

## 13 Investigating if an act of family and domestic violence is a criminal offence

### 13.1 Violence restraining orders are not a substitute for the pursuit of criminal charges

The research literature suggests that there are concerns that VROs are being used as ‘an alternative, more lenient legal response to domestic violence’<sup>622</sup> when criminal charges should also be laid:

Some commentators have expressed concern that protection orders have supplanted appropriate criminal justice interventions and provided an exit route for police unwilling to investigate or charge potential criminal offences ... [T]he development of a protection order regime has effectively ‘decriminalised’ domestic violence ... In practice, they argue, protection order legislation has been used ‘instead of’ rather than ‘as well as’, criminal laws, which has shifted attention away from criminal justice interventions.<sup>623</sup>

The risk of using VROs as ‘a replacement for assault charges, rather than the useful, protective supplement to criminal charges that they were intended to be’ was also identified in Western Australia in 1994 by the Chief Justice’s Taskforce on Gender Bias.<sup>624</sup>

Reasons why criminal charges may not be pursued include that ‘[s]ome family violence will not amount to a criminal offence; [violence restraining] orders generally offer a speedier response to violence and therefore speedier protection; and there is a lower standard of proof in civil protection order proceedings.’<sup>625</sup> However, as the Australian Law Reform Commission has observed:

... [W]here there is an overlap between criminal and civil responses, the balance “is a delicate one, between providing a legal mechanism for protecting people who experience domestic violence, but not downplaying its significance by applying what is essentially a private law remedy”.<sup>626</sup>

Of the actions available to police when attending a domestic violence incident, arresting the perpetrator is not only considered an effective method of ‘keeping victims safe’ but of holding ‘perpetrators more accountable for their behaviour.’<sup>627</sup> Research has also identified that arrest can also influence future decisions to engage in violent behaviour:

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<sup>622</sup> Chief Justice’s Taskforce on Gender Bias, *Report on Gender Bias*, Chief Justice of Western Australia, Perth, 30 June 1994, p. 169.

<sup>623</sup> Wilcox, K, *Recent Innovations in Australian Protection Order Law – A Comparative Discussion*, Australian Domestic & Family Violence Clearinghouse, The University of New South Wales, Sydney, 2010, p. 3.

<sup>624</sup> Chief Justice’s Taskforce on Gender Bias, *Report on Gender Bias*, Chief Justice of Western Australia, Perth, 30 June 1994, p. 169-170.

<sup>625</sup> Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws: Final Report* the Law Reform Commission, Perth, 2014, p. 352.

<sup>626</sup> Fehlberg, B, and Behrens, J, 2007, cited in Australian Law Reform Commission, *Family Violence – A National Legal Response*, ALRC, Canberra, 2010, p. 353.

<sup>627</sup> Braaf, R and Sneddon, C, ‘Arresting practices: exploring issues of dual arrest for domestic violence,’ *Australian Domestic & Family Violence Clearinghouse*, Sydney, 2007, p. 2.

Studies have also shown that arrest reduces recidivism. In Minneapolis, USA, Sherman and Berk (1984) found that arrest for domestic violence offences significantly reduced the likelihood of further violence, by over 50% more than other police responses (i.e. mediation, advice giving or ordering the perpetrator to leave). While replication studies in the US have indicated more modest results ... other research confirms the impact of arrest on recidivism. Campbell et al's. (2003) US study of 563 cases of domestic homicide and domestic physical abuse demonstrated that arrest was consistently related to reduced subsequent aggression against female victims and reduced the risk of femicide.<sup>628</sup>

In addition, responses such as police 'speaking to the victim separately from the perpetrator ... searching for evidence, and making arrests,' and generally treating victims with 'courtesy, respect, understanding, appearing concerned and listening' have also been associated with increased victim satisfaction.<sup>629</sup> Research has identified that these behaviours 'reflect police taking the situation seriously, and being proactive at the scene.'<sup>630</sup>

As recently observed by Her Majesty's Inspectorate of Constabulary in its review of the police response to domestic violence:

Just as a first response officer's attitude to the victim can make a difference, the initial investigation at the scene, is critical to a successful prosecution.

Officers need to see beyond the incident they are dealing with and look at the wider context of the situation they find. Responding officers should start to **build the case on behalf of the victim rather than rely on the victim to build the case for the police.**<sup>631</sup> [Original emphasis]

Furthermore, '[w]here prosecutions are to be taken forward without the victim's involvement, it is even more critical that the initial investigation is rigorous and extensive.'<sup>632</sup>

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<sup>628</sup> Braaf, R and Sneddon, C, 'Arresting practices: exploring issues of dual arrest for domestic violence,' *Australian Domestic & Family Violence Clearinghouse*, Sydney, 2007, p. 3.

<sup>629</sup> Paradine, K and Wilkinson, J, *Protection and Accountability: The Reporting, Investigation and Prosecution of Domestic Violence Cases*, HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary, London, 2004, p. 37.

<sup>630</sup> Robinson, A, *The Cardiff Women's Safety Unit: A Multi-Agency Approach to Domestic Violence: Final Evaluation Report*, Cardiff University, Cardiff, 2004, p. 46.

<sup>631</sup> Her Majesty's Inspectorate of Constabulary (HMIC), *Everyone's business: Improving the police response to domestic abuse*, HMIC, London, 2014, p. 55.

<sup>632</sup> Her Majesty's Inspectorate of Constabulary (HMIC), *Everyone's business: Improving the police response to domestic abuse*, HMIC, London, 2014, p. 55.

### 13.1.1 Reviews by the State Coroner and WAPOL following the murder of Andrea Louise Pickett<sup>633</sup>

On 12 January 2009, Andrea Louise Pickett:

...was murdered ... by her estranged husband, Kenneth Charles Pickett (Mr Pickett). At the time of the murder a violence restraining order was in place intended to protect Andrea from Mr Pickett. In addition, at the time of the murder, Mr Pickett was on parole in respect of a charge that on 14 February 2008 he had made a threat to kill Andrea.<sup>634</sup>

Following Andrea's<sup>635</sup> murder, the State Coroner conducted an inquest involving a number of state government departments and authorities, including WAPOL.<sup>636</sup> The State Coroner made seven recommendations relating to Andrea's murder.<sup>637</sup>

Prior to the State Coroner's inquest, WAPOL had conducted an internal review that identified 'practices that needed to improve the way police responded to family and domestic violence incidents.'<sup>638</sup> Of particular relevance to the Office's investigation, the WAPOL review identified concerns that:

...investigating officers had not taken ownership of the investigations and that prior to a decision being made that the file would be written off, contact had not been made with the District Family Protection Coordinator in order to obtain his opinion ... [and] all avenues of inquiry had not been explored, people central to the incidents had not been spoken to and investigations into alleged breaches of restraining orders had not been adequately conducted.<sup>639</sup>

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<sup>633</sup> The Law Reform Commission received a submission from Andrea's family during the consultation process for the Law Reform Commission Final Report. As stated in the Law Reform Commission Final Report, many of the issues raised by Andrea's family 'cannot realistically be primarily addressed through legislative reform and extend beyond the scope of this reference.' See: Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws: Final Report* the Law Reform Commission, Perth, 2014, p. 6. With the permission of Andrea's family, the submission was forwarded to the Office by the Law Reform Commission and those aspects of the submission relevant to issues associated with violence restraining orders and their relationship with family and domestic violence fatalities have been considered by the Office as part of this investigation.

<sup>634</sup> Western Australian State Coroner Alastair Hope, *Inquest into the death of Andrea Louise Pickett*, Coroner's Court of Western Australia, Perth, 28 June 2012, p. 3.

<sup>635</sup> Western Australian State Coroner Alastair Hope, in the *Inquest into the death of Andrea Louise Pickett*, Coroner's Court of Western Australia, Perth, 28 June 2012, p. 3, stated that Andrea Louise Pickett 'at the request of the family will be referred to as Andrea in these reasons'. The Office has also respected this request throughout this section of the report.

<sup>636</sup> Western Australian State Coroner Alastair Hope, *Inquest into the death of Andrea Louise Pickett*, Coroner's Court of Western Australia, Perth, 28 June 2012, p. 56-62.

<sup>637</sup> Western Australian State Coroner Alastair Hope, *Inquest into the death of Andrea Louise Pickett*, Coroner's Court of Western Australia, Perth, 28 June 2012, p. 56-62.

<sup>638</sup> Western Australia Police, *Response to Four Corners from Western Australia Police*, Perth, July 2012, p. 2.

<sup>639</sup> Western Australian State Coroner Alastair Hope, *Inquest into the death of Andrea Louise Pickett*, Coroner's Court of Western Australia, Perth, 28 June 2012, pp. 57-58.

Also of relevance to this investigation the (then) State Coroner, Alastair Hope, observed that:

Although the incident report refers to multiple witnesses it appears witness statements were only taken from Andrea and one other witness.<sup>640</sup>

The WAPOL review report made a number of recommendations, including that:

- Investigations [be] allocated to a specific officer and inquiries commenced at the earliest opportunity to ensure victim safety;
- All witnesses and nominated persons of interest [be] interviewed and the investigation was consistent with the agency's investigative practices; and
- Supervisors review all family and domestic violence incidents and where prime facie evidence exists offenders are charged with the relevant criminal offences ...<sup>641</sup>

As a result of its internal review, WAPOL 'developed and put into practice the *WA Police Investigation Doctrine*' (**the Doctrine**).<sup>642</sup> The Doctrine describes investigative practices which WAPOL officers should employ when investigating allegations of family and domestic violence.

The Office has examined the investigative practices applied by WAPOL when responding to family and domestic violence perpetrated against people in the 30 fatalities, through an examination of the 75 DVIRs. The results of this examination are set out below. As discussed in section 8.3.1, the 75 DVIRs related to incidents which involved predominantly Aboriginal people who were killed, and suspected perpetrators who were Aboriginal people, living in regional and remote Australia. More particularly, 65 of the 75 DVIRs (87 per cent) related to an Aboriginal person who was killed in the 30 fatalities.

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<sup>640</sup> Western Australian State Coroner Alastair Hope, *Inquest into the death of Andrea Louise Pickett*, Coroner's Court of Western Australia, Perth, 28 June 2012, p. 7.

<sup>641</sup> Western Australia Police, 'Response to Four Corners from Western Australia Police, WAPOL, Perth, July 2012, p. 3.

<sup>642</sup> Western Australian State Coroner Alastair Hope, *Inquest into the death of Andrea Louise Pickett*, Coroner's Court of Western Australia, Perth, 28 June 2012, p. 58.

## 13.2 The investigation of family and domestic violence incidents involving people who were killed in the 30 fatalities

### 13.2.1 Legislative requirements

Section 62A of the *Restraining Orders Act* requires police officers to investigate acts of family and domestic violence as follows:

#### 62A. Investigation of suspected family and domestic violence

A police officer is to investigate whether an act of family and domestic violence is being, or has been committed, or whether an act of family and domestic violence is likely to be committed, if the police officer reasonably suspects that a person is committing, or has committed, an act of family and domestic violence which —

- (a) is a criminal offence; or
- (b) has put the safety of a person at risk.

### 13.2.2 Policy requirements

The COPS Manual and the Doctrine provide officers with guidance for investigating acts of family and domestic violence, setting out requirements to gather evidence from a range of sources to enable an evidence-led prosecution.

The COPS Manual emphasises the importance of investigating and pursuing criminal charges, in addition to any use of VROs, in particular stating that:

The policy of the Western Australia Police Service in respect to intervention at family and domestic violence incidents is one of pro-charge, pro-arrest and pro-prosecution; where evidence exists that a criminal offence has been committed. Violence Restraint Orders and Police Orders are to be seen as additional safeguards and not as an alternative to the laying of appropriate charges.<sup>643</sup>

Of particular relevance to the investigation of family and domestic violence incidents, the COPS Manual specifies that:

When attending family and domestic violence incidents members are to pay particular attention to the early collection of evidence including (but not limited to):

- Comprehensive notes;
- A signed medical release;
- Statements - complainant, witnesses including children and any evidence of early complaint;
- Photographs - complainant's injuries, scene;
- Physical evidence - clothing, weapons, damaged property;
- "000" recordings.<sup>644</sup>

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<sup>643</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.2.

<sup>644</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.4.1.

The COPS Manual further specifies that '[t]he five key investigative strategies ... must be followed in accordance with the WA Police Investigative Doctrine'.<sup>645</sup> The five key investigative strategies are a structured process developed by WAPOL to enable investigating officers 'to maximise the investigative opportunities, secure evidence and establish the truth. *The Five Key Investigative Strategies* are the means by which investigations should be conducted so that all potential avenues of inquiry are explored.'<sup>646</sup>

The Doctrine specifically recognises that interviewing witnesses is one of the five key investigative strategies and identifies different types of witnesses including:

- the victim;
- eye witnesses ('[d]irectly observed the offence'); and
- other significant witnesses ('[o]bserved an event prior to or post the offence which is classified as relevant evidence').<sup>647</sup>

The Doctrine also identifies 'suspects/persons of interest'<sup>648</sup> as a separate investigative strategy, in particular setting out the following associated 'actions':

The development of strategies to trace, implicate or eliminate suspects including:

- Arrest plan
- Interview plan
- Covert investigation plan
- Assessment of evidence in particular identity and opportunity.

This includes method of arrest, obtaining suspect's account, establishing potential alibi, accessing intelligence held by internal and external agencies that may assist in identifying the offender or corroborating the offender's identity.<sup>649</sup>

The COPS Manual also notes that it 'is critical that statements from involved persons are obtained by police officers at the earliest opportunity.'<sup>650</sup> The COPS Manual requires:

All involved persons should be sighted and interviewed regarding the incident and IMS [Incident Management System] interview panels updated accordingly. Should a decision be made not to interview a POI [person of interest], the reason must be fully explained and recorded in the running sheet.<sup>651</sup>

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<sup>645</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.4.1.

<sup>646</sup> Western Australia Police, *The Five Key Investigative Strategies*, WA Police Investigation Doctrine Extract, April 2010.

<sup>647</sup> Western Australia Police, *The Five Key Investigative Strategies*, WA Police Investigation Doctrine Extract, April 2010.

<sup>648</sup> Western Australia Police, *The Five Key Investigative Strategies*, WA Police Investigation Doctrine Extract, April 2010.

<sup>649</sup> Western Australia Police, *The Five Key Investigative Strategies*, WA Police Investigation Doctrine Extract, April 2010.

<sup>650</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.4.1. p. 13.

<sup>651</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.4.

### 13.2.3 During investigations involving people who were killed in the 30 fatalities, WAPOL did not gather evidence from all significant witnesses

The Office examined the 75 DVIRs to determine whether all witnesses required to be interviewed in accordance with the Doctrine were interviewed, namely, victims, eye witnesses, other significant witnesses, and suspects/persons of interest. As shown in Figure 39 below, the Office's examination of the DVIRs found that the victim was most likely to be interviewed (92 per cent), followed by the suspect/person of interest (73 per cent), with other significant witnesses least likely to be interviewed (48 per cent of 46 incidents where potential significant witnesses were recorded).

**Figure 39: Recorded interviews in the 75 DVIRs**

| <i>Witness</i>   | <i>Number and percentage interviewed</i>    |
|--|---|
| Victim   | 69 (92 per cent)                            |
| Suspect/person of interest                                     | 55 (73 per cent)                            |
| Eye witnesses and other significant witnesses where applicable | 22 (48 per cent of 46 applicable incidents) |

Source: Ombudsman Western Australia

The Office further examined the 20 DVIRs in which the suspect/person of interest was not interviewed to identify whether the reasons for this were fully explained and recorded on the running sheet in accordance with the COPS Manual. The Office identified that the reason for the decision not to interview the suspect/person of interest was recorded on two running sheets. In the remaining 18 DVIRs information was recorded elsewhere in the DVIR as follows:

- in 14 of the 18 DVIRs, (78 per cent), the suspect/person of interest was not present when police attended the scene. In six of these 14 DVIRs (43 per cent), records indicated that action was taken to locate the suspect/person of interest. This included alerts placed on WAPOL's Incident Management System, police patrols and contact with other agencies;
- in 14 of the 18 DVIRs, (78 per cent), information was recorded to indicate that the suspect/person of interest would not be charged (for example, the following notes were made; 'no offence detected', 'insufficient evidence' and 'not proceeded with'); and
- in two of the 18 DVIRs (11 per cent), it was recorded that the victim did not want to disclose any offences and did not want action to be taken (in these two instances the incident had been reported to WAPOL by a party other than the victim).

#### **Recommendation 33**

WAPOL ensures that, when undertaking investigations in accordance with section 62A of the *Restraining Orders Act 1997*, and where required by the *Commissioner's Operations and Procedures Manual* and the *WA Police Investigation Doctrine*, police officers interview all witnesses, including victims, suspects/persons of interest, eye witnesses and other significant witnesses, and, should a decision be made not to interview a person of interest, the reasons should be fully explained and recorded on the running sheet.

### **13.2.4 During investigations involving people who were killed in the 30 fatalities, WAPOL took photographs of the victim's injuries as a means of gathering evidence in 44 per cent of relevant occasions**

As noted above, the COPS Manual requires that police officers 'pay particular attention to the early collection of evidence including ... photographs [of the] ... complainant's injuries [and the] scene.'<sup>652</sup> Allegations of bodily harm were recorded in 46 of the 75 DVIRs (61 per cent). In one of the 46 DVIRs, it was recorded that there were no visible injuries to the victim. For the remaining 45 DVIRs, it was recorded that the victim's injuries had been photographed on 20 occasions (44 per cent). In the remaining 25 DVIRs, information was not recorded regarding the decision not to take photographs.

#### **Recommendation 34**

WAPOL ensures that, when undertaking investigations in accordance with section 62A of the *Restraining Orders Act 1997*, and where required by the *Commissioner's Operations and Procedures Manual* and the *WA Police Investigation Doctrine*, police officers take photographs of any arising injuries to the victim, with their consent, in accordance with the *Commissioner's Operations and Procedures Manual* and the *WA Police Investigation Doctrine*.

## **13.3 Detecting and recording offences, and laying charges at family and domestic violence incidents involving people who were killed in the 30 fatalities**

### **13.3.1 Legislative and policy requirements**

As previously discussed, section 62A of the *Restraining Orders Act* provides as follows:

#### **62A. Investigation of suspected family and domestic violence**

A police officer is to investigate whether an act of family and domestic violence is being, or has been committed, or whether an act of family and domestic violence is likely to be committed, if the police officer reasonably suspects that a person is committing, or has committed, an act of family and domestic violence which —

- (a) is a criminal offence; or
- (b) has put the safety of a person at risk.

WAPOL's policy position is set out in the COPS Manual and 'is pro-charge, pro-arrest and pro-prosecution; where evidence exists that a criminal offence has been committed'.<sup>653</sup> Reflecting this, the COPS Manual requires that all disclosed offences are to be recorded in the DVIR, in accordance with National Crime Recording Standards:

Where offences are disclosed and there is no credible evidence to the contrary at the time of reporting, the offence must be listed on the IR [Incident Report] as per National Crime Recording Standards. This provides a common basis for

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<sup>652</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.4.1.

<sup>653</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.2.

recording offences according to the judgement of the police officer as distinct from evidentiary or prosecutorial reasons.<sup>654</sup>

The COPS Manual specifically recognises that victims may face difficulties in assisting police officers, including in the detection of offences, noting:

Fear of the perpetrator and future retribution is one of the most influential factors that may prevent the victim cooperating with police. Victims may not display obvious signs of fear. Victims of family and domestic violence have usually been subjected to intense attacks on their self-esteem, including constant criticism, name-calling, ridicule, degrading behaviour, and threats, and may find it difficult to assert themselves at the scene.<sup>655</sup>

With this in mind, the COPS Manual explicitly states:

**Members are to take ownership of the decision to prefer a charge and not place the responsibility with the victim.**<sup>656</sup> [Original emphasis]

In addition, once an offence has been detected and recorded, the COPS Manual further requires that these offences are to be cleared as follows:

The only two clearance types to be utilised for domestic violence related offences are;

- Insufficient Evidence
- Offender Processed

Any other outcome considered can only be authorised by the Officer in Charge of the District Detectives Office and/or the District Family Protection Coordinator, following a thorough investigation...<sup>657</sup>

### **13.3.2 WAPOL detected an offence in 51 of the 75 incidents involving people who were killed in the 30 fatalities, and processed 29 offenders**

WAPOL detected an offence in 51 of the 75 DVIRs (68 per cent). Where an offence was not detected, this does not mean an offence may not have been committed. For example, DVIRs which were closed as 'no offence was detected' included the following statements:

- The victim 'refused to state what happened' and was 'very anti-Police ... nil offence committed-DV only'; and
- 'She was very withdrawn and evasive when questioned by police ... there was no complaint received from the victim and no persons would assist with the investigation'.

After a fatality, as part of its internal review process, WAPOL also develops a timeline (**the Timeline**) which includes a record of all recorded incidents between the parties and WAPOL's response. The Timeline can include issues identified by WAPOL as part of this

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<sup>654</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.4.3.

<sup>655</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.4.

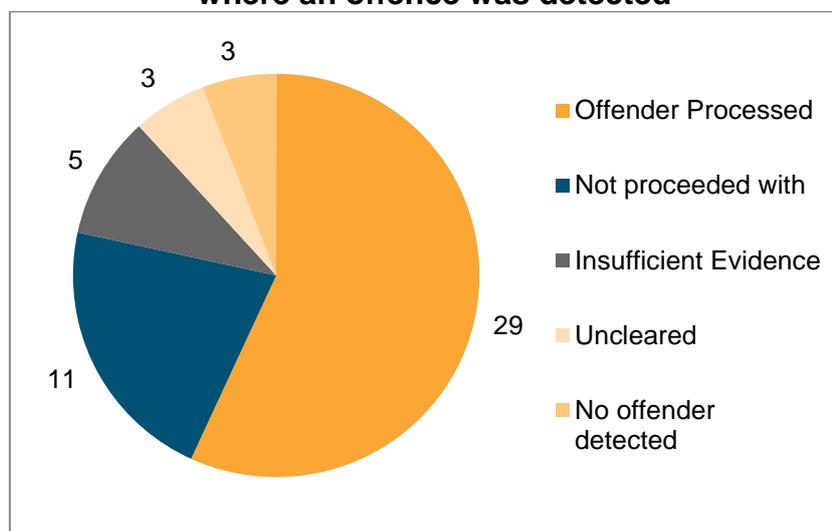
<sup>656</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.4.1.

<sup>657</sup> Western Australia Police, *Commissioner's Operations and Procedures (COPS) Manual*, DV 1.1.4.1.

internal review. In several incidents recorded in the Timelines, WAPOL identified issues relating to not recording disclosed offences. In particular, WAPOL's internal reviews noted that records indicated that offences were disclosed when police were first contacted (for example 000 calls) but these offences were not added to the offence panel of the associated DVIR.

Overall, as shown in Figure 40 below, WAPOL complied with the requirements to clear offences as either 'offender processed' or 'insufficient evidence' in 34 of the 51 DVIRs where an offence was detected (67 per cent). An offender was processed (arrested or summonsed) on 29 of these 51 occasions (57 per cent).

**Figure 40: WAPOL clearance type for the 51 DVIRs where an offence was detected**



Source: Ombudsman Western Australia

As shown in Figure 40 above, in 11 of the 51 DVIRs where an offence was detected (22 per cent) the incident was cleared as 'not proceeded with'. In the Office's review of the 75 DVIRs, this clearance type was used to indicate that the victim of the offence did not wish to participate in the prosecution of the alleged offender. For example, the following information was recorded on a DVIR that was not proceeded with:

... [U]nless the victim assists police, and gives a full account of the circumstances prior to the injury being sustained, the enquiry cannot continue.<sup>658</sup>

**Recommendation 35**

WAPOL ensures that responses to family and domestic violence incidents record all offences disclosed in accordance with the *Commissioner's Operations and Procedures Manual* (including offences disclosed prior to attendance).

<sup>658</sup> Western Australia Police, Domestic Violence Incident Report (unpublished).

**Recommendation 36**

WAPOL ensures that it takes ownership of the decision to prefer a charge and does not place the responsibility with the victim, in accordance with the *Commissioner's Operations and Procedures Manual*.

**Recommendation 37**

WAPOL ensures that all offences detected at family and domestic violence incidents are cleared in accordance with the *Commissioner's Operations and Procedures Manual*.