

Infringements Working Group  
Submission

# Discussion Paper: Consultation on Proposed New Scheme to Manage Victims of Family Violence within the Infringements System

February 2017



## The Infringements Working Group

The Infringements Working Group (**IWG**) is a joint working group of the Federation of Community Legal Centres (Victoria) and the Financial and Consumer Rights Council. The IWG's 36 member organisations are listed in **Annexure 1**.

The Productivity Commission's *Access to Justice Arrangements Report* noted that the community legal sector assists the most disadvantaged and vulnerable individuals, as well as those with special needs, in dealing with a significant variety of legal issues.<sup>1</sup> The Federation of Community Legal Centres' most recent annual report details that 73% of clients earned less than \$26,000 per annum and 20% of clients self-identified as having some form of disability.<sup>2</sup> Based on the experiences of IWG members, we know that infringements are one of the most common legal issues that our sector assists with.

Similarly, financial counsellors regularly assist the most marginalised members of our community. Financial counselling clients typically rely on Centrelink income support and regularly present with mental health or other issues that complicate their ability to understand and interact with the infringements system. These clients rely on financial counsellors to both interpret the system and advocate for them within it. Accordingly financial counsellors in Victoria have developed a strong working knowledge of the strengths and weaknesses of the infringements system as it currently stands.

The IWG has worked closely with successive governments, enabling infringements policy to be informed by the expertise and experience of practitioners who work daily with vulnerable and disadvantaged people to resolve their infringements matters.

This submission is informed by the direct experience of IWG members in assisting disadvantaged clients to navigate the infringements system. This work provides us with insights into our clients' interaction with enforcement agencies and the courts, as well as the very real risks that women face when trying to take legal action within a context of family violence.

This submission presents constructive recommendations for the development of mechanisms to effectively address family violence-related infringements and ensure that victims of family violence are not exposed to heightened risks of violence when engaging with the infringements system.

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<sup>1</sup> Productivity Commission, *Access to Justice Arrangements*, 2014, p 671, available at <http://www.pc.gov.au/inquiries/completed/access-justice/report>.

<sup>2</sup> Federation of Community Legal Centres, *2015/16 Annual Report*, p 5, available at [http://www.fclc.org.au/cb\\_pages/files/FCLC%20AR2016\\_Web\\_Final.pdf](http://www.fclc.org.au/cb_pages/files/FCLC%20AR2016_Web_Final.pdf).

## Table of Contents

<b>The Infringements Working Group</b> .....	1
<b>Executive summary</b> .....	3
<b>The current flawed system and its impact on victims of family violence</b> .....	6
<b>Implementing the recommendations of the Royal Commission</b> .....	7
<b>Increased risks of violence to victims and their children created by the Proposed Scheme</b> .....	7
Requirement to identify the perpetrator.....	8
Perpetrator accountability.....	9
The proposed management of family violence-related infringements (referrable vs non-referrable infringement offences) .....	11
Limited understanding of the risks to victims of family violence .....	12
<b>Impact of the Proposed Scheme on the limited resources of the Magistrates' Court</b> .....	12
<b>Other deficiencies in the Proposed Scheme</b> .....	13
Unrealistic evidentiary requirements .....	14
Treatment of applications to the Proposed Scheme where two or more applications have been granted in the previous five years .....	15
Refusals of family violence applications .....	16
The Proposed Scheme should be capable of dealing with the offence of excessive speeding, but not drunk or drug driving.....	16
<b>Principles to shape the development of a safe and effective scheme</b> .....	17
<b>A safe and effective scheme to manage family violence-related infringements</b> .....	18
<b>Annexure 1 – List of IWG member organisations</b> .....	22

## Executive summary

The Infringements Working Group (**IWG**) has worked to inform the Victorian Government's consideration of the impact of fines and infringements on victims of family violence, including through a detailed submission to the Royal Commission into Family Violence (**IWG RCFV Submission**).<sup>3</sup> Recognising the insights and direct experience of IWG members, the Royal Commission into Family Violence (**Royal Commission**) stated:

*The Commission was greatly assisted by the Infringements Working Group (IWG) who work with clients experiencing family violence, financial hardship and family violence-related infringements... The Commission agrees with the two primary issues raised by the IWG, namely that victims face difficulties in nominating the perpetrator when they incur the infringement or fine in the victim's name, and in having a fine or infringement waived in situations where the victim incurred the fine or infringement in circumstances of family violence.*<sup>4</sup>

Informed by our members' direct work with clients dealing with family violence-related infringements, the IWG is concerned that the proposed scheme to manage victims of family violence within the infringements system (**Proposed Scheme**) does not present the solutions it aims to and, in fact, presents an increased risk to the safety of victims of family violence.<sup>5</sup>

While we welcome aspects of the Proposed Scheme, particularly that victims do not incur demerit points for driving offences and the introduction of trained, specialist staff within Fines Victoria, the IWG identifies the following six significant flaws with the Proposed Scheme:

1. **Danger to victims.** Key aspects of the Proposed Scheme endanger the safety of women and children, and heighten the risk of serious injury or death, because of the increased likelihood of retribution by perpetrators of violence in response to:
  - The requirement to identify the perpetrator of violence, contrary to Recommendation 112 of the Royal Commission which recognised that it is too dangerous for victims to do this;
  - The requirement for victims to attend court in relation to 'referrable' infringement offences and the joining of perpetrators to these proceedings;
  - The proposal to transfer liability for the pecuniary and non-pecuniary penalties associated with infringement offences from victims to perpetrators; and

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<sup>3</sup> Infringements Working Group, Submission to the Royal Commission into Family Violence, 2015, <http://www.rcfv.com.au/getattachment/E42EA087-76C3-4E26-89CE-48473534520E/Infringements-Working-Group>.

<sup>4</sup> State of Victoria, Royal Commission into Family Violence: Summary and Recommendations, Parl Paper No 132 (2014–16), Vol IV, p120.

<sup>5</sup> We also note that the Discussion Paper misunderstands the legislative framework of fines reform. We note that the *Fines Reform Act 2014* (Vic) (**Fines Reform Act**) amends the *Infringements Act 2006* (Vic) (**Infringements Act**), it does not replace it. Further, the *Fines Reform and Infringements Acts Amendment Act 2016* (Vic) amends the *Infringements Act* and the *Fines Reform Act*.

- The suggestion of a ‘deferred FV nomination scheme’, which proposes putting nominations on hold for six months and ignores the reality that family violence often continues for years and is extremely unlikely to have dissipated within six months.

A perpetrator liability scheme and the requirement for victims to identify the perpetrator fundamentally undermine the safety and effectiveness of the Proposed Scheme and should be abandoned.

2. **Target group excluded or deterred.** The benefits of the Proposed Scheme (i.e. specialists within Fines Victoria dealing with infringements and demerit points where family violence ‘contributed to’ the infringeable conduct) will not be available for a significant proportion of the victims that it is targeted at, including victims who:
  - Are unable to meet the onerous and inflexible requirements for evidence;
  - Need to address fines incurred in circumstances of family violence more than twice in five years; or
  - Have infringements that fall within the broad category of ‘referrable’ offences (e.g. speeding offences of more than 10km/hour over the speed limit).

By the time victims in these circumstances are excluded, deterred from applying or channelled through the Magistrates’ Court of Victoria, the intended benefits of the Proposed Scheme will be seriously constrained.

3. **A complex, bifurcated process.** While a standalone scheme for victims of family violence and an approach that does not differentiate between infringement offences committed by the victims in circumstances of family violence or by the perpetrator are welcome, the Proposed Scheme does not recognise the complexity of circumstances for many victims. For example, it is common for our clients to have high volumes of infringements (including a mix of ‘referrable’ and ‘non-referrable’ offences), as well as circumstances that overlap with their experience of family violence including circumstances that fall within the current definition of ‘special circumstances’ under the *Infringements Act 2006* (Vic) (**Infringements Act**), i.e. mental illness, substance dependence and/or homelessness. It is not clear how these intersections will be addressed by the Proposed Scheme and it appears that victims would still be required to engage in multiple different processes (e.g. some through court appearances for ‘referrable’ matters, some addressed by Fines Victoria as ‘non-referrable’ matters, and some via the special circumstances process).
4. **Over-reliance on the court system.** The Proposed Scheme will see a high volume of family violence-related infringements referred to the Magistrates’ Court. In addition to presenting an increased risk to victims and deterring them from accessing the Proposed Scheme, this is contrary to the recommendation of the Royal Commission that the Government should consider transferring fines and infringements out of the Magistrates’ Court because “the court’s capacity to manage family violence matters is compromised by

the volume of cases in areas other than family violence ... [i]n particular, low-level penalties and traffic matters".<sup>6</sup>

5. **Sentencing options unclear, including finding of guilt.** The sentencing options in the Magistrates' Court of Victoria are not clear. It is unclear what legislative framework is being considered to ensure that victims who go through the court process under the Proposed Scheme (which would be a significant proportion given the current broad category of 'referrable' infringement offences and the two application cap) will not have a finding of guilt recorded against them. It is unclear how rehabilitative sentencing conditions could be imposed by Magistrates in the circumstances where the matter does not come before the Court as a criminal charge and no finding of guilt is made. The lack of clarity on this point further undermines benefits of the Proposed Scheme.
6. **Flawed approach to safety on our roads.** Effective policy to encourage road safety cannot rely on automatic traffic cameras and pressure on family violence victims to identify driving offenders. The deterrent effect of the Proposed Scheme will leave perpetrators who commit driving offences invisible as victims will continue to accept responsibility for infringement offences they did not commit to avoid the risk of retribution in response to identification of the perpetrator. The Proposed Scheme fails to consider other measures to encourage road safety, such as proactive policing and technological solutions.

Because of these deficiencies and risks, eligible victims will be deterred from applying to the Proposed Scheme. This inability to address family violence-related infringements is likely to lead to an exacerbation of isolation and harm for family violence victims as a result of interference with a victim's access to transport arising out of the imposition of sanctions or licence suspensions, or because of the enormous financial pressure infringements represent for victims who may not have access to financial resources.

While we understand the concern of the Department of Justice and Regulation (**DOJR**) to ensure safety on our roads, the Proposed Scheme does not strike an appropriate balance with the need to ensure victim safety and in fact exposes victims to significantly increased danger of violent retribution.

In the view of the IWG, the Proposed Scheme requires further consideration. In this submission, we have addressed how the Proposed Scheme fails to deliver a safe and effective mechanism to resolve family violence-related infringements. We also propose principles to inform development of a more appropriate scheme as well as an alternative model that should be considered. In addition, we recommend delaying the introduction of the new scheme to enable further comprehensive consultation with experts from the family violence, legal assistance and financial counselling sectors to ensure the scheme that is introduced is safe and effective.

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<sup>6</sup> RCFV Report, above n 4, Vol III, p162.

## The current flawed system and its impact on victims of family violence

The IWG's members frequently assist victims of family violence who have been caught up in the infringements system. Some of these clients have committed infringement offences themselves in the course of escaping or living with family violence. Others are the registered operators of vehicles driven by a violent family member who has incurred infringements in the victim's name. Infringements frequently become a form of violence and control over a victim whose access to information about the infringements or the financial resources to manage them may be obstructed by the perpetrator of violence.

This information, together with five case studies, was set out in detail in the IWG RCFV Submission.

The IWG advocated for and welcomed the introduction of family violence in the definition of special circumstances via the *Fines Reform and Infringements Acts Amendment Act 2016* (Vic) as one component of the required reforms needed to effectively address family violence-related infringements. The expanded definition of special circumstances would enable victims of family violence to seek review of infringements where they committed infringement offences in connection with their experience of family violence, such as when fleeing on public transport or a toll road without a ticket or payment, or when driving an unregistered vehicle because the perpetrator's financial abuse prevented her from registering the vehicle.

However, as the IWG identified in the IWG RCFV Submission and as the Discussion Paper recognises:

- Victims of family violence should not be required to plead guilty to offences in the Magistrates' Court and should not have demerit points imposed where they could not control the offending because of the family violence they were subjected to; and
- The special circumstances regime cannot address the significant problem of infringements incurred by a violent perpetrator and attributed to a victim of family violence, a problem seen frequently by our member agencies.

The IWG welcomes the DOJR's recognition of these inadequacies and their impact on victims of family violence, which include:

- Severe financial hardship and overwhelming debt;
- Exacerbated fear and anxiety; and
- Sanctions, including licence or registration suspension and the risk of imprisonment for unpaid fines, which further isolate women, limit their independence and reduce their safety.

## Implementing the recommendations of the Royal Commission

The Victorian Government has committed to implementing all of the recommendations of the Royal Commission into Family Violence.<sup>7</sup>

A whole-of-government approach has been adopted in relation to the implementation of most of the recommendations. However, we are concerned that the Proposed Scheme appears to have been developed in isolation from the approach of the rest of government and without consultation with the State-Wide Family Violence Committee, family violence experts, the legal assistance and financial counselling sectors and other key stakeholders.

The development of any scheme to overcome the impact of family violence-related infringements must give effect to the entirety of the Royal Commission's recommendations, rather than focus on single recommendations in isolation.

Although the Discussion Paper recognises related Royal Commission recommendations and reforms, the Proposed Scheme, which focuses on recommendations 112 and 113, will fail to deliver on other Royal Commission recommendations, including by overburdening the Magistrates' Court with referable infringements.<sup>8</sup>

Moreover, the Royal Commission recommendations taken as a whole require government and services to put the safety of victims of family violence first. We are concerned the Proposed Scheme will expose victims of family violence to heightened risks of further violence, including death. This is discussed further below.

## Increased risks of violence to victims and their children created by the Proposed Scheme

A number of aspects of the Proposed Scheme would seriously endanger, rather than protect, vulnerable women caught up in the infringements system and their children. In our view, these proposals fundamentally undermine the safety and effectiveness of the Proposed Scheme and should be abandoned.

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<sup>7</sup> ABC News, Victorian Premier commits to implementing all Domestic Violence Royal Commission recommendations, 30 March 2016, <http://www.abc.net.au/news/2016-03-30/victorian-premier-commits-to-implementing-all/7284746>.

<sup>8</sup> The Proposed Scheme directly contradicts Recommendation 62, which provides that the government should consider "transferring some of the jurisdiction of the Magistrates' Court of Victoria to another forum—for example, fines and traffic infringements; [and] expanding the range of matters that can be determined on the papers—that is, without an in-person hearing".



## Requirement to identify the perpetrator

We strongly recommend that applications to Fines Victoria under the Proposed Scheme should not be required to identify the perpetrator. Instead, Applicants should be required to declare that some or all of the infringements were caused by a person who has committed family violence against the Applicant and it is unsafe to identify that person. Recommendation 112 of the Royal Commission, which this Discussion Paper is responding to, specifically recommends that the Government investigate a scheme that enables a victim to address her infringements without identifying the perpetrator.

Identification of a perpetrator, whether through nomination or an application to the Proposed Scheme which would use the identity of the perpetrator to take some action against him, puts an Applicant at serious risk of retribution. We note the views of family violence experts who have provided letters of support to this submission. In their view, the requirement to identify the perpetrator poses unacceptable levels of risk for victims of family violence.

Ensuring a victim's safety in accessing the scheme must be the central consideration in its design. As identified by the Royal Commission, the current nomination process is unsafe for many victims of family violence due to the very real risks of retaliation and further violence. Unfortunately the Proposed Scheme will simply replicate this flaw and force women to choose between further violence and accepting liability for infringements she did not incur.

Victims of family violence who are too fearful to take action under this scheme will face highly undesirable consequences including wheel clamping or suspension of her registration or driver's licence. As the Royal Commission identifies, "the loss of access to transport may in turn impede a victim's capacity to escape violence and keep her isolated, particularly in outer suburban and regional areas where public transport is limited".<sup>9</sup> This makes the need to design a scheme that is useable and effective for victims all the more critical.

As the following case study demonstrates, under the current system, the requirement to identify the driver of the vehicle causes victims of violence to accept responsibility for offences and then try to navigate their way through a protracted, unwieldy special circumstances process, which leaves them with a finding of guilt on their criminal record.<sup>10</sup>

### **Karen: relying on special circumstances because too afraid to identify the driver**

Karen and Geoff were in an abusive relationship for three years. The relationship was characterised by Geoff regularly and seriously physically assaulting Karen. Geoff also subjected Karen to psychological abuse and was extremely controlling. He isolated Karen from her family and friends and coerced her into a dependence on illicit drugs. He also forced her to secure a loan

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<sup>9</sup> RCFV Report, above n4, Vol IV, p106.

<sup>10</sup> As the Special Circumstances List currently operates, people with special circumstances are required to plead guilty and are then sentenced by the judicial registrar in accordance with the *Sentencing Act 1991* (Vic). The requirement to plead guilty to access the Special Circumstances List means that the most vulnerable people in the infringements system receive a criminal record for their infringement offence, regardless of whether the court records a conviction.

to buy and register a car in her name. Geoff was the regular driver of this car. He incurred many traffic fines in the vehicle, which were all issued to Karen as the registered owner.

Eventually Karen became aware of the fines, but avoided doing anything about them because she was too fearful of Geoff to discuss them. This avoidance was compounded by Karen's mental illness, which included clinical anxiety and depression. By this time, she was also addicted to drugs.

Warrants associated with the non-payment of these fines were issued, empowering the Sheriff to seize Karen's property or arrest her. By this point, Karen owed \$20,000 in fines and had lost her licence as a result of demerit points attached to some of the infringement offences. She had also obtained a family violence intervention order to protect her from Geoff's violence.

Karen approached a CLC in mid-2014. Karen was advised about making an application for revocation on the grounds of exceptional circumstances, arguing that Geoff had incurred the infringements. However, Karen instructed her lawyer to apply for revocation of the enforcement orders on the basis of special circumstances, namely, her drug addiction and mental illness at the time the fines were incurred. Karen was adamant that she would assume full responsibility for all the fines, even though this was likely to be a lengthy process, her criminal record would be affected, and she could not seek to overturn the imposition of demerit points which caused her to lose her driver's licence. Karen said she could not nominate or identify Geoff because she feared that, should the authorities pursue him as a result or should Geoff become aware of her disclosure, he would place her life in jeopardy.

As the Discussion Paper identifies at page 10, the Proposed Scheme is likely to replicate this deterrent effect. The requirement to identify the perpetrator presents an unacceptable level of risk to victims and is likely to result in victims being deterred from accessing the Proposed Scheme and continuing to accept responsibility for offences they did not commit.

For these reasons, the IWG recommends that applications where the name of the perpetrator has been redacted from a Family Violence Safety Notice or Family Violence Intervention Order should be accepted.

## Perpetrator accountability

The IWG recognises that driving infringements and their associated penalties play a role in deterring unsafe driving behaviour. While the Royal Commission recognised that there is "an important issue of transferring liability to the perpetrator, particularly in serious cases of car-related offending",<sup>11</sup> the IWG's strong view is that the Proposed Scheme does not strike the appropriate balance between this issue and the risks to victims of family violence.

The IWG strongly encourages DOJR to properly contemplate and quantify the risks presented by the extremely broad category of 'referrable' infringement offences (i.e. all offences that attract more than two demerit points, which in our view do not constitute "serious cases of car-related offending"). While an accumulation of demerit points by perpetrators is important to

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<sup>11</sup> RCFV Report, above n4, Vol IV, p107.

monitor, it should be unlikely that a perpetrator who is consistently driving erratically will go unapprehended by Victoria Police. As a community, we should not be relying solely on traffic cameras and the wherewithal of victims of family violence to identify drivers who present a risk to public safety.

Importantly, because the Proposed Scheme presents a danger to victims and deters them from using it, perpetrators will continue to be invisible because victims will accept responsibility for the offences, rather than making use of the Proposed Scheme.

The Proposed Scheme's mechanism for holding perpetrators to account for driving offences is overly broad and poorly targeted at the risk it is seeking to manage. This is to the detriment and risk of victims of family violence and fundamentally undermines the effectiveness of the Proposed Scheme.

Any scheme to give effect to transferred liability (even if the perpetrator was not joined to the original proceedings) would require the perpetrator to be informed of the evidence against him, which would include (or it would be readily apparent) that the victim had identified him. Furthermore, it is likely to lead to cases of perpetrators disputing or pleading not guilty to offences or the attribution of demerit points, summoning victims of family violence to court and even cross-examining them.

The Royal Commission findings make it clear that this is highly undesirable and is likely to lead to an exacerbation of family violence. It may also result in the court's processes themselves being used to perpetuate further family violence by controlling, intimidating and harassing victims (e.g. by requesting unnecessary adjournments or cross-examining witnesses). For this reason, we have submitted that victims should not be required to identify the perpetrator at all.

Victims of family violence accessing the Proposed Scheme and being referred to court may not have intervention orders. Even where they do, the safety risks posed by requiring the parties to participate in a proceeding the purpose of which is to transfer demerit points or a suspension period from the victim to the perpetrator are significant. For example, Karen's case discussed above would not be improved by the Proposed Scheme and the risks to her safety would be substantially greater. The \$20,000 of infringements she accumulated would inevitably include 'referrable' offences. While she could apply to Fines Victoria and identify that family violence contributed to the offences, she would be referred to the Magistrates' Court of Victoria and Geoff could be joined as a party.

While it may be the case that Karen's infringements would be dismissed and she could avoid demerit points, her fear and the risk to her safety would not be ameliorated. Rather, they could be significantly exacerbated by a court appearance, meaning it is highly unlikely she would make use of the Proposed Scheme.

In our strong view, the perpetrator accountability measures contemplated by the Discussion Paper must be abandoned to ensure that the scheme is safe for victims. Perpetrators should never be joined to or notified of court proceedings determining referrable infringement offences because of the serious risk of further violence this exposes victims to.

We note that the Discussion Paper does not identify any measures to manage these risks. In our view, these risks cannot be effectively managed.

Penalties, whether non-pecuniary or pecuniary, should never be transferred to perpetrators. Instead, the Department could consider perpetrator accountability and road safety strategies that do not endanger victims.

For example, vehicles which accumulate significant numbers of public safety-related infringements could be monitored. Sheriff's officers or police could target high-risk vehicles and intercept them when driving offences are committed, which would ensure that infringements or criminal charges can be served directly upon the offender rather than the victim of family violence. In addition, technological solutions which address the risk of future unsafe driving in identified vehicles (rather than by identified individuals) should be considered. Existing and emerging technology should be used to identify drivers committing driving offences, including examination of photographs taken by automatic traffic cameras.

### The proposed management of family violence-related infringements (referrable vs non-referrable infringement offences)

In our submission, all family violence-related infringement offences should be dealt with by Fines Victoria (that is, the distinction between referrable and non-referrable infringement offences should be abandoned).

It is highly undesirable to require victims of family violence to attend court proceedings to resolve their infringements, whether or not perpetrators are involved in these proceedings. Victims of family violence will often also be going to court to obtain or vary an intervention order, vary their tenancy agreement or to give evidence in criminal proceedings. Requiring vulnerable and traumatised victims to attend another stressful, time-consuming court hearing is likely to negatively impact on their stress, safety and recovery.

The prospect of being required to attend court is likely to deter many victims from accessing the Proposed Scheme. Victims of family violence should be able to resolve infringements discreetly and with a minimum of additional stress.

We note that the Discussion Paper does not propose a detailed framework for the handling of referrable infringement offences by the Magistrates' Court, or even whether these matters would be heard only within the Specialist Family Violence jurisdiction of the Court. We understand that it is hoped the Court would be empowered to make rehabilitative orders similar to those available in the Special Circumstances List (and mainstream criminal lists). However, we question how such orders could be made where the matter is not before the Court as a criminal charge and the Court is not asked to make a finding of guilt.

If certain infringement offences were to be referred to court, Magistrates should be empowered to cancel pecuniary and non-pecuniary penalties (as distinct from transferring liability for non-pecuniary penalties). Any legislative changes should also require the Court to prioritise the safety of the victim in its decision-making.

## Limited understanding of the risks to victims of family violence

The Proposed Scheme does not address how it will be managed in a way that is safe for victims who apply to it.

It is imperative that DOJR carefully considers how it will communicate with applicants to the scheme, given that a victim's mail and phone may be accessible to the perpetrator of violence. Communication that is capable of informing a perpetrator that a victim is attempting to access the scheme must be avoided because of the serious safety risks this would create. For example, even the fact that infringement correspondence suddenly ceases (after a successful application is made) may also raise perpetrator suspicions and expose the victim to the risk of retaliation.

Equally, a perpetrator accountability scheme will require communication with the perpetrator. Procedural fairness would require that this communication addresses how the perpetrator came to be identified. This will create extremely serious risks of violent retribution against women and children.

The Proposed Scheme seems to assume that victims and perpetrators will not be living together and that the violence has ended. It is well-known that family violence often persists for many years and that it takes a victim on average seven times to leave a violent relationship. Many of the clients assisted by IWG member agencies are still trapped in violent relationships when they attempt to address their infringements.

In the IWG's submission, the Discussion Paper has failed to engage with the complex reality of family violence and the question of how to keep victims who apply to the Proposed Scheme safe. The current proposal is fraught with danger and requires significant additional consideration and consultation.

## Impact of the Proposed Scheme on the limited resources of the Magistrates' Court

We are also concerned about the impact of the scheme on the Magistrates' Courts' capacity to appropriately manage the family violence list as well as this new cohort of family violence-related infringements.

Recommendation 62 requires the Government to consider freeing up Magistrates' Court resources by removing infringements matters from its jurisdiction. Instead the Proposed Scheme increases the Court's responsibility.

We are concerned that any court resources freed up by the introduction of Fines Reform will be eroded by the influx of complex and lengthy matters that the Proposed Scheme will create. As a result, the Court will not have any additional resources to devote to family violence intervention order proceedings, as recommended by Recommendation 62.

The Discussion Paper states at 3.2.2 that the Magistrates' Court can "better support victims". We question this statement, particularly given that it is proposed (at 3.5) that Fines Victoria

staff will make appropriate referrals for victims. Moreover, the Proposed Scheme does not propose that Applicant Support Workers would be available to victims engaging the scheme or that additional resources should be allocated to Applicant Support Workers to enable them to support victims accessing the scheme. In any event, access to an Applicant Support Worker will not be capable of mitigating the danger created by the scheme itself.

Adding a further burden on court services and the Magistracy to support victims will also further undermine the delivery of Recommendation 62.

We support the Proposed Scheme's recognition that specialist staff should assess family violence applications. Staff should be recruited and trained to be highly knowledgeable in family violence (including risk assessments) and understanding the dynamics and impacts of family violence. Training should be provided by experts from the family violence sector.

As discussed above, in our view specialist Fines Victoria staff should assess and determine all applications to the scheme, i.e. they should be empowered to cancel both the infringements and any associated demerit points or suspensions, irrespective of the number of demerit points the offence attracts.<sup>12</sup>

We support the proposal for specialist Fines Victoria staff to be trained to make appropriate referrals. The referral framework should be developed in consultation with family violence experts to ensure it is consistent with the approach to referrals across government and the community sector.

## Other deficiencies in the Proposed Scheme

In addition to presenting an unacceptable risk to the safety of victims and imposing an unmanageable burden on the resources of the Magistrates' Court, the effectiveness of the Proposed Scheme is further limited by:

- Unrealistic evidentiary requirements; and
- The proposal that a victim who has successfully addressed family violence-related infringements twice in the preceding five years will be automatically referred to the Magistrates' Court.

Both aspects of the Proposed Scheme ignore the reality of family violence, including the isolation it imposes and its recurring nature for many victims.

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<sup>12</sup> Note the IWG's proposals below that DUI offences are excluded from the scheme and that non-financial penalties may be imposed by Fines Victoria for driving offences where it can be shown that the Applicant was the driver and the offence attracts three or more demerit points (noting that we also recommend that decision-makers are given discretion in relation to the imposition of demerit points or licence suspensions in cases where family violence is established e.g. excessive speeding when fleeing from family violence).

## Unrealistic evidentiary requirements

The proposed evidentiary requirements at 3.1.1 of the Discussion Paper are excessive and go beyond those recommended by the Royal Commission in Recommendation 112. The proposed evidentiary requirements will have the effect of excluding many, if not most, victims of family violence from access to the scheme. The scheme must recognise that many women experience family violence in isolation (frequently this isolation is caused by the violence); it is inappropriate to exclude those victims who have not engaged with services or police.

The IWG's members frequently see clients who, because of the nature of the family violence they have experienced or their disadvantage, have never accessed assistance from community services. Women experiencing family violence may have endured or fled violence but never disclosed this, or discussed whether to access support services or to apply for an intervention order, until they see a lawyer or financial counsellor in relation to infringements. As the Royal Commission stated, "not all women feel able to report family violence to police, or seek a family violence intervention order".<sup>13</sup>

IWG members also see first-hand that it can be extremely difficult to access low or no cost supporting documents.<sup>14</sup>

We also note that the evidentiary requirements for the Proposed Scheme draw on those from the Migration Act. We note that evidentiary requirements to support an application to the Proposed Scheme should not be as onerous as to apply for a visa, given the lesser significance of the application.

Further, the evidentiary requirements to access the Proposed Scheme are out of step with those required to establish special circumstances. In our submission, a higher evidentiary burden for making an application to the Proposed Scheme is likely to result in victims being forced to rely on the special circumstances regime where they also experienced homelessness, mental illness or substance dependence and are unable to obtain evidence of their family violence from multiple practitioners.

We note that the list of practitioners at 3.1.1 is outdated. For example, the reference to "women's refuge or FV or domestic violence crisis centre" should be replaced with "specialist family violence service", which would encompass services that provide refuge accommodation, counselling, crisis support, safety planning, intake and other services to victims of family violence.

In light of the above, the IWG recommends a flexible evidentiary approach to eligibility, which recognises that people who have experienced family violence have often been disengaged from support services during the period of offending.

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<sup>13</sup> RCFV Report, above n4, Volume IV, p121.

<sup>14</sup> For example, it is not uncommon for medical professionals to require payments of \$300 to \$600 for a medical report to support an infringements revocation application.



We agree with the Royal Commission that evidence to access any family violence-related infringements scheme should require:

- a copy of a family violence safety notice or family violence intervention order; or
- a support letter, report or statutory declaration from any of the practitioners or institutions listed in the Discussion Paper at 3.1.1 (subject to the above comments) or from a financial counsellor; or
- a statutory declaration prepared by the Applicant.

In our submission, Fines Victoria should have discretion to accept other evidence that demonstrates family violence on a case-by-case basis.

To avoid requiring victims of family violence to identify the perpetrator in an application to the scheme, DOJR may also require evidence of the victim's inability to name the perpetrator because of the fear of retribution.

### Treatment of applications to the Proposed Scheme where two or more applications have been granted in the previous five years

The proposal to require all infringements (whether referable or not) to be referred to the Magistrates' Court where the victim has made two previous successful family violence applications in the previous five years is inappropriate. This proposal fails to recognise the pervasiveness of family violence and the risks to women of leaving violent relationships. It also fails to take account of the infringement lifecycle, whereby separate correspondence is sent for each individual infringement, which travel through the system separately.

Our member agencies frequently assist victims of family violence who make internal review or revocation applications in relation to infringements incurred by their violent partners, only to have further infringements received once those applications are on foot, and then further infringements are often received once the matters are resolved.

The proposal to refer this category of infringements to court will penalise and deter the most vulnerable victims – those who are still in violent relationships or who are still the registered operator of vehicles controlled by a violent family member, who cannot control the accrual of further infringements by the perpetrator.

The proposal will also encourage victims issued with infringements to wait long periods before making applications to the scheme, to try to gather up as many infringements as possible. The proposal appears to assume that victims will wait until they have left the violent situation before they apply. In our submission, the scheme should be designed to encourage early and proactive access to the scheme and recognise that family violence is a pervasive phenomenon that may go on for many years. The scheme should assess each application on its merits. Applications should never be referred directly to court simply because the applicant has successfully engaged the scheme in the past.



## Refusals of family violence applications

Under the current infringements system, applications for revocation are frequently made by vulnerable individuals without seeking legal or financial counselling advice. These applications typically fail to provide adequate evidence or identify the basis for the application.

The same problem is likely to impact on the accessibility of the Proposed Scheme for family violence victims. Individuals frequently do not see infringements as a legal issue and proceed to make an application without legal advice and with a poor understanding of the process or the evidence required.

Once Fines Reform comes into effect, applicants seeking enforcement review on the grounds of special circumstances will be able to make a second application where the first application is refused. In the IWG's view, the Proposed Scheme should provide that, where Fines Victoria refuses an application to the scheme, Applicants will be permitted to make second or additional applications supported by additional evidence. Fines Victoria should advise Applicants whose applications are refused of what further evidence is required to meet the evidentiary threshold and should provide contact information for the Victoria Legal Aid Helpline (1300 792 387).

This is particularly important given Applicants will not be able to appeal decisions by Fines Victoria.

## The Proposed Scheme should be capable of dealing with the offence of excessive speeding, but not drunk or drug driving

Based on what we see through our work, the IWG's view is that the offence of excessive speeding should be an offence capable of being dealt with through the scheme. This offence is usually detected by a traffic camera and results in a lengthy suspension of the registered operator's licence, unless an objection or nomination is successful.

For the reasons identified by the Royal Commission, nomination of a violent perpetrator will not be safe for many victims of family violence. The existing timeframe to object to an excessive speeding offence (28 days) means that many victims will not know about the offence (for example, if their mail is being controlled by the violent perpetrator or they have fled their listed address) or may not be in a position to obtain legal advice and submit an objection due to other pressures caused by family violence.

For these reasons, as well as the major impact that suspension of a victim's driver licence has on her capacity to manage or escape family violence, the offence of excessive speeding should be included in the offences eligible for determination through the scheme.

We accept, however, that because of the gravity of the offences and the fact that they would always involve direct interception by police of the offender, the offences of drink and drug driving should not be capable of being resolved by the Proposed Scheme.

## Principles to shape the development of a safe and effective scheme

Informed by the direct experience of assisting victims of family violence to navigate the infringements system, the IWG proposes eight principles that should inform the development of a scheme to manage family violence-related infringements:

1. Victims' safety must be the central principle informing the design of the scheme. The scheme must take account of the complex and pervasive nature of family violence.
2. Implementation of the Proposed Scheme must be delayed to enable further consultation. This is crucial to ensure that the proposed model is safe and effective. We recommend a series of targeted consultations with the family violence, legal assistance and financial counselling sectors, as well as relevant social scientists, to generate and test ideas for a proposed scheme. We recommend that this consultation and consideration be based on evidence as to the nature of family violence and risks to the safety of women and children, as against the problem of road/public safety and measures to deter and manage it.
3. Victims should not be required to identify the perpetrator to access the scheme. This proposal would give effect to the findings and recommendations of the Royal Commission that the safety of women and children should be at the core of government policy, and would avoid deterring victims from accessing the scheme.
4. Fines Victoria should be empowered to review all infringement offences (that is, the distinction between referable and non-referable infringement offences should be abandoned). This will ensure that victims of family violence are not exposed to further stress and risk through additional court proceedings. It will also ensure that the benefits of the Fines Reform amendments for the capacity of the Magistrates' Court are not eroded.
5. The proposed perpetrator liability measures must be abandoned because of the serious safety risks they give rise to for victims and their children.
6. There should not be a limit on the number of applications that can be made to the scheme. Rather, each application should be considered on its merits by staff who understand the pervasiveness of family violence and the barriers to leaving violent relationships.
7. The suggestion that infringement offences could be dealt with at Family Violence Support and Safety Hubs would require proper resourcing of legal services and legal education within these Hubs and may be beyond the scope of what the Hubs can provide.
8. A scheme that impacts the resources of Victoria Police, the Magistrates' Courts, the legal assistance sector, the financial counselling sector, the family violence sector and other parts of the community sector must be appropriately funded.

## A safe and effective scheme to manage family violence-related infringements

Below, the IWG has proposed an alternative scheme which builds on the foundations of the Proposed Scheme and addresses the deficiencies discussed throughout this submission.

We agree that:

- A stand-alone scheme to manage family violence-related infringements should be introduced;
- The scheme should be capable of determining infringements incurred by the victim in connection with her experience of family violence, as well as infringements incurred by the perpetrator of violence in the victim's name;
- The scheme should be administered by trained, specialist staff within Fines Victoria; and
- The nexus between the infringement and the experience of family violence should be defined as 'contributed to' rather than 'resulted in'.

Building on these foundations, we propose a scheme with the following features:

### ***Applications and evidentiary requirements***

1. Applications to the scheme should not require the perpetrator of violence to be identified. Rather, an application should require an applicant to declare that the infringements were incurred in a context of family violence.
2. Applicants are required to provide the following evidence to establish that family violence contributed to the fines:
  - a copy of a family violence safety notice or family violence intervention order; or
  - a support letter, report or statutory declaration from any of the practitioners or institutions listed in the Discussion Paper at 3.1.1 (subject to the above comments) or from a financial counsellor; or
  - a statutory declaration prepared by the Applicant; or
  - other evidence that demonstrates family violence on a case-by-case basis.
3. In addition, applications in respect of infringements that attract three or more demerit points should require the Applicant to complete a statutory declaration stating which offences she committed, and that it is unsafe to nominate the person who committed the other offences because of family violence. Given that in many cases a person will present with dozens if not hundreds of offences over a number of years, a streamlined cost-free process for obtaining traffic camera photographs connected with the offences prior to submitting an application must be introduced to assist Applicants to determine who committed the offences.

4. Where the application does not contain sufficient evidence, Fines Victoria staff should communicate with Applicants to advise what further information would satisfy them and allow a three month stay to enable additional evidence to be filed, prior to refusing the application. This would align with the Infringements Court's current approach to evidence in respect of special circumstances applications.

### ***Fines Victoria powers***

5. Fines Victoria should be empowered to determine all family violence-related infringements, irrespective of the number of demerit points attached to the infringement offence. Where offences attract two or more demerit points and are too serious for a VPS3 to determine, the matters could be referred to more senior staff within the specialist team at Fines Victoria for determination. Having Magistrates or Judicial Registrars make these decisions would be a poor use of their time and would counteract the Royal Commission recommendations to alleviate the pressure on the Magistrates' Courts.
6. All infringement offences attracting two or fewer demerit points should be withdrawn where a nexus with family violence is established (irrespective of whether or not the Applicant or another person committed the offence).
7. Further consideration should be given to how to manage the interaction of the family violence scheme and the special circumstances regime. There will be many cases where victims present with many dozens of infringements, with some having been committed in connection with family violence and others in connection with substance dependence, mental illness and/or homelessness. Victims will be required to engage with both regimes. Resolution of the infringements will be complex and time-consuming thus prolonging the victim's trauma and delaying healing. This should be avoided.

### ***Non-financial penalties (demerit points and licence suspensions)***

8. For offences that attract three or more demerit points that were committed by the Applicant, legislative amendments should be considered that would enable demerit points and/or suspensions to be imposed in the absence of financial penalties or findings of guilt. That is, where an Applicant has committed an offence attracting three or more demerit points, Fines Victoria could impose demerit points where appropriate while cancelling the financial component of the fines.
9. Where an Applicant is unable to determine who committed offences attracting three or more demerit points and the evidence available to determine the identity of the driver is unclear, those matters should be determined as if the offences were not committed by the Applicant.
10. Legislative amendments should also be considered to enable limited discretion to be exercised by decision-makers in relation to the imposition of demerit points in cases where family violence is established. This would enable Fines Victoria to impose, for

example, something less than a licence suspension where an Applicant committed an excessive speeding offence but was fleeing from family violence at the time. It would also enable a Magistrate, upon hearing a drink or drug driving charge following either the laying of charges or an offender's objection to the imposition of an automatic conviction, to decide whether it is appropriate to suspend a victim's licence.

We are aware of many circumstances where the imposition of demerit points is unjust given the family violence context, for example where a victim had to flee family violence by car after having been drinking or consuming drugs particularly where no public transport options were available, or where a victim was telephoning police to report a serious or ongoing incident of family violence while driving. A legislative test could be established to guide this process, for example: where (i) the offender establishes on the balance of probabilities that the behaviour constituting the offence was necessary or unavoidable because of family violence, and (ii) the impact on the offender's licence would be unjust in all the circumstances, then a lesser demerit point penalty could be imposed.

### ***Processes and administration***

11. Where an application to the scheme is refused, Applicants should be permitted to make second or additional applications supported by additional evidence. Fines Victoria should advise applicants whose applications are refused of what further evidence is required to meet the evidentiary threshold and should provide contact information for the Victoria Legal Aid Helpline (1300 792 387).
12. Careful consideration must be given to communication with Applicants to the scheme, because of the serious risks of violence Applicants would face when perpetrators become aware of their applications. Application forms could ask whether it is safe to make contact by telephone, email or mail. Applicants should be given the option of appointing an agent to receive correspondence on her behalf. The findings of consultation with family violence experts, including perpetrator experts such as No to Violence, must shape the communication strategy.

### ***Perpetrator accountability and road safety measures***

13. Public and road safety measures must be designed to operate independently of identification or other obligations on victims. We suggest that vehicles which accumulate significant numbers of public safety-related infringements could be monitored and intercepted when driving offences are committed to ensure that infringements or criminal charges can be served directly upon the offender rather than the victim of family violence.
14. In addition, technological solutions which address the risk of future unsafe driving in identified vehicles (rather than by identified individuals) should be considered.
15. Existing and emerging technology should be used to attempt to identify drivers committing driving offences, including by examining photographs taken by automatic

traffic cameras and using facial recognition technology prior to the issuing of infringements to the registered operator.

In the IWG's view, this alternative model overcomes many of the difficulties arising out of the Proposed Scheme, and strikes an appropriate balance between keeping victims of family violence safe and deterring unsafe use of our roads.

Nevertheless, we urge the DOJR to commit to delaying its decision around the content of a final scheme and its implementation until comprehensive, targeted and structured consultations are undertaken with relevant experts.

## Annexure 1 – List of IWG member organisations

- Bendigo Community Health Services
- Brimbank Melton Community Legal Centre
- Carlton Fitzroy Financial Counselling Service
- Casey Cardinia Legal Service
- Diversitat
- Eastern Community Legal Centre
- Federation of Community Legal Centres
- Financial & Consumer Rights Council
- Fitzroy Legal Service
- Flemington and Kensington Community Legal Centre
- FMC Mediation & Counselling Vic. (Financial Counselling & Capability Program)
- Good Shepherd Youth & Family Service
- Hume Riverina Community Legal Service
- Inner Melbourne Community Legal
- Justice Connect Homeless Law
- Lentara UnitingCare
- Loddon Campaspe Community Legal Centre
- Mental Health Legal Centre
- Monash University
- Moonee Valley Legal Service
- Nankivell Taylor Lawyers
- Odyssey House
- Peninsula Community Legal Centre
- Port Phillip Community Group
- ReGen UnitingCare
- SouthPort Community Legal Service
- Springvale Monash Legal Service
- St Kilda Legal Service
- Upper Murray Family Care
- Victoria Legal Aid
- Victorian Aboriginal Legal Service
- West Heidelberg Community Legal Service at Banyule Community Health
- Whittlesea Community Legal Service
- Women's Legal Service Victoria
- WEstjustice (Western Community Legal Centre)
- Youthlaw