SUBMISSION TO THE ROYAL COMMISSION INTO FAMILY VIOLENCE BY DR RENATA ALEXANDER

Introduction

I am a Victorian barrister (since 2002) specializing in family law, family violence and child abuse cases. This includes intervention orders in Magistrates' Courts (and appeals in the County Court) as well as appearing in children's and property/financial cases in both the Federal Circuit Court and the Family Court. I have also done matters at the Children's Court and VOCAT and in the Supreme Court, all related to family violence.

I have also worked as a volunteer lawyer at a community legal centre for many years and serve as a member of its Board of Directors.

I am also a senior lecturer in the Faculty of Law at Monash University teaching family law and clinical practice. My primary areas of research and publication are gender issues, family law, family violence and child abuse.
I am the author/co-author of three books on family law and family violence and the sole author of Laws of Australia, ch 17.5 *Domestic Violence* (last updated in 2014).

Time constraints

I am about to go overseas for an extended period and I am unable to make a detailed submission addressing the over 20 questions raised in your issues paper.
I just wish to make a few salient points and would appreciate the opportunity to elaborate further in person or in writing at a later stage in any hearings and consultations.

These points represent my personal views.

I am happy for my name and identity to be disclosed. I do not require confidentiality other than in respect of any private details.

Issues

a. *Family Violence Protection Act 2008* (Vic)
This Act was enacted after the thorough review of the VLRC. It is very good overall. The preamble recognises the gendered nature of family violence and related human rights issues and the Act provides extensive pathways and procedures for courts, police, victims/survivors and perpetrators/offenders.

The provisions in the Act such as s 5 as to the meaning of 'family violence', s 73 as to 'expert evidence' and ss 81 and 82 as to conditions including 'exclusion conditions' are generally applied very well and serve to protect vulnerable parties. However there are problems. The issues listed below mostly relate to the interpretation and application of the Act.

- Police remain loath to issues safety notices even though the time and day restrictions were recently extended.
- Police are the applicants for intervention orders in over 66% of applications. This is commendable but this is a soft option. Police should **also** be prosecuting for any related criminal offences as intervention orders and criminal proceedings are **not** mutually exclusive.
- Most magistrates are very good in their appreciation of the dynamics and effects of family violence. However some magistrates are dismissive or trivialize the allegations and refuse to hear applications until the parties have communicated or attended counselling which in many cases is inappropriate and re-victimizes the 'affected parties' (usually women and children). Other magistrates appear to apply a subjective test and find that the behaviour alleged is not 'controlling enough', especially in cases of economic or social abuse. Other magistrates, especially in regional and rural courts where resources are limited, are less than sympathetic, employing local knowledge and urging parties to 'try and sort it out' – often because the parties are known to them through the local community.
- In seeking a final intervention order under s 74, there are evidentiary hurdles to meet in showing that the respondent has committed family violence and 'is likely to continue to do so or do so again'. Some magistrates apply a 'one off' perspective treating past violence as 'historical' or a 'one off' and so refuse to make a final order, even on an *ex parte* basis when the respondent has been served but chooses not to attend.
- Conditions and exceptions attached to interim and final intervention orders are long and cumbersome. The printed *pro forma* includes conditions and exceptions that do not apply to all cases and should be edited more carefully and tailored to suit each individual case by magistrates and court staff. For eg, the exceptions relating to family law are overly complicated and badly worded. Many parties (both protected persons and respondents) think that intervention orders mean that the respondent can have no contact at all with any children named. That needs to be made clearer.
- Some magistrates are loath to make intervention orders for longer than 12 or 24 months. Family violence and controlling behaviour often continue long after parties have separated and do not miraculously end just because an intervention order is made.
- Where a person is unrepresented, VLA may provide assistance just for cross-examination purposes, leaving the parties (both applicants and respondents) to run the rest of the case themselves. This is artificial. Courts should be more pro-active in requiring VLA to provide funding for representation.
- Costs are rarely awarded. In some cases, respondents (who often have better resources and legal representation) book in for contests and then do not appear, meaning the applicants have expended time and money on their attendance. This is so even if VLA is granted as the applicants are usually required to make a contribution.
- Family violence is not a criminal offence of itself (and this is a separate recommended amendment to the *Crimes Act 1958* (Vic)). In sentencing for breaches of intervention orders (s 123) and persistent breaches (s 125A),

magistrates and County Court judges impose more lenient sentences than for criminal offences involving the same sort of criminal behaviour except in a non-family or domestic context.

- Some magistrates need to be more vigilant when accepting undertakings (which are not enforceable and do not involve the police) in lieu of intervention orders. Often women agree to these because of time (including child minding and absence from paid work) and expense issues or because they do not have access to legal advice or representation.
- Some magistrates need to be more vigilant in making mutual orders by consent. Many respondents seek intervention orders as 'tit-for-tat' without having the requisite grounds. Magistrates still need to be satisfied that such grounds warrant making mutual orders rather than mutual orders being sought and made simply because of time and resources and intimidation tactics.
- Some magistrates and police need to be more inquisitorial and pro-active when women seek to discharge intervention orders 'voluntarily'. Parties may indeed have reconciled but that does not mean that any intervention order should not remain in place. Police should be more pro-active and assume responsibility in such cases to avoid the respondent 'blaming' the protected person for not seeking to discharge an order.
- Some magistrates do not understand their powers under ss 86-93 relating to personal property and *Family Law Act 1975* (Cth) orders. Sections 91 and 93 as to decisions about contact with a child are particularly complicated if there are past or concurrent family law proceedings.

b. *Family Law Act 1975* (Cth) (FLA)

There is a lot of misunderstanding and lack of understanding about the intersection and interaction between intervention orders made under State law and family law orders made under the FLA.

Most of these issues can be remedied by information, education and training.

- Some magistrates do not understand their jurisdiction and powers under the FLA especially ss 68N to 68T.
- Some magistrates mis-apply their powers under the FLA. For eg, invoking s 68 R to 'revive, vary, discharge or suspend' family law orders when not fully appraised of the family law situation and any on-going family law proceedings under the FLA.
- Some magistrates do not understand the effect of s 68T whereby any revival, variation or suspension made under s 68R ceases after the expiration of 21 days.
- Some exceptions attached to intervention orders conflict with existing FLA orders and are unworkable.
- Some magistrates do not know about s 68Q as to any inconsistency between an intervention order and a family law order. In such a case, the FLA order prevails.
- Some magistrates do not understand the relevance of s 60CC(3)(k) whereby any findings made in the Magistrates Court can be used in FLA proceedings in the Federal Circuit Court of Australia or Family Court of Australia.

Many thanks for your consideration of this brief submission.

I am hopeful that the Royal Commission's work will assist our community and I wish you well in your endeavours and deliberations.

I can be contacted on my work email [redacted] or through my clerk Paul Holmes on [redacted].

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22 May 2015