A can – and should – apply to offending that occurred prior to its commencement. There are two parts to this argument: Firstly, can s 16A apply to offending that occurred prior to 1 July 2019 but prosecuted after? Secondly, can s 16A apply to a prior family violence offence for which the offender has already been convicted (in situations where this is not already identified by the Police flag as a family violence offence)?

In respect of the first question, the issue of whether s 16A applies to offending that occurred prior to 1 July 2019 but prosecuted after has not arisen in reported case law. If it were, I suggest the New Zealand courts would interpret this similarly to the Queensland courts when faced with the same issue. In Queensland case law it was determined that the domestic violence notation is procedural rather than substantive.⁴⁴⁸

⁴⁴⁷ Ministry of Justice, above n 7, at 1.

⁴⁴⁸ See *R v MD*, above n 232, at [18] – [19].

In respect of the second question, the research in this thesis would suggest there is no principled reason why the court cannot order that a prior family violence offence for which the offender has been convicted also be entered in the permanent court record as a family violence offence.

While the offence description (such as male assaults female or breach of a protection order) can identify a significant proportion of past family violence offending, there will be a number of offences that occurred in a family violence context that remain unidentified and unrecorded. Applying the family violence flag to a previous offence – for which the offender has been convicted – ensures the court record accurately reflects an offender’s family violence history. It will also help improve the evidence base relating to family violence offending.

Retrospective application of the family violence flag is done in both Queensland and New South Wales.⁴⁴⁹ This is not considered to offend the rule against retrospectivity as the family violence flag is considered a procedural mechanism, used to identify that the particular offence occurred in a family violence context.⁴⁵⁰ As discussed in Chapter V, there is a range of procedural safeguards to ensure the family violence flag is applied only if the court is satisfied the previous offence is a family violence offence. The prosecutor must make an application to the court and the application must contain sufficient information about the circumstances of the offence (such as the agreed summary of facts).

Applying the family violence flag to previous offences could be achieved through the inclusion of three new subsections (see below). These subsections could follow s 16A(4) as amended, or, if this constitutes too many subsections,⁴⁵¹ a new s 16B governing the recording of previous offences as family violence could be inserted.

- [(1) If the court makes an order under s 16A(4) to enter an offence as a family violence offence, the prosecution may make an application to the court requesting that the court order that an offence for which the offender has previously been convicted (a **previous offence**) be entered in the permanent court record as a family violence offence.
- (2) The application—
 - (a) may be made in writing or orally; and
 - (b) must include enough information to allow the court to make a decision whether to order that the offence be entered as a family violence offence.

⁴⁴⁹ Penalties and Sentences Act 1992 (Qld), s 12A(9); Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12(7).

⁴⁵⁰ Criminal Law (Domestic Violence) Amendment Bill 2015 (Qld) (Report No. 6) at 35 (footnote 115).

⁴⁵¹ Parliamentary Counsel Office “Principles of clear drafting” <www.pco.govt.nz>.

- (3) If the court is satisfied a previous offence is a family violence offence, the court must order that the offence be entered in the permanent court record as a family violence offence.]

The process for making an application requesting the court to order that a previous offence be entered as a family violence offence would fall within the general provisions relating to applications in subpart 4 of the Criminal Procedure Rules 2012.⁴⁵² No consequential amendments are needed to the Rules to enable such applications.

D Apply the Family Violence Flag to all Proven Family Violence Offending

The intent of the family violence flag is to identify family violence offending, distinguish it from other forms of criminal offending, and help identify repeat and escalating family violence offending.⁴⁵³ However, s 16A only applies when the court enters a conviction. This excludes a significant proportion of proven family violence offending where the court does not enter a conviction, for example, where it grants a s 106 discharge without conviction.⁴⁵⁴

This is problematic in the family violence context because family violence frequently manifests as a pattern of behaviour that escalates in severity. What may be seen as minor or trivial behaviour (such as threats or wilful damage) can be a precursor to much more serious and violent behaviour. In assessing risk, it is important for a judge to have the complete picture of a perpetrator's family violence history. It then becomes an evaluative decision for the judge as to how much weight is afforded to that prior offending.

In Chapter VI I suggest that capturing all proven family violence offending within the scope of s 16A could be achieved in two different ways.

1 Option One: Amend section 16A(4) to apply when a person pleads guilty to the offence or is found guilty of the offence

Firstly, this could be achieved by amending the provision so that it applies when a person pleads guilty to the offence or is found guilty of the offence. This is the approach taken in New South Wales⁴⁵⁵ and could be achieved by amending s 16A(4) to provide:

- [(4) If a person pleads guilty to the offence or is found guilty of the offence and the court is satisfied that the offence is a family violence offence, the court must order that the

⁴⁵² Criminal Procedure Rules 2012, subpart 4.

⁴⁵³ Ministry of Justice, above n 7, at 2.

⁴⁵⁴ Sentencing Act 2002, s 106. A discharge without conviction is treated as an acquittal.

⁴⁵⁵ Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 12(2).

offence be entered in the permanent court record of the proceeding as a family violence offence.]

The advantage to this recommendation is that it would ensure a formal record of all proven family violence offending. Given prior family violence offending is the key risk factor for future family violence, there is a strong public interest in taking this approach.

The disadvantage to this recommendation is that consideration would need to be given to how this would sit with ss 282 and 283(a) of the Oranga Tamariki Act. These sections enable the Youth Court to discharge a child or young person from proceedings without any further order or penalty, although in the case of a s 283(a) discharge, a record of the child or young person's offending is still kept by the Ministry of Justice.⁴⁵⁶ This issue is outside the scope of this thesis and would require analysis of the policy and principles behind recording convictions against children and young people.

A further disadvantage is that this amendment would necessitate consequential amendment to the Criminal Procedure (Transfer of Information) Regulations 2013, which come into play when an offender is "convicted" of a family violence offence.⁴⁵⁷ In terms of consistency across criminal legislation I note "convicted" is the term generally used in the CPA to denote a finding or plea of guilt.⁴⁵⁸

2 *Option Two: Make section 16A(4) a mandatory order of the court upon conviction*

An alternative approach is to amend s 16A(4) to make s 16A(4) a mandatory order of the court upon conviction. This could be achieved by amending s 16A(4) as per my recommendation in Section B above (changes italicised):

- ([4] If the defendant is convicted *of the offence and the court is satisfied that the offence is a family violence offence* (even if the charging document does not specify that the offence charged is a family violence offence), *the court must order that the offence be entered in the permanent court record of the proceeding as a family violence offence.*])

This would bring the family violence flag within that category of orders that the court is required to make on conviction. Section 16A(4) could then be read alongside s 106(3)(c) of the Sentencing Act 2002, which provides that "[a] court discharging an offender under this section may ... make any order that the court is required to make on conviction." Because the family violence flag becomes an order the court is required to make on conviction (if satisfied

⁴⁵⁶ Oranga Tamariki Act 1989, s 283(a). Under this disposition option the Youth Court may discharge the young person from the proceedings without further order or penalty.

⁴⁵⁷ Criminal Procedure (Transfer of Information) Regulations 2013, regs 7 and 7A.

⁴⁵⁸ Criminal Procedure Act 2011, s 376.

the offence is a family violence offence), the court may make an order under s 106(3)(c) that the flag be entered.

One issue with this is that a court discharging an offender *may* make any of the orders listed in s 106(3). In Chapter IV I argued that to be effective, and to achieve its policy purpose, the family violence flag needs to be a mandatory order the court is required to make if the pre-conditions in s 16A(4) are satisfied. Without expressly drawing attention to s 16A in s 106, a sentencing judge may fail to make an order that the family violence flag is to be entered.

One way of getting around this is to include a new subsection (1A) in s 106 to provide:

- [(1A) Despite subsection (1), if the court is satisfied that the offence is a family violence offence, the court must order that the offence be entered in the permanent court record of the proceedings as a family violence offence in accordance with s 16A of the Criminal Procedure Act 2011.]

My suggested amendments to s 106 are set out further below in Section F.

E Proposed Amendments to Section 16A

My recommended amendments to s 16A are set out in their entirety below (changes italicised):

[16A *Recording of family violence offences*

- (1) The charging document may specify that the offence charged is a family violence offence.
- (2) The court may, at any time after a charging document is filed and before the delivery of the verdict or decision of the court, amend the document to add, confirm, or remove a specification that the offence charged is a family violence offence.
- (3) The power in subsection (2)—
 - (a) is exercisable on the court’s own motion or on the application of the defendant or the prosecutor:
 - (b) is exercisable by the Registrar, if both the defendant and the prosecutor agree:
 - (c) does not limit the powers in section 133.
- [(4) If the defendant is convicted of *the offence and the court is satisfied that the offence is a family violence offence* (even if the charging document does not specify that the offence charged is a family violence offence), *the court must order that the offence be entered in the permanent court record of the proceeding as a family violence offence.*]

- [(4A) *The court may require the prosecutor to provide further information to enable it to determine whether to order that the offence be entered in the permanent court record as a family violence offence.*]
- [(4B) *A victim of an offence is not compellable in any proceedings before the court to determine whether the court should order that the offence be entered as a family violence offence.*]
- (5) In this section, **family violence offence** means an offence—
- (a) against any enactment (including the Family Violence Act 2018); and
 - (b) involving family violence (as defined in section 9 of that Act).]

16B Previous offences may be recorded as family violence offences

- (1) *If the court makes an order under s 16A(4) to enter an offence as a family violence offence, the prosecution may make an application to the court requesting that the court order that an offence for which the offender has previously been convicted (a **previous offence**) be entered in the permanent court record as a family violence offence.*
- (2) *The application—*
- (a) *may be made in writing or orally; and*
 - (b) *must include enough information to allow the court to make a decision whether to order that the offence be entered as a family violence offence.*
- (3) *If the court is satisfied a previous offence is a family violence offence, the court must order that the offence be entered in the permanent court record as a family violence offence.*
- (4) *The court may require the prosecutor to provide further information to enable it to determine whether to order that the offence be entered in the permanent court record as a family violence offence.*
- (5) *A victim of an offence is not compellable in any proceedings before the court to determine whether the court should order that the offence be entered as a family violence offence.*
- (6) In this section, **family violence offence** means an offence—
- (a) against any enactment (including the Family Violence Act 2018); and
 - (b) involving family violence (as defined in section 9 of that Act).

F Use the Family Violence Flag to Enhance Victim Safety

In its *Family Violence Review*, the Ministry of Justice looked at options to ensure safety for victims of family violence in bail proceedings.⁴⁵⁹ In this thesis, I argue the Ministry could have gone further and looked at other ways to enhance safety for victims. My two recommendations about how the family violence flag can be used to enhance victim safety relate to the court's power to discharge a person without conviction and its power to impose a protection order in civil proceedings.

1 Discharge without conviction

A discharge without conviction under s 106 of the Sentencing Act 2002 is not an uncommon sentencing option in family violence cases, particularly in the Family Violence Courts.⁴⁶⁰ Currently, the drafting of s 16A is unclear as to whether the family violence flag is to be entered when an offender is discharged without conviction (that sentencing option being treated as an acquittal).⁴⁶¹ This is problematic given the purpose of the family violence flag is to identify family violence offending, including repeat and escalating family violence offending.

In Part D of this chapter I recommended that the family violence flag apply to all proven family violence offending, including family violence offending that results in a discharge without conviction. As outlined, this reform could be achieved by amending s 16A(4) so that the flag *must be entered* in the permanent court record if the court is satisfied that the offence is a family violence offence. This objective would be further supported by the inclusion of a new subsection (1A) in s 106 clarifying that the court must order that the family violence flag be entered when granting a discharge without conviction (if satisfied the offence is a family violence offence).

The above recommendation strengthens the application of the family violence flag in identifying all family violence offending as a “distinct type of offending”. In doing so it paves the way for family violence offences to be treated similarly to drug possession or drink driving offences, which the courts have acknowledged as being of considerable social concern.⁴⁶² In drug possession cases, the courts have recognised that a previous discharge without conviction for offending of the same type must count against a discharge on a later occasion.⁴⁶³

In introducing s 16A, Parliament has introduced a mechanism to clearly identify and differentiate family violence offences. It has done this in recognition of the serious and repeat

⁴⁵⁹ Ministry of Justice, above n 7, at 27.

⁴⁶⁰ Ministry of Justice, above n 264.

⁴⁶¹ Sentencing Act 2002, s 106.

⁴⁶² *Ovtcharenko*, above n 294; *Linterman*, above n 293.

⁴⁶³ *Police v McCabe*, above n 289; *Morgan v Police*, above n 288.

nature of family violence.⁴⁶⁴ As the Court of Appeal said in *Basnyat v Police*, this arguably tips the proportionality scales to be applied at stage 3 of the discharge without conviction test by that level of seriousness.⁴⁶⁵

Section 106 also provides a jurisdictional barrier to the sentencing court imposing a protection order when making a discharge without conviction, in that a protection order under s 123B of the Sentencing Act 2002 is predicated on the *conviction* of the offender.⁴⁶⁶ The court's inability to impose a protection order when making a s 106 discharge is at odds with contemporary understandings of family violence, which are reflected in the expanded meaning of family violence in the FVA.⁴⁶⁷ Section 10 of the FVA specifically provides that "a number of acts that form part of a pattern of behaviour (even if all or any of those acts, when viewed in isolation, may appear to be minor or trivial) may amount to abuse."⁴⁶⁸ The restriction on criminal courts to impose a protection order when granting a discharge without conviction is also out of step with the civil approach, in which the courts have focused on the respondent's previous pattern of violence in the relationship (rather than the seriousness of the incident).⁴⁶⁹

The above issues could be resolved by amending s 106 as follows (changes italicised):

106 Discharge without conviction

- (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.

[(1A) *Despite subsection (1), if the court is satisfied that the offence is a family violence offence, the court must order that the offence be entered in the permanent court record of the proceedings as a family violence offence in accordance with s 16A of the Criminal Procedure Act 2011.*]
- (2) A discharge under this section is deemed to be an acquittal.
- (3) A court discharging an offender under this section may—
 - (a) make an order for payment of costs or the restitution of any property;
or
 - (b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—

⁴⁶⁴ Ministry of Justice, above n 7, at 26.

⁴⁶⁵ *Basnyat*, above n 297, at [19].

⁴⁶⁶ Sentencing Act 2002, s 123B(1)(a).

⁴⁶⁷ Family Violence Act 2018, ss 9 – 11.

⁴⁶⁸ Family Violence Act 2018, s 10.

⁴⁶⁹ *KFW v KBW*, above n 97.

- (i) loss of, or damage to, property; or
 - (ii) emotional harm; or
 - (iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property:
- [(ba) *make a protection order under s 123B:*]
- (c) make any order that the court is required to make on conviction.
- [(3A) Sections 32 to 38A apply, with any necessary modifications, to an order under subsection (3)(b) as they apply to a sentence of reparation.]
- (4) *Repealed.*
- [(5) Despite subsection (3)(b), the court must not order the payment of compensation in respect of any consequential loss or damage described in subsection (3)(b)(iii) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.]

2 *Protection order at sentencing*

Building on the above argument, victim safety could be enhanced in family violence cases if s 123B of the Sentencing Act 2002 was amended to provide that making a protection order is an order that the court *is required* to make on conviction for a family violence offence. As noted, one of the advantages in making a protection order under s 123B mandatory is that it would enable a sentencing court to make a protection order when an offender is discharged without conviction.⁴⁷⁰ This reform would obviate the need for the proposed para (ba) of s 103(3) that the court may “make a protection order under s 123B”, although it could remain to ensure there is no ambiguity over whether the court can impose a protection order in conjunction with a s 106 discharge.

Secondly, framing s 123B in mandatory terms is consistent with the recent family violence reforms, which focused on ensuring safety for victims of family violence throughout the criminal justice process and adapting court practice and procedure for family violence cases.⁴⁷¹ The court would still have the option of declining to make a protection order if satisfied that an order is *not necessary* for the protection of the victim of the offence. The reference to “necessary” makes it clear that the criminal court is to issue a protection order on the same criteria as set out in s 79 of the FVA.

In *Solicitor-General v Karekare Jagose J* considered the purpose behind s 123B, opining that a conviction for a family violence offence is proof of past family violence and provides a

⁴⁷⁰ Sentencing Act 2002, s 106(3)(c).

⁴⁷¹ Ministry of Justice, above n 7.

reasonable foundation for a fear of future violence.⁴⁷² In Jagose J’s words, “I acknowledge that finding comes close to being one that a protection order should follow in all but exceptional circumstances on conviction for domestic violence.”⁴⁷³

I also argue that the caveat in s 123B(2)(b) that “the court may make a protection order if the victim of the offence does not object to the making of the order” is not necessary. The accepted position in case law is that there is no affirmative obligation on the court to establish an absence of objection. As noted by Muir J in *Sutherland v Police*, “[it] is for the victim to record such an objection if the caveat in s 123B(2)(b) is to apply.”⁴⁷⁴ Whether the victim objects can be taken into account by the court in determining whether a protection order is necessary, but such views should not be determinative.⁴⁷⁵

Regarding whether a protection order can be imposed upon conviction and prior to sentencing, *Police v Cerzey* confirms that the intent of s 123B is to afford victims immediate and effective protection without having to resort to making applications under the FVA.⁴⁷⁶ There had been some confusion as to whether a protection order made upon conviction – and in situations where final sentence had been adjourned – ended the sentencing process. In *Police v Cerzey* Clark J was clear that “a protection order made under s 123B does not have effect as a sentence and thereby, of itself, conclude the sentencing process.”⁴⁷⁷

My suggested reforms to s 123B are set out as follows as follows (changes italicised):

123B Protection order

- (1) This section applies if—
 - (a) an offender is convicted of a [[family violence offence]]; and
 - (b) there is not currently in force a protection order against the offender made under the [[Family Violence Act 2018]] for the protection of the victim of the offence.
- [(2) *The court must make a protection order against the offender if it is satisfied that the making of the order is necessary for the protection of the victim of the offence.*]
 - ~~(b) — the victim of the offence does not object to the making of the order.~~

⁴⁷² *Solicitor-General v Karekare*, above n 340, at [26].

⁴⁷³ *Ibid.*

⁴⁷⁴ *Sutherland v Police*, above n 350, at [18].

⁴⁷⁵ See generally the approach taken in bail proceedings where s 8(3A) mandates the victim’s protection as the court’s primary consideration.

⁴⁷⁶ *Police v Cerzey*, above n 324, at [24].

⁴⁷⁷ At [24].

- (3) A protection order may be made under this section in addition to imposing a sentence or making any other order.
- (4) An order may be made under subsection (2) even though [family violence proceedings] have been filed by the victim of the offence against the offender, and those proceedings have not yet been determined.
- (5) If an order is made under subsection (2) in the circumstances described in subsection (4), the [family violence proceedings], in so far as they relate to an application for a protection order against the offender, end.

II Continuous Improvement and Education

Beyond the suggested legislative amendments, there are other measures relating to ongoing education and improved data collection that could improve awareness of all forms of family violence offending. While detailed consideration of these measures is outside the scope of this thesis, I do identify a number of areas that could form the basis for future research.

A Education and Awareness

In Chapter III I argue that for the family violence flag to serve its purpose and be effective, the legislative definition of a family violence offence needs to be widely understood. The message needs to be reiterated that any offence where there is a family relationship between the parties should be flagged as a family violence offence. This does not mean that all family violence cases will all be treated in the same way or that the same risk factors apply, but it does signal to the decision-maker that there might be other considerations at play.

One way of improving education and awareness is to have a consistent explanation of what a family violence offence is, both on the certified copy of conviction and in justice sector forms and publications. The explanation could say:

When someone commits an offence by using physical, sexual or psychological abuse against someone with whom they have or have had a family relationship, it is known as a **family violence offence**.

This explanation could cross-reference the meaning of family violence and family relationship in the FVA. The explanation could be accompanied by examples of different types of family violence offending, such as digital abuse, ill-treatment of a child or vulnerable adult, ill-treatment of an animal, or financial abuse.

B Improving the Evidence Base

In Chapter VIII I briefly outline the current state of the family violence evidence base in New Zealand. I argue that the family violence flag can valuably contribute to that evidence base by

identifying and rendering visible what could be otherwise invisible patterns of family violence offending. Currently, further work is required to better integrate IT systems across justice agencies and develop a national family violence data framework.

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Chapter X: Conclusion

Imagine a car dashboard: an indicator is a warning light flashing on the dashboard. It is fed by one of many streams of data – maybe oil level, temperature etc ... It flashes when all is not well, suggesting we stop the car. The indicator ‘alerts us to something worthy of investigation’.⁴⁷⁸

This thesis has focussed on family violence offending. On 1 July 2019 a new legislative definition of a family violence offence was introduced. Under this definition, a family violence offence means an offence against any enactment (including the Family Violence Act 2018) and involving family violence (as defined in section 9 of that Act).⁴⁷⁹ A family violence offence is a subset of family violence; there is a range of other family violence abusive behaviours – such as controlling, undermining, isolating and belittling a victim – that are not criminal offences.

Section 16A of the Criminal Procedure Act 2011 – referred to throughout this thesis as the family violence flag – was introduced to better identify and record family violence offences in the criminal justice system.⁴⁸⁰ The policy papers identify two benefits to its introduction.⁴⁸¹ Firstly, the family violence flag will ensure all family violence cases are treated as such. This is important because there are dynamics and risk factors that are particular to offending that occurs between people in a family relationship. A second, and related benefit, is the ability of the family violence flag to facilitate the gathering of information about family violence offending rates. Section 16A took effect from 1 July 2019.

While there was an internal system for flagging family violence incidents in the Police and court databases prior to the introduction of s 16A, the Ministry of Justice had concerns about the reliability and robustness of the system. The Ministry was of the view that the policy objectives for identifying and recording family violence in the criminal justice system could be better achieved by a legislative solution.⁴⁸² Furthermore, because of concerns about the reliability of the internal system, offences flagged as involving family violence have never been part of official data sets regarding the prevalence of family violence offending.⁴⁸³

As this thesis has illustrated, identifying whether an offence is a family violence offence is not always straightforward. In many cases, the family violence context will be evident from the charges laid (for example, assault on a person in a family relationship) or the summary of facts. However, this is not always the case. Offences like dangerous driving, wilful damage or digital

⁴⁷⁸ Association of Public Health Observatories *The Good Indicators Guide* (2008) at 6.

⁴⁷⁹ Criminal Procedure Act 2011, s 16A(5).

⁴⁸⁰ Ministry of Justice, above n 9, at 12.

⁴⁸¹ *Ibid.*

⁴⁸² Ministry of Justice, above n 7, at 26.

⁴⁸³ Ministry of Justice, above n 264.

abuse may occur in a family violence context, but unless the charges are flagged as involving family violence it may not be evident to later decision-makers that these offences were family violence related.

There is also a tendency, both in case law and in public awareness campaigns, to associate family violence with intimate partner violence. However, intimate partner violence is only one component of the wider concept of family violence.⁴⁸⁴ Intra-familial family violence offending, particularly abuse towards children, also needs to be identified and recorded. Being able to identify family violence offending across a range of family relationships can help inform scholarship about risk factors and triggers for intra-familial violence. To date, research in this area has focussed almost exclusively on violence occurring in heterosexual intimate partner relationships, but we know harm within families extends beyond these relationships.

There is no doubt that the family violence flag is a useful tool for identifying and recording family violence offences. However, as I have argued throughout this thesis, there are areas where the provision could be strengthened so that “it is not left to the practices of prosecutors and judges who will often be operating under considerable pressures.”⁴⁸⁵ Recommended measures to strengthen its application include both legislative and system reform. Legislative reform includes making the family violence flag a mandatory order of the court, applying it to all proven family violence offending, and enabling the family violence flag to apply retrospectively. System change includes greater education on identifying all forms of family violence offending, building up to a common awareness of what a family violence offence is and why we need to know about it.

The analogy quoted at the start of this chapter provides a useful explanation of how the family violence flag can be used to inform risk assessment. It does not of itself suggest a particular outcome or level of risk, but it should prompt judges to think deeper about the risk factors and dynamics common in family violence cases and to consider obtaining further information.

Adopting a shared understanding of what a family violence offence is will also help improve the evidence-base about family violence offending. If used, the family violence flag can be used as a reliable outcome indicator of the prevalence of family violence offences reported and prosecuted in New Zealand. As argued by Gulliver and Fanslow, “good quality, reliable outcome indicators can be used to monitor trends, identify emerging problems, create awareness, guide legislative and policy reforms and ensure adequate provision of services.”⁴⁸⁶

⁴⁸⁴ Families Commission, above n 430, at 16.

⁴⁸⁵ Law Commission, above n 69, at 55.

⁴⁸⁶ Families Commission, above n 430, at 52.

New Zealand has an appalling record of family violence. The reasons for this are multiple and complex but they are also, as Dr Ian Lambie argues, associated with many of the drivers of other social concerns.⁴⁸⁷ Increasing awareness and knowledge about family violence is one of the first steps in preventing it. Because family violence is so often hidden and under-reported, when agencies and individual decisions-makers, like judges, get an opportunity to intervene they need to take it. They need to ensure they have as much information as possible about the family violence perpetrator, their history of family violence, and what is happening within the family. It is only by having access to this level of information that decision-makers can make “sound, safe decisions that protect people from future harm.”⁴⁸⁸

⁴⁸⁷ Lambie, above n 75, at 1.

⁴⁸⁸ Judge Jan-Marie Doogue “The Coroner’s inquest findings into the death of Christie Marceau” (press release, 7 March 2018).

Appendices

Family Violence Act 2018 (NZ)

9 Meaning of family violence

- (1) In this Act, **family violence**, in relation to a person, means violence inflicted—
 - (a) against that person; and
 - (b) by any other person with whom that person is, or has been, in a family relationship.
- (2) In this section, **violence** means all or any of the following:
 - (a) physical abuse:
 - (b) sexual abuse:
 - (c) psychological abuse.
- (3) Violence against a person includes a pattern of behaviour (done, for example, to isolate from family members or friends) that is made up of a number of acts that are all or any of physical abuse, sexual abuse, and psychological abuse, and that may have 1 or both of the following features:
 - (a) it is coercive or controlling (because it is done against the person to coerce or control or with the effect of coercing or controlling, the person):
 - (b) it causes the person, or may cause the person, cumulative harm.
- (4) Violence against a person may be dowry-related violence (that is, violence that arises solely or in part from concerns about whether, how, or how much any gifts, goods, money, other property, or other benefits are—
 - (a) given to or for a party to a marriage or proposed marriage; and
 - (b) received by or for the other party to the marriage or proposed marriage).
- (5) Subsection (2) is not limited by subsections (3) and (4) and must be taken to include references to, and so must be read with, sections 10 and 11.

10 Meaning of abuse

- (1) A single act may amount to abuse.
- (2) A number of acts that form part of a pattern of behaviour (even if all or any of those acts, when viewed in isolation, may appear to be minor or trivial) may amount to abuse.
- (3) This section does not limit section 9(2).

11 Meaning of psychological abuse

- (1) Psychological abuse includes—
 - (a) threats of physical abuse, of sexual abuse, or of abuse of a kind stated in paragraphs (b) to (f):

- (b) intimidation or harassment (for example, all or any of the following behaviour that is intimidation or harassment:
 - (i) watching, loitering near, or preventing or hindering access to or from a person's place of residence, business or employment, or educational institution, or any other place that the person visits often:
 - (ii) following the person about or stopping or accosting a person in any place:
 - (iii) if a person is present on or in any land or building, entering or remaining on or in that land or building in circumstances that constitute a trespass):
 - (c) damage to property:
 - (d) ill-treatment of 1 or both of the following:
 - (i) household pets:
 - (ii) other animals whose welfare affects significantly, or is likely to affect significantly, a person's well-being:
 - (e) financial or economic abuse (for example, unreasonably denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education):
 - (f) in relation to a person unable, by reason of age, disability, health condition, or any other cause, to withdraw from the care or charge of another person, hindering or removing (or threatening to hinder or remove) access to any aid or device, medication, or other support that affects, or is likely to affect, the person's quality of life:
 - (g) in relation to a child, abuse stated in subsection (2).
- (2) A person psychologically abuses a child if that person—
- (a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a family relationship; or
 - (b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring.
- (3) However, the person who suffers the abuse in subsection (2)(a) and (b) is not regarded, under subsection (2), as having (as the case may be)—
- (a) caused or allowed the child to see or hear that abuse; or
 - (b) put the child, or allowed the child to be put, at risk of seeing or hearing that abuse.
- (4) Psychological abuse may be or include behaviour that does not involve actual or threatened physical or sexual abuse.
- (5) This section does not limit section 9(2)(c).

12 Meaning of family relationship: general

For the purposes of this Act, a person (**A**) is in a **family relationship** with another person (**B**) if A—

- (a) is a spouse or partner of B; or
- (b) is a family member of B; or
- (c) ordinarily shares a household with B (*see also* section 13); or
- (d) has a close personal relationship with B (*see also* section 14).

13 Meaning of family relationship: sharing household

For the purposes of section 12(c), a person (**A**) is not regarded as sharing a household with another person (**B**) by reason only of the fact that—

- (a) A has, with B,—
 - (i) a landlord-tenant relationship; or
 - (ii) an employer-employee relationship; or
 - (iii) an employee-employee relationship; and
- (b) A and B occupy a common dwellinghouse (whether or not other people also occupy that dwellinghouse).

14 Meaning of family relationship: close personal relationship

- (1) A person (**A**) is not regarded as having a close personal relationship with another person (**B**) under section 12(d) by reason only of the fact that A has, with B,—
 - (a) an employer-employee relationship; or
 - (b) an employee-employee relationship.
- (2) A person (**A**) is not prevented from having a close personal relationship with another person (**B**) under section 12(d) by reason only of the fact that A has, with B, a recipient of care-carer relationship.
- (3) In determining whether a person (**A**) has a close personal relationship with another person (**B**) under section 12(d), the court must have regard to—
 - (a) the nature and intensity of the relationship, and in particular—
 - (i) the amount of time A and B spend together;
 - (ii) the place or places where that time is ordinarily spent;
 - (iii) the manner in which that time is ordinarily spent;
 - (b) the duration of the relationship.
- (4) Despite subsection (3)(a), it is not necessary for a person (**A**) to have a sexual relationship with another person (**B**) in order for A to have a close personal relationship with B.

- (5) Subsections (2), (3), and (4) do not limit the matters to which a court may have regard in determining, under section 12(d), whether a person has a close personal relationship with another person.

Criminal Procedure Act 2011 (NZ)

16A Specifying that offence charged is, or that conviction entered is for, family violence offence

- (1) The charging document may specify that the offence charged is a family violence offence.
- (2) The court may, at any time after a charging document is filed and before the delivery of the verdict or decision of the court, amend the document to add, confirm, or remove a specification that the offence charged is a family violence offence.
- (3) The power in subsection (2)—
 - (a) is exercisable on the court's own motion or on the application of the defendant or the prosecutor:
 - (b) is exercisable by the Registrar, if both the defendant and the prosecutor agree:
 - (c) does not limit the powers in section 133.
- (4) If the defendant is convicted (even if the charging document does not specify that the offence charged is a family violence offence), the court may enter in the permanent court record of the proceeding a specification that the conviction is for a family violence offence.
- (5) In this section, **family violence offence** means an offence—
 - (a) against any enactment (including the Family Violence Act 2018); and
 - (b) involving family violence (as defined in section 9 of that Act).

Sentencing Act 2002 (NZ)

9 Aggravating and mitigating factors

- (1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

....

[(ca) that the offence was a family violence offence (as defined in section 123A) committed—

- (i) while the offender was subject to a protection order (as defined in section 8 of the Family Violence Act 2018, or that was made under section 123B of this Act); and
- (ii) against a person who, in relation to the protection order, was a protected person (as so defined):]

123B Protection order

- (1) This section applies if—
- (a) an offender is convicted of a [[family violence offence]]; and
 - (b) there is not currently in force a protection order against the offender made under the [[Family Violence Act 2018]] for the protection of the victim of the offence.
- (2) The court may make a protection order against the offender if—
- (a) it is satisfied that the making of the order is necessary for the protection of the victim of the offence; and
 - (b) the victim of the offence does not object to the making of the order.
- (3) A protection order may be made under this section in addition to imposing a sentence or making any other order.
- (4) An order may be made under subsection (2) even though [[family violence proceedings]] have been filed by the victim of the offence against the offender, and those proceedings have not yet been determined.
- (5) If an order is made under subsection (2) in the circumstances described in subsection (4), the [[family violence proceedings]], in so far as they relate to an application for a protection order against the offender, end.]

106 Discharge without conviction

- (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
- (2) A discharge under this section is deemed to be an acquittal.
- (3) A court discharging an offender under this section may—

- (a) make an order for payment of costs or the restitution of any property: or
 - (b) make an order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—
 - (i) loss of, or damage to, property; or
 - (ii) emotional harm; or
 - (iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property:
 - (c) make any order that the court is required to make on conviction.
- (3A) Sections 32 to 38A apply, with any necessary modifications, to an order under subsection (3)(b) as they apply to a sentence of reparation.
- (4) *Repealed.*
- (5) Despite subsection (3)(b), the court must not order the payment of compensation in respect of any consequential loss or damage described in subsections (3)(b)(iii) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.
- (6) *Repealed.*
- (7) *Repealed.*

Crimes (Domestic and Personal Violence) Act 2007 (NSW)

12 Recording of domestic violence offences

- (1) The charge in respect of an offence may indicate that the offence is a domestic violence offence.
- (2) If a person pleads guilty to an offence or is found guilty of an offence and the court is satisfied that the offence was a domestic violence offence, the court is to direct that the offence be recorded on the person's criminal record as a domestic violence offence.
- (3) If the court makes a direction under this section to record an offence as a domestic violence offence, the prosecution may make an application to the court requesting that the court direct that specified offences in respect of which the person has previously pleaded guilty or been found guilty be recorded as domestic violence offences.
- (4) Any such application is to include sufficient information in support of the request to enable the court to make a decision as to whether such a recording is appropriate.
- (5) The court may require the prosecutor to provide further information to enable it to make a determination as to whether to direct a recording to be made under this section.
- (6) If satisfied after considering an application under subsection (3) that an offence referred to in the application was a domestic violence offence, the court is to direct that the offence be recorded on the criminal record of the person concerned as a domestic violence offence.
- (7) A victim of an offence is not compellable in any proceedings before the court to determine whether the court should make a direction under this section to record an offence as a domestic violence offence.
- (8) A court that directs a recording to be made under this section or is required to take such a recording into account may, on application or on its own motion, correct the recording if it considers that there is an error in the recording.
- (9) Regulations may be made for or with respect to the recording of offences under this section, including the manner in which and time within which such recordings are to be made.

Note. An indication in the charge for an offence that a person has committed a domestic violence offence will be relevant in bail proceedings. The recording on a person's criminal record that an offence is a domestic violence offence will be relevant to sections 7 and 8 of this Act, where previous behaviour constituting a domestic violence offence is taken into account for the purpose of determining whether a person's behaviour amounts to intimidation or stalking, and to sections 27 and 49 of this Act, which require police to make applications for apprehended domestic violence orders in situations where the person in question has already committed a domestic violence offence. Section 21A of the *Crimes (Sentencing Procedure) Act 1999* provides that a record of previous convictions is an aggravating factor to be taken into account when determining the appropriate sentence for an offence.

Penalties and Sentences Act 1992 (Qld)

12A Convictions for offences relating to domestic violence

- (1) Subsections (2) to (4) apply if—
 - (a) a complaint or an indictment for a charge for an offence states the offence is also a domestic violence offence; and
 - (b) the offender is convicted of the offence.
- (2) If a conviction is recorded in relation to the offence, it must also be recorded as a conviction for a domestic violence offence.
- (3) If no conviction is recorded in relation to the offence, the offence must be entered in the offender's criminal history as a domestic violence offence.
- (4) However, a matter must not be recorded or entered under subsection (2) or (3) in relation to the offence if the court makes an order to the effect it is not satisfied the offence is also a domestic violence offence.

Note—

See the *Evidence Act 1977*, section 132C, which provides for the sentencing judge or magistrate in any sentencing procedure in a criminal proceeding to act on allegations of fact.

- (5) If a court convicts an offender of an offence for which a matter must be recorded or entered under subsection (2) or (3) or of an offence against the *Domestic and Family Violence Protection Act 2012*, part 7, the prosecution may apply to the court for an order that an offence, stated in the application, of which the offender has previously been convicted (a *previous offence*)—
 - (a) for a previous offence for which a conviction was recorded— be recorded as a conviction for a domestic violence offence; or
 - (b) otherwise—be entered in the offender's criminal history as a domestic violence offence.
- (6) The application—
 - (a) may be made in writing or orally; and
 - (b) must include enough information to allow the court to make a decision about whether it is appropriate to make the order.
- (7) The court may ask the prosecutor for further information for it to decide whether to make an order under subsection (8).
- (8) If, after considering the application, the court is satisfied a previous offence is a domestic violence offence, the court must order that the offence—
 - (a) for a previous offence for which a conviction was recorded—also be recorded as a conviction for a domestic violence offence; or
 - (b) otherwise—be entered in the offender's criminal history as a domestic violence offence.
- (9) A person against whom the domestic violence offence was committed is not compellable as a witness in proceedings before the court to decide the application.

- (10) If a court is satisfied an error has been made in recording or entering an offence as a domestic violence offence, the court may, on an application or its own initiative, correct the error.
- (11) For this section, proof that an offence is a domestic violence offence lies on the prosecutor.
- (12) To remove any doubt, it is declared that this section does not require a matter to be recorded or entered in an offender's traffic history under the *Transport Operations (Road Use Management) Act 1995*.

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