



LIV Submission to the Royal Commission into Family Violence

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Date: 3 June 2015

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INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 18,000 members.

This submission brings together the views of members of the LIV's Legal Policy and Practice Sections, including its Family Law, Criminal Law, Elder Law, Workplace Relations, Disability Law, Administrative Law and Human Rights Sections and Reconciliation and Advancement Committee. The LIV acknowledges the valuable contribution made by Emma Swart, Barrister.

The submission focuses on the legal system as an element of the broader family violence 'system' which the Issues Paper defines as the array of government and non-government responses to family violence.

Lawyers play an important role in the multidisciplinary approach needed to support families and individuals affected by family violence. Early legal advice and representation, as well as holistic approaches across legal and other support services, are critical components of an effective response to family violence.

SUMMARY

In this submission, the LIV focuses on the legal system as an element of the broader family violence 'system' which the Issues Paper defines as the array of government and non-government responses to family violence. In particular, the submission looks at:

- Family violence and the court system
- Role of lawyers in the family violence system
- How LIV can contribute to the work of the Royal Commission

Family violence and the court system

People affected by family violence often find themselves in a labyrinth of court processes, having to attend court many times at different places and for different reasons. The LIV recognises the complexity of the court system as a key issue to be addressed to meet the objectives of the Royal Commission.

The operation of the court system will fundamentally affect whether people affected by family violence can be supported and receive fast and effective responses; and whether people who have been violent are held to account.

The legal system is an element of the family violence 'system'; namely, it is the mechanism for creating and enforcing laws and settling disputes between citizens. Within the legal system, the courts deal directly with people affected by family violence and those who have been violent.

For people affected by family violence, going to court is not necessarily a straightforward path. The court system is complex, involving a number of different courts dealing with different aspects of family violence. Each court has different procedures, focuses on different questions and involves different parties.

The court system is divided by constitutional jurisdiction, with federal and state courts dealing with different matters based on constitutional division of powers.

One family could be involved in concurrent litigation in the one of the Family Courts, the Children's Court, the Family Violence and Criminal Divisions of the Magistrates' Court and, in cases of serious criminal offences, the County Court or Supreme Court.

The attached [Appendix 1](#) provides a snapshot of the court system for people in the family violence system. It shows the different courts, issues dealt with, people involved and the links and disconnections.

Families experiencing violence and relationship breakdown commonly find themselves dealing with at least two different courts (federal and state), with different procedures, locations, legislation, areas of concern and, at times, different lawyers in each court. State courts deal with criminal violence, intervention orders, some property matters and child protection. Federal courts deal with parenting arrangements and property settlements.

Families with complex needs may find themselves dealing with the Children’s Court on child protection issues, the Magistrates’ Court on intervention order and criminal matters and possibly one of the federal courts on parenting orders or property issues.

The complexity of the legal system means that information, advice and referral pathways are needed to help people access the right court at the right time.

While it is a legal mechanism, the court system is broader than lawyers and the judiciary. A wide range of professions and services play a part in the court system, notably:

- Victoria Police
- Department of Human Services
- Child Protection Services
- Corrections Victoria
- Men's behaviour change programs (including the Men's Referral Service)
- Indigenous and culturally and linguistically diverse support services
- Family violence support and crisis accommodation services
- Women and children's support programs
- Family violence networkers, homeless and children's networkers;
- Other generalist or community services which offer family violence crisis and victims services; and
- Other agencies identified at the local level, such as hospital emergency departments and community health services

Inter-professional collaboration is vital to provide effective responses to family violence.

Role of lawyers in the family violence system

Lawyers play an important role in the way they work with clients and other professionals within the system.

To effectively support people affected by family violence, lawyers in the family violence system not only need to understand a broad range of legal issues and jurisdictions but also be aware of how the unique psychological complexities and inter-party dynamics that exist in matters involving family violence are best addressed and managed – both within the court system and the greater family violence support networks. This requires a breadth of knowledge, a range of interpersonal skills,

and strong inter-professional referral and collaboration. Lawyers play an integral part of the system, ensuring that all parties are adequately advised and represented, and acting as a conduit to all other support networks in the system.

Specialisation and cross-skilling for lawyers

The nature of the modern legal profession is that many lawyers work in areas of specialisation. The LIV supports specialisation and development of high standards for consumers, through the accreditation of lawyers in areas of specialisation. Lawyers working in specialist areas (e.g. criminal law, family law, children's law) may, within their area of specialisation, assist people who are affected by family violence or people who have been violent. However, the client is likely to have broader legal needs (as well as other support needs). In order to provide effective support to people affected by family violence, lawyers must have the required skills and experience to:

1. Identify each separate legal need for that client (whether it be family law, personal safety protection orders, criminal law);
2. Advise extremely stressed and often emotionally conflicted clients about each of the legal options; and
3. Refer the client to specialists in other fields of law and to non-legal support networks.

The LIV is currently examining ways to further enhance cross-skilling for lawyers and specialist professional development measures such as:

- A greater focus on cross-skilling lawyers so they can work across the child protection, family violence and family law systems. For example, rather than perceiving or promoting themselves as 'criminal law' specialists or 'family law' specialists, lawyers may specialise as 'family violence' specialists.
- Enhanced family violence training, professional development and information for lawyers generally.

The LIV is committed to providing high quality education that equips lawyers to provide access to justice in difficult circumstances to meet client needs.

Inter-professional working

In 2002, the Victorian Government established a State-wide Steering Committee to address family violence issues in the community. The Committee included representatives from police, government departments, family violence services, the courts, support and legal services, peak bodies for family violence and the Victorian Health Promotion Foundation. We support the findings of the Committee in its report¹ which recommended an integrated response to family violence in Victoria.

As the family violence system is complex, effective responses require professionals across disciplines to work effectively together. The LIV supports models which enhance multi-agency cooperation and coordination of services. Measures which may be considered are:

- Project or program based collaboration, where teams and processes are formed in specific geographic locations, populations or issues. For example the “cohealth” health justice partnership model in Footscray that Justice Connect cites in its submission to the Royal Commission into Family Violence.² Evaluation of these models would provide useful guidance to the LIV and its members about effective inter-professional collaboration practices.
- For some lawyers in private practice, forming project or program based teams may not be practicable (e.g. due to the size or resources of a firm). For all lawyers, support can be provided by other forms of inter-professional collaboration.
- Coordinated training offered to the community sector, police, judicial officers and court staff in all areas of family violence, including specific issues that arise for different people, such as elderly people.
- Using consistent screening and risk assessment tools across the range of services including child protection professionals, police, lawyers and courts.³

¹ Report of the *State-wide Steering Committee to Reduce Family Violence* (2005) http://www.dhs.vic.gov.au/data/assets/pdf_file/0020/643124/reforming_family_violence.pdf

² Justice Connect: *Family violence and elder abuse: similar, but different* (June 2015) <http://www.justiceconnect.org.au/family-violence-and-elder-abuse-similar-different>

³ Government of Victoria, *Family Violence Risk Assessment and Risk Management: Supporting an Integrated Family Violence Service System* http://www.dhs.vic.gov.au/data/assets/pdf_file/0006/581757/risk-assessment-risk-management-framework-2007.pdf

- Developing the skills, capabilities and processes that support all professionals in family violence to work effectively with each other as part of a broader system.
- Supporting models where services are placed within courts to provide information and referral to dispute resolution and support services.⁴
- Developing a family law screening tool for community and support workers.⁵

Early intervention

From the perspective of the legal system, measures that support early intervention for families affected by violence include:

- Raising community awareness of legal support services available, so that these are front of mind at the critical time when a person experiencing family violence is making the decision whether and how to leave. The LIV also provides community information through its *Find Your Lawyer* referral service.⁶
- Early access to legal advice and representation for all parties. Where people cannot afford to pay for private legal representation, availability of government funded legal information and advice enables early intervention.
- Making it easy to find lawyers with appropriate expertise. The LIV provides a referral service, where community members can be referred to a lawyer with appropriate expertise and receive an initial 30 minute consultation for free. In 2014, the LIV provided nearly 7,300 referrals for advice on matters commonly connected with family violence (domestic violence, family & relationships, intervention orders, child protection, parenting order, elder law).
- Culturally tailored services and programs make it more likely people will seek and receive appropriate support. For example, the Aboriginal Family Violence Prevention & Legal Service Victoria and Victorian Aboriginal Legal Service which specifically support Aboriginal and Torres Strait Island (ATSI) clients.

⁴ LIV Submission to Victoria Legal Aid Review of Family Law Services (pg3) <http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Family-Law/Submissions/Submission-to-Victoria-Legal-Aid---Family-Law-Lega.aspx?rep=1&qlist=0&sdiag=0&h2=1&h1=0>

⁵ Ibid at pg2

⁶ LIV website: <http://www.liv.asn.au/Referral>

Support for people experiencing family violence

LIV supports existing practices that have been put in place to provide greater support to people experiencing family violence, including:

- the capacity for police to initiate Family Violence Safety Notices outside of court hours;
- the capacity of the police to persist with orders on behalf of an affected family member (AFM) where the AFM does not consent to the making of the order (enabling the AFM to avoid blame);
- the capacity of the Court to order Victoria Legal Aid to fund respondents to avoid the situation where an AFM would be cross-examined by an alleged perpetrator when the respondent is a self-represented litigant.

How LIV can contribute to the work of the Royal Commission

This submission provides an overview of the key themes identified by LIV members in response to the Royal Commission's Issues Paper. In areas where further information, research or round table discussion are sought by the Royal Commission, the LIV would be happy to assist in providing access to its expertise and membership.

We can assist by providing:

- Further information and advice on the legal system or legal issues, either in round table discussions or through targeted research and analysis;
- Access lawyers' views on specific issues through our broad membership base; and
- Support to implement the recommendations, such as information, education and training.

In light of the timeframes available, the breadth and complexity of issues required to be considered by the Commission and the resources available to the LIV and its members, this submission has focused on the issues raised by the traditional paradigm of family violence; namely, parents with minor children. It is uncontroversial that family violence arises in other situations; for example, elder abuse is an emerging and increasing problem. Unfortunately, family violence arising in other situations does not receive the same attention as family violence issues arising within the traditional paradigm. They are nevertheless important issues to consider.

Although not possible to address in this submission, we note that the following groups of people are also adversely and uniquely affected by family violence:

- Migrants;
- Persons living with disability; and
- Elderly persons.

Furthermore, there are a range of views expressed by members in respect of the ongoing operation and possible expansion of some features of the current court systems that address family violence. We seek an opportunity to discuss these with you confidentially.

We would be happy to provide further information about the experience and effects of family violence on these groups of people via round table discussions or supplementary submission.

RECOMMENDATIONS

1. Explore ways of establishing more integrated court processes for Family Violence matters.
2. Improve outcomes and case-flow of intervention order matters by providing legal advice and/or review of applications at application stage by expanding the duty lawyer services or expanding court-employed lawyer roles.
3. Thoroughly evaluate the pilot at Dandenong Magistrates' Court of 'fast-tracking' criminal charges relating to family violence to ensure appropriate and effective resourcing.
4. Establish a dedicated service to provide early intervention for accused persons charged with family violence offences or responding to intervention orders.
5. Develop a greater focus on offender rehabilitation and behaviour change in sentencing for family violence related offences.
6. Review monitored support services available for offenders released after family violence related periods of imprisonment.
7. Review the use of intervention orders to remove young people from their homes.
8. Amend the *Family Violence Protection Act 2008* to give appointed family law independent children's lawyers the right to appear in intervention order cases where represented children are named aggrieved family members (AFMs).
9. Review legal aid funding eligibility guidelines for federal family cases where family violence is alleged.
10. Investigate ways to improve sharing of information between courts so previous orders and transcripts are readily accessible to other courts.
11. Increase the capacity of lawyers to provide advice on the effects of intervention orders on family law and criminal law matters at intervention order hearings through additional training or targeted duty lawyer services.
12. Review the wording and layout of the intervention order document to ensure it is easy to follow and understand.
13. Investigate ways to protect vulnerable groups in the community experiencing family violence
14. Improve outcomes for Aboriginal and Torres Strait Islander families by considering reforms to the Koori justice system.

Court structure and process

Recommendation 1

Explore ways of establishing more integrated court processes for Family Violence matters

The LIV supports consideration of models that integrate court processes and deal effectively with the complex issues that are currently before state and federal courts. By providing a holistic approach to the many legal processes a family may be facing, courts may be able to be more efficient, quicker and less traumatic for families.

Integrating court processes will be complex because of the distinct Commonwealth and State jurisdictions, which raises funding, political and constitutional law issues. That said, the benefits of integrated processes could be immense. LIV considers that this is a priority area for attention in enhancing responses to family violence.

Addressing levels of demand and resourcing implications

The recent increase in Family Violence Protection Applications has led to various resource challenges in the court system. Magistrates' Courts are overrun with cases. Our members report that, on days when intervention orders are heard, smaller court buildings are at full capacity with people. Duty lawyer services are overwhelmed and litigants who pay for private lawyers are frustrated and dismayed when cases are adjourned to a further stage and require yet another court appearance (with the associated cost). Legal aid funding and assistance is limited.

LIV members report that the process at the interlocutory stage has become cumbersome with orders for further particulars now standard and respondents often ordered to reply to the particulars. This leads to multiple court days and significant delay, as well as, for respondents, loss of the right to test the case being put against them before choosing whether to give evidence. The original strength of the intervention order process – quick, accessible and able to make early findings of fact – has been lost.

There is a flow on effect across other jurisdictions, as each court effectively waits for another to make a finding. Intervention order proceedings, in which there are duplicate allegations in family law proceedings, are being adjourned for months (and longer) with respondents' civil liberties affected

by the long-term operation of interim orders where parties simply cannot afford to litigate in multiple courts.

There are numerous policy papers and research which may be used to inform initiatives to improve the intersection between the family law, criminal law, child protection and family violence jurisdictions. While there have been some important developments which have improved the interaction between the multiple jurisdictions, it is widely acknowledged that the legal system remains fragmented and confusing for families with legal issues across multiple jurisdictions. For example, one family could be involved in litigation in the Family Court referred from the Family Violence and Criminal Divisions of the Magistrates' Court and Children's Court litigation. The legal landscape is confusing and frustrating for clients; funding decisions for legal assistance are made on different criteria in each jurisdiction; and it is not uncommon for one court to wait for another court to make findings before proceeding to final hearing.

The LIV submits that there should be an information sharing mechanism dealing with family law, family violence and intervention and child protection orders which may be accessed by each of the relevant courts. We refer to Recommendation 10 below.

Recommendation 2

Improve outcomes and case-flow of intervention order matters by providing legal advice and/or review of applications at application stage by expanding the duty lawyer services or expanding court-employed lawyer roles

Varying the way in which the initial complaint is taken could make a simple and effective improvement, which would flow through the system and alleviate some of the pressure on it.

At present, the complaint is either taken by police officers who are trained in taking statements from witnesses (but are not in a position to give legal advice to an affected family member (AFM)) or by Magistrates' Court Registrars who enter the complaint into a computer system (which requires fields to be typed and entered based on information from a form filled out by the applicant). This in itself is a lengthy process, where the paperwork can be confusing for applicants who are upset or overwhelmed.

It is common for allegations to be broad and not particularised, leaving AFMs at risk of worthy cases failing to satisfy a magistrate of relevant matters and respondents unable to properly assess the

case against them. An AFM needs the assistance of a trained lawyer to properly document the abuse alleged and to advise on the process before it begins.

If respondents are able to properly assess the case against them, they can make an informed decision early about whether to contest an order. Compare this to the current situation, where matters are often adjourned to the next stage to gather information.

If the AFM had legal assistance when making a complaint, many of the delays in the system would be alleviated, as respondents would know the case they have to meet and matters would be ready to proceed to hearing sooner. The resources of the Magistrates' Court could be refocused on fulfilling the role of the frontline court able to move quickly, establish the facts and make the necessary orders in a timely way. Currently, the Magistrates' Court's resources are disproportionately consumed by interlocutory proceedings, necessary to give natural justice to respondents, which could otherwise be provided by a well particularised complaint.

Legal services for AFMs at court could be provided by a duty lawyer scheme as part of a multi-discipline community support team. The services should be provided when the application or complaint is made, rather than the return date of applications.

An alternative would be to employ lawyers within the Magistrates' Court itself in an expansion of the role currently performed by Registrars (who are not required to be legally qualified and, even if they are, cannot provide legal advice). For example, a new role, equivalent to a Senior Registrar, could have the responsibility for checking applications issued by a party other than the police; going through the allegations with the Applicant; and requiring information not properly particularised to be provided before the application is issued and served.

Respondents should also receive information and advice about how their behaviour affects other family members (and particularly children) in the short term and long term, and how their behaviour (if it does not change) may impact:

- their relationship with their children in the future; and
- any future family court proceedings.

Recommendation 3

Thoroughly evaluate the pilot at Dandenong Magistrates' Court of 'fast-tracking' criminal charges relating to family violence to ensure appropriate and effective resourcing

In December 2014, the Magistrates' Court commenced a trial in Dandenong of fast tracking criminal charges arising out of family violence.⁷ This trial is proposed to be extended to Broadmeadows and Shepparton, but that expansion has currently been suspended.

The LIV submits that the success of the further initiatives will depend heavily upon access to legal advice and consistent representation for accused. These reforms could not be absorbed within the current capacity of the legal profession, which is limited due to current levels of legal aid funding. The LIV has consistently called on state and federal governments to increase funding to the legal assistance sector to address the \$200m funding gap identified by the Productivity Commission in its *Access to Justice Report*.⁸

LIV members recently reported the following problems from the Dandenong trial:

- The content of the preliminary briefs provided at the mention stage by prosecution is insufficient for any accused to assess whether they should plead guilty or not guilty.
- It is difficult for the accused to arrange legal aid funding within the expected time frame and gain access to all evidence to be alleged against them in order to make an informed and well advised decision.

The penalties for criminal offences which arise out of family violence have potentially significant consequences for a person beyond the recording of a conviction or finding of guilt.⁹ Without proper access to legal advice and representation or full disclosure at an early stage in the proceedings, contested hearings will increase in number. This will have unfortunate impacts upon complainants who will face the pressure of giving evidence.

One of the difficulties in the prosecution of offenders is the volume of offences faced by the offender initially, most of which are dropped along the way, with only one or two of the charges imposed likely to proceed to the resolution stage. This affects the person's entitlement to bail at the initial remand and a likelihood that they will remain in custody until the matters are able to be resolved.

⁷ See : Magistrates Court of Victoria – [Practice Direction No. 4 of 2015](#) extending the Dandenong trial.

⁸ LIV Media release (April 2015) <http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/Legal-assistance-requires-more-support-in-state-an.aspx?rep=1&glist=0&sdiag=0>

⁹ LIV submission to government on spent convictions legislation: <http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Criminal-Law/Submissions/LIV-Submission-Introduction-of-Spent-Conviction-Le?glist=0&rep=1&sdiag=0>

Therapeutic justice and behavioural change in response to violence

Recommendation 4

Establish a dedicated service to provide early intervention for accused persons charged with family violence offences or responding to intervention orders

Currently, legal assistance is available to applicants for intervention orders through duty lawyers or community legal centres. However, no assistance is available for respondents to applications for intervention orders, apart from the private profession (our members report low rates of respondents seeking legal advice from private practitioners). We note that assistance *is* available for respondents when they *breach* intervention orders, but not to resist the making of an order in the first place.

The lack of assistance in court when the application for an intervention order is made places considerable pressure on the application for an intervention order, as well as court staff, police members and lawyers assisting the applicant. There is no structural barrier between the aggrieved and self-represented respondent and other family members, including the applicant.

This can result in an environment when the aggrieved and self-represented respondent places pressure on the applicant to withdraw the application – and, indeed, this often occurs. The AFM may try to distance herself from the actions of the police and refuse to proceed with either charges or the application for an intervention order. Such reactions are based on a desire avoid blame being placed upon the AFM and to reduce the risk of further violence in the future. It is a particularly challenging situation for police officers who need support and training to understand and respect an AFM's resistance to charges proceeding and intervention orders being made.

LIV members report that, even in cases where ultimately a custodial sentence is not likely, defendants charged with family violence offences are remanded in custody. If this is a first contact with the criminal justice system, it is a crucial opportunity for the courts to expose the offender to services or mandate participation in programs if the offender is given the opportunity of conditional bail or a deferral of sentence.

The Court Integrated Services Program¹⁰ and CREDIT Bail Support Program¹¹ provides accused people with access to services and support to reduce rates of reoffending and promote safer communities. CISP currently operates at the Latrobe Valley, Melbourne and Sunshine Magistrates' Courts and provides short term assistance before sentencing for an accused with health and social needs. This enables the accused to work on the causes of offending through individualised case management. It provides priority access to treatment and community support services, which reduces the likelihood of reoffending.

This type of dedicated service could be very effective in family violence cases, particularly in cases where people present with concerns around mental health or drug or alcohol use. Respondents would have the opportunity to address the behaviour or issues which gave rise to the criminal charges or application for an intervention order at the time of the initial application stage.

Recommendation 5

Develop a greater focus on offender rehabilitation and behaviour change in sentencing for family violence related offences

LIV members report that there is a significant under-utilisation of the option of diversion¹² for first time offenders where minor breaches or behaviour constituting family violence warrants criminal justice intervention. There is no barrier to diversion being offered to offenders. However members report that police are resistant to the provision of diversion in family violence matters and have opposed the suggestion.¹³

When diversion is offered, it can create a further opportunity for referral and court mandated participation in programs designed to address the prevalence of family violence in the community without detracting from the seriousness of the offending.

¹⁰ The Department of Justice and the Magistrates' Court of Victoria established the Court Integrated Services Program (CISP) in November 2006. <https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/court-integrated-services-program-cisp>

¹¹ The CREDIT/Bail Support Program was created from the merge of two court bail programs. In December 2004, in consultation with the Department of Justice and Corrections Victoria the Magistrates' Court of Victoria combined the Court Referral & Evaluation for Drug Intervention & Treatment Program (CREDIT) and the Bail Support Program (BSP) <https://www.magistratescourt.vic.gov.au/court-support-services/credit-bail-support-program>

¹² s59 *Criminal Procedure Act 2009* (VIC)

¹³ LIV submission to Victoria Police (September 2014)

Recommendation 6

Review monitored support services available for offenders released after family violence related periods of imprisonment

In sentencing people who have been violent, appropriate consideration should be given to rehabilitation, therapeutic justice and behaviour change. Where sentences of imprisonment are imposed without support in custody or follow up after release, underlying behavioural issues may not be addressed and the risk to the family recur on release from custody. While it is important the people who have been violent are held to account, a punitive focus in sentencing can be dangerous and counter-productive. Courts have the ability to fashion orders which mandate specific courses or interventions to address the behaviour, while at the same time reflecting adequate punishment.¹⁴

Recent high profile cases involving parole, and changes to parole following recent independent reviews,¹⁵ have impacted on opportunities for offenders to receive support, supervision and continued education upon leaving prison. Where parole is refused, there is no support or supervision following release. Offenders are often released without the rehabilitative or preventative measures which could have been in place had they been released on parole. This can place family members and the community at an increased risk.

The LIV endorses the principles outlined in the recent report issued by the RMIT Centre for Innovative Justice: *Opportunities for Early Intervention: Bringing perpetrators of family violence into view*, which includes recommendations to remove the burden from victims of family violence and place it on the justice system.¹⁶

¹⁴ *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014)

¹⁵ Ian Callinan AC, *Review of the Parole System in Victoria* (July 2003); See also: [Review of the Parole System in Victoria](#), Law Institute of Victoria (10 September 2013); Victorian Ombudsman's Office, Deborah Glass, *Ombudsman Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* – Discussion Paper (October 2014)

¹⁶ RMIT Centre for Innovative Justice (2015) <http://mams.rmit.edu.au/r3qx75qh2913.pdf>

Protecting children and maintaining parent-child relationships

Recommendation 7

Review the use of intervention orders to remove young people from their homes

Drugs, alcohol and mental health issues impact significantly on family violence offending in the community, particularly in the case of young offenders.

The provisions of the *Family Violence Protection Act 2008* (FVPA)¹⁷ can be used to remove drug-affected, violent children from their home for the benefit of the rest of the family. However, the consequences of doing so can be devastating for a young person and broad in reach, including the effects on the young person's development and wellbeing (psychologically and economically); ability to access and continue schooling; and financial security (including the ability to access secure housing).

The response to violence in the home where parents are at the desperate point of requiring the forced removal of their child from the home needs to be multi-disciplined and distinguished from circumstances where power imbalances exist.

There is a long-acknowledged tension in legal responses to family violence between the safety of those experiencing family violence and the rights of children to have a meaningful relationship with each of their parents. In the case of children who are violent towards their parents, this tension is different to the tension that exists where the *child* is at risk of harm from the *parent(s)*. In the former case, the tension is between the rights of different people, i.e. the right of the (violent) child to have a meaningful relationship with their parents and the safety of other family members (some of whom may be children). In the latter case, the tension is between competing rights of the child, i.e. to safety or a relationship with their parents.

¹⁷ s83 *Family Violence Protection Act 2008* (VIC)

Recommendation 8

Amend the *Family Violence Protection Act 2008* to give appointed family law independent children's lawyers the right to appear in intervention order cases where represented children are named affected family members (AFMs)

Children's representation is linked to the particular court and court events, rather than the events which have brought the family into the court system.

Children may be directly represented in the Magistrates' Court for FVPA matters, but only on the court's own initiative.¹⁸ In appointing a children's representative, the court considers the protection of the child from unnecessary exposure to the court system and harm which may come to the child and family relationships.

There are circumstances where outcomes for children in family law matters may improve if independent children's lawyers instructed in the family law matter were given greater capacity to appear in related intervention order proceedings before the Magistrates' Court.

Members report that the tension is reduced in the more extreme cases where the need to protect children from harm is clear and obvious and orders can confidently be made for no time to be spent between a child and a parent who has been violent. Our members report that it is the cases where the evidence is open to differing interpretations and where the assessment of future risk is the critical question that fills the lists of the federal family courts. These cases are also often the contested cases in the Magistrates' Court under the FVPA and may have the involvement of child protection services of the Department of Health and Human Services (DHHS). Independent children's lawyers are an important means of managing this tension.

The efficiency of Magistrates' Court proceedings involving family violence would be enhanced by providing independent children's lawyers appointed in family law matters with a statutory right to appear in matters involving the same family before the Magistrates' Court.

We note that there is currently no funding for instructing independent children's lawyers in family law trials or the Magistrates Court.

¹⁸ s62 *Family Violence Protection Act 2008* (VIC)

Ensuring fair and efficient hearings in family violence matters

Recommendation 9

Review legal aid funding eligibility guidelines for federal family cases where family violence is alleged

The LIV have previously raised concerns regarding current legal aid funding guidelines which do not allow for representation at final hearing unless the other party has a lawyer who is not funded by legal aid, except in limited specified cases. In the federal family courts, a person who has experienced family violence may be without representation at trial and be directly cross-examined by the perpetrator.

The LIV acknowledges that the current limitations on legal aid funding eligibility guidelines are a result of limited legal aid funding. The LIV has consistently called on state and federal governments to increase funding to the legal assistance sector to address the \$200m funding gap identified by the Productivity Commission in its *Access to Justice Report*.¹⁹

Recommendation 10

Investigate ways to improve sharing of information between courts so previous orders and transcripts are readily accessible to other courts

Judges in the federal family courts have access to child protection reports from DHHS but make their decisions on different risk assessment criteria than the Children's Court of Victoria.

The Magistrate's Court has no access to orders of the family courts unless provided by the parties. Likewise the Family Courts have no access to orders of the Magistrate's Court unless provided by the parties (and no access to transcripts of ex-parte hearings). Currently the only information sharing mechanism between the courts is the DHHS liaison officer trial at Melbourne and Dandenong family courts. Greater transparency of the information obtained by the Court through this process is recommended.

¹⁹ LIV Media release (April 2015) <http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/Legal-assistance-requires-more-support-in-state-an.aspx?rep=1&glist=0&sdiag=0>

In family law cases, the federal family courts must consider the best interests of the child having regard to their right to have a meaningful relationship with both parents and the need to protect the child from harm. Where an IVO exists, the Court needs to consider the events which led to the IVO to:

- make a finding as to whether or not a child is at risk of harm from the spending time with or communicating with the parent (the Respondent of the IVO) ; and
- determine whether the parenting order is consistent with the IVO and, if not, identify how it effectively varies the IVO.

It is very difficult to make these decisions without having a transcript of the evidence in the *ex parte* Magistrates' Court case that resulted in the interim IVO being made. In other jurisdictions (e.g. Western Australia, where transcripts are available on request by a party at a cost which is considerably less than the cost of engaging legal representation to prepare an affidavit of those same facts. These transcripts are able to admitted into evidence without being exhibited to an affidavit.)

Providing the federal family courts with the orders and a transcript of *ex parte* proceedings before the Magistrates' Court for an intervention order would reduce costs and delay for family law litigants in their family law proceedings and ensure the court has all the relevant information required to make parenting orders that are in the best interests of the children. The provision of transcripts to parties (as well as to the Court) would also assist to identify children at risk of abuse or family violence as family lawyers are better placed to advise their clients whether they should file a Notice which then triggers the Court's legal obligation to notify the state welfare authority of the risk for further investigation by them.

We endorse recommendations 30(14-19) by the Australian Law Reform Commission Final Report: Family Violence—A National Legal Response to:

- develop guidelines to assist agencies and organisations working in the family violence and child protection systems to better understand the rules relating to the sharing of information;
- develop protocols for federal family courts, state and territory magistrates' courts, police and relevant government agencies on the exchange of information in relation to family violence matters;
- establish a national register which, at a minimum, should include interim, final and police issued family violence notices or orders and child protection orders made under state and

territory legislation, as well as related orders and injunctions made under the Family Law Act; and

- make such information available to the federal, state and territory police and courts that hear any matter related to family violence or child protection, as well as child protection agencies.

We also refer to our submission to the Family Law Council on Families with Complex Needs & the Intersection of the Family Law and Child Protection Systems, which endorsed these principles.

Recommendation 11

Increase the capacity of lawyers to provide advice on the effects of intervention orders on family law and criminal law matters at intervention order hearings through additional training or targeted duty lawyer services

The increase in demand for intervention orders over the past decade and the development of the Magistrates' Court family violence jurisdiction (including the Family Violence Division) has coincided with a reduction in funding and accessibility of the federal family courts. Urgent applications need the approval of a legally-qualified registrar before they are issued and members report that listings for urgent injunctions are difficult to obtain. As a consequence, the first court appearance after a family breakdown will often be the first listing of an intervention order application.

The family law "triage window" now occurs at the Magistrates' Court. At the Neighbourhood Justice Centre in Collingwood, a multi-disciplinary team assists family members with targeted referrals and support. At most Magistrates' Courts, the task falls to the registrars to help struggling applicants with information about crisis accommodation, Centrelink and emergency housing.

LIV members report that, in some cases, the AFM operates under an assumption that, once they obtain the intervention order (IVO), the respondent has no right to see their child. This can sometimes be a motivation to obtain an IVO in cases where the facts supporting the IVO are situational (based on an incident at separation, as opposed to a need to protect the AFM from future harm). In such cases, often those parties were close to resolving family law disputes and a parent frustrated with the process turns to IVO's as a means of lashing out at the other parent. This can lead to protracted family law disputes which are pursued "to get back at" the AFM. Alternatively, the respondent perceives that the motivation behind the AFM obtaining the IVO is to prevent the respondent from having a relationship with their children and this can lead to further acts of family violence particularly if the respondent perceives they have nothing left to lose (i.e. they have lost the relationship with the AFM and their children at the same time).

Where parties are represented, lawyers with criminal law practices appearing in intervention order matters may be unprepared to provide advice on family law (and similarly family lawyers may not be able to advise on criminal law impacts). Lawyers specialise in particular areas of law due to the complexity of the relevant laws and the difficulty (and, indeed, professional risk) in keeping abreast of developments across multiple areas of law. The complexity of the laws is, in turn, a reflection of the increased complexity of society and social relationships, as well as Parliament's desire to provide for, and accommodate, a variety of individual circumstances faced by individuals and families.

The LIV submits that early advice at the initial stage to both AFM and respondent on how the interaction between the IVO and family law matters would greatly assist in reducing court delays and reducing the frequency of IVO's that are later effectively varied by family court orders or taken out in response to family court proceedings. Examples of the advice that should be provided at this early stage include:

- how the federal family courts make parenting orders, for instance the best interests of the child principle having regard to the factors in s60CC of the *Family Law Act 1975* (Cth); and
- the interaction between intervention orders and family law matters; and
- advice about (and assistance with drafting) basic parenting plans;

Presently, the resources to provide such assistance are simply not available.

Clarity of intervention orders

Recommendation 12

Review the wording and layout of the intervention order document to ensure it is easy to follow and understand

When intervention orders are made, they have a complex interaction with family law orders. The Commonwealth legislation provides a time-limited override of the federal family law order by the state-based intervention order; however, generally, the family law order will prevail²⁰. The effect of these override provisions should be clearly expressed in the intervention order, so that intervention orders can be understood on their face, without the need for additional legal advice.

²⁰ s68N-s68T *Family Law Act 1975* (CTH)

The effect of intervention orders and the reasons why they were imposed (including the proportionality of the orders to the risk posed) are not always apparent on the face of intervention orders. The LIV suggests that the layout and wording of intervention orders be reviewed so that intervention orders are readily understood by the parties, the schools, community groups and other agencies working with families.

Intervention orders should be made to better reflect the informal or proposed care arrangements for children already existing. This would lead to a reduction of orders made in the federal family courts which effectively vary the intervention orders.

Magistrates would be assisted in making such orders by legally represented parties or, at the very least, parties who have had the benefit of early advice, such as at the stage of applying for an intervention order. We refer to, and repeat, our submissions in respect of Recommendation 4 above.

Intervention orders should also clarify how the parties are to communicate with each other about care arrangements for children (other than through their respective lawyers). This could be cost-effectively achieved by attaching an information brochure to intervention orders with sample wording of written communications (such as email and SMS messages) that are both appropriate and inappropriate. Without such guidance, AFM's are often reluctant to report communications that breach an IVO if the communication in some way refers to children; and respondents are more likely to engage in further acts of family violence against the AFM if they perceive the AFM applied for the intervention order to prevent the respondent having a relationship with the children. We refer to, and repeat, our submissions on this point made in respect of Recommendation 11.

Family Violence and particular groups and communities

Recommendation 13

Investigate ways to protect vulnerable groups in the community experiencing family violence

Family Violence in the workplace

The LIV commends the 2013 reform to the National Employment Standards (NES) which apply to all employees covered by the national workplace relations system regardless of industrial instrument or contract of employment. The eligibility to request flexible work arrangements (for employees of 12 month continuous service) were extended to include:

- Persons experiencing violence from a member of their family; and
- Those who provide care or support to a member of their immediate family or household, who requires care or support because they are experiencing violence from their family.

While this is a positive change, there is no process to appeal a refusal of flexibility. The Commission may wish to consider whether there should be a process to appeal such a refusal.

Older people

LIV members report that older people affected by family violence have become an increasing concern as the high cost of housing, family breakdown and increase in illicit drug use in the community put older people at risk of abuse from carers and family members. Individuals are highly dependent on their family and carer support and LIV members advise that the level of reporting of abuse is believed to be much lower than is occurring. The gender balance of those who experience and those who use family violence is different from other groups and existing family violence services are not adequately resourced to assist men who experience family violence in these matters.

LIV members report that issues of particular concern include financial abuse through misuse of powers of attorney and guardianship documents. The LIV is currently investigating the feasibility of registering documents to mitigate the risk of the documents being used as instruments of abuse and/or exploitation.

The LIV submits that the expansion of the definition in the *Family Violence Protection Act 2008* (Vic) (FVPA) to include direct and indirect exposure of children to violence was a positive change.

The LIV submits that, in order to appropriately capture the dimensions of elder abuse, the definition should be expanded to include neglect and subtle forms of financial abuse. The LIV supports the recommendations made by Justice Connect on this issue.²¹

As discussed above, this is an issue that requires further consideration and raises legal issues not traditionally seen as ‘family violence’, such as abuse of powers of attorney. We would be happy to provide additional information and insights by way of further written submissions or face-to-face meetings.

Recommendation 14

Improve outcomes for Aboriginal and Torres Strait Islander families by considering reforms to the Koori justice system

Overview

Aboriginal and Torres Strait Islander (ATSI) people affected by family violence typically have complex needs best met by coordinated and integrated justice responses.

LIV members are concerned to note that the current number of child protection substantiations for ATSI children is disproportionately high and continues to rise.²² The factors contributing to the increase in the child protection substantiation rate include family violence, alcohol and drug misuse, mental health issues, homelessness, economic factors, and dispossession/ loss of culture and identity.

At the same time, there is significant underreporting of family violence issues within ATSI communities related to the interaction between family violence and child protection. Often ATSI clients will be afraid to report on issues of family violence as they are afraid that child protection orders may be made and their children removed.²³

The LIV is concerned that the rate of removal of ATSI children will increase following the commencement of the amendments to the *Children, Youth and Families Act 2005*, which were introduced by the former state government and the majority of which will be maintained by the current

²¹ Justice Connect: Family violence and elder abuse: similar, but different (June 2015) <http://www.justiceconnect.org.au/family-violence-and-elder-abuse-similar-different>

²² See, e.g. <https://www3.aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-c/>

²³ See, e.g. http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical_report/jcu_131180.pdf.

state government.²⁴ These amendments remove many powers of the Children's Court to make orders in the best interests of children and are anticipated to result in greater removal of children from their families, with fewer options for the Children's Court to order reunification.

Research findings suggest that ATSI prisoners are much more likely to be imprisoned for assault offences than non-aboriginal people. The statistics raise questions about racial profiling by police and others in the criminal justice system and emphasise a need for specialist training and well-resourced dedicated legal services such as the Victorian Aboriginal Legal Service and the Aboriginal Family Violence Prevention & Legal Service Victoria.

The traditional response of treating individuals as victims and perpetrators has led to families being divided, sometimes unnecessarily. It is important that any responses are integrated and ensure that the family's dynamic is preserved as much as possible. This involves assisting both victims and perpetrators to keep the family unit together by use of community-based therapeutic justice responses.

Court solutions

From a court system perspective, outcomes for Aboriginal and Torres Strait Islander families may be improved by considering:

- Establishing specialist Aboriginal Family Violence Courts;
- Extending the jurisdiction of the Koori Courts; and
- Expanding the Koori Family Violence Court Support program to resource clients in relation to intervention order matters

Koori Courts do not currently deal with family violence intervention order matters. Koori courts have been operating in the Magistrates', Children's and County Courts in Victoria for a number of years within the criminal justice system, originally with jurisdiction limited to the Melbourne area and now expanded across Victoria.²⁵ The Koori Courts include the Aboriginal community in the sentencing process by including Aboriginal Elders or respected persons and Koori Court Officers. They generally have less formal environments than other courts, with all parties and the judge sitting at a

²⁴ LIV Media release (August 2014) <http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/Law-Institute-concerned-by-watering-down-of-Childr.aspx?rep=1&glist=0&sdiag=0>

²⁵ See, e.g. County Koori Court website: <https://www.countycourt.vic.gov.au/county-koori-court>; Magistrates' Koori Court: <https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/koori-court>; and Children's' Koori Court: <http://www.childrencourt.vic.gov.au/jurisdictions/koori-court>

round table. They are intended to increase ATSI positive participation in the court process and increase accountability of offenders and thereby deter offenders from re-offending. The current delays as wait lists increase are an indication of the success of the model.

The LIV submits that the current Koori Family Violence Court Support program should be expanded to:

- provide support and assistance to ATSI clients who are applying for, or responding to, family violence intervention orders or safety notices;
- provide appropriate referrals to legal and support services;
- conduct risk assessments; and
- give information about how to keep safe from further family violence.²⁶

Consideration should be given to the introduction of specialist Aboriginal Family Violence Courts based on the Koori Courts model, or extending the existing Koori Courts jurisdiction. Specialist Aboriginal Family Violence Courts would promote enhanced therapeutic justice responses and rehabilitation by:

- having jurisdiction to deal with both civil and criminal family violence matters;
- seeking to promote more therapeutic justice outcomes by facilitating coordinated access to court-based responses;
- promoting enhanced cultural responsiveness to consider complexities and nuances of family violence and better understanding of impact on ATSI individuals and families; and
- balancing the needs of perpetrators and survivors/victims for more holistic and sustainable outcomes by supporting family reintegration whilst holding perpetrators accountable.

²⁶ See, e.g. <https://www.magistratescourt.vic.gov.au/jurisdictions/intervention-orders/family-violence-court-programs> and <https://www.magistratescourt.vic.gov.au/sites/default/files/Default/141017%20Koori%20Family%20Violence%20Fact-sheet.pdf> (PDF)

FEDERAL

STATE

Family Court of Australia (FCA)

Specialist superior family law court

Hears:

- Parenting orders (Family Law Act 1975 (Cth) including where DHHS intervenes (s91B FLA) or is a party and complex parenting matters (ie. relocation/child abduction/Hague convention proceedings) transferred from MC and/or FCC
- Property settlements (s79 FLA)
- Child support and spousal and child maintenance
- Family violence – Magellan Program (fast track program for serious allegations of physical/sexual abuse and family violence) , coordinated approach with state welfare authorities
- Personal Safety Orders (injunctions under FLA/exclusive occupation orders)
- Findings in Magistrate’s Court can be used in FCA and FCC (transcripts and orders admitted into evidence)
- Family lawyers, family consultants, private experts (psychologist/psychiatrists), Independent Children’s Lawyers

Matters can be transferred from FCA to FCC and vice versa. Similar jurisdiction, different forms and procedure. Complex, lengthier matters heard

Federal Circuit Court of Australia (formerly Federal Magistrate’s Court)

Multi-disciplinary court of record

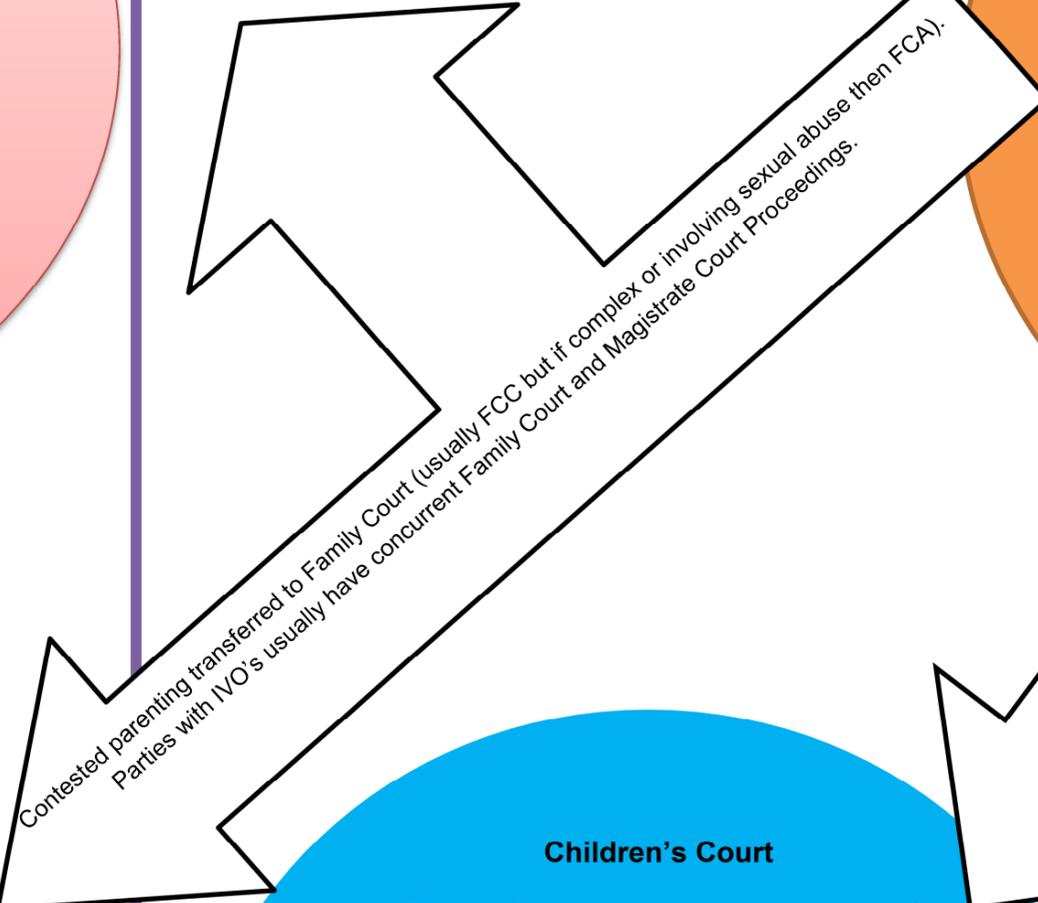
Hears:

- Parenting orders (Family Law Act 1975 (Cth) (where final hearing is less than 4 days and no allegations of serious abuse or violence)
- Property settlements (where final hearing is less than 4 days)
- Child support and spousal and child maintenance
- Family lawyers, family consultants, private experts (psychologist/psychiatrists), Independent Children’s Lawyers
- Personal Safety Orders (injunctions/exclusive occupation orders under FLA)

FAMILY VIOLENCE

COURT PROCESSES IN VICTORIA

Note: Parties can have concurrent proceedings in Family Court (FCA or FCC), Children’s Court, Magistrate’s Court (for IVO) and County Court (criminal offences and bail).

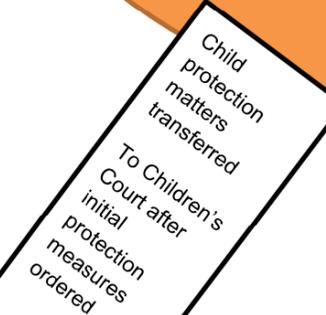


Magistrate’s Court (MC)

Provides prompt resolution of proceedings

Matters heard by Court:

- Personal Safety orders (Police Initiated Intervention Orders, Family Violence Safety Notice/Private initiated IVO - Family Violence Protection Act 2008 and Personal Safety Intervention Orders Act 2010)
- Criminal matters (accused on bail/summons/remand)
- VOCAT
- Child Protection (Emergency – then transferred to Children’s Court)
- Limited Parenting and Property Orders (Family Law act 1975 (Cth) by consent) (defended to be transferred to Family Courts)
- Limited civil claims (arising from family violence)
- Specialist family divisions in Heidelberg, Ballarat, Frankston and Moorabbin.



Children’s Court

- Provides for community services to support children and families
- Provides for protection of children
- Make provision for children charged with offences
- To continue Children’s Court as a specialist court dealing with matters relating to children.

Matters heard by Court:

- Child Protection (Transferred from Magistrate’s Court)
- Parenting Orders under **Children, Youth and Families Act 2005** (DHHS involvement)
- Personal Safety Orders (**Family Violence Protection Act 2008** and **Personal Safety Intervention Orders Act 2010**)

County Court

- IVO breaches
- Serious Criminal offences
- Criminal appeals

Coroner’s Court

- Investigations on deaths from family violence
- Systemic issues

VCAT

- Discrimination
- Guardianship
- Appeals against DHHS case planning decisions (child protection)