MAKING VIOLENCE AGAINST WOMEN (IN)VISIBLE? RESTRICTIONS ON MEDIA REPORTING OF INTERVENTION ORDERS

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Journalists are often criticised for their reporting of violence against women ('VAW'). Media coverage has been described as lacking in context, thus presenting VAW as individual incidents rather than as a social problem, as being over-reliant on police as sources, and generally distorting the reality of that violence. However, much of this criticism ignores the legal restrictions placed on the media. This article focuses on one such restriction, that contained in family violence intervention order legislation. It explores whether the reporting of intervention orders should be subject to any restrictions, especially in the context of reporting on intimate partner homicides ('IPHs'). We conclude that there are good reasons to provide for restrictions on reporting, provided the subject of the order is able to give consent to publication of the information, but that the removal of the restriction in the context of IPHs would make a small, but important, contribution to increasing public understanding of such homicides and VAW.

I INTRODUCTION

In this article we examine the statutory restrictions on reporting intervention order proceedings in Victoria. The restrictions are seen by journalists as overly restrictive and sometimes unclear, perhaps leading to over-cautious reporting practices when an intervention order is involved.[1] If the restriction is leading to the under-reporting of intervention orders, then the public is being deprived of

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1 Georgina Sutherland, Margaret Simons and Annie Blatchford, 'News Media and the Primary Prevention of Violence against Women and Their Children: Emerging Evidence, Insights and Lessons' (Evidence Paper, Our Watch, June 2017) 23; Interview with David Weisbrot, Australian Press Council Chair (Annie Blatchford, Phone, 16 November 2016).

relevant information on the incidence of intimate partner violence ('IPV'). While the media is often criticised for shortcomings in its coverage of violence against women ('VAW'), it is important to recognise the role of legal restrictions and processes in contributing to these limitations. These include the limited amount of information made available by police in the early stages of an investigation, the inability to identify a suspect until they are charged and arrested by police followed by strict legal restrictions such as sub judice contempt which restricts what can be reported once legal proceedings are on foot, and then the rules of evidence which filter and restrict the raw material available to journalists to report. Many of these restrictions are beyond the scope of this article; our focus is on the specific restrictions in intervention order legislation and particularly the Victorian legislation.[2]

A *Why the Reporting of Violence against Women Matters*

The eradication of IPV has become a key strategic goal of governments and numerous NGOs around the world,[3] and features, in the Australian context, as the subject of action plans and a series of government-funded initiatives.[4] Although not all victims of IPV are women, they are overwhelmingly the victims, as is recognised in the preamble to the *Family Violence Protection Act 2008* (Vic) ('*Family Violence Protection Act*') itself.[5] VicHealth established that IPV is the most common cause of death and disability in women between 15 and 44 years of age.[6]

How the media reports VAW is a significant concern if the levels of such violence are to be abated. International and Australian research has repeatedly identified community attitudes, particularly attitudes to gender roles, as associated with

2 The Victorian legislation is most similar to the South Australian legislation: *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 33 ('*Intervention Orders Act*').

3 *Convention on Preventing and Combating Violence against Women and Domestic Violence*, opened for signature 11 May 2011, CETS No 210 (entered into force 1 August 2014); *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN Doc A/RES/48/104 (23 February 1994); International Criminal Court, 'Policy Paper on Sexual and Gender-Based Crimes' (Paper, June 2014) <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

4 Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children* (Report, February 2011) <https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>.

5 After general statements condemning family violence, the *Family Violence Protection Act 2008* (Vic) ('*Family Violence Protection Act*') preamble states:

> In enacting this Act, the Parliament also recognises the following features of family violence— (a) that while anyone can be a victim or perpetrator of family violence, family violence is predominantly committed by men against women, children and other vulnerable persons.

6 VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence* (Summary of Findings, June 2004) 10 <https://www.vichealth.vic.gov.au/media-and-resources/publications/the-health-costs-of-violence>.

the prevalence and prevention of VAW.[7] While research into precisely how media reports might be influential is limited, it is suggested that media reports influence those who consume them, interacting with audience gender and prior understanding to affect knowledge about VAW, emotional responses and attributions of responsibility, including the likelihood of engaging in victim blaming, acceptance of rape myths and attitudes to perpetrators.[8]

Empirical work on Australian media representations of VAW indicates a failure to represent the reality of VAW and a tendency to de-contextualise it.[9] The research has noted, in particular, the preponderance of events-based reporting, describing the who, what, where and when of the violence. This is at the expense of more thematic reporting, which might include analysis of the violence, or contextualising it with data and thereby representing VAW as a social problem and not just an individual problem. [10]

This 'episodic' framing is particularly prominent in the media's reporting of court and police action, which forms a large proportion of the media's reporting of VAW.[11] This is hardly surprising. The nature of IPV is that it usually takes place in private and domestic settings. The media becomes involved when the police act, with law enforcement personnel being key sources.[12] Whereas many instances of IPV are never the subject of media reports, homicides almost always are. For this reason, the reporting of intimate partner homicide ('IPH') is

7 See, eg, Kim Webster et al, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research Report, March 2018); Michael Flood and Bob Pease, 'The Factors Influencing Community Attitudes in Relation to Violence against Women: A Critical Review of the Literature' (Research Paper No 3, VicHealth, 2006); Mary Ellsberg et al, 'Intimate Partner Violence and Women's Physical and Mental Health in the WHO Multi-Country Study on Women's Health and Domestic Violence: An Observational Study' (2008) 371(9619) *Lancet* 1165; Lori L Heise, 'Violence against Women: An Integrated, Ecological Framework' (1998) 4(3) *Violence Against Women* 262; Gwendolyn L Gerber, 'Gender Stereotypes and the Problem of Marital Violence' in Leonore Loeb Adler and Florence L Denmark (eds), *Violence and the Prevention of Violence* (Greenwood Publishing Group, 1995) 145.

8 Cathy Ferrand Bullock and Jason Cubert, 'Coverage of Domestic Violence Fatalaties by Newspapers in Washington State' (2002) 17(5) *Journal of Interpersonal Violence* 475; Rae Taylor, 'Slain and Slandered: A Content Analysis of the Portrayal of Femicide in Crime News' (2009) 13(1) *Homicide Studies* 21; Kellie E Palazzolo and Anthony J Roberto, 'Media Representations of Intimate Partner Violence and Punishment Preferences: Exploring the Role of Attributions and Emotions' (2011) 39(1) *Journal of Applied Communication Research* 1.

9 See, eg, Jenny Morgan and Violeta Politoff, VicHealth, *Victorian Print Media Coverage of Violence against Women: A Longitudinal Study* (Technical Report, 2012); Georgina Sutherland et al, *Media Representations of Violence against Women and Their Children: Final Report* (ANROWS Research Report No 03/2016, 6 June 2016) <http://anrows.org.au/publications/horizons/media-representations> ('*Media Representations: Final Report*').

10 Morgan and Politoff (n 9) 15; Kellie E Carlyle, Michael D Slater and Jennifer L Chakroff, 'Newspaper Coverage of Intimate Partner Violence: Skewing Representations of Risk' (2008) 58(1) *Journal of Communication* 168, 173; Sutherland et al, *Media Representations: Final Report* (n 9) 15; Georgina Sutherland et al, 'Media Representations of Violence against Women and Their Children' (State of Knowledge Paper No 15/2015, ANROWS, November 2015) 12 <http://anrows.org.au/publications/horizons/media-representations>.

11 'Among incident-based news reports, one quarter (28.4%, 77 [out of 444]) were identified by coders as being coverage of a court case or legal proceedings': Sutherland et al, *Media Representations: Final Report* (n 9) 15.

12 Margaret Simons and Jenny Morgan, 'Changing Media Coverage of Violence against Women: Changing Sourcing Practices?' (2017) 19(8) *Journalism Studies* 1202, 1204–6.

particularly important if the media is to play a role in informing the community about the nature of domestic violence and IPV.

We also know that, all too often, an IPH, where the victim was the current or former partner of the perpetrator, is preceded by a history of violence.[13] In many cases, the homicide occurs even after a victim has taken steps to protect herself and her family by taking out a family violence intervention order.[14] News reporting has the potential to make visible the frequent patterns of prior violence and systemic failings of legal interventions and thus point to the broader social context of VAW.

Unfortunately, however, most news coverage of these cases is individualised and 'episodic', in that the story is confined to the facts of the incident making the murder appear isolated and random.[15] In addition, it has been found that perpetrators are frequently invisible in media reports.[16] As this article will demonstrate, the publication restriction on reporting intervention order proceedings may in fact be contributing to these episodic accounts of VAW.

II WHAT ARE FAMILY VIOLENCE INTERVENTION ORDERS?

A family violence intervention order is a civil order which is directed to providing safety for the protected person(s) and their property and can place a range of conditions on the respondent. Examples of such conditions include a prohibition on the respondent contacting the protected person except to arrange contact with the children[17] or cancelling or suspending the respondent's firearm license.[18]

The orders are made by a Magistrate under the *Family Violence Protection Act*. They are a matter between the parties[19] meaning that the issuing of an order does

13 Australian Domestic and Family Violence Death Review Network, *Data Report 2018* (Report, May 2018) 26–8 <http://www.coroners.justice.nsw.gov.au/Documents/ADFVDRN_Data_Report_2018%20(2).pdf> ('*Data Report*'); Tracy Cussen and Willow Bryant, 'Domestic/Family Homicide in Australia' (Research in Practice No 38, Australian Institute of Criminology, 5 May 2015) 6; Alison Wallace, *Homicide: The Social Reality* (New South Wales Bureau of Crime Statistics and Research, 1986) 110; Mandy McKenzie et al, 'Out of Character? Legal Responses to Intimate Partner Homicides by Men in Victoria 2005–2014' (Discussion Paper No 10, Domestic Violence Resource Centre Victoria, 2016) 32 <http://www.dvrcv.org.au/knowledge-centre/our-publications/discussion-papers/out-character>.

14 Women's Coalition Against Family Violence, *Blood on Whose Hands? The Killing of Women and Children in Domestic Homicides* (Federation Press, 1994).

15 Carlyle, Slater and Chakroff (n 10) 177–8; Morgan and Politoff (n 9) 15; Sutherland et al, *Media Representations: Final Report* (n 9) 15; Kellie E Carlyle et al, 'News Coverage of Intimate Partner Violence: Impact on Prosocial Responses' (2014) 17(4) *Media Psychology* 451, 454.

16 Sutherland et al, *Media Representations: Final Report* (n 9) 54; Erin Hawley, Katrina Clifford and Claire Konkes, 'The "Rosie Batty Effect" and the Framing of Family Violence in Australian News Media' (2018) 19(15) *Journalism Studies* 2304.

17 *Family Violence Protection Act* (n 5) s 81.

18 Ibid s 95. See also 'Family Violence Intervention Orders (FVIO)', *Magistrates' Court of Victoria* (Web Page, 14 October 2020) <https://mcv.vic.gov.au/family-matters/family-violence-intervention-orders-fvio> ('FVIO').

19 *Family Violence Protection Act* (n 5) s 45.

not result in the respondent having a criminal record or conviction.[20] Police can however apply for an intervention order if they believe a person or their children are at risk of family violence.[21] A breach of a valid order is a criminal offence[22] with penalties being applied if the respondent is found guilty or pleads guilty in court.[23] Intervention orders are also known as restraining orders or apprehended violence orders in other jurisdictions in Australia.[24]

The effectiveness of intervention orders is a contentious issue. Although for many women violence decreases after seeking a protection order, a significant number of women are still subjected to abuse.[25] A review of research on victims' experiences with protection orders indicated that they view the police and court responses to applications for orders and breaches of the orders as inconsistent and that the services they came into contact with demonstrated poor understandings of the dynamics of family violence and overall the experience could be re-traumatising.[26] Further, the legal intervention has earned itself a reputation as being 'just a piece of paper'.[27] The Victorian Royal Commission into Family Violence found intervention order breaches increased by 140% from July 2009 to June 2014 and that figure does not include the many breaches that go unreported.[28]

III THE PUBLICATION RESTRICTIONS IN THE *FAMILY VIOLENCE PROTECTION ACT*

Section 166 of the *Family Violence Protection Act* stipulates that there is to be no publication of information that may lead to the identification of any person involved in intervention order proceedings except where consent to publication is given by the adult victim[29] or where a court reasonably considers that publication

20 Ibid s 123; FVIO (n 18).

21 *Family Violence Protection Act* (n 5) s 45.

22 Ibid s 123.

23 Annabel Taylor et al, 'Domestic and Family Violence Protection Orders in Australia: An Investigation of Information Sharing and Enforcement' (State of Knowledge Paper No 16/2015, ANROWS, December 2015) 8 <https://www.anrows.org.au/publication/domestic-and-family-violence-protection-orders-in-australia-an-investigation-of-information-sharing-and-enforcement-state-of-knowledge-paper-sok/>.

24 See, eg, *Restraining Orders Act 1997* (WA); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

25 Taylor et al (n 23) 2, citing Matthew J Carlson, Susan D Harris and George W Holden, 'Protective Orders and Domestic Violence: Risk Factors for Re-Abuse' (1999) 14(2) *Journal of Family Violence* 205, 206–7, 220. See also Sandra J Egger and Julie Stubbs, *The Effectiveness of Protection Orders in Australian Jurisdictions* (Australian Government Public Service, 1993).

26 Taylor et al (n 23) 24–8. See also Heather Douglas and Tanja Stark, *Stories from Survivors: Domestic Violence and Criminal Justice Interventions* (Report, 2010).

27 Matt Johnston and Elissa Doherty, 'New Laws to Target Thugs Breaching Family Violence Intervention Orders', *Herald Sun* (online, 1 April 2016) <http://www.heraldsun.com.au/news/new-laws-to-target-thugs-breaching-family-violence-intervention-orders/news-story/4fa3c35d088d78c3fe89e985745de113>.

28 *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 3, 21 ('*Royal Commission into Family Violence*').

29 *Family Violence Protection Act* (n 5) s 169B. This section provides that in certain circumstances a victim can consent to information of an intervention order being published. This provision is discussed further below.

is in the public interest.[30]

Section 166(2) refers to particulars likely to lead to the identification of a person involved which are then listed in s 168 including:

> (a) the person's name, title, pseudonym or alias;
>
> (b) the address of any premises at which the person lives or works, or the locality in which the premises are situated;
>
> (c) the address of a school attended by the person or the locality in which the school is situated;
>
> (d) the physical description or the style of dress of the person;
>
> (e) any employment or occupation engaged in, profession practised or calling pursued by, the person or any official or honorary position held by the person;
>
> (f) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;
>
> (g) the recreational interests or the political, philosophical or religious beliefs or interests of the person …

A default statutory restriction on the publication of intervention order proceedings also exists in the relevant Australian Capital Territory[31] and South Australian legislation.[32] In Queensland, a closed court is required for such proceedings unless the court determines otherwise.[33] Other jurisdictions however vary in the extent of their restrictions, some of which give the discretion to the court to impose a restriction or the restriction is limited to the identities of children unless otherwise ordered.[34] The fact that an automatic ban on the publication of identifying information does not exist in all jurisdictions gives rise to questions around its purpose and necessity. The restrictions and exceptions for each jurisdiction are summarised in Appendix A.

It is important to remember in this context the commitment of the common law to open justice. That is, that court proceedings are open to the public and everything that occurs in open court can be reported.[35] This is justified on a variety of grounds:

30 Ibid s 169. This provision is also discussed further below.

31 *Family Violence Act 2016* (ACT) ss 149–50.

32 *Intervention Orders Act* (n 2) s 33.

33 *Domestic and Family Violence Protection Act 2012* (Qld) ss 158–9.

34 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45.

35 *Scott v Scott* [1913] AC 417.

for example, it enhances public confidence in the courts that they are operating fairly;[36] or, relatedly, that it 'keep[s] the judges accountable for the way in which they exercise their power'.[37] However, there have always been exceptions, even at common law, to this principle. As described by the Tasmanian Law Reform Institute, open justice requires that court proceedings occur 'in open court unless the subject matter of the action requires that the court be closed or there is a risk that parties may be discouraged from seeking justice in the absence of restrictions on the publication of identifying details relating to the proceedings'.[38]

The publication restriction expressed in s 166 is such an example of a statutory incursion into open justice. The rationale of the restriction in s 166 can be found in the then Attorney-General Robert Hulls' second reading speech in introducing the Family Violence Protection Bill 2008 (Vic) and the consideration of its compatibility with Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*').[39] It was stated that the overall purpose of the Bill was to 'maximise safety for persons who have experienced family violence', reduce family violence and promote accountability of perpetrators.[40] With regards to s 166 and its compatibility with the *Charter*, Attorney-General Hulls stated the Bill's imposition on freedom of expression was justified as consistent with the *Charter* because it safeguarded the privacy interests of the parties.[41] The right to privacy is in s 13 of the *Charter* and is defined as a person's right not to have their 'privacy, family, home or correspondence unlawfully or arbitrarily interfered with' and 'not to have [their] reputation unlawfully attacked'. The Attorney-General described the right to privacy in the following way:

> Privacy encapsulates concepts of personal autonomy and human dignity. It encompasses the idea that individuals should have an area of autonomous development, interaction and liberty — a 'private sphere' free from government intervention and from excessive unsolicited intervention by other individuals. Privacy comprises bodily, territorial, communications and information privacy.[42]

36 See *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J): '[T]he public administration of justice tends to maintain confidence in the integrity and independence of the courts'.

37 Sharon Rodrick, 'Open Justice, Privacy and Suppressing Identity in Legal Proceedings: "What's in a Name?" and Would Anonymity "Smell as Sweet"?' in Normann Witzleb et al (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press, 2014) 371, 374, citing *Russell v Russell* (1976) 134 CLR 495, 520. In this judgment, Gibbs J provided: 'This rule [that cases be heard in open court] has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected'.

38 Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes* (Final Report No 19, November 2013) 4. See also Sharon Rodrick, 'Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public' (2014) 19(1) *Deakin Law Review* 123 ('Achieving the Aims of Open Justice').

39 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2008, 2637 (Robert Hulls, Attorney-General).

40 Ibid.

41 Ibid 2642.

42 Ibid 2641.

Here, we are concerned with information privacy, and the right to autonomy — the right to make decisions about the information available to the world about us.

The purpose of the *Family Violence Protection Act* and restrictions on publication were further elaborated on by Bell J in the 2013 Supreme Court of Victoria case *AA v BB*,[43] who turns more to the needs of the administration of justice rather than privacy per se. In that matter an appeal was brought, under s 272(1) of the *Criminal Procedure Act 2009* (Vic), against convictions arising from the appellant's breaches of a family violence intervention order. Aside from the question of whether the convictions should be set aside, Bell J also had to consider whether a non-publication order should be granted restricting reporting of all or part of the proceedings before him. Both the 'respondent and the protected person sought orders for complete suppression of the proceeding, including the judgment'.[44] It is within this context that s 166 of the Act was closely analysed. Bell J stated it was likely that technically s 166 did not apply to the appeal his Honour was dealing with as the provision only operated to restrict publication about any proceedings 'under this Act' or an order made 'under this Act' (the *Family Violence Protection Act*), and here the appeal was brought under the *Criminal Procedure Act 2009* (Vic).[45] Thus it may well have been the case that the restrictions in s 166 did not apply. However, Bell J said it was unnecessary to decide this. Bell J found that he had the power to impose a non-publication order under the *Supreme Court Act 1986* (Vic), and that the purposes behind the *Family Violence Protection Act* and in particular s 166 were relevant to the question of whether he should impose a non-publication order in the proceedings before him.[46]

Bell J referred to submissions made by the appellant which discussed the purpose of the restriction in the *Family Violence Protection Act* which was to empower people affected by family violence to seek protection through a simple process and without fear of being traumatised by being publicly identified.[47] Bell J went on to say:

> It was also intended that other persons who may need to be involved in proceedings would not experience the same fear. The non-publication provisions try to remove or minimise this fear so that people needing protection will not be deterred from going to the police or the court and other persons will not be discouraged from participating in a proceeding.[48]

43 *AA v BB* (2013) 296 ALR 353 ('*AA v BB*').

44 Ibid 382 [153].

45 Ibid 384 [162]. We are not convinced that the restriction does not apply to the proceedings before Bell J; however, for our purposes, the analysis of the policy issues by Bell J is what is of relevance.

46 Ibid 384 [163].

47 Ibid 383 [155].

48 Ibid. Bell J also referred to the abovementioned list of particulars in that they provided a guide in determining how the Court might anonymise the judgment or avoid identifying persons involved in the current proceedings.

Bell J's final decision was to grant a partial non-publication order in that the identities or identifying particulars of both the appellant and protected person (who was in fact a candidate for federal election) would be restricted.[49] His Honour said:

> It would defeat the purpose of the statutory privacy protections which were applicable in the proceeding in the Magistrates' Court if those protections were not to be applicable in the appeal proceeding in this court. … People needing protection from family violence should not fear the loss of their privacy in an appeal.[50]

IV FEAR AND STIGMA AS CONSIDERATIONS

Bell J refers to fear as an underlying motivation for the restrictions on press freedom — fear of publicity that might reveal their identity — which would thus be a deterrent on reporting domestic violence.[51] It is worthwhile spelling out this experience of fear. For some victims the first attendance at court to seek an intervention order may be the first time that she has bought the violence into the public realm. This could be stressful and traumatising in itself, despite the fact that the hearing will be held in the absence of the perpetrator in an ex parte hearing. But a victim of domestic violence may also fear antagonising the perpetrator.[52] While the perpetrator will know in the future that an intervention order has been sought, on the return of the order, there is more time to deal with and process that fear. It could also be the case that a perpetrator will be more enraged, and thus there is more to fear, if the perpetrator is identified by name. The threat of publicity could thus deter reporting. As the Ontario Court of Appeal stated in the context of a publication restriction in relation to legal proceedings for sexual assault:

> [I]t has been clearly established that the social value to be protected, namely, the bringing of those who commit such … offences to justice, is of superordinate importance and can merit a prohibition against publication of the victims'

49 Ibid 391 [194].

50 Ibid 390 [188]–[189]. See also *YY v ZZ* [2013] VSC 743. Cavanough J also considered the purpose of s 166 in a judicial review case where a respondent was contesting a family violence intervention order made against him by the County Court on appeal from the Magistrates' Court. Section 166 arose in relation to whether the Supreme Court proceedings should be suppressed. Similarly to Bell J, although the proceedings before his Honour were not considered to be 'under the Act', that is, the *Family Violence Protection Act*, Cavanough J decided it would undermine the purpose of s 166 if the protected person's privacy was neglected in the proceedings before him: at [6]. Cavanough J therefore also decided to anonymise the publication of the court proceedings: at [7].

51 *AA v BB* (n 43) 383 [155].

52 See, eg, Donna Chung and Sarah Wendt, 'Domestic Violence against Women: Policy, Practice and Solutions in the Australian Context' in Andrew Day and Ephrem Fernandez (eds), *Preventing Violence in Australia: Policy, Practice and Solutions* (Federation Press, 2015) 202, 210. See also Jenny Mouzos and Toni Makkai, 'Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)' (Research and Public Policy Series No 56, Australian Institute of Criminology, 2004) 96–107.

> identity or of any information that could disclose it. It is a reasonable limitation on the freedom of the press.[53]

This might, then, justify a publication ban in the intervention order context.

Neither the judgment in *AA v BB* (nor indeed the second reading speech) referred to a second possible reason why the protection of the privacy interests of both alleged victims and perpetrators might be justified, which is the potential stigma which may attach to the status of being a victim (or indeed an alleged perpetrator) of family violence. Is there stigma attached to being identified as a victim of domestic violence? The Australian Law Reform Commission and New South Wales Law Reform Commission suggested that a victim of family violence may be reluctant to disclose 'due to feelings of shame'.[54] Or, as put by one of the women who had participated in the criminal justice system and spoke to Heather Douglas about her experience of women's support service staff: 'They don't judge you, which is really nice, because you always feel judged when you're a domestic violence person, I think'.[55]

The stigma attached to identification as a crime victim has been most frequently considered in relation to sexual assault. For instance, in a *Canadian Charter of Rights and Freedoms* challenge by a Canadian media organisation to a provision that prohibited the publication of rape victims' names, except with the victim's consent, the Women's Legal Education and Assistance Fund (LEAF) argued, in the late 1980s, that 'for a woman to be known as a victim of sexual violence is always stigmatic, frequently humiliating and sometimes dangerous'.[56] The abovementioned Commissions' report suggested a similar argument might well apply to being a victim of domestic violence.[57]

Certainly, there has traditionally been a reluctance to report domestic violence, and arguably one reason for this was the stigma that attached. Family violence was something that was supposed to remain 'private', to be hidden from the

53 *Canadian Newspapers Co Ltd v A-G (Canada)* (1985) 16 DLR (4th) 642, 661.

54 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 832 [18.4] ('*National Legal Response*'). The Commissions went on to suggest other factors contributing to a reluctance to disclose:

> [L]ow self esteem or a sense that he or she, as the victim, is responsible for the violence. A victim may feel that he or she will not be believed. A victim may hope that the violence will stop, or might believe that violence is a normal part of relationships. Because of the family violence, a victim may feel powerless and unable to trust others, or fear further violence if caught disclosing it.

55 H Douglas, 'Battered Women's Experiences of the Criminal Justice System: Decentring the Law' (2012) 20(2) *Feminist Legal Studies* 121, 131.

56 *Canadian Newspapers Co Ltd v A-G (Canada)* [1988] 2 SCR 122 (Factum of the Women's Legal Education and Action Fund (LEAF) et al), cited in Christine Boyle, 'Publication of Identifying Information about Sexual Assault Survivors: *R v Canadian Newspapers Co Ltd*' (1989) 3(2) *Canadian Journal of Women and the Law* 602, 608.

57 *National Legal Response* (n 54) 832 [18.4].

world.[58] Ironically, of course, a large part of the aim of feminist activism on VAW over the past 40 years has been to bring such violence out of the 'privacy' of the home into the public realm.[59] However, that journey may not yet be complete and in some circumstances stigma for being a domestic violence victim (or perpetrator) remains. The facts of *AA v BB* itself illustrate this: the victim in that case sought the protection of her privacy because she was about to stand for election to federal Parliament. Presumably, she thought public presentation as a victim would damage her chances in the eye of the public.

On the other hand, given the high-profile treatment of VAW over the last 40 years, and especially in the last five years, with massively increased media reporting, the Royal Commission into Family Violence,[60] and government and police attention the issue has received, the stigma may well have diminished.[61]

It has been suggested, at least in the context of sexual assault, that the continuing suppression of names of sexual assault survivors has the effect of continuing the notion that stigma attaches to being a victim of sexual assault. As put by Jane Doe, herself a victim of sexual assault:

> We require that women protect themselves by limiting their actions before rape in order to prevent it and then hide themselves after rape to avoid shame, blame, and other retribution. We have organized a good/bad morality and racially based understanding of sexually assaulted women as defiled and suspect, without agency, choice, or activity of their own, so much so that their identities must be hidden, their names lost.[62]

A similar argument could, of course, be made here: persisting with the suppression of the identity of domestic violence survivors continues the privatisation of such

58 See Jennifer Koshan, 'Sounds of Silence: The Public/Private Dichotomy, Violence and Aboriginal Women' in Susan B Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, 1997) 87, 90. See also Women's Policy Co-ordination Unit, 'Criminal Assault in the Home: Social and Legal Responses to Domestic Violence' (Discussion Paper, Department of Premier and Cabinet (Vic), 1985).

59 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) 10–23.

60 The particular influence of the Victorian Royal Commission into Family Violence recommendations on information sharing is considered below.

61 See Jacqui Theobald, Suellen Murray and Judith Smart, *From the Margins to the Mainstream: The Domestic Violence Services Movement in Victoria, Australia, 1974–2016* (Melbourne University Publishing, 2017).

62 Jane Doe, 'What's in a Name? Who Benefits from the Publication Ban in Sexual Assault Trials?' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 265, 281. While advocating for the ability of sexual assault complainants to be able to publicly tell their stories, Nina Funnell from End Rape on Campus Australia suggested the following reasons for why sexual assault survivors might want to identify themselves: 'Firstly, they might want to break down the stigma and shame around the issue itself … They might want to highlight the problems of victim blaming, they might want to push for law reform, they might want to advocate for better sex education, particularly consent education', quoted in Ellen Coulter, 'Tasmanian Sex Crime Survivors Seek Right to Be Publicly Identified', *Australian Broadcasting Corporation* (online, 8 May 2019) <https://www.abc.net.au/news/2019-05-08/sex-crime-survivors-seek-right-to-be-publicly-identified/11089016>.

harms that feminists have fought so hard to remove. However, a complete removal of the privacy protection may well have the effect of sacrificing the interests of the individual complainant, either because of her extreme fear of the perpetrator, or because of her particular circumstances, as we saw in *AA v BB*.

On the other hand, we know that intervention orders are frequently breached and regarded as 'just a piece of paper'.[63] If intervention orders carried with them the risk of the perpetrator's behaviour being publicly exposed, might that not help by showing some real world consequences? The role of media publication in deterrence has long been recognised as part of its functions in giving practical effect to open justice.[64]

Another consideration is the reality that not all intervention order proceedings will be of interest to the media. Indeed, in most cases the media will not be interested; one exception might be where the proceedings involve (by accident or design) a public figure. Interestingly, this is a consideration mentioned in Queensland's legislation which requires the court to be closed for domestic violence protection order proceedings *except* when a public figure is involved and closed court might result in inaccurate representations of the proceedings.[65] The other scenario that captures the media's attention is when there is a need to 'backtrack'. That is, tracing the history of domestic violence because of a more serious incident, such as an assault or murder, making the history of an intervention order more relevant. Some of these dilemmas are addressed by the exceptions in the *Family Violence Protection Act*, to which we now turn.

V THE 'EXCEPTIONS' IN THE *FAMILY VIOLENCE PROTECTION ACT*

As has been alluded to, when the *Family Violence Protection Act* was first enacted, it contained, and still contains, a provision allowing a court to give permission for identifying information to be made public. Section 169 provides:

> (1) The court may make an order allowing the publication of a locality, particulars or picture only if—
>
> (a) the court reasonably considers it is in the public interest to allow the publication of the locality, particulars or picture; and

63 Johnston and Doherty (n 27).

64 For a discussion of how the public interests of open justice and deterrence interact in the context of a publication restriction on judicial proceedings involving sex offenders, see Sharon Rodrick, 'Open Justice, the Media and Reporting on Preventive Supervision and Detention Orders Imposed on Serious Sex Offenders in Victoria' (2011) 37(2) *Monash University Law Review* 232, 248. See also Rodrick, 'Achieving the Aims of Open Justice?' (n 38).

65 *Domestic and Family Violence Protection Act 2012* (Qld) s 158(2).

(b) the court reasonably considers it is just to allow the publication in the circumstances.

Interestingly, the legislative example included under these subsections provides that 'the court may consider it in the public interest and just to allow a protected person to publicise the person's case to raise awareness of family violence'. That is, the legislation explicitly recognises one of the very important countervailing cultural values to publication restrictions, the need to increase public knowledge of domestic violence.

As a matter of practical reality, however, the mainstream media is rarely going to spend the time and financial resources to seek the court's permission, though some examples of where it has done so are discussed below. Yet the legislation is recognising an important public interest in the dissemination of information about domestic violence, notwithstanding its arguably limited utility in practice. In cases where the media does put in this effort, it is often because the case has become newsworthy, leading to a different striking of the balance between public and private interests, as described below.

Until 2014, seeking the court's permission was the only route to follow if the media wanted to report on an intervention order in a way that identified the parties, even if the victim-survivor consented, or indeed lobbied for public identification.[66] However, in 2013 the Herald Sun commenced its 'Take a Stand' campaign.[67] As part of that campaign, it supported the efforts of a Ms Carla Gagliardi to seek to have a court give permission for the publication of details of a prior intervention order taken out against her former partner, Hugh Marshall.[68] In March 2012 Marshall came back to the property they had shared and hid under the house before attacking Ms Gagliardi, including choking her, damaging windows of the house with a brick and driving his car at Ms Gagliardi's car, damaging it. An intervention order was taken out. Three days later, in obvious breach of the order, Marshall beat her extremely severely with a sledgehammer. He was originally charged with attempted murder, but the Crown pursued charges of intentionally causing serious injury, and he was sentenced to a term of 10 years and six months, with a minimum of eight years.[69] Whilst he was in prison, the Herald Sun, on behalf of Gagliardi, sought a court order allowing publication of the details of the intervention order.[70] As reported by Herald Sun journalist Ellen Whinnett,

66 *Family Violence Protection Amendment Act 2014* (Vic) s 20. See also Explanatory Memorandum, Family Violence Protection Amendment Bill 2014 (Vic) 12.

67 See generally Simons and Morgan (n 12); Jenny Morgan and Margaret Simons, 'Changing Media Coverage of Violence against Women: The Role of Individual Cases and Individual Journalists' (2018) 12(9) *Journalism Practice* 1165.

68 Ellen Whinnett, 'Government Backs Survivor Carla Gagliardi's Fight to Name and Shame Thugs', *Herald Sun* (online, 31 August 2013) <https://www.heraldsun.com.au/news/law-order/government-backs-survivor-carla-gagliardi8217s-fight-to-name-and-shame-thugs/news-story/59ef5b784b9161a28650a64a3ca73aa7>.

69 See *R v Marshall* [2012] VSC 587, [49]. See also ibid.

70 Whinnett (n 68).

Marshall opposed the granting of the order arguing, according to the Herald Sun, that he had 'concerns about his safety' and that 'he was also concerned about the breach of his and his family's privacy, and it would cause problems for him as a mentor to other prisoners'.[71] The Magistrate granted permission for publication, saying Marshall and his family's privacy 'must be sacrificed for the greater good'. It was important there be public debate on family violence and the effectiveness of intervention orders, her Honour said.[72]

As reported by Whinnett, the Attorney-General Robert Clark, in response, announced '[w]e will be examining family violence legislation to ensure its restrictions on publication work to protect victims and children, not those convicted of breaching family violence orders'.[73]

The *Family Violence Protection Act* now provides that a victim can publish, or give consent to someone else publishing, information about a family violence safety notice or intervention order, where there is a context of a family violence related criminal offence. The criminal offence or alleged criminal offence can be one that occurred before or after the intervention order was issued.[74] While the circumstances in which a victim can consent to the publication of identifying information are somewhat restricted, it certainly returns a substantial level of control to the victim, an aim which is being pursued by other jurisdictions.[75] As stated by Minister Edward O'Donohue in the second reading speech:

> The proposed amendments will allow honest and open reporting and discussion about the extent of family violence and its impact on Victorian families, by giving victims the right to tell their stories publicly without having to seek permission from the court. These amendments will also contribute to perpetrator accountability, consistent with the action plan.[76]

A strong commitment to allowing victims to consent to publication of information

71 Ibid.

72 Ibid.

73 Ibid.

74 See *Family Violence Protection Act* (n 5) ss 169A–169B, introduced by the *Family Violence Protection Amendment Act 2014* (Vic) s 20 and amended by the *National Domestic Violence Order Scheme Act 2016* (Vic).

75 Coulter (n 62). See also *Open Courts and Other Acts Amendment Act 2019* (Vic) s 10, which, among other things, allows a victim of sexual assault or domestic violence to seek review of a suppression order that prevents the publication of the victim's identity and with their consent can be revoked. Section 15 also provided for the amendment of the *Judicial Proceedings Reports Act 1958* (Vic) s 4 to include a defence for a sexual assault complainant to give permission for their identity to be published at the conclusion of proceedings and conviction of the accused. The Bill passed Parliament on 2 May 2019. For an overview of the law reform developments concerning *Judicial Proceedings Reports Act 1958* (Vic) s 4(1A), see Natalia Antolak-Saper, 'Silenced by Law: The Right of Sexual Offence Survivors to Self-Identify Needs to Be Heard', *Monash Lens* (Web Page, 1 September 2020) <https://lens.monash.edu/@politics-society/2020/09/01/1381177/silenced-by-law-the-right-of-sexual-offence-survivors-to-self-identify-needs-to-be-heard>. See also Victorian Law Reform Commission, *Contempt of Court* (Report, February 2020).

76 Victoria, *Parliamentary Debates*, Legislative Council, 20 August 2014, 2622 (Edward O'Donohue, Minister for Liquor and Gaming Regulation).

about them goes some way to contributing to the removal of any stigma attached to being a victim of domestic violence and encouraging its widespread reporting. Keeping the default control on the media contained in s 166 may make a small contribution to addressing the fear women may feel on initially reporting VAW to a court seeking an intervention order.

VI INTERVENTION ORDERS PRECEDING INTIMATE PARTNER HOMICIDES

We now move to consider the situation of reporting on intervention orders in the context of IPHs — where the victim is, of course, no longer able to give consent to the publication of information relating to any prior intervention order. IPHs, more than any other crime, frequently arise out of a long history of violence rather than from a random unprovoked attack. In Alison Wallace's groundbreaking study of homicides in New South Wales it was identified that 'marital murder' was rarely an isolated act 'activated by mental illness, jealousy or "passion"; typically it followed a series of violent exchanges and threats that culminated in a lethal attack'.[77] Similarly, Patricia Easteal found in her analysis of IPH data that 'a history of physical violence was characterised as a contributing factor in … over a quarter of the cases' and 'was undoubtedly … a thread in the tapestry in a much higher proportion'.[78] Kenneth Polk also identified the pattern of prior domestic violence present in cases of IPHs, and emphasised that when a woman kills, they too have often been victims of domestic violence. That is, the woman has often been subject to domestic violence perpetrated by the male homicide victim.[79] Tracy Cussen and Willow Bryant found that in one third of domestic/family homicide incidents, there was a recorded history of domestic violence which may have included a protection order between the victim and perpetrator.[80] In 2018, the Australian Domestic and Family Violence Death Review Network reported that in a majority of homicides in which a male killed a female former or current partner,[81] the male had historically used violence against the victim leading up to the homicide.[82] Of those 105 identified homicides, 80 males had previously used physical violence against the victim, a majority had used emotional and psychological abuse against their partner (80%) and over half had been socially

77 Wallace (n 13) 116.

78 Patricia Weiser Easteal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) 73.

79 Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (Cambridge University Press, 1994) 146–7. See also Jenny Morgan, 'Who Kills Whom and Why: Looking beyond Legal Categories' (Occasional Paper, Victorian Law Reform Commission, June 2002).

80 Cussen and Bryant (n 13) 6.

81 Occurring between 2010–14 in New South Wales, Victoria, Queensland, South Australia and the Northern Territory: *Data Report* (n 13) 17.

82 Ibid 29.

abusive towards the victim (61%).[83] While all these studies show a high level of prior violence, they are likely to underestimate prior violence as they, of necessity, largely rely on documented evidence of such violence, usually in the form of intervention orders, and of course not all victims of domestic violence pursue an intervention order.

Consistently with this general data, in examining some of the highly publicised domestic homicides to occur in Victoria over the last six years, there is an alarming pattern of women seeking intervention orders against their former or current partners shortly before they are murdered, a pattern we have already seen in the Gagliardi case above, though of course Gagliardi survived the attack.

These homicide cases include the murder of Sargun Ragi in 2012 who had taken out an intervention order against her ex-husband Avjit Singh who went on to repeatedly breach the order by stalking and contacting her and ultimately tracking her down to physically assault her with a knife and set her alight in her home causing her death.[84] Craig McDermott stabbed his ex-partner Fiona Warzywoda to death in public, just hours after she had finalised an intervention order against McDermott and as she was leaving her lawyer's office.[85] Teresa Paulino was another victim who had gone to the lengths of obtaining an intervention order against her former husband who continued to stalk, threaten, harass and ultimately murder her in 2013.[86] In 2016, Abuk Akek was stabbed to death by her former partner Makeny Banek from whom she had separated a month earlier.[87] Banek had threatened and physically assaulted her in 2014 breaching an intervention order Abuk Akek had taken out against him at the time, the same year he had been imprisoned for assaulting another partner.[88] In 2017, Kylie Cay was bashed so severely by her boyfriend Justin Turner that she died four days later. Turner, who pleaded guilty to manslaughter, was subject to an intervention order at the time of her death.[89]

The pattern manifest in these cases not only reflects the prior violence frequently

83 Ibid.

84 *Inquest into the Death of Sargun Ragi* [2015] Coroners Court of Victoria (State Coroner Gray).

85 Wayne Flower, 'Craig McDermott Jailed for at Least 20 Years for Murdering Fiona Warzywoda', *Herald Sun* (online, 17 August 2016) <https://www.heraldsun.com.au/news/law-order/craig-mcdermott-jailed-for-at-least-20-years-for-murdering-fiona-warzywoda/news story/74f9d6e8479d65cf7d1ea2a8adab0628?amp&nk=44060326441c6555060897337866111 8-1607258816>.

86 Emma Younger, 'Melbourne Man Fernando Paulino Found Guilty of Murdering Ex-Wife', *Australian Broadcasting Corporation* (online, 15 June 2017) <https://www.abc.net.au/news/2017-06-15/fernando-paulino-found-guilty-of-murdering-ex-wife/8614854>. See *DPP (Vic) v Paulino (Sentence)* [2017] VSC 794.

87 Adam Cooper, '"I Snapped": Makeny Banek Pleads Guilty to Murdering Ex-Partner Abuk Akek', *The Age* (online, 16 August 2016) <http://www.theage.com.au/victoria/i-snapped-makeny-banek-pleads-guilty-to-murdering-expartner-abuk-akek-20160816-gqtvom.html>.

88 Adam Cooper, 'Punching Wouldn't Kill … So He Used Knife on Ex-Partner', *The Age* (Melbourne, 2 February 2017).

89 Andrew Thomson, 'Justin Turner Jailed for Manslaughter', *The Standard* (online, 26 June 2017) <https://www.standard.net.au/story/4752587/port-fairy-man-jailed-for-12-years-after-partners-death/>.

present in IPHs and the steps taken by the women to protect themselves, but also the systemic failings of intervention orders and the legal system. These failings have been considered in numerous inquiries and reports including the Victorian Law Reform Commission's *Review of Family Violence Laws* (2006),[90] the *Victorian Systemic Review of Family Violence Deaths* (2012),[91] the coronial inquiry into Sargun Ragi's death,[92] the coronial inquiry into Greg Anderson's murder of his son Luke Batty, whose mother Rosie Batty had taken out five family violence intervention orders against him,[93] and most recently the Victorian Royal Commission into Family Violence.[94] Throughout these reports and inquiries it was acknowledged that intervention orders were poorly enforced. A recent review of the literature showed that victims still believed that breaches were either not being taken seriously by police or not being prosecuted in court, or, if prosecuted, perpetrators did not receive adequate sentences.[95]

State Coroner Judge Ian Gray found that in the case of Sargun Ragi, the police response to the individual breaches was weak and inadequate as it failed to see the way in which these breaches, taken together, equated to an escalating and serious risk.[96] This finding reflected the concerns discussed in most other reviews of the effectiveness of intervention orders. It was stated in the Royal Commission report:

> As a consequence, victims remain responsible for managing their own safety — staying ever vigilant to breaches of intervention orders and navigating ongoing threats or contact by perpetrators — even after they have sought protection from the justice system.[97]

For the media, reporting that there was an intervention order in place is a direct and factual way they can reveal the prior violence preceding an IPH and the broader systemic context in which this legal intervention has failed to protect the victim. However, this is hindered by *Family Violence Protection Act* s 166 which

90 Victorian Law Reform Commission, *Review of Family Violence Laws* (Report, March 2006).

91 Coroners Court of Victoria, *Victorian Systemic Review of Family Violence Deaths* (First Report, November 2012).

92 *Inquest into the Death of Sargun Ragi* (n 84).

93 *Inquest into the Death of Luke Geoffrey Batty* [2015] Coroners Court of Victoria (State Coroner Gray).

94 See generally *Royal Commission into Family Violence* (n 28).

95 Taylor et al (n 23) 25–7. According to the Sentencing Advisory Council's report on the sentencing outcomes for the contravention of family violence intervention orders, for repeat intervention order breaches between 2004–07 and 2009–12, there had been an increase in the imposition of custodial sentences as opposed to fines. Imprisonment was the most common sentence (21.7%) in these cases. This change was said to be brought about by the introduction of the *Family Violence Protection Act*, changes within the Victoria Police and an 'increasingly specialised nature of family violence decision-making and service provision in the Magistrates' Court': see Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention* (Monitoring Report, September 2013) 44 [5.7].

96 *Inquest into the Death of Sargun Ragi* (n 84) 21 [86].

97 *Royal Commission into Family Violence: Summary and Recommendations* (Report, March 2016) 10.

prevents the media from immediately reporting this information.[98]

Despite the emphasis on victim privacy as described above, a number of situations have arisen in which the restriction has worked to protect the identity of the perpetrator rather than the victim. While this can occur in relation to non-fatal violence, as we have seen above, the risks of it doing so have been substantially ameliorated with the introduction of the victim consent provisions. The issue remains, however, particularly pertinent to the reporting of IPHs. The media is often criticised for a failure to place an IPH into context, and representing it as, say, a one-off out of character action of a man 'provoked' by his partner[99] (though, of course, the defence of provocation has been abolished in Victoria).

The silence in the reporting around prior violence, which is commonly observed and criticised in situations of IPHs,[100] may be because the media would like to report this contextual information, but are restricted by provisions like s 166. Clearly, where the victim is dead, she cannot give permission. The only option for the media who may want to publish information about the accused's prior violence by way of reporting on an intervention order, is to go to court and seek permission. This is an expensive and time-consuming process.

However, the media does occasionally seek such permission. In 2014 the Herald Sun obtained consent from a Magistrate to report on the existence of an intervention order taken out by the homicide victim Sargun Ragi against her former husband who went on to stalk, contact and eventually murder her. The media outlet wrote about the difficulties this restriction caused in the reporting of VAW:

> It was apparently designed to protect the privacy of the victims. The *Herald Sun* respects that decision.
>
> However, it also means that we are unable to give our readers the full story surrounding some of the most horrific crimes in this state.
>
> It means that in recent years, we have been unable to tell you about a high-profile sportsman jailed for breaching an intervention order taken out by his girlfriend. Or another prominent identity who harassed his former wife mercilessly and breached his intervention orders over and over again — but is now back on the social set with a new girlfriend.
>
> The *Herald Sun* was able to tell you about the intervention order failings in Ms

98 The reporting of intervention orders is further restricted by other legal processes and publication restrictions. For example, in a criminal trial concerning an IPH, the rules of evidence may operate to make material regarding an intervention order inadmissible and therefore publication of such information would constitute sub judice contempt — an indictable common law offence.

99 See, eg, Sutherland et al, *Media Representations: Final Report* (n 9).

100 Ibid; Morgan and Politoff (n 9).

> Ragi's case only by seeking a court order, which was granted mostly because Singh [the perpetrator] was dead.[101]

Herald Sun Executive Editor Alan Howe wrote about how the intervention order in Ragi's case, which was released by the court to the Herald Sun, revealed a long history of violence including rape, beatings, starvation and imprisonment. Howe discussed the previous media commentary around Ragi's case in which it was said she had had an extramarital affair. The information provided by the intervention order however, put this allegation into context, and, according to Howe 'there can be no surprise that she formed a relationship with another man'.[102]

Again in 2014 the Herald Sun went to court to seek permission to publish information about an intervention order taken out by the victim Fiona Warzywoda against her de facto ex-partner Craig McDermott who murdered her not long after the order was finalised. Magistrate Peter Reardon granted the Herald Sun permission to report this information. According to a Herald Sun report the Magistrate said, '[i]n light of recent events … in these circumstances it is in the public interest'.[103]

This is a prime example of a news organisation wanting to include information about an accused person's prior violence as well as the broader context of the relationship, but being prevented by a legal restriction. In the case of the Herald Sun, they could afford to pursue legal action thanks to editorial support and monetary resources. It should also be noted that at the time of Sargun Ragi and Fiona Warzywoda's deaths, the outlet was about to begin or had begun a campaign to end VAW, further bolstering their enthusiasm for being granted permission to report on the intervention orders.

However, media outlets do not always have the interest, time or resources to take these measures to seek a court's permission to report.[104] Even when the victim has died, there is still a tendency for the media to tiptoe around the issue of the intervention order for fear of getting something wrong. Further, there is little advice or guidelines around the reporting of intervention orders making the restriction somewhat ambiguous, particularly given the different variations across Australia. The Australian Press Council, which published guidelines on reporting family violence in 2016, included the following in their one page document dedicated to legal restrictions:

101 'Family Violence Must End', *Opinion*, *Herald Sun* (online, 22 July 2013) <https://www.heraldsun.com.au/news/opinion/family-violence-must-end/news-story/2e80eb81c620cfe87eeebda4ced6c060>.

102 Alan Howe, 'Time to Speak Out for Sargun', *Herald Sun* (Melbourne, 15 October 2012).

103 Australian Associated Press, 'Melbourne Man Accused of Murdering Partner "Had Family Violence Order"', *The Guardian* (online, 17 April 2014) <theguardian.com/world/2014/apr/17/melbourne-man-accused-of-murdering-partner-had-family-violence-order>.

104 See Morgan and Simons (n 67). The authors found that individual journalists and editorial support influenced a media outlet's focus on the issue of VAW.

> Similarly, all Australian jurisdictions regulate reporting about proceedings related to (as they are variously called) Apprehended Violence Orders, Domestic Violence Orders, Interventional Orders, Protection Orders and the like.[105]

Similarly, the Our Watch[106] guidelines *How to Report on Violence against Women and Their Children* stated: 'Be aware that there are certain legal parameters that outline what you can and can't report regarding certain sexual offences, where protection orders have been issued, or where there are children involved.'[107]

However, in both of the above guidelines, further information about publication restrictions on reporting protection orders in different circumstances such as IPHs is not offered.

Interviews with court reporters, conducted for one of the authors' PhD research, indicated diverging views amongst Victorian media outlets. A court reporter from the Herald Sun, on the advice of the outlet's legal team, consistently adhered to the *Family Violence Protection Act* restriction even when a victim had been killed. The reporter stated that the legal advice she has received was that the words 'family violence' or 'intervention order' could not be published, and the best she could do to contextualise the homicide, without breaching the legislative provision, would be to report that there was a 'court order'.[108] Other court reporters from other media outlets however, said they were aware of a restriction related to intervention orders, however in practice when the victim has been murdered, they assumed that the restriction was no longer relevant and the intervention order could be reported. That is, there was no longer a need to protect the privacy of the victim and therefore, there was no need to apply to the court to report on the order as the Herald Sun did in the cases of Sargun Ragi and Fiona Warzywoda. A Channel 7 court reporter stated that when the victim has been murdered, the 'rules change'. She said that when there was an intervention order prior to a murder, it was imperative that that information be included to show what the victim had done to protect herself and encourage a broader public conversation.[109] An ABC journalist stated:

105 Australian Press Council, *Legal Restrictions on Family and Domestic Violence Reporting* (Advisory Guideline, 2 March 2016) <http://www.presscouncil.org.au/uploads/52321/ufiles/Guidelines/Legal_Restrictions_on_Family_and_Domestic_Violence_Reporting.pdf>.

106 Our Watch is an independent, not-for-profit national organisation funded by government, established to raise awareness and engage the community to prevent violence against women and their children. The organisation was established under the *National Plan to Reduce Violence against Women and Their Children 2010–22*. See Department of Social Services (Cth), 'Our Watch', *Women's Safety* (Web Page, 9 August 2019) <https://www.dss.gov.au/women-programs-services-reducing-violence/our-watch>.

107 Our Watch, *How to Report on Violence against Women and Their Children* (Victorian Edition Guidelines, 2019) 4.

108 Interview with Anonymous 9, Court Reporter for the Herald Sun (Annie Blatchford, Phone, 3 September 2019). This approach to the restriction is also reflected in the above discussion about the Herald Sun's applications to the Magistrates' Court in the Fiona Warzywoda and Sargun Ragi cases.

109 Interview with Anonymous 7, Court Reporter for Channel 7 (Annie Blatchford, Phone, 26 November 2018).

> It can sound callous, but a lot of the time once someone has died you almost give up your rights to things like anonymity because you would never identify a victim of sexual assault, but once they [die], if they've been murdered and sexually assaulted in the same attack we often do report that and identify them.[110]

Similarly, we see no reason to support continued restrictions on publication after the victim is dead, and thus no need for media outlets to have to apply to a court for permission to publish the presence, at the time of death or close to it, of the existence of an intervention order.

In our view, there are no relevant privacy interests requiring protection once the victim has been killed. Privacy is traditionally seen as protecting the dignity and autonomy of rights holders. Those who are dead have no autonomy to protect, nor would publicising prior violence interfere with any dignity rights. As put by Paul Roth: 'It is normally accepted that in law, deceased persons have no privacy interests. This is presumably on the basis that the raison d'être for privacy protection no longer exists, since dead people can feel no shame or humiliation.'[111]

However, James Taylor has argued: 'It is common to claim that there *is* a duty to respect the privacy of the dead'.[112] After examining various theories of why the dead might have privacy rights that need protecting, Taylor agreed with Roth that the dead are not harmed or wronged by violations of their privacy but

> this latter claim is compatible with holding that it would be wrong to violate a person's privacy after her death, if such a violation evinced a morally inappropriate undervaluation of the instrumental value of the autonomy of the person whose privacy was thus violated. … [T]he reason why we should be concerned about the privacy of the dead is because the living will (often) be concerned that their privacy be respected after they die.[113]

Such an approach might justify, for example, respecting the privacy of medical records of a person who is dead. It is consistent with the approach recommended by the Australian Law Reform Commission ('ALRC') which was aiming 'to ensure that living individuals are confident to provide personal information, including sensitive information, in the knowledge that the information will not be disclosed in inappropriate circumstances after they die'.[114]

We are not convinced either of these approaches requires the information

110 Interview with Anonymous 6, Court Reporter for the Australian Broadcasting Corporation (Annie Blatchford, Melbourne, 5 September 2018).

111 Paul Roth, 'Privacy Proceedings and the Dead' (2004) 11(2) *Privacy Law and Policy Reporter* 50, 50.

112 James Stacey Taylor, 'Privacy and the Dead' in Adam D Moore (ed), *Privacy, Security and Accountability: Ethics, Law and Policy* (Rowman & Littlefield, 2016) 63, 63 (emphasis added).

113 Ibid 71.

114 Australian Law Reform Commission, *For Your Information: Privacy Law and Practice* (Report No 108, May 2008) vol 1, 356 [8.3].

about any intervention orders in the circumstances of IPH to be restricted. It is either not 'morally inappropriate', in Taylor's terms, or is not an 'inappropriate circumstance' to reveal the prior violence in a relationship that has ended in death, by exposing the context of such a death. The ALRC was also concerned about protecting family members from distress.[115] Any children of a victim are highly unlikely to be affected by publicity concerning prior violence, particularly close to when the death is first reported, given the circumstances.[116]

Indeed, it seems family members are more concerned with the media reporting a 'distorted view of domestic murder' via omissions: 'This comes about because of the silencing of the murdered woman's voice. Then there is the omission of facts like the nature of the relationship between the woman and the man.'[117]

These concerns would be partly addressed by allowing any prior intervention orders to be easily reported on. It is worth noting that New South Wales restrictions on reporting identifying information about sexual assault victims lapse on the death of the victim.[118] Such an approach should also be adopted under the Victorian *Family Violence Protection Act*.

VII A CHANGING CULTURE OF PRIVACY?

The Royal Commission into Family Violence gave significant consideration to the operation of privacy laws and the need to develop an information sharing culture across the family violence sector. This is a shift which, according to Domestic Violence Victoria's Alison Macdonald, could have ripple effects on how the media report IPHs.[119]

The change to an information sharing culture was a priority given that the complex and confusing nature of privacy laws was causing family violence services and other organisations to take a risk-averse approach to sharing information. What stands out from the Commission's recommendations is the emphasis on holding perpetrators to account. The report stated: 'Sharing necessary information about perpetrators — to keep them in view, engaged and accountable — will enhance victims' safety and help prevent family violence.'[120]

It was recommended that amendments be made to the *Family Violence Protection Act* to create an information sharing regime with one of the guiding principles

115 Ibid.

116 This information may well be introduced, regardless, if there are legal proceedings.

117 Women's Coalition Against Family Violence (n 14) 127.

118 See *Crimes Act 1900* (NSW) s 578A(4)(f).

119 Interview with Alison Macdonald, Domestic Violence Victoria Policy and Program Manager (Annie Blatchford, Melbourne, 19 October 2017) ('Interview with Macdonald').

120 *Royal Commission into Family Violence* (n 28) vol 1, 185.

being the following: 'The balance between a victim's right to safety and a perpetrator's right to privacy should be recalibrated in the victim's favour.'[121]

The new scheme was created through the introduction of pt 5A of the *Family Violence Protection Act* and authorises a group of organisations to share information between themselves for family violence risk assessment and management.[122] The Act also removed the requirement arising from the *Privacy and Data Protection Act 2014* (Vic) that there must be an imminent threat to an individual's life, health, safety or welfare for information to be lawfully shared in the context of family violence.[123] Groups within the scheme's purview are 'organisations' which are prescribed 'community services' such as homelessness, health care, aged care, disability, drug and alcohol mental health services and 'information holders' such as police officers, nurses, midwives, doctors and teachers.[124] The courts are also included in the regime, a particularly important aspect given the inconsistent and incomplete sharing of information within and between jurisdictions.[125]

Ms Macdonald suggested that although these recommendations are focused on sector services and organisations, this shift in perspective could ultimately have an impact on what raw material is available for journalists to report.[126] That is, the above 'prescribed organisations' are also the range of sources the media turn to for information on VAW incidents and the issue more broadly. If those organisations and the courts have a more contextual understanding of individual cases and broader patterns, that knowledge may potentially transition through to the journalists' understanding of the issue and therefore their reporting.

Ms Macdonald said:

> I think s 166 is an issue that hasn't galvanised a lot of attention — both when the *Family Violence Protection Act* was drafted and, in the years since leading to the 2015 Royal Commission, apart from among the journalists and media companies that are directly affected by it. This may be because it's a relatively minor issue in amongst a very large reform agenda, but it's a shame the Royal Commission did not look at it because that would have been a good opportunity to examine its purpose and rationale.
>
> Because very explicitly under the information sharing amendments, it says if you are a perpetrator of violence, you don't have that right to privacy.[127]

121 Ibid 187.

122 *Family Violence Protection Amendment (Information Sharing) Act 2017* (Vic) s 7.

123 *Family Violence Protection Act* (n 5) ss 144NA–144NB. See also 'Family Violence Information Sharing Scheme', *Victorian Government* (Web Page, 19 October 2020) <https://www.vic.gov.au/family-violence-information-sharing-scheme>.

124 *Family Violence Protection Act* (n 5) s 210A.

125 Ibid pt 5A. See also Victorian Government, *Family Violence Information Sharing Guidelines* (Ministerial Guidelines, December 2017) 7.

126 Interview with Macdonald (n 119).

127 Ibid.

VIII CONCLUSION: SHOULD THERE BE *ANY* RESTRICTIONS ON REPORTING THAT IDENTIFIES THOSE WHO HAVE SOUGHT FAMILY VIOLENCE INTERVENTION ORDERS?

Our focus of course has been on the privacy interests of victims of domestic violence, rather than those of perpetrators. And, notwithstanding that the *Family Violence Protection Act* s 166 is a comparatively small issue, we have concluded that there is some useful purpose served by continuing restrictions on reporting the names of those who are protected by intervention orders, provided the victim can consent to the publication of their name. There are reasons to think some victims of domestic violence would be even more reluctant to report to police and seek their assistance due to the stigma that still attaches to being a victim of domestic violence, and the fear engendered by making this victimisation public.[128] However, allowing victims to consent to the information being published is essential (and consideration might be given to loosening the strictures on publication, and simplifying processes). The other process that has been in the legislation since the commencement of the *Family Violence Protection Act*, which allows the media to seek the court's permission to publish, should continue. However, in our view it would be appropriate, and helpful, to provide that the restrictions cease on the death of the victim. This would encourage the media to report freely the common context in which many IPHs occur — that of prior violence, and often where assistance has been sought from the state in terms of intervention orders.

As stated by the Attorney-General in his second reading speech introducing amendments to the *Open Courts Act 2014* (Vic) and the *Judicial Proceedings Reports Act 1958* (Vic) to allow for greater participation by victims in removing publication restrictions under those Acts:

> Allowing victims greater choice over their personal information — here their victim status — is generally consistent with the values protected by the right to privacy … I am of the view that the right to privacy is enhanced by allowing adults greater control over disclosure of their victim status.[129]

As he went on to say: 'Relevantly, a number of victims do not feel diminished by their experiences.'[130]

Many victims want to call to account their perpetrators, and the police, by publicising their efforts to seek protection. Some journalists also want to talk

128 However, it is important to note that such restrictions do not exist in some other jurisdictions: see app A.

129 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 August 2018, 2680 (Martin Pakula, Attorney-General).

130 Ibid.

about more than 'just the facts', to report on the social context in which domestic violence occurs and draw attention to the alarming levels of VAW. Publicity may also possibly play a role in deterrence and making intervention orders more than just a 'piece of paper' in the minds of perpetrators.[131] The removal of any restrictions on reporting prior intervention orders in cases of IPHs would make a small contribution to increasing public understanding of such homicides.

131 Johnston and Doherty (n 27).

APPENDIX A: PUBLICATION RESTRICTIONS ON PROTECTION ORDER PROCEEDINGS IN AUSTRALIAN JURISDICTIONS

Jurisdiction	Order	Legislation	Restriction	Exceptions
Australian Capital Territory	'Domestic violence order'	*Family Violence Act 2016* (ACT) ss 149–50	Cannot publish identifying information about parties to the proceedings, persons related to or associated with a party or a witness. Also cannot publish information that allows the identities of party to the proceeding or a person related to or associated with a party to be 'worked out'.	The material is a 'permitted publication' (eg a court transcript). Found by court to be in the public's interest. Publication will promote compliance with the protection order. Necessary for the proper functioning of the Act.
New South Wales	'Apprehended domestic violence order'	*Crimes (Domestic and Personal Violence) Act 1997* (NSW) s 45	Only restricts publication of information identifying children. The court may direct that the identification of other persons also be restricted (including protected person, respondent, witness or someone likely to be mentioned or otherwise involved).	Publication of an official court report which identifies any of the persons whose identities are otherwise restricted by the section. Consent from one of the persons protected by the restriction or of the court.

Northern Territory	'Domestic violence order'	*Domestic and Family Violence Act 2007* (NT) ss 26, 123	Court *may* include an order restricting publication of personal details of the protected person or witness if satisfied the publication would expose them to risk of harm (s 26). Cannot identify children protected by the order, who are witnesses in proceedings or would be mentioned in proceedings (s 123).	The restriction on identifying children does not apply if identified in an official court document or the court consents to publication.
Queensland	'Domestic violence protection order'	*Domestic and Family Violence Protection Act 2012* (Qld) ss 158–9	Court hearing a domestic violence protection order proceeding is closed unless it is found to be in the public's interest or proceedings are related to other open court proceedings (s 158). Cannot publish information given in evidence or that identifies a party to proceedings, witness or child (s 159).	Court authorises the information to be published. Each person to whom the information relates consents. If it is anonymised and to be published for the purpose of law reports or judgments or if approved for research.
South Australia	'Intervention order'	*Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 33	Restricts publication of information that identifies any person involved, any protected person or child of protected person or respondent.	Consent can be given by person involved.

Tasmania	'Family violence order'	*Family Violence Act 2004* (Tas) s 32	Court can decide before/during/after proceedings whether to restrict publication of any material related to the proceedings. No material identifying children can be published. The publication of any 'reference' or 'allusion' to material restricted is taken to be a publication if it is sufficient to disclose the material.	
Victoria	'Intervention order'	*Family Violence Protection Act 2008* (Vic) s 166	Cannot publish information that may lead to the identification of any person involved in intervention order proceedings.	Consent given by persons involved. Found by court to be in the public's interest.
Western Australia	'Violence restraining order'	*Restraining Orders Act 1997* (WA) s 70(2)	Person must not publish information that would reveal the whereabouts of a party to proceedings or witness.	Protected person/s understand the purpose of the section and have consented to it not applying.