Royal Commission into Family Violence
St Kilda Legal Service Co-op Limited

Submission 23 May 2015

Background

St Kilda Legal Service (SKLS) is a community legal centre (CLC) that has been operating for over forty years. We service the catchments of Port Phillip, Bayside, Stonnington and parts of Glen Eira.

SKLS has provided continuous duty lawyer services for applicants in Family Violence Intervention Order (FVIO) matters in Moorabbin Magistrates Court since the court opened in 2008. We have had, variously, no funding to do this, or short-term funding from different sources. Our most continuous source of funding was a three-year Legal Services Board (LSB) grant, which expired in November 2014. This program included components of legal education (CLE) to workers and the community, and also fortnightly outreach to two community agencies (Family Life and the Highett Maternal and Child Health Centre. Currently we are funded through Victoria Legal Aid (VLA) until 30 June 2015, in an emergency arrangement described by VLA as 'bare bones'. The current funding does not allow for CLE or outreach but we are still providing these services from an extremely small amount left over from the LSB grant. Our entire Family Violence (FV) program will cease 30 June without a continuation of funding.

FV lists at Moorabbin have ballooned, from around a dozen per week, listed on Mondays, in 2008, to in excess of 100, now listed two days per week (Mondays and Fridays).

Our FV lawyer has been in the role for three years and has extensive experience in other FV courts (Werribee, Sunshine, Ballarat and Dandenong).

Scope of this submission

CLCs are uniquely placed to provide insights into what is working in FV and what is not. CLCs have provided court services, casework, community development and CLE for FV applicants for several decades. CLCs have integral links to community and strong relationships with FV service providers.

SKLS understands that the Federation of CLCs and several other CLCs are lodging submissions to this Royal Commission. We have met with these stakeholders and support any submissions that raise issues faced by our clients and our FV lawyer, both in the realm of prevention and response. Some of these issues are, and this is a non-exhaustive list:

- Child respondents
- Housing and homelessness
- Elder abuse
- Women with disabilities
- Women prisoners
- CALD and Aboriginal communities
- Training for state authorities i.e. DHS, Civic Compliance, Centrelink
- FV and infringements
- FV and Family Law
- Access to services in remote areas
- Police response and enforcement
- Safety at court
- Inconsistency with magistrates
- Rollout of Specialist Courts
- Overwork of duty lawyers
- Availability and efficacy of Men's Behaviour Change programs

While these factors greatly impact our clients and our FV lawyer, we do not propose to address them in this submission, as we believe other CLCs will do so more than adequately. Rather, we will focus on concerns with the Family Violence Protection Act (FVPA), and its legal remedy, the Family Violence Intervention Order (FVIO).

Specifically, this submission addresses:

1 The gendered nature of FV and the non-gendered nature of the FVPA – particularly in terms of cross-applications
2 The definition of FV in the FVPA
3 Ambiguity in FVIOs
4 Firearms licenses
5 Further and better particulars

1 Gender

It is generally accepted that FV is perpetrated in the main by men against women and children. While this is not always the case, our experience and the data we collect points to this situation being in the overwhelming majority. For that reason we take a gendered approach in this submission. We mean no offence in doing so and we accept that FV is committed by a minority of those in the community.

When mentioning intimate partners, we use the word 'spouse'. For this submission 'spouse' includes a intimate or formerly intimate partner, in any and every variety.

Access to justice

Women have lower incomes than men. Many women rely on their spouses for financial support. Women hold less superannuation, have lower monetary assets, and lower chances to enter or re-enter the workforce, because of responsibilities they have to their children. This can translate to women having less power.

The law is blind to gender. It does not differentiate. Financial disadvantage can impede a woman's ability to access the legal system. A man who has the means and the willingness to do so, can use the legal framework to his advantage.

Cross-applications by respondents after the fact, or applications by respondents against other family members (for example the original applicant's father) are the bane of all FV workers' lives. But the current legal framework means that we can't do anything about them other than allow them to run their often malicious course. There are no tools to deal with cross-applications in the FVPA, the term is not mentioned.

Recommendation 1:
That cross-applications be recognised in the FVPA. That cross-applications lodged as bargaining tools be discouraged by way of sanctions to be written into the FVIO and VLA eligibility guidelines (see recommendations 2, 3, 4 and 5 overleaf).

Scenario: A man perpetrates serious FV on a woman. She, who does not do paid work but cares for children, applies for a FVIO and is granted an interim order. He, who is in the paid workforce, engages a private lawyer to refute the allegations. He also lodges a cross-application, let's say it's light on grounds. The court registry does not have the power to refuse his application. He is not granted an interim order but his application proceeds.

At court his lawyer suggests mutual orders. The woman has to weigh her options. Consenting to this is unfair given the disparity of the allegations. Taking the matters to Contest may result in the outcome she desires, however because she is now a respondent, she is prohibited under S70(3) from cross-examining the man unless he consents to that. He does not consent. In any event she may consider the prospect of cross-examining him, terrifying. Unless she is eligible for a grant of legal aid (eligibility guidelines are strict and most in the community are ineligible) she will need to pay. A private lawyer will charge some thousands of dollars for a contested hearing. Even the S71 order for respondent representation by VLA will cost her up to $670. If she has, for example, saved up the money she will need for her first month's rent and bond (in effect her escape fund from FV) then VLA will request a contribution from her for the representation. Her financial independence is further reduced by her having to spend her escape money on refuting a meritless application.

Recommendation 2: That magistrates be empowered with discretion to refuse cross-applications (or applications by a respondent against, for example, the original applicant's father) lodged after the fact, if they are deemed to not meet the threshold (fear for safety or wellbeing, tested objectively). Perhaps this could be effected by a requirement for leave to apply. While a requirement to seek leave may mean one extra court hearing initially, it could save several hearings later.

Recommendation 3: That VLA FVIO eligibility guidelines be reviewed. That the merits guideline be tightened to mean that a cross-applicant (mostly male) where the application is deemed to have little or no merit be ineligible for S72 (applicant) representation.

Recommendation 4: That the VLA means test for a respondent to a *cross-application* (mostly female) be relaxed so that, for example, she does not have to forfeit her escape fund.

Costs

Costs are rarely awarded in this jurisdiction. The *exceptional circumstances* criteria under S154(3)(a) has potential impact on either party. In our FV lawyer's experience costs have only been awarded when a party has insisted on dragging the matter to contest and then failed to show up, without notice.

However under S154(3)(b) costs can be awarded if an application is deemed vexatious, frivolous or in bad faith. This section impacts solely on the applicant.

Case study: Serena (not her real name) was grabbed, punched and dragged along the floor by her hair, by her boyfriend Alan (not his real name). She tried to defend herself by reaching out for something, and in doing so a lamp was broken. Police were called and issued a safety notice against Alan. Alan lodged a cross-application with the breakage of the lamp his only ground. At court, because Serena refused to consent (and rightly so) to Alan's application, he also refused to consent. The matters were adjourned. Interim FVIOs were applied for. Both Serena and Alan had to give oral evidence. It was humiliating that the magistrate asked Serena to display her bruises, but she was granted an interim FVIO and Alan was not.

At Directions Hearing Alan consented to Serena's FVIO but refused to withdraw his own application. That matter was listed for Contest and an order under S71 was granted for representation for Serena. VLA asked her to pay $670. She did so, and was informed by VLA the night before the contest that she would be represented by a barrister. At the contest, Alan's lawyer attended but Alan did not show up. His application was struck out. Serena's VLA-briefed barrister, unbelievably, did not apply for costs. While Serena was relieved that her ordeal was over, she was $670 out of pocket. We assisted her to write letters to VLA and after some months they agreed to refund her money.

While the outcome for Serena was ultimately just, Alan had been able to use the FVPA to further perpetrate emotional, psychological and potentially financial abuse upon her. He was even willing to pay (his lawyer) for that privilege.

Recommendation 5: That a further clause be inserted into S154 empowering magistrates with discretion to award costs against respondents where the contesting of an application is deemed vexatious, frivolous or in bad faith.

2 Definitions of FV

Our FV lawyer sees many applications for FVIO that are refused at contested hearing. In our experience the initial applications are rarely vexatious, rather, misguided. We believe the definition of FV in the Act is misleading.

SKLS recognises that it is crucial to include acts other than physical abuse, within any definition of FV. Other behaviours may be equally damaging. However we find the definitions poorly worded and open to misunderstanding. The most important phrase is hidden in subsection (1)(a)(vi) - ***and causes that family member to feel fear for the safety or wellbeing of that family member or another person.***

At court it is our duty to explain to applicants that this is an objective test. Often our clients are surprised, this is the first time they have heard that. They have not received legal advice before, instead have been advised by police that 'we can't do anything without an intervention order', or, more alarmingly, by health professionals 'you are strong enough now to *take out* an intervention order, go to court and do it'. In reality magistrates do not grant orders (unless of course the order is by consent) unless satisfied that reasonable fear exists.

While this problem may be addressed by community education and police training, we suggest that S5 be reworded to bring this objective test to the forefront.

We feel also that the word *wellbeing* is too vague. We prefer the word health as this has a more serious tone but still encompasses physical and mental health.

S5(1) is reproduced in its current form here:

S.5 FV definition

(1) For the purposes of this Act, ***family violence*** is—

(a) behaviour by a person towards a family member of that person if that behaviour—

(i) is physically or sexually abusive; or

(ii) is emotionally or psychologically abusive; or

(iii) is economically abusive; or

(iv) is threatening; or

(v) is coercive; or

(vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or

(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Recommendation 6: That S5(1) read as follows:

S.5 FV definition

(1) For the purposes of this Act, *family violence* is behaviour by a family member that causes a person to fear for their safety or health, or for the safety or health or another family member. Family violence includes:

(a) physical or sexual abuse;

(b) threats to health or safety;

(c) coercion;

(d) emotional or psychological abuse;

(e) economic abuse;

(f) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in this section.

Controlling behaviour

We find this term problematic. Applications for FVIO are often made on behalf of a child, against a parent. Parenting *requires* control. In recent times we have seen several applications for FVIO made on behalf of a child, by a parent who does not live with the child, against the parent who does (a high percentage of these are in effect, cross-applications but sometimes the court does not recognise them as such as the parties' names are different (they will have the child's name on rather than the absent parent's). Where a child is involved the court takes these applications seriously (rightly so) but where the court has been unaware it is a cross-app, interim orders have been made ex-parte (where perhaps they would not have been made had the court known it was a cross-app) and this has resulted in interim orders being served on women that make it impossible for them to properly parent their children, under the current definition of FV.

Recommendation 7: **That the word *controls* be removed from the S5 FV definition.**

Economic abuse

We also find this term problematic in terms of FVIOs. If we look at physical abuse, that describes *actual* behaviour, and the repercussions of the behaviour can be a criminal charge of *contravene FVIO*. However, economic abuse more often than not signifies the *absence* of behavior, for example *not* paying the rent. If the respondent has the means to pay the rent and the applicant does not, then his non-action can have serious consequences for her (eviction, homelessness). However it is difficult to imagine how a FVIO could remedy this. It is almost unthinkable that police would lay a charge of contravene FVIO on the basis of non-payment of rent. If economic abuse is not taken seriously then there is little point in its mention in the FVPA, and on FVIOs.

Recommendation 8: **Where there are allegations of serious economic abuse, empower magistrates with discretion to order production of financial records and/or make wage garnishee orders.**

3 Ambiguity in FVIOs

Applications for FVIO print out from the court's system with up to 23 clauses. Some clauses are irrelevant, repetitive, poorly worded, unfinished, and some negate each other. Respondents are directed to contact the Men's Referral Service (even if they are women).

This documents is what is served on the respondent, but its expectations are not always clear.

Recommendation 9: **That documents are better checked when printed out, and edited to make more sense before being issued.**

If English is not the respondent's native language, it will be especially difficult for him to understand what has been served. We accept that the court does not have the means to translate its documents into languages. We believe that general information should be available in other languages.

Recommendation 10: **That FVIO applications include a generic statement, pre-prepared and available to the registry, in a range of community languages. Details could be: *an application for FVIO has been made against you. You are summonsed to attend court ... you may obtain legal advice from VLA, etc.***

Terminology is confusing

The words *consent* and *contest* sound similar and yet mean the opposite. Explaining these concepts to those with intellectual disabilities or English as a second language is difficult and can lead to misunderstandings.

Recommendation 11: That the terms *consent* and *contest* be replaced with other terms such as agree and oppose.

Notices of Hearing are misleading

Hearing notices state that the matter is listed at 9.30am and 5 minutes is allocated for the hearing. What's not said, is that there may be 50, 60, 70 matters all listed at 9.30. Naturally clients are annoyed and agitated if they are still at court at 4pm or beyond.

Recommendation 12: That hearing notices be reworded to be more in keeping with the reality of court.

Wording and order of S92 exemptions in FVIOs lead to confusion

The family law exemptions commonly included in FVIOs bear little relation to the actual text in S92 FVPA. We accept that the intersection of the FVPA and the FLA is fraught with difficulty, and we do not expect parties to make arrangements for child contact while at court when everyone is anxious, fearful, and safety is the primary concern. Generally the magistrates at Moorabbin take this view also. However the exemptions are important, and we feel should be on every FVIO (albeit in a different form) *unless* the magistrate has made a specific decision to remove them. Their current position is at the end of the FVIO, and this is unfortunate because they often appear by themselves on the second page, which can be overlooked or become separated from the first.

Recommendation 13: That FL exemptions are integrated into the relevant clauses, and have them on FVIOs as a matter of course. Magistrates to 'opt out' if the clauses are irrelevant, or if they have made the decision to remove them for safety.

The FVPA has come a long way since the Crimes Family Violence Act (CFVA) but in our view this is one area where the changes are unsuccessful. It is confusing for respondents to be told they cannot communicate with a person by any means, and on the next page they can communicate in writing about child arrangements.

4 Firearms licenses

Our FV lawyer notes an increase in applications by respondents, to be deemed non-prohibited persons under S189 Firearms Act 1996. The wording of that Act is cumbersome and convoluted, however in a nutshell the process for applications under S189 depends on the wording of the FVIO. If the FVIO does not include a condition disallowing a firearms license, the application can simply be made. If it does include such conditions, first an application to vary the FVIO must be made. Rather than dissuade applications, this process puts the Protected Person through an extra court hearing. There is no legal aid available for Protected Persons in this jurisdiction and it is incomprehensible that she must pay privately to oppose an application for him to legally hold a gun.

Of the four such applications SKLS had involvement with during 2014, three were eventually refused (one of our Protected Person clients had to appear at court on four separate occasions solely for the firearms license matter) but one was successful.

Case study: Jennifer (not her real name) was a Protected Person in a final FVIO. Her former husband Ray (not his real name) was the Respondent. Ray applied to be deemed a non-prohibited person. Jennifer was unrepresented – while we go out of our way to represent clients in these matters we are not funded to do so and rarely have the capacity. The case was based on him wishing to shoot recreationally at a rifle range. She gave evidence that in twenty years of marriage he never once expressed the desire to attend a rifle range. She also said that she was scared of him particularly since he had become angry and aggressive over a recent child support finding. She expressed the fear that he might shoot her. Ray's employer gave evidence at the firearms hearing, that Ray was employed full-time and was of good character (the same employer had earlier given evidence in the child support matter that Ray was employed only part-time and had a low income). The police case was less than robust and *non-prohibited person* status was granted.

We find this result alarming.

Recommendation 14: That legal aid funding be available private lawyers to assist protected persons in opposing non-prohibited persons applications, or that CLCs be funded to do this work.

5 Further and better particulars and other casework

Many applications for FVIO, written by protected persons or police, don't read as particularly compelling, but that does not mean that there aren't compelling facts behind them. Lawyers for Respondents often request further and better particulars (f&b) at court. Typically these are ordered at Directions Hearing but some magistrates order them at the first Mention. Well-drafted f&b can be powerful, and our FV lawyer has had considerable success in compelling consent with the production of f&b at Directions Hearing, avoiding the need to proceed to Contest. However we are not funded to do this and have limited capacity to undergo casework of this type. Sometimes clients need to draft their own (as if they don't have enough to worry about) or pay privately. VLA recently charged a client $500 for f&b.

For the last two years FV has been the single most common 'problem type', of all clients presenting to SKLS (this includes our generalist day service, our three times a week night services, our FV program and our drug outreach program). FV itself gives rise to other legal issues (i.e. what we know as *sexually transmitted debt*) and clients are often in need of advocacy (in terms of landlords, banks, Civic Compliance, VOCAT, family law et al). We are often in the position of being able to provide advice and referral only. CLC services are not just about making pathways to justice, we have a crucial role in assisting women and their children to find their feet, overcome some barriers, and ultimately lead safer, happier and more productive lives in the community.

Thank you for your consideration of this submission and its recommendations. We wish you all the best in your endeavours. Should you require further details, feel free to contact our FV lawyer Sharon Carr at sharon@skls.org.au, or our Principal Lawyer Philip Cottier at philip@skls.org.au.

Recommendation 15: That all CLCs, particularly those that provide FV duty law services are funded for full-time FV positions in order to undergo FV casework, related matters, further develop agency partnerships and provide community legal education and outreach services, rather than just duty law work.