

ATTACHMENT 'LS 4'

This is the attachment marked '**LS 4**' referred to in the witness statement of Leanne Kathryn Sinclair dated 3 August 2015.



Duty Lawyer manual for family violence and personal safety

February 2014

Family Law Program – Victoria Legal Aid

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Introduction

People who experience family violence can seek remedies under State and Commonwealth legislation. The relevant legislation is:

Commonwealth

Family Law Act 1975 (FLA).

Victoria

Family Violence Protection Act 2008 (FVP Act).

An automatic power of arrest attaches to both Intervention Orders and Commonwealth injunctions for personal protection.

Note: If proceedings for an Intervention Order have been instituted under state law, the applicant is precluded from seeking protection under Commonwealth law in respect of the same matter unless the state proceedings have lapsed.

The Victorian System

Under the State legislation, an “affected family member” (AFM) may seek a Family Violence Intervention Order to protect her/him against further family violence. The FVP Act contains a broad definition of an affected family member making injunctive remedies under that Act available to a much wider range of persons than the FLA which restricts injunctive remedies, such as an injunction restraining a party from approaching the other party.

In Victoria, victims of stalking who are not “family members” can obtain Personal Safety Intervention Orders (PSIOs) under the Personal Safety Intervention Orders Act 2010.

Part A: A snapshot of the law in family violence cases

Family Violence Intervention Orders: Family Violence Protection Act 2008

The major remedy under the FVP Act is an injunction known as a Family Violence Intervention Order. It is an order that restricts a person's behaviour in relation to another person. It is provided to protect family members and/or property.

A court can only make an Intervention Order if the situation satisfies the two limbs set out under the FVP Act.

First the court has to be satisfied on the balance of probabilities that a behaviour prohibited under the legislation has been experienced by an Affected Family Member of the respondent. This behaviour includes assault, causing damage to property, threatening to assault, threatening to cause damage to property, harassing or molesting or behaving in an offensive manner. The prohibited behaviour now also includes economic and emotional abuse as defined by sections 5 and 6 of the FVP Act. Exposing a child to acts of family violence, including the child cleaning up after family violence, constitutes family violence against the child.

If the court is so satisfied, then it must also be satisfied on the balance of probabilities that the respondent is likely to engage in that conduct again.

The duty lawyer should be satisfied that the relationship between the complainant and respondent is covered in the definition of "**family member**". The FVP Act has defined family member very broadly. A family member includes:

- a spouse (married/separated/divorced)
- domestic partner
- person who has had an intimate personal relationship with that person
- person who is or has been a relative of that person
- child who normally resides with that person
- child of whom the person is a guardian and a person who is or has been ordinarily a member of the household of that person
- any other person whom the relevant person regards or regarded as being like a family member.

A **domestic partner** includes parties who are not married but are or have been in a relationship as a couple, including same sex couples, and even if they do not reside under the one roof. Someone is not a domestic partner merely because they are a co tenant.

A **relative** includes parents, grandparents, step parents, children, grandchildren, siblings, step siblings, in laws (whether by marriage or in a case of domestic partners would be such a relative if the domestic partners were married to each other), uncles and aunts, nephews and nieces and cousins. It also includes a person who for cultural reasons may also be considered a relative.

Specific definitions of family members, domestic partners and relatives are defined in sections 8, 9 and 10 of the FVP Act and the duty lawyer should familiarise him/herself with those sections of the Act.

A **child** is a person under the age of 18 years.

An **intimate relationship** includes boyfriend/girlfriend relationships, same sex relationships, and partners who have had a brief sexual relationship. The relationship need not be sexual to be considered intimate.

Originating procedures

The originating procedure for an Intervention Order is usually an **Application and Summons for an Intervention Order** which sets out the allegations supporting the Application and sets a date for the hearing of the Application. The applicant (who is usually the AFM) usually obtains the Application and Summons from the registrar at the Magistrates' Court. The court need not be the nearest court to where the applicant resides. The Application and Summons must be served on the respondent before the court will hear the matter, unless there are exceptional circumstances such as where there is evidence that the respondent is deliberately avoiding service or that the violence is so severe that the court is able to make an interim order ex parte.

In urgent situations where there has been an allegation of assault, threat of assault, damage caused or threat to cause damage to property, a **Complaint and Warrant** may be issued. The Registrar has to be satisfied that the personal safety of the AFM would be seriously threatened or damage to property is likely to be caused unless the respondent is arrested and brought into custody. Once arrested the respondent can be bailed to appear or held in custody. Bail conditions would usually mirror the terms of the Intervention Order sought.

For a Complaint and Warrant to be issued there needs to be an immediate concern for the safety of the victim or some evidence that a criminal offence has been committed. Complaints and Warrants are usually brought by the police.

Part B: Magistrates' Court Procedure

Lawyers should familiarise themselves with the practice, procedure and personnel of their local Magistrates' Court and how they deal with family violence matters.

Some regional courts may not list family violence matters in a designated court. If you are appearing as a duty lawyer in a regional court in a family violence matter, you should make enquiries with the family law registrar upon arrival at the court as to the listing practice.

Some Courts hold a meeting at the start of the day if there is a family violence list/ court. The purpose of the meeting is to enable the registrar to provide duty lawyers with details of clients who wish to see the duty lawyer, for the applicant worker (if there is one) to flag matters where they may want to see someone to discuss their support services, and for the registrar to advise which matters have been withdrawn, have not been served or need to be adjourned. Any other relevant matters, including any potential security issues, are raised at this meeting.

Attendees at that meeting include the family law registrar, the applicant support worker (if provided), respondent support worker (if provided), the police prosecutor/police liaison officer, the Community Legal Centre (CLC) duty lawyer (if provided) and Court Network as well as other court staff. The VLA duty lawyer must attend these meetings if they are being held.

Duty Lawyers should familiarise themselves with the local Court they appear in to see what days Intervention Order matters are listed. The Courts also often list specific FVPA/PSIO matters on allocated days. For example police matters will be dealt with on one day, stalking matters on another day and applications by applicants in person on a separate day.

Part C: Duty lawyer advice and practice

Role of the Duty Lawyer

Duty lawyers can be called on to provide advice, negotiate and/or represent either applicants or respondents in Intervention Order proceedings. Some Magistrates' Courts have an alternative duty lawyer service provided by a Community Legal Centre.

Duty lawyers should familiarise themselves with the VLA Duty Lawyer Guidelines (Appendix 1).

Duty lawyers may be asked to represent respondents who have breach of Intervention Order proceedings, or who are appearing in bail applications where they have been charged with assault or a breach of their Intervention Order, and may even be asked to present a plea on behalf of a respondent. These matters are beyond the scope of this manual. Usually these matters should be referred to criminal law duty lawyers.

When a client is referred to the duty lawyer, the duty lawyer should introduce him or herself and at the outset explain to the client the scope of the service being provided.

The duty lawyer should then explain that they will be required to take the client's details to complete the duty lawyer record, and that they will then go through the allegations in the complaint and provide advice to the client with respect to the matter before the court. Limitations of the duty lawyer service should be explained to the client including any limitations on appearing in contested matters and/or at directions hearings or PSIO matters.

What happens at Court?

The client should be advised about all of the options available to her/him on the day including that:

1. the Application may be withdrawn
2. what an applicant must prove before a Magistrate can make an Intervention Order (including an Interim Intervention Order)
3. the Application may be struck out due to the Applicant failing to appear
4. the matter may be adjourned so that a party can seek further legal advice or representation
5. the applicant may be given leave to proceed on an undefended or ex parte basis
6. the respondent may consent to the Intervention Order being made without making any admissions to the allegations contained in the Complaint (and have this noted on the order)
7. the respondent may wish to contest the Intervention Order application
8. the matter can be settled by negotiation – see the Settlement options section below
9. the respondent may offer an undertaking and if accepted by the applicant, the intervention order application is withdrawn with a right of reinstatement
10. for PSIO applications, the parties may agree or be directed to attend mediation the matter may be adjourned for this to occur.

The implications and consequences of all options should be explained to the client.

If the duty lawyer is advising the applicant and the respondent does not appear at court the applicant can proceed on an undefended basis, subject to proof of service on the respondent

The duty lawyer should advise the applicant how to proceed with their application on an undefended basis. This includes being sworn in to give evidence and to confirm the facts set out in the complaint under oath and provide any further evidence that the magistrate requires. In such instances the duty lawyer may appear on behalf of the applicant, particularly in matters where the applicant is a priority client or has a special need for example, if English is not their first language, they have a disability or there are other restrictions preventing the applicant being able to proceed with the matter on their own.

When advising a respondent in situations where an applicant does not appear the respondent can apply to have the application struck out. This is usually done at the counter and the duty lawyer should make themselves familiar with the process of the particular Magistrates' Court as to how long the Court gives applicants to show up at court in such instances.

The duty lawyer should also advise clients about court ordered representation and prohibition on cross examination by self - represented parties. This is explained in more detail below, in Part C of this Chapter.

Settlement options

There are several settlement options:

1. by consent the applicant can agree to withdraw his or her application
2. the parties can agree to adjourn the application to attend counselling or mediation if appropriate
3. when both parties are at court the matter can be resolved by an undertaking. Undertakings are promises given to the court which are either made orally or in writing that a party will not engage in any of the behaviours that would otherwise be prohibited by an order. The respondent usually gives an undertaking on the basis that the applicant withdraws his or her application with a right of reinstatement. In some instances mutual undertakings are a common way of resolving matters even if there is only one application on foot.

Applicants should be advised as to the effect of an undertaking and in particular that if an undertaking is in force the police will not act on a report of a breach of undertaking.

Applicants should also be advised of the process they need to follow in the event that there is a breach of an undertaking. They will need to refer the matter back to court and the facts in the original application are still relevant in relation to any further proceedings brought as a result of a breach of undertaking. If an Interim Order was in place at the time the application was withdrawn, this will also be reinstated.

Respondents need to be advised as to the consequences of a breach of undertaking including that the original application can be reinstated and also the more serious consequence of contempt of court proceedings being instituted.

4. matters can also be resolved by consent. In such instances a respondent may consent to an order being made without admitting any of the allegations in the complaint.

If resolving a matter with an undertaking or a consent order without admission, the duty lawyer should be aware that the conditions of the undertaking or the order are negotiable.

It is usual also to have exceptions to some of the conditions, the most common being for the respondent to spend time with the children pursuant to a written agreement or court order or attending mediation.

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5. the matter may be adjourned to a contested hearing (final hearing). Most Magistrates' courts will list contested matters for a directions hearing prior to the final hearing. A final hearing cannot be held on the first return date unless both parties have received independent legal advice and consent to the final hearing taking place.

Tips and traps for family violence cases

A number of restrictions can be placed in an undertaking or an order including:

- prohibiting the respondent from committing family violence including physically or sexual abuse, emotional or psychological abuse, economic abuse, threatening or coercive behaviour, or any other behaviour that controls or dominates a family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person. This also includes behaviour that causes a child to hear or witness or otherwise be exposed to the effects of these behaviours.
- prohibiting or restricting the respondent from approaching the AFM or coming within a specified distance of the AFM (usually five metres)
- prohibiting or restricting the respondent attending where the AFM lives, works, or frequents irrespective of whether the respondent has a legal or equitable interest in the property
- prohibiting or restricting the respondent from being in a locality specified in the order
- prohibiting the respondent from approaching, contacting, harassing threatening or intimidating the AFM (including by writing, text messaging, email or other electronic communication)
- prohibiting the respondent from damaging or threatening to damage property of the AFM
- prohibiting the respondent from causing another person to engage in similar conduct
- restricting what furniture or appliances can be removed from the family home
- requiring the respondent to return property owned by the protected person or a family member or jointly owned by the protected person and the respondent
- prohibiting the respondent from following another person or keeping him/her under surveillance
- prohibiting the respondent from publishing anything via internet, email or electronic means about another person
- prohibiting the respondent from living in the same place as, or spending time or communicating with, any child protected by the Order
- there may be an order over-riding a Family Law Courts Order in relation to the children of the relationship. This may prohibit a respondent from having any contact and/or communication with the children of the relationship even though there are Family Law Court orders in place stating otherwise
- requiring a male respondent to contact the Men's Referral Service to obtain confidential advice and information about services that may assist him
- there may also be an Order revoking any license, permit or other authority to possess carry or use firearms.

You can negotiate one or any of those prohibitions in an undertaking or an order.

Within each prohibition you can also negotiate as to the terms of that condition.

It is important to remember, in dealing with applications brought by third parties, such as the police, that the Court cannot make a final Order excluding the respondent from the family home, having contact with the AFM or relating to the use of personal property without the consent of the AFM. (section 75 FVP Act).

Cross examination by unrepresented respondents

Section 70 FVP Act has introduced certain limitations on the ability of an unrepresented respondent to cross examine protected witnesses.

In summary and subject to limited exceptions, if a respondent wishes to cross examine a protected witness then the respondent *must* do so only through a legal representative.

This places an onus on duty lawyers assisting unrepresented respondents to:

- ensure they have advised the respondent that they are not permitted personally to cross examine a protected witness
- inform the respondent that they can have the matter adjourned in order to obtain legal representation.

It will be important for duty lawyers to impress upon the respondent that if they wish to contest the making of a Family Violence Intervention Order then they essentially will not be able to do so without the help of a lawyer.

Exceptions to the prohibition of unrepresented cross examination

Section 70(3) gives some very limited exceptions to the rule prohibiting cross examination of protected witnesses. Duty lawyers should know that *all* the conditions must apply before cross examination will be permitted.

The exceptions include:

- the protected witness is an adult
- the protected witness consents or if they have a case guardian, the guardian consents
- if the protected witness has a cognitive impairment, the court is satisfied that the protected witness understands the nature and consequences of giving consent and would be competent to give evidence
- the court decides it would not have a harmful impact on the protected witness to be cross examined by the respondent.

Section 70(4) places requirements on the court to inform the respondent that they cannot personally cross examine a protected witness and the court can adjourn a case on its own initiative if satisfied that the respondent has not had sufficient opportunity to obtain legal representation.

Orders for legal representation

If the respondent does not obtain legal representation for cross examining a protected witness after being given a reasonable opportunity to do so, the court *must* order Victoria Legal Aid to *offer* the respondent legal representation for that purpose. Usually this order is made at the directions hearing.

Tips for duty lawyers when advising about cross examination and court ordered representation

1. The court orders Victoria Legal Aid to offer legal assistance, not the duty lawyer:

It is not the responsibility of the duty lawyer to offer legal representation.

Duty Lawyers should ordinarily advise and/or assist a client to apply for legal assistance, if they appear to be eligible for a grant for their case. The representation can then be provided by a VLA lawyer or a private practitioner in the usual way.

The court ordered representation will then usually be for clients who would not otherwise be entitled to a grant of legal assistance, due to means or merit or who did not want to apply for legal assistance.

2. The order overrides anything in the *Legal Aid Act 1978*:

The order overrides merits and means tests although Victoria Legal Aid may still impose a financial contribution upon a respondent and still apply all or any of the conditions under section 27 of the Act.

It may be the case that Victoria Legal Aid will limit legal assistance to the cross examination of the protected witness. Duty lawyers should refer to current Grants handbook guidelines.

3. The refusal by a respondent of legal representation offered results in an inability to contest the matter:

Neither the respondent *nor their witnesses* may give evidence if cross examination is prohibited by the court. The advice the duty lawyer should give in these circumstances is that the respondent's case cannot be properly presented.

Family Violence Safety Notices

The relevant section which introduces the FVSN is section 24. The FVSN is the procedure the police use after hours when there are matters involving FV. The FVSN can be issued by a police officer when that officer has reasonable grounds to suspect that a FVIO doesn't exist and it is necessary to preserve the safety/property of the affected family member or to protect a child from FV.

A FVSN can include the same conditions as an Intervention Order except for firearms and weapons authority revocations, section 29.

If a police officer suspects FV, he/she will need to apply to another officer above the rank of a sergeant for a FVSN to be issued. If a FVSN is issued it operates as an application or a summons which requires the respondent to appear at court within 120 hours.

A FVSN commences when it is served and will cease to operate when an order is made and served or an order is refused. If parties are not at court when the FVSN is heard, then the police have the ability to obtain a final FVIO if in the circumstances an order should continue.

In essence the grounds for issuing a FVSN are the same as required for an interim FVIO (see sections 53-60).

Interim Orders

Once the Application and Summons has been served on the respondent by the police, s/he is deemed to have notice of the proceedings. The court is then able to hear evidence and decide whether to make an order.

At the first return date, if the respondent is present and wishes to contest the matter, or if the respondent is not present because s/he has not been served, the court may make an Interim Intervention Order and adjourn the matter to a contested hearing or a later date to allow for service. It is not compulsory for the court to make an Interim Intervention Order in order to adjourn the matter for either purpose, and an Order can only be made if sworn evidence has been given by the applicant or informant.

Final Orders

The court will not make a final Intervention Order unless the respondent has been served and evidence is presented at court.

If the respondent is present, whether or not s/he is represented, an Intervention Order, whether interim or final, can be negotiated by consent. If the respondent wishes to contest the matter, it will almost always be adjourned to a contested hearing date.

A Final Order, made either by consent or after a contested hearing, can last for any period.

Duty lawyers do not appear at contested hearings for Intervention Orders.

Children and Intervention Orders

Where there are children of one or both parties involved as either AFMs in their own right, or as witnesses to violence experienced by the AFM, the Court can include the children in an order made for the primary protection of the AFM. Where the child is the primary AFM, the proceedings should take place in the Children's Court. However this is discretionary.

The court can order that a child who is an affected family member and not the applicant, be represented in family violence proceedings.

If the Court decides to make an Intervention Order, and either party is the parent of a child, the court must also decide whether it will jeopardise the safety of the protected person or the child for the child to live with, spend time or communicate with the respondent and the child.

If there are no family law orders in place, and the court decides their safety will not be jeopardised, then the order must include a condition that any arrangements for spending time etc must be agreed in writing and must include arrangements for handover.

As Intervention Orders are usually sought at the time of the breakdown of the relationship, in most cases there are no such arrangements in place and the duty lawyer may be required to negotiate such arrangements. See Part E: Precedents for family violence cases

If there is a family law Order in place, which would be inconsistent with the Intervention Order, the Court **must** vary, discharge or suspend the family law order to the extent it is inconsistent with the Intervention Order.

Firearms Prohibition

Many respondents are unaware of the ramifications of the making of an order in relation to firearms in their possession. If police are satisfied on the balance of probabilities that there are grounds for the issue of an Intervention Order, they must seize any firearm of the respondent. An Intervention Order may disqualify the respondent from obtaining a licence, permit or other authority to possess, carry or use firearms for the term of the order and for five years after that.

Police are instructed to request these conditions when an Intervention Order is granted. After an Intervention Order has been made the police may, without warrant, enter and search any premises where the respondent resides or has resided in order to seize any firearm in the respondent's possession. This power is authorised even in the absence of any firearms condition in the order.

Exclusion Conditions

The court must consider whether an exclusion condition is needed if an Intervention Order is made. A respondent can be prevented from entering premises (including the family home) so that an affected family member is protected from family violence.

The court must consider factors in addition to ensuring that the AFM is protected from violence including the need to avoid disruption and maintain social networks and support for the affected family member/s. If the respondent is a child additional compulsory considerations must be taken into account under section 83.

The Intervention Orders relating to property do not affect the ownership of the property and are subject to any Family Law Order. To the extent of any inconsistency, the family law order prevails.

Variation, Revocation and Extension

Duty lawyers also need to be aware that many applications are brought before the courts to vary, revoke or extend orders. A variation of orders can include deleting or adding a condition to the orders or a variation in the terms of a particular condition of the order.

An example of revocation is where the parties reconcile and the order needs to be revoked to enable co-habitation to resume. There has to be a new fact or circumstance that has arisen since the original hearing for a revocation application to be successful. A respondent must seek leave of the court before bringing an application to revoke or vary. The application for leave would focus on the new facts or circumstances which would justify the application to revoke or vary.

If the order had been made on a police application and the affected family member wants to revoke the order, the police will need to agree to the application.

An AFM can apply for an extension of an order just prior to the expiry of their current order. S/he will need to produce evidence to the court that unless an order is extended, the respondent's behaviour, which gave rise to the need for an order in the first place, is likely to continue. An obvious example of this is if the respondent has breached the order during the preceding 12 months.

No appeal lies in relation to revival, variation or suspension orders.

Breaches of Intervention Orders

The court views breaches of Intervention Orders very seriously and the penalties available reflect the intention of Parliament to impose severe punishment on offenders, particularly habitual offenders. Breaches of orders range from slight such as attempted phone contact to very serious cases involving assault. The latter breach would be prosecuted in conjunction with the criminal offence and a term of imprisonment is a realistic outcome. Penalties range from fines to bonds to up to five years' imprisonment.

However, as breaches of Intervention Orders are criminal in nature, a family law duty lawyer should not provide advice or an appearance in these matters in the very rare event that s/he is asked to do so, but should refer the client to a VLA criminal law duty lawyer.

Personal Safety Intervention Orders Act 2010

Duty lawyer should be familiar with the Duty Lawyer Guidelines for Personal Safety Intervention Orders (Appendix 2).

This act applies where there is no family relationship between the parties.

For a claim of stalking to support an Intervention Order application, the court has to be satisfied on the balance of probabilities that the respondent has committed prohibited behaviour (section 5 PSIO Act) and is likely to do so again; and the respondents prohibited behaviour would cause a reasonable person to fear for his or her safety; or stalked the affected person and is likely to continue to do so again (section 61 PSIO Act).

An interim order can be made if the court is satisfied on the balance of probabilities that an interim order is necessary pending a final decision about the application to ensure the safety of the affected person; or to preserve the property of the affected person; and that it is appropriate to make the order in all the circumstances of the case (section 35 PSIO Act).

Stalking is defined in section 10 of the PSIO Act. A person stalks another person if they engage in a course of conduct, with the intention of causing physical or mental harm or of arousing apprehension or fear in the second person for his or her own safety or that of any other person. Specific examples are set out in the Act. If a PISO application is commenced, and it is later found that it should have been commenced as a FVIO application, (for example, if an intimate personal relationship was found to exist) the PSIO application must be struck out and the application made for a FVIO. The same applies in the reverse.

Part D: Interaction between Victorian and Commonwealth family violence laws

Injunctions under the Family Law Act

Even though Intervention Orders have become the preferred injunctive relief because they are enforceable by the state police, the duty lawyer should be familiar with the injunctions available to married and de facto partners under the Family Law Act 1975, as a warrant to arrest attaches to the orders and persons may be taken into custody as a consequence of failing to observe the injunction.

Section 114 FLA allows a court exercising jurisdiction under the Family Law Act to issue an Injunction to:

- ensure the personal protection of a party to a marriage (including de facto)
- protect the rights of the child in relation to where s/he lives or with whom s/he spends time;
- prevent entry into/ remaining at the residence/workplace/school/other specified place of the child or person with parenting orders
- protect property
- restrict the use or occupancy of the marital home.

How the Family Law Act impacts on Intervention Orders

Section 68Q FLA

This section invalidates a family violence order to the extent that it is inconsistent with an earlier, existing family law order or injunction that provides for a child to spend time with a person or expressly or impliedly requires or authorises a person to spend time with a child.

Section 68R FLA

Under section 68R, when a state court is making or varying an Intervention Order, it can revive, vary, discharge or suspend:

- a parenting order
- a recovery order
- an injunction
- an undertaking
- a registered parenting plan
- a recognisance.

to the extent that they provide for a child to spend time with a person. It is important to note that s68R does not allow a state court making an Intervention Order to make a Family Law order where one does not currently exist.

Limitations on section 68R

A Magistrate must not revive, vary, or suspend an order unless it:

- also makes or varies a family violence order
- has before it material that was not before the court when the original order or injunction was made under the FLA.

In relation to interim Orders, if a state court revives, varies or suspends an order, injunction or arrangement under section 68R, this will cease to have effect:

- after 21 days or
- when the interim order stops being in force whichever occurs first.

If a Section 68R Order is made and a client has concerns about the effect of that decision, further application for different orders should be made to a Commonwealth Court exercising jurisdiction under the FLA.

Where the parties have children the duty lawyer should always ask whether there are existing family law orders.

How Intervention Orders impact on Family Law proceedings

When family violence is an issue in Family Law proceedings in the Family and Federal Magistrates' Courts, the Court may take into account the existence of an Intervention Order (or equivalent from another State) in its deliberations, whether the Order is a Final Order, or is an Interim Order made not by consent.

If a Final Intervention Order is made after a contested hearing, the federal courts will recognise that a finding of fact has been made that family violence has occurred.

Part E: Precedents for family violence cases

For current precedents for family violence cases under the FVP Act see our Corporate drive Family law precedents collection located at:

H:\Corporate\PRECEDENTS - Family

In the family collection you will find the following documents:

In **Blank Court Forms and Brochures\ Magistrates Court Family Violence folder** the following court forms:

- Information for application for an IVO
- Application form associated final order – additional applicant
- Application form associated final order – additional respondent
- Application form to extend, vary or revoke an IVO
- Directions Hearing Information sheet

In **Family Violence Intervention Order folder**

- Checklist for duty list use
- Undertaking forms with and without conditions for both FVIO Act and PSIO Act
- Template interim agreement for children called “contact agreement FVPA”
- Contact agreement pursuant to section 92 of the FVIO Act
- Request for better and further particulars
- Pro forma letters to clients reporting on the outcomes of the court hearing.

Appendix 1 - Duty Lawyer guidelines Family Violence Intervention Orders

1. Purpose of these guidelines

- 1.1 To set out who is eligible to access the Duty Lawyer Service in family violence intervention order applications at Magistrates' Court locations throughout Victoria.
- 1.2 To help duty lawyers and support staff to prioritise eligible clients in the Duty Lawyer Service.

2. Application

- 2.1 These Guidelines apply to all duty lawyers providing services to adult applicants or respondents at the Magistrates' Court, whether they are VLA staff, briefed counsel or private practitioners.

2.2

3. Underlying Principles

- 3.1 VLA resources are limited and must be carefully targeted to those who are most in need of legal help bearing in mind the client's ability to pay for legal representation, whether the client falls into a priority group and the nature of the individual matter.
- 3.2 A primary goal of the Duty Lawyer Service is to resolve matters on the first day that a person comes into contact with the service, unless it is impractical or unreasonable to do so.
- 3.3 The Duty Lawyer Service is an important part of the effective functioning of the Magistrates' Court and the service is to be arranged and delivered with that in mind.
- 3.4 The priorities of, and demands on, the Duty lawyer Service are different across the State and there must be enough flexibility in these guidelines to allow services to be arranged with those differences in mind.
- 3.5 The benefit of doubt about whether a person qualifies for the Duty Lawyer Service is to be exercised in favour of providing a service.

4. What the Duty Lawyer Service is

- 4.1 The Duty Lawyer Service is made up of lawyers, and in some locations, support staff based at Magistrates' Court locations and available to help people in the following ways:

In-Court Advocacy: By a lawyer providing advice to an applicant or respondent, negotiating with the other party and also representing that person in court on the day.

Legal Advice: By a lawyer providing advice to either an applicant or respondent but not representing that person in court. This can include negotiation with the other party and referral. The lawyer should also refer the client to appropriate services.

Legal Information: By providing information in writing to help an applicant or respondent to understand the legal matter that they face, the process to be followed, how to represent themselves in court, and where to access services.

5. Family Violence court events:

- 5.1 While Magistrates' Courts may follow different listing practices across the State, generally the following court events apply to family violence intervention orders:

First Return Date: This is the first date that the matter is listed at Court after the application has been filed. This may also be referred to as the "mention date".

Directions Hearing: A matter may be set down for a Directions Hearing prior to a contested hearing where the matter could not be resolved on the First Return Date. This court event is often used to enquire about the preparation of the matter for contest including the number of witnesses to be called and whether an order for VLA to provide representation has been complied with.

Contested Hearing: The Duty Lawyer Service will not provide assistance or representation to parties at a contested hearing.

6. Summary of these guidelines

- 6.1 Applicants may receive assistance from the Duty Lawyer Service on the First Return Date and Directions Hearing. No means test is to be applied for this service.
- 6.2 Respondents may receive assistance from the Duty Lawyer Service on the First Return Date. No means test is to be applied for this service.
- 6.3 Respondents who are not eligible for a grant of legal aid will not receive assistance from the Duty Lawyer Service at the Directions hearing. Information only in the form of written publications may be provided to a respondent who does not qualify for a substantive grant of legal aid grant at the Directions Hearing.
- 6.4 Only respondents who are eligible for a substantive grant of aid may receive assistance in the form of in-court advocacy or legal advice at the Directions Hearing.

7. Lawyer's discretion to provide assistance at the Directions Hearing

- 7.1 Where a respondent does not meet VLA's guidelines for a substantive grant, a duty lawyer may exercise his or her discretion to provide in-court advocacy or legal advice where there are compelling reasons why the client cannot self-represent. This will only apply in exceptional circumstances. Duty lawyers will need to use their training and experience to make this assessment.
- 7.2 A decision to provide in-court advocacy under this discretion should include consideration of the competing priorities in the court list on the day,

8. Matters in which information only is given

Respondents who do not meet VLA's guidelines for a substantive grant will receive information only in the form of pre-prepared information sheets at the Directions Hearing.

Universal entitlement to legal information

- 8.1 All clients presenting at the Duty Lawyer Service are entitled to information in writing to help the client to understand the legal nature of the matter and their options, the process to be

followed, how to represent themselves in court, and where to access services, including those of a private practitioner.

- 8.2 Legal information is provided by VLA through its website, Legal Help and at court through printed brochures, information sheets and self-representation guides.
- 8.3 The Duty Lawyer Service must pro-actively provide Legal Information to people who are otherwise ineligible for a duty lawyer service because of their income or the nature of the matter.
- 8.4 Information only is to be provided at Directions Hearings to Respondents who do not meet VLA's guidelines for a substantive grant, including those who do not qualify under the means test.

Appendix 2 - Duty Lawyer guidelines Personal Safety Intervention Orders

1. Purpose of these guidelines

- 1.1 To set out who is eligible to access the Duty Lawyer Service in Personal Safety Intervention Order applications at Magistrates' Court locations throughout Victoria.
- 1.2 To help duty lawyers and support staff to prioritise eligible clients in the Duty Lawyer Service.

2. Application

- 2.1 This Guideline applies to all duty lawyers providing services to applicants or respondents at the Magistrates' Court and the Children's Court, whether they are VLA staff, briefed counsel or private practitioners.

3. Underlying Principles

- 3.1 VLA resources are limited and must be carefully targeted to those who are most in need of legal help bearing in mind the client's ability to pay for legal representation, whether the client falls into a priority group and the nature of the individual matter.
- 3.2 A primary goal of the Duty Lawyer Service is to resolve matters on the first day that a person comes into contact with the service, unless it is impractical or unreasonable to do so.
- 3.3 The Duty Lawyer Service is an important part of the effective functioning of the Magistrates' Court and the service is to be arranged and delivered with that in mind.
- 3.4 The priorities of, and demands on, the Duty Lawyer Service are different across the State and there must be enough flexibility in these guidelines to allow services to be arranged with those differences in mind.
- 3.5 The benefit of doubt about whether a person qualifies for the Duty Lawyer Service is to be exercised in favour of providing a service.

4. What the Duty Lawyer Service is

- 4.1 The Duty Lawyer Service is made up of lawyers, and in some locations, support staff based at Magistrates' Court locations and available to help people in the following ways:

In-Court Advocacy: By a lawyer providing advice to an applicant or respondent, negotiating with the other party and also representing that person in court on the day.

Legal Advice: By a lawyer providing advice to either an applicant or respondent but not representing that person in court. This can include negotiation with the other party and referral to the Dispute Settlement Centre Victoria. The lawyer should also refer the client to appropriate services.

Legal Information: By providing information in writing to help an applicant or respondent to understand the legal matter that they face, the process to be followed, how to represent themselves in court and where to access services.

5. Personal Safety Intervention Order court events:

- 5.1 While Magistrates' Courts may follow different listing practices across the State, generally the following court events apply to Personal Safety Intervention Orders.

First Return Date: This is the first date that the matter is listed at Court after the application has been filed. This may also be referred to as the "mention date".

Directions Hearing: A matter may or may not be set down for a Directions Hearing prior to a contested hearing where the matter could not be resolved on the First Return Date. This court event may be used to enquire about the preparation of the matter for contest including the number of witnesses to be called.

Contested Hearing: The Duty Lawyer Service will not provide assistance or representation to parties at a contested hearing.

6. Summary of these guidelines

- 6.1 Clients who are genuinely facing homelessness as a result of these proceedings, or are the alleged victim of 'obsessed stranger stalking' may receive in-court advocacy on the first mention date. No income test is to be applied for this service.
- 6.2 Priority clients and clients who do not meet income test requirements, but where the allegations are sufficiently serious to warrant additional assistance, may receive legal advice.
- 6.3 Non-priority clients, where the allegations are not serious and the client does not meet income test requirements will receive information only.

7. The income test

- 7.1 The income test only applies to non-priority clients and does not apply to victims of stranger stalking or who are genuinely at risk of homelessness as a result of these proceedings.
- 7.2 The income test is not the same as the means test for a grant of legal aid. It is a way of ensuring that limited legal aid resources are targeted to those people who genuinely cannot afford their own lawyer. The income test will be communicated to Magistrates' Court staff and publicised to people through signage, VLA legal information material and the Legal Help telephone service.
- 7.3 A person who has a Health Care Card or Pensioner Concession Card is automatically assumed to meet the income test.
- 7.4 All other persons will need to make a simple declaration of income without the need for documentary proof.
- 7.5 person will meet the income test if:
- 7.5.1 they are not supported by anyone else and their weekly after tax income is less than:
- \$750.00 if they have no dependant children, or
 - \$900.00 if they have a dependent partner or one dependant child, with an additional \$50 for each additional dependent child, or

7.5.2 they are supported by a partner or another person and their **combined** income is less than \$900 after tax per week with an additional \$50 for each additional dependent child. NB This can be waived if the accused person cannot reasonably rely on that person to fund their legal costs e.g. because of family violence.

7.6 Where a person is employed on a short term contract a weekly average of the income for the previous three months may be used as their weekly income for the purposes of the income test.

8. Matters in which in-court advocacy is provided

Clients who are genuinely facing homelessness as a result of these proceedings, or are the alleged victim of 'obsessed stranger stalking' will receive in-court advocacy

8.1 In-court advocacy should be provided on the first return date for a person who is:

- The alleged victim of 'obsessed stranger stalking'.
- At risk of homelessness as a result of these proceedings.
- A child applicant or respondent upon referral by the court.

8.2 Obsessed stranger stalking is:

- Obsessed stranger stalking is loosely defined and can include where the respondent has been engaging in persistent harassing and /or threatening behaviour such as following the applicant or leaving unwanted messages for him/her, and the applicant is in genuine fear for his/her safety as a result.
- Stranger stalking occurs where there has been no close or personal relationship between the applicant and respondent. The applicant and respondent may have knowledge of each other but that knowledge does not relate to any civil, commercial or neighbourhood dispute or transaction.

8.3 A client is genuinely at risk of homelessness as a result of these proceedings where:

- the making of an Intervention Order would genuinely result in the respondent being excluded from living in their current residence. A mere inconvenience, for example being required to use an alternate entrance or exit, or having restrictions placed on their movement within common areas does not result in a genuine risk of homelessness.
- the applicant and respondent live in the same shared housing or accommodation.

Lawyer's discretion to provide in-court advocacy

8.4 Duty lawyers will need to use their training and experience to assess whether a client is a 'priority client', a victim of obsessed stranger stalking or at genuine risk of homelessness and where there is doubt about that matter benefit of the doubt should be given to concluding that the client does fall within that priority group.

8.5 Where a client is not a victim of obsessed stranger stalking or genuinely at risk of homelessness a duty lawyer may exercise his or her discretion to provide in-court advocacy where there are compelling reasons why the client cannot represent themselves, for example if s/he is a child. This will only apply in exceptional circumstances.

8.6 A decision to provide in-court advocacy under this discretion should include consideration of the competing priorities in the court list on the day,

9. Matters in which legal advice is given

Priority clients, and clients who meet income test requirements, where the allegations are sufficiently serious to warrant additional assistance may receive legal advice.

9.1 Duty lawyers should provide legal advice to priority clients or to non-priority clients in matters where the allegations are sufficiently serious.

9.2 Legal advice can include a lawyer providing advice as to the merits and legal nature of the matter, taking part in limited negotiations, but not representing the client in court. The lawyer should also refer the client to appropriate services.

9.3 Where matters are resolved an 'appearance tick list' should be completed by the duty lawyer and placed on the court file in lieu of in-court advocacy.

9.4 Our priority clients are people who:

- have an intellectual disability, diagnosed acquired brain injury, diagnosed psychiatric or psychological illness, diagnosed serious health condition or serious physical disability;
- experience cultural barriers, which make that person unable to participate effectively in court proceedings without legal representation; and/or
- identify as an Indigenous Australian; and/or
- are illiterate.

9.5 Sufficiently serious allegations include:

- matters where it is alleged a crime has been committed, for example a physical or sexual assault. Verbal abuse in isolation from other serious criminal behaviour would not amount to 'sufficiently serious'.
- matters with police involvement

10. Matters in which information only is given

Non-priority clients and clients who do not meet income test requirements will receive information only in the form of pre-prepared information sheets and referral to the VLA website

Universal entitlement to legal information

10.1 All clients presenting at the Duty Lawyer Service are entitled to information in writing or other accessible form to help the client to understand the legal nature of the matter and their options, the process to be followed, how to represent themselves in court, and where to access services, including those of a private practitioner.

10.2 Legal information is provided by VLA through its website, Legal Help and at court through printed brochures, information sheets and self-representation guides.

10.3 The Duty Lawyer Service must pro-actively provide Legal Information to people who are otherwise ineligible for a duty lawyer service because of their income or the nature of the matter.

10.4 Information only is to be provided to clients where:

- the allegations are not sufficiently serious
- the client is not a priority client and does not meet income test requirements
- the matter relates primarily to a neighbourhood, commercial or civil dispute.



VLA Practice Matter – Family Violence (procedural advice)

SCENARIO	PROCEDURAL ADVICE AND INTERNAL REFERRAL
<p>Female caller on DSP. She has already applied for an intervention order against her ex-partner and an interim order was made ex-parte on the same day because it was determined that she needed protection straight away. The first mention date is next week and she has called Legal Help to find out about what will happen at that hearing. She is very anxious about seeing her ex-partner at court and doesn't really understand the court process. She also wants to know whether she needs to be represented by a lawyer.</p>	<p>This is a good example of where Legal Help can add value by providing procedural advice and a to the Duty Lawyer (DL).</p> <p>Procedural advice could include:</p> <ul style="list-style-type: none"> • Telling her to bring any documentary evidence with her to Court e.g facebook print outs, emails, texts, photos. Explain that this evidence could help the DL negotiate outcome on the first mention. Explain that her witnesses (if she has any) do not need to attend on the first mention but it is helpful to bring documentary evidence to show DL. Also suggest she may wish to bring a support person with her to Court. • If she is really concerned about her safety, explain that she can contact Court so they can arrange security, a separate area for her to wait, or some assistance from Court Network / other support agency. They can also arrange an interpreter if she requires one. • Explaining the Court process e.g respondent will have the opportunity to respond to her application at the first mention. The respondent may agree to the order, ask for an undertaking instead of an order (explain what this is), argue against the order ie contest it or ignore summons by not coming to Court. • If an final order is made on the first mention, you wont need to come back to Court again. But if the respondent doesn't come to court or the matter doesn't resolve, the proceeding may need to be adjourned. • If the matter is adjourned for a directions hearing and/or contested hearing, the Court may make an order for VLA to represent her and/or the respondent during cross-examination. Explain s71 and s72 orders and how these work ie Court may order for VLA to represent respondent and/or applicant for purposes of cross-examination. Court will send copy of the order to VLA and an assessment officer will send out VLA application for her to complete. Explain that VLA could force her to make contributions and that the order by the Magistrate clearly stipulates VLA can attach conditions to funding. In practice, section 72 orders (for applicants) are usually made when a s71 order is made for respondent to ensure 'level playing field' between the parties. • Explaining that the grant of aid is only for cross-examination at the contested hearing so may have to represent herself for the most part of the contest unless VLA decides to fund whole contested hearing pursuant to our guidelines for funding of intervention orders. Go through VLA guidelines for family violence intervention orders. • Explaining that sometimes the Court may make an order for further and better particulars. If this order is made, explain that she will need to detail the facts and the evidence she intends to rely on to prove those facts to the Court in a written document.

- If the matter is proceeds to a contested hearing, she will need to subpoena any witnesses to attend court (there is a form for this on Magistrates Court website or she can obtain from the Court). If she obtains a grant of aid the lawyer may assist her with this.

- Prepare duty lawyer memo

Conflict and referral issues

Although there is no requirement to undertake a conflict check for procedural advice and where an internal referral to a DL is being made, in the interests of making a good client focused referral, it is important to check for any 'red flag' conflict issues. For example, ask if:

- the respondent been charged in relation to the FV? If so, VLA could already be acting for the respondent in criminal proceedings.
- there are any family law proceedings or child protection proceedings on foot? If so, VLA could be acting for the respondent in those proceedings.

If there is an obvious conflict, consider referral to CLC who provides DL services in relevant Court.



Definition of Family Violence

Based on the Family Violence Protection Act 2008 - SECT 5

Family violence is a behaviour toward a family member that is

- physically or sexually abusive; or
- emotionally or psychologically abusive; or
- economically abusive; or
- threatening; or
- coercive; or
- in any other way controls or dominates the family member and causes them to feel fear for their safety or well being and that of other family members.

Family violence includes the following behaviour-

- assaulting or causing personal injury or threatening to do so;
- sexually assaulting or engaging in sexually coercive behaviour or threatening to do so;
- intentionally damaging a family member's property, or threatening to do so;
- unlawfully depriving a family member of the family member's liberty or threatening to do so;
- causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.

Behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.

What family violence might sound like*

Form	Example
Physical abuse	Pushing, shoving, hitting, slapping, choking hair, pulling, punching or using weapons (Note: acts are physically abusive even if they don't result in physical injury)
Sexual abuse	Rape (which includes being forced to perform unwanted sexual act, or to have sex with others) Being pressured to agree to sex, Unwanted touching of sexual private parts, Causing injury to the victim's sexual organs,
Emotional abuse	Acts that humiliate degrade and demean a person, Threatening: to harm a person, to take their children, to commit suicide, to report a person to authorities such as Centrelink or Immigration
Social abuse	Isolating a person from social networks and supports, either by preventing them from having contact with their family friends or by verbally or physically abusing them in public in front of them. Continually putting friends and family down so that the person is slowly disconnected from their support network Preventing the person from having contact with people who speak their language and/or share their culture
Economic abusive	Denying a person access to money, including their own Demanding that the family live on inadequate resources Incurring debts in the person's name Selling the person's possessions
Controlling behaviour	Dictating what the person does, who they talk to, or where they go. Not allowing the person privacy, forcing the person to go without food and water.
Verbal abuse	Screaming, shouting, making put-downs, name calling, ridiculing the person in public or private.
Intimidation	Smashing things, destroying possessions, putting a fist through the wall, questioning the person in a hostile way. Recklessly driving a car when the person is a passenger.
Spiritual abuse	Ridiculing or putting down the person's beliefs and culture Preventing the person from belonging to or taking part on a group that is important to their spiritual beliefs, or practising their religion.

* This is an adaptation of *Family Violence Risk Assessment and Risk Management Framework and Practice Guidelines*. Department of Human Services 2012 pages 20-21