



# **Submission to the Royal Commission into Family Violence**

June 2015

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## Foreword

Victoria Legal Aid plays a leading role in the coordination of family violence legal services in Victoria.

We provide information, advice and legal representation to women, men and children who are affected by family violence in the State and Commonwealth civil, criminal and family law systems. We provide these services through our network of offices across the state. We also fund private practitioners and community legal centres to deliver family violence legal services.

People who have experienced, are experiencing, or are at risk of experiencing family violence are priority clients for Victoria Legal Aid.

We are committed to the provision and coordination of legal services that promote victim safety and interrupt the cycle of violence. We provide court-based legal services to applicants and respondents in family violence intervention order matters in the Magistrates' Court and provide assistance to women, men and children with parenting dispute matters in the Commonwealth family law courts and child protection matters in the Family Division of the Children's Court of Victoria.

We are also committed to procedural fairness and to upholding the rights of an accused in criminal justice processes. This ranges from the provision of duty lawyer services to respondents who breach family violence intervention orders in the Magistrates' Court to trial representation in the County and Supreme Courts for serious indictable offences committed in a family violence context.

We provide legal assistance in ways that seek to address some of the broader social, economic and legal consequences of family violence and support victims to access victims of crime compensation. For example, Victoria Legal Aid provides legal services to parents in child support matters where one parent may be reluctant to seek child support due to a history of financial control. Similarly, we see evidence of financial abuse and control in the lives of some of the clients we assist with social security and infringement offences.

We also extend the reach of our services through the provision of legal information and community legal education that aim to prevent legal problems from occurring and from escalating.

More detail about our family violence legal services can be found in **Appendix 1**.

Like many other workers, Victoria Legal Aid staff are on the front line of our community response to family violence and this submission includes case examples based on the stories of our clients. For some case examples, Victoria Legal Aid obtained the consent of the client but de-identified the content to protect their identity and the identity of others involved in the matter. Other case examples are composite examples, which illustrate the story of many Victoria Legal Aid clients but do not refer to a particular individual.

Victoria Legal Aid is committed to the elimination of family violence in the community. We support the work of the Royal Commission and look forward to assisting the Royal Commission to achieve a better system response to family violence.



**BEVAN WARNER**  
Managing Director

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## Executive Summary

Victoria Legal Aid is committed to the elimination of family violence in the community. We support the work of the Royal Commission and look forward to assisting the Royal Commission to achieve a better system response to family violence.

Our experience working with people at risk of family violence, experiencing family violence and those who perpetrate family violence tells us that the solution is not as simple as protecting the victims and punishing the perpetrators. While victim safety must be central to the system, a more sophisticated approach is required that addresses violence supporting attitudes and prevents family violence from occurring. We must maximise the opportunity presented by a person's interaction with the justice system to make positive change in the lives of those who use and experience violence.

Most importantly, the solution requires an investment in the system elements and services, including legal services, which support safer outcomes for people affected by family violence. The system is not able to realise its potential because it is overloaded.

Legal services are part of the solution and remain a critical element of the response to family violence. Victoria Legal Aid is the largest provider of family law services in Victoria. Our family violence duty lawyer service provides assistance to both applicants and respondents in family violence intervention order applications. We can assist with the resolution of underlying family relationship issues relating to children, debt and property, but are constrained in doing so. We also assist with criminal charges arising in the context of family violence, including breaches of family violence intervention orders

Legal services have an important preventative role in the response to family violence.

By ensuring that legal advice and assistance is available to applicants and respondents (as well as people charged with criminal offences in the context of family violence) we are more likely to achieve safer long-term outcomes and reduce the prevalence of family violence in the community because the response they receive will be suitable to their circumstances. It also reflects best practice family violence service delivery and is procedurally fair.

Legal services assist in minimising the impact of power and resource imbalances that may result in further fear or trauma for applicants seeking family violence intervention orders. Legal services also reduce the likelihood of inappropriate or unsafe agreements being reached through the family violence intervention order court process. An affected family member should be supported with legal advice even where Victoria Police brings an application for an intervention order to ensure that the order is appropriate to the circumstances of their everyday lives and they feel supported and heard through the process.

In our experience, when people receive legal advice they are able to develop realistic expectations of the outcome of the proceeding and have a clear understanding of their rights, responsibilities and the legal consequences of their actions. This is demonstrated by our experience working with respondents to family violence intervention orders.

Providing legal assistance to respondents to family violence intervention orders increases the effectiveness of these orders by reducing the likelihood that a respondent will breach an order. This is a positive step towards victim safety and supports continued investment in the delivery of legal services to respondents. The reason for this correlation is simple - respondents who have access to

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legal advice are more likely to understand the conditions of the order and the order is more likely to be appropriate to their individual circumstances.

The response to family violence extends to the Commonwealth family law jurisdiction. Many of the people we assist with family violence intervention orders also need assistance with related family law issues. Uncertainty about parenting arrangements can fuel conflict and crisis in these families and operate as a roadblock to achieving victim safety. Early identification and advice on family law issues can assist families to agree to safe, workable care arrangements for children over the longer-term. Advice on related family law issues also reduces the risk that respondents will contest family violence intervention orders because they are concerned about the implications of an order for their unresolved parenting arrangements. In addition to promoting better outcomes for these families, this can also contribute to greater system efficiency.

Our services also connect people with the information, advice and assistance they need to address the causes and consequences of family violence. People who use or experience family violence typically have a cluster of legal and non-legal problems. Our lawyers can play a critical role forging connections with other support services. Not only do these interventions support victim safety but they also provide an opportunity to connect perpetrators with services that may assist to address the factors contributing to violence, such as drug and alcohol dependencies or violence-supporting attitudes. By facilitating connections with support services, the legal response furthers both immediate safety and longer term preventative outcomes.

The current legal framework in Victoria for family violence provides a foundation for a more effective system response but an urgent injection of resources is required to address its current state of crisis. Many people impacted by family violence who seek the protection of the law currently experience a system that does not deliver on its promise. We consider that the current legal response to family violence, still recognised as best practice in its design, urgently needs to be backed up with the resource investment and process improvements required to realise its potential.

The system needs a significant injection of resources to reduce system congestion and improve the availability of legal and non-legal support services. By relieving the congestion in the system legal and non-legal support services will be able to spend more time with applicants and respondents in family violence intervention order matters. This is essential to assist them to navigate the different parts of the system, deliver the right intervention at the right time, open up pathways to other service providers and achieve better outcomes for victims of family violence.

Offences committed in the context of family violence should be treated as seriously as offences committed in other contexts and perpetrators should be made accountable for their actions through existing criminal laws. When providing assistance to people charged with criminal offences in the context of family violence we support proportionate sentencing that promotes rehabilitation where appropriate, supported by programs which will reduce the prevalence of family violence in the community by addressing the causes as well as the consequences of offending behaviour. In our view, victim safety is not incompatible with proportionate and rehabilitative responses to perpetrators of family violence. Targeted responses to perpetrators promote longer term safety for victims and contribute to a reduction in the prevalence of family violence.

This submission supports a better response to children and young people who use violence in the home. The response needs to recognise that violence by young people is serious but the dynamics of violence in this context are different, and the response should take into account the individual

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circumstances of these families, be immediate so that young people understand that there are consequences to their actions and prioritise therapeutic and diversionary responses over criminal liability and sanctions. Effective intervention in the lives of these children and young people may halt the progression to more serious criminal offending.

The need for legal responses that shape better futures for people who experience family violence is evident in our organisational data. Our data tells us that high contact users of legal aid services were more likely to have sought help from us across multiple law areas (criminal, civil and family) and were more likely to have seen us for a child protection or family violence issue before the age of 18. By tailoring the system response to children we have an opportunity to interrupt the intergenerational transmission of violence and reduce other impacts.

We acknowledge that family violence is largely perpetrated by men against women and children and that there are lower rates of violence against women in communities with greater gender equality. Advancing gender equality by tackling systemic discrimination and inequality should make a difference and measures that would provide protection against discrimination for people who have experienced family violence could also be enacted.

In summary, this submission makes recommendations to improve the legal response to family violence and maximise the effectiveness of legal services and court intervention to interrupt the cycle of violence. We support a system that:

- recognises the unique preventative role and value of family violence legal services for both applicants and respondents;
- improves the operational processes supporting the legal response to family violence;
- promotes rehabilitation where appropriate once a criminal justice response is triggered by responding to the individual circumstances of people who commit criminal offences in the context of family violence;
- provides a better response to children and young people who use violence in the home informed by the different characteristics of young people;
- delivers a response that can deal efficiently and effectively with the multiple and complex legal and non-legal needs of people and families who experience family violence; and
- responds to the broader legal impacts and consequences of family violence, including underlying and related legal issues that will often need addressing to achieve safe and lasting solutions.

For the justice system to deliver on these objectives, a greater commitment to resourcing is required. Without an injection of funding that is committed over the long term, the system will fall short of delivering on a sustainable and effective response to family violence. This includes assessing and addressing the downstream impacts for the legal assistance sector of any future changes to the system response to family violence.

## Summary of Recommendations

This submission makes 35 recommendations to improve the legal response to family violence.

### The role of family violence legal services

#### Recommendation 1 - Family Violence Legal Services

That the response to family violence continue to include access to court-based family violence legal services.

### Opportunities to improve the legal response to family violence

#### Recommendation 2 - Applicant and Respondent Workers

That applicant and respondent support workers be available at all Magistrates' Court locations and available to assist people at all stages of matters related to family violence.

#### Recommendation 3 - Discretion to mandate participation in behaviour change programs

That magistrates at all court locations have the discretionary power to mandate participation by suitable candidates in behaviour change programs.

#### Recommendation 4 - Relevant considerations for behaviour change programs

That the Commission considers making recommendations relating to behaviour change programs that give effect to the following:

- timely and effective participation
- sufficient places to meet demand
- culturally appropriate and accessible programs
- programs appropriate to other less common forms of family violence

#### Recommendation 5 - Specialist training for Magistrates

That all magistrates and court staff continue to receive specialist training on family violence to deepen the current knowledge and understanding of the nature of family violence.

#### Recommendation 6 - Multi-disciplinary training

That consideration be given to the funding and delivery of multi-disciplinary training to promote shared understanding of family violence and related issues.

#### Recommendation 7 - Meeting demand for family violence legal services

That additional recurrent funding be provided to increase capacity to deliver family violence legal services.

#### Recommendation 8 - Meeting demand for regional service delivery

That additional recurrent funding be provided to increase family violence legal service delivery in regional locations.

**Recommendation 9 - Better referrals to legal and non-legal support services**

That the system be resourced to open up better referral pathways, including warm referrals, that result in actual connection and engagement with support services.

**Recommendation 10 - Improving safety at court locations**

That the safety of applicants and respondents at court locations continue to be improved.

**Recommendation 11 - Continued access to legal assistance from a safe location**

That additional safety measures do not limit the effective access to legal advice and assistance for applicants and respondents.

**Recommendation 12 - Interim orders with a finalisation condition**

That the provisions of the *Family Violence Protection Amendment Act 2014* providing for interim orders with a finalisation condition be repealed.

**Responding to people accused of criminal offending in the context of family violence****Recommendation 13 – Offences & Sentencing**

That offences committed in the context of family violence should be treated as seriously as offences committed in other contexts and perpetrators should be made accountable for their actions through existing criminal laws.

The Sentencing Advisory Council should conduct a full examination of current sentencing outcomes for summary and indictable offences to ensure that sentencing outcomes for criminal matters in the context of family violence are comparable with sentences for matters in a non-family violence context.

**Recommendation 14 - Consistent response to breaches of family violence intervention orders**

That Victoria Police work with legal and non-legal services to develop a decision-making tool to support a consistent response to breaches of family violence intervention orders, including the making of referrals to services and the consideration of civil options even if criminal charges are not being pursued.

**Recommendation 15 - Access to programs and support services for offenders**

All perpetrators of family violence, including those on bail, community corrections orders or serving a custodial sentence, have access to relevant support programs to address the contributing factors to their offending behaviour.

**Responding to children and young people who use violence in the home****Recommendation 16 - Guidelines for use of police discretion when responding to children and young people who use violence in the home**

That Victoria Police develop policy guidelines which support the exercise of discretion in intervention order applications against children, and that it include the use of undertakings, family group conferencing and other suitable interventions, including intensive case management.

**Recommendation 17 - Guidelines for use of police discretion when responding to breach of family violence intervention orders by children and young respondents**

That Victoria Police, the Children's Court and other stakeholders develop guidelines for decision-making in response to breaches which prioritises continued engagement in non-legal support services and interventions and appropriate case management.

**Recommendation 18 - Referral to support services**

That the response to children and young people who use violence in the home prioritise therapeutic and diversionary responses that connect children, young people and their families to support services to address the underlying causes of violence and concerning behaviour.

**Recommendation 19 - Dedicated Youth Liaison Officer for children and young people who use violence in the home.**

That Victoria Police engage dedicated Youth Liaison Officers (or youth aid officers) to provide support to children, young people, their families and carers following interaction with police.

**Recommendation 20 – Investment in support programs for children, young people and their families**

That there be further investment in non-legal programs and services which address concerning relevant behaviour and which can assist young people and families to deal with such behaviour before it requires police assistance.

**Recommendation 21 – Diversion from criminal justice system**

That a legislated diversion scheme be established in Victoria.

**Recommendation 22 –Guidelines to support diversion**

That Victoria Police develop policy guidelines which prioritise cautions and diversion, which utilise the Children's Court Clinic and group conferencing, which are based on the premise that therapeutic and diversionary responses are appropriate for children and young people.

**Recommendation 23– Increasing community awareness**

That there be a community awareness and legal education program to encourage children, young people and families to seek assistance earlier in relation to adolescent violence in the home.

**Recommendation 24 – Increasing awareness in the justice system**

That the implementation of a new approach to children and young people who use violence in the home be supported by training of Victoria Police, the judiciary, court staff, and lawyers in the jurisdiction on the different considerations that arise when children use violence in the home

## Responding to families with multiple and complex legal needs

### Recommendation 25 - Providing support to families following notification of risk

That the “non-offending” or “protective” parent in families where DHHS has become involved following a notification of risk receive the support necessary to provide a safe environment for the child. This should include attention to accommodation arrangements of both parents.

### Recommendation 26 - One Court Principle

That the response to families with complex needs be improved through the following measures:

- clarifying the threshold test for adjourning Family Law Court proceedings due to DHHS involvement in the family.
- DHHS appearing at the Family Law Court return date to present to the court the findings of its investigation so that the Family Law Court can make orders that address protective concerns and there is reduced need to initiate a second round of court proceedings in the Children’s Court to address protective concerns.
- the Children’s Court adopting a practice of making family law orders by consent where the DHHS plans to withdraw on the condition that family law orders are made.
- where DHHS seeks to withdraw from a family but the parents do not consent to family law orders, DHHS appearing at the first Family Law Court date to assist the family in the transition to the Family Law Court jurisdiction.
- better assisting Magistrates to make decisions about suspending time provided by a family law order due to allegations of family violence by making available information on existing family law orders which can then inform analysis of the adequacy of the current care arrangement.
- establishing a process for the Magistrates’ Court to notify the relevant Family Law Court when a decision is made to suspend time provided under existing Family Law Court orders via section 68R; with the notification prompting the Family Law Court to list the matter (if interim orders are in place) or prioritise an application from the parent who has had time suspended (under a final order) within twenty-one days.

### Recommendation 27 - Better Information Sharing

That there be better information sharing between courts and agencies to support decision-making by:

- the DHHS establishing and communicating a consistent and structured approach for receiving and responding to Notices of Risk.
- considering the expansion of the Co-Located DHHS Liaison Officers program in the Family Law Courts.
- establishing a database of orders that provides a single repository of family law, family violence and child protection orders that can be accessed by each of the relevant courts (the Family Law Courts, Magistrates’ Courts and Children’s Court) and by state child protection authorities.
- clarifying Family Law Court Rules to assist with streamlined sharing of expert reports prepared in Family Law Court proceedings with the Children’s Court and child protection authorities.
- amending the Victorian *Children, Youth and Families Act 2005* to enable the sharing of Court Clinic and Expert reports with the Family Law Courts.

## Responding to the broader consequences of family violence

### Recommendation 28 - Child Support

That the Commission support changes by the Commonwealth to the administration of child support payments to ensure that people who experience family violence are not disadvantaged.

### Recommendation 29 - Impact of family violence on social security payments

That the Commission support further consideration being given by the Commonwealth to issues relating to family violence that arise in relation to social security payments.

### Recommendation 30 - Recognition of family violence in infringement matters

Amend the *Infringements Act 2006* to include family violence as a special circumstance.

### Recommendation 31 - Better processes for driver nomination

Review the processes for nomination of other drivers to accommodate the dynamics of family violence.

### Recommendation 32 - Addressing systemic discrimination

That the Commission note the potential for increased gender equality to reduce violence against women and consider making recommendations that will increase the capacity of the Victorian Equal Opportunity and Human Rights Commission to examine issues of systemic discrimination. This should include increased resources and enhanced compliance powers.

### Recommendation 33 – Protection against discrimination

That the *Equal Opportunity Act 2008* be amended to provide protection against discrimination based on a person's experience of family violence by including "being a victim of family violence or stalking" as a protected attribute under section 6 of that Act.

### Recommendation 34 - Access to victims of crime compensation

That consideration be given to the adequacy of current arrangements for victims of family violence under the *Victims of Crime Assistance Act 1996*.

## Resourcing Implications

### Recommendation 35 - Funding the legal response to family violence

That the Commission consult with Victoria Legal Aid on the anticipated impact for the legal assistance sector of any changes to the policy settings for the legal response to family violence.

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## Snapshot: A morning at court with a family violence duty lawyer

Alex has been rostered on as a duty lawyer in the family violence intervention order list at a busy outer metropolitan court.

She arrives at court at 9am and heads straight to the registry where she is given a list of people who would like to see a lawyer. There are already upwards of 15 names on the list. Alex heads to the duty lawyer office and fires up the computer. She has a quick scan of the applications handed to her by the court registrar.

The local community legal centre (CLC) provides an alternate duty lawyer service at the court. Alex leaves the office and heads to find the CLC's duty lawyer for the day. They sit down for five minutes to work through the list around a small table outside one of the courtrooms and identify which matters they will both be seeing a client in. Alex has a legal conflict and cannot provide advice to one client she has been allocated, Stella, in Stella's application for an order against Benjamin, so Alex and the CLC lawyer swap files and resolve the conflict to make sure both Stella and Benjamin can receive legal advice.

Alex returns to the duty lawyer office and calls the first name on her list. Simon is 16 years of age. It is alleged he has been verbally abusing his mother, punched holes in walls and recently physically assaulted her as well as taken items to sell for what she expects may be an ICE addiction. Simon's mother is frightened to have him living in the home. Victoria Police are seeking a full intervention order excluding him for the time being from the home.

Simon enters the duty lawyer room. He is aggressive, pounding the table and denying any wrongdoing. Alex takes him through the terms of the order being sought by Victoria Police in their application and explains the seriousness of an order and the potential implications of its terms including that he will be excluded from the home. She also explains to Simon the different types of behaviour and conduct, not just physical assault, that constitute family violence. This is a difficult task and one that Alex needs to approach with care as Simon has denied the police allegations and Alex is also concerned to ensure she does not collude with Simon's view that his behaviour is his mother's fault.

Alex provides advice on his options and suggests Simon speak with the respondent support worker at court to assist with accommodation and drug referrals and a conversation about a behaviour change program. She walks him to the respondent support worker and informs him to see her again when he is finished. Alex then goes to liaise with Victoria Police to confirm what terms they are seeking on the day and whether this is the outcome the mother is seeking. The police are unclear if the mother agrees with all of the terms of the order sought, so Alex suggests they advise the mother she can see the CLC so she receives independent legal advice about her position.

Next Alex calls in Ryan. Ryan has recently separated from his wife of 15 years. He says the separation was amicable. His adult stepdaughter has applied for an intervention order after a number of incidents in which she says he was threatening towards her and her children. Ryan says that his stepdaughter has made the whole thing up as she has never liked him and wants to speed up the separation. He says the allegations are baseless.

Alex talks with Ryan and asks him about the main incident outlined in the application. He recounts being annoyed that the children had been playing with his toolbox and had left some tools out in the rain. He had "strong words" with the children and waved a hammer in the air. Alex asks Ryan

whether he thinks that this may have caused his stepdaughter and her children to feel fearful. He concedes that they were probably scared. Alex explains that the law prohibits this kind of behaviour, which falls within the definition of family violence. Ryan is uneasy with the realisation that his conduct is family violence.

Alex starts to outline Ryan's options. They are interrupted by a knock on the door. Alex is told that there is a matter listed with an interpreter and the interpreter is only booked until midday. Alex will have to speak with the respondent in that matter as soon as possible so that the matter can be heard before the interpreter has to leave.

Ryan heads back to the court foyer and waits.

Alex scans down the list and finds the matter listed with an interpreter. She calls in Nilton. Nilton and the interpreter join Alex in the office. A number of his family members want to support Nilton and join him in the duty lawyer office. There isn't room so they wait in the foyer.

Nilton and his wife have two children. Nilton's wife had an extra-marital relationship. She successfully applied for an interim intervention order after Nilton shared details of her extra-marital relationship on social media. There was also a verbal confrontation at their home when Nilton uncovered evidence of the extra-marital relationship.

Alex, through an interpreter, takes Nilton through the conditions of the interim order. It becomes clear that he doesn't understand the terms of the current order and it takes some time. Nilton also wants to talk about what happened. Nilton tells Alex about why he felt that he needed to tell people about the end of his relationship with his wife and the extra-marital relationship. He says that he wasn't threatening towards her but that it was his right as her husband to know why she has decided to commence a relationship with another man and to share this information with friends and family in their homeland. He says that if it is her decision he cannot do anything to stop her. In his culture, he says, he must accept her decision and go quietly.

It takes some time to take Nilton through the conditions of the interim order so that he can provide instructions on whether or not he will agree to making the order final. The interpreter relays his understanding of the order. Alex explains that he will have to wait until the matter is ready to go before the magistrate and that this may take some time. Alex is keen to keep things moving as she knows that they only have the interpreter until the middle of the day.

Alex flags down the CLC lawyer and they update on where they are at with the other applications and check whether any are ready to proceed. The lawyer from the CLC is acting for Nilton's ex partner. He says that she has instructed that she would like the order changed before it is made final. She would like to include additional conditions that limit Nilton's contact with the children and prevent him from coming to the family home. Alex makes a note of the proposed revisions and indicates that she will need to seek fresh instructions from Nilton.

Alex starts to walk back to the duty lawyer office. A private practitioner stops her and indicates that he is acting for Robert, who is the respondent in a matter somewhere further down the list. An interim order was put in place following a police application. The lawyer says that Robert doesn't want his two kids included on the final order and will contest it if they are. Alex hasn't seen the affected family member yet but tells the lawyer she will be in touch.

Alex returns to the duty lawyer office and calls in Nilton and the interpreter. She tells him about the conditions that his wife would like to include in the final order. It takes a while as Nilton has quite a

few questions. He is keen to understand what he should do in different scenarios - for example, if he meets his wife or children on the street or in a shopping centre. Alex tells him that he should not approach them. He comes up with a few more scenarios and they work through the examples with the interpreter's assistance. He decides to consent to the final order without admissions.

Alex tells him that they will need to wait to be called before the magistrate. She lets the CLC lawyer know that they are ready and tells the registry staff that it is ready to proceed.

She heads back to the duty lawyer office. A young man is waiting by the door. He says he has been waiting for a long time and needs to see a lawyer. Alex explains that she is working through the list and gives him some publications about responding to an intervention order to read while he waits.

Alex calls Lisa. Lisa has been in touch with Victoria Legal Aid during the week. Alex has already provided her with some preliminary advice with her family law issue and knows that in addition to Lisa seeking an intervention order today, they need to put in place some arrangements for the care of her child with Aidan. Lisa tells Alex that Aidan is sitting in the court foyer. He doesn't have a lawyer. Alex cannot give Aidan legal advice but tells him about the court processes so that he understands what will happen today. He says that he will agree to whatever Lisa wants as long as he can see his child. Alex suggests that Aidan speak to the lawyer from the local CLC before consenting to the final order.

Alex calls Michelle into the duty lawyer office. Michelle's partner is Robert, who is being assisted by the private practitioner who spoke to Alex earlier in the morning. Robert and Michelle have two children. Michelle also has a child from a previous relationship. Michelle called the police after Robert physically assaulted her and an interim order was made upon the police's application. Michelle says that Robert has been addicted to alcohol since losing his job a few years ago. She tells Alex that sometimes he lashes out when he has been drinking. Michelle says she wants to continue the relationship but wants to make sure Robert gets his drinking under control first. She says that they have remained in contact and text messaging about the children since the order was made.

Alex explains that this would mean that Robert is in breach of the interim order as the conditions in the order taken out by the police don't allow for communication by text message or arrangements to be made for the care of their two children. Alex explains that the proposed final order currently contains the same terms. Victoria Police have also notified the Department of Health and Human Services child protection division (the DHHS), who have conducted a risk assessment for the children.

Michelle wants to keep the children on the order for the time being but wants to revise it so that she can be in contact with Robert from time to time to make arrangements for Robert to see the children as she wants them to continue to have a relationship. Alex advises that this will depend on the risk assessment and any recommendations of the DHHS. Michelle doesn't know what the DHHS requires.

Alex asks Michelle to wait in the duty lawyer office and goes to talk to the police at their office in the court. Alex waits for a few minutes until the relevant police advocate has finished talking with another person, then asks him if he has heard from the DHHS in Michelle's matter. The Victoria Police advocate says that he has not heard back from the DHHS but will try to follow up. Alex returns to the duty lawyer office and lets Michelle know that Victoria Police will try to contact the DHHS and suggests Michelle could also try and contact the DHHS immediately and if not

successful then Alex will telephone. Alex advises Michelle that provided the Department agrees it is safe to include an exception in the final order that will allow for written child arrangements to be made between her and Robert by text message, this is a request Michelle is likely to be able to make successfully from the court. Michelle is comfortable with this approach.

Alex goes out to the foyer and speaks to the private practitioner representing Robert. She explains the proposed changes to the conditions of the order that Michelle would like to pursue and that under those conditions, Robert would be able to see the children if they put in place some written arrangements and communicate by text message. Alex also suggests he speak to the respondent support worker to get some information about alcohol counselling services that may help his client to deal with his alcohol addiction. The private practitioner confers with Robert and returns to inform Alex that Robert has decided he will no longer contest the making of the final order if there is some provision for contact with his children.

Alex is called into court to deal with Nilton's matter. The order is made and she explains this to Nilton and advises him to get a copy of the order from the registry before leaving court. She returns to the duty lawyer office. She ticks Nilton's matter off the list and puts the paperwork to one side.

She calls Milly. Milly is a previous client and understands the process. There is no current order in place in this matter. Milly says that she spotted her ex boyfriend having a cigarette out the front as she was coming in to court so she assumes he was served with the application she has made against him. She tells Alex that she needs to go back to the house to get some things for their toddler as there are not enough toys or clothes at her mother's house where they are staying. She wants to know whether Victoria Police can come to the house to help her move out because last time she hired a truck and went to the house he wouldn't let her in. She says she would need a couple of hours to fill a truck. Alex knows from experience that it is unlikely that Victoria Police will be able to allocate two officers to one house for a couple of hours. She advises that Milly could ask for the order to include provision for a family member to accompany Milly to the house to collect some belongings.

The Victoria Police advocate knocks on the door and Alex asks Milly to excuse her while she goes to speak to the police quickly. He informs Alex that the DHHS has advised it has no ongoing concerns regarding Michelle and Robert's children seeing Robert provided they are protected under the intervention order. Alex conveys this to Michelle just as the matter is called into court.

Before going into court for Michelle's matter, Alex asks Milly to wait in the foyer while she runs into court. Milly asks Alex to walk her back to her seat because she feels anxious about bumping into her ex boyfriend in the court foyer. Alex takes her to a seat near the registry before racing back into the court room. The magistrate hears the matter and the order is made with the conditions agreed to by Michelle and Robert.

As she is leaving the courtroom, Alex speaks to the lawyer from the CLC at the courtroom door. They do a quick update on where things are up to – and identify a couple of matters that are ready to proceed. Alex informs the registry and makes her way back to the duty lawyer office. Lisa stops Alex on her way and asks how much longer she will need to wait until the matter is called. Alex tells her it hopefully won't be too long.

Alex looks for Milly in the court foyer to continue their discussion. Milly isn't there. Alex resumes her chair in the duty lawyer office as the court breaks for lunch. She uses this opportunity to sift through the growing pile of paperwork and prepare for the rest of the day.

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## Responding to family violence in Victoria

An effective response to family violence requires peripheral vision. It is difficult to describe or define the boundaries of a family violence system. As the snapshot of a morning with one of our duty lawyers demonstrates, families who experience family violence each bring a set of different circumstances, different pathways, different needs and expectations and different combinations of legal and non-legal problems.

When we refer to the legal response to family violence in Victoria we are usually talking about a combination of the civil system of family violence intervention orders and the criminal justice response to offences committed in the context of family violence. However, we must also recognise that the legal response to family violence must extend beyond state boundaries to the Commonwealth family law system. Victoria Legal Aid considers that any examination of the response to family violence should recognise this critical intersection and ensure that there is a joined-up approach to the resolution of the problems experienced by families impacted by violence.

In addition, our experience suggests we should avoid simply grafting a response to family violence on to the side of the existing architecture of the justice system. The response to family violence should be embedded in the everyday services and processes of our legal system. We should harness the potential of the existing legal framework and supporting services to prevent family violence before it occurs.

For example, people who breach family violence intervention orders may have had prior contact with the criminal justice system. The justice system should enable and support connection with relevant support services at the first available opportunity to reduce risk factors that may lead to further offending. For example, a state-wide expansion of the Court Integrated Services Program would better enable this to occur. In recent years, the Magistrates' Court has demonstrated the capacity to make a powerful shift from a justice dispensary to an active and effective point of interception in the lives of people with multiple and complex issues. We support further innovation in this regard.

We consider that the legal response to family violence should also take the burden off victims of family violence to forge their own path through the various processes. Better referrals and better processes for the sharing of information will relieve some of this burden. Well-resourced alternate duty lawyer services are also essential.

This part of our submission examines family violence intervention orders and the response to family violence at Magistrates' Courts across the state. We say more about our aspirations for a better approach to responding to families with issues in both Commonwealth and State legal systems later in this submission.

## Family Violence Intervention Orders

The central pillar of the legal response to family violence in Victoria is the *Family Violence Protection Act 2008* ("the Act"). Victoria Legal Aid supported the introduction of the Act and continues to support its objectives of:

- maximising the safety of children and adults who have experienced family violence;
- preventing and reducing family violence to the greatest extent possible; and

- promoting the accountability of perpetrators of family violence for their actions.

The Act aims to achieve these objectives through the provision of an effective and accessible system of family violence intervention orders and family violence safety notices. It also creates offences for contravention of family violence intervention orders and family violence safety notices to promote the accountability of perpetrators for their actions.

A number of elements of the current legal response are recognised as best practice.<sup>1</sup> This includes:

- guiding principles in the Act that recognise the nature, prevalence and impact of family violence in the community;
- a broad definition of family violence that includes coercive and controlling behaviour and economic abuse as well as physical and sexual violence;
- an accessible system of family violence intervention orders;
- a legal response that contemplates the intersection between the family law and family violence intervention order jurisdictions;
- measures to reduce system trauma for victims, such as preventing cross examination of an applicant directly by a respondent;
- specialist courts and dedicated support services for applicants and respondents; and
- specialist training and resources for the judiciary on the nature of family violence.

We consider that the Act continues to provide an appropriate foundation for the provision of intervention orders and a platform for the broader legal response to family violence. The best practice elements above remain important and have been drawn on by other jurisdictions, including Queensland and Western Australia. We acknowledge though, that for victims and perpetrators of family violence the legislative framework and navigating the legal system can be a confusing and overwhelming experience. We propose a number of measures that will improve this experience.

## **The role of family violence legal services at the Magistrates' Court**

The court environment can be challenging for people involved in applications for family violence intervention orders. Lawyers play an integral role in supporting those impacted by family violence to navigate the system.<sup>2</sup> As demonstrated by the snapshot above, duty lawyers do not simply shepherd people through the court processes. The operation of the duty lawyer service reflects the complex and dynamic environment of the court and the variety of problems and systems people need to navigate following an incident of family violence. To piece together the information required to provide good advice to applicants and respondents to family violence intervention orders, the duty lawyer may speak to a combination of the court registry, community legal centres and private practitioners, the Department of Health and Human Services, Victoria Police, applicant and

<sup>1</sup> See for example Australian Law Reform Commission & New South Wales Law Reform Commission (2010) *Family Violence – Improving Legal Frameworks - Consultation Paper* Law Reform Commission of Western Australia (2014) *Enhancing Family and Domestic Violence Laws; Final Report*.

<sup>2</sup> A recent report by the Loddon Campaspe Community Legal Centre documenting women's experience of family violence in regional Victoria included feedback from women on the importance of having a good lawyer to support them during the legal process. See Loddon Campaspe Community Legal Centre (2015) *Will Somebody Listen to Me? Insight Actions and Hope for Women Experiencing Family Violence in Regional Victoria*, p 73-74.

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respondent support workers and other parties who may not be represented by a lawyer. There may also be family law issues in the mix.

Duty lawyers juggle multiple matters simultaneously. There are often false starts when instructions change or new information comes to light, such as new conditions and circumstances that need to be accommodated to ensure the order is suitable and effective. This all occurs before setting foot in the courtroom for the matter to be heard.

In our view, it is appropriate that the burden falls to the system including via lawyers, rather than applicants and respondents, to weave together the various fragments of the legal response to family violence.

Legal services are also fundamental to the effectiveness of the justice response. Access to well-timed and effective legal interventions contributes to the achievement of the objectives of the Act – importantly, not only maximising safety but also preventing and reducing family violence and promoting perpetrator accountability – and, more generally, better outcomes for both victims and perpetrators of family violence and their families.

Because of this, Victoria Legal Aid has an ongoing commitment to improving the delivery of our services to applicants and respondents to family violence intervention orders and working better with our partners in the justice system to prevent family violence and reduce its impact.

Court-based family violence legal services are a core component of the justice system's response to family violence and the provision of duty lawyer services at court provides an effective and efficient way to deliver these services. Our lawyers are trained to identify and respond to a range of legal and non-legal issues and provide legal assistance in a way that responds to the full circumstances of people seeking help in relation to a family violence matter. Further training is also in the process of implementation.

The value of court-based family violence legal services was recognised in the recent examination of the response to family violence in Queensland. The Queensland Taskforce recommended the establishment of a state-wide duty lawyer service in Magistrates' Courts for both applicants and respondents in family violence matters.<sup>3</sup> The Taskforce found that the benefits of a duty lawyer system, for both male and female applicants and respondents, include:

- mitigating the trauma of the court process for victims
- parties are better informed of their rights and the legal process and know what they can and cannot ask of the court
- victims will receive assistance and advice with completing application forms. This will ensure all relevant information is before the court. The court process will proceed more smoothly as a consequence of properly prepared documents and legally informed clients appearing before it
- more appropriate orders and conditions can be applied for which improves victims safety, and reduces the risk of recidivism, breach and applications for variations of the orders
- timely legal advice and information to respondents could lead to a less litigious approach to proceedings and appropriate referrals

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<sup>3</sup> Special Taskforce on Domestic and Family Violence in Queensland (2015) *Not Now Not Ever: Putting an end to domestic and family violence in Queensland*, p 313.

- victims will be empowered to pursue their matters and not withdraw because of fear or intimidation by the perpetrator or because of lack of knowledge of the complex legal system. The result will be greater safety for older people, women and children experiencing domestic and family violence.<sup>4</sup>

Unlike in Queensland, state-wide duty lawyer services are already currently provided in Victoria. Victoria Legal Aid provides or arranges the delivery of duty lawyer services at all major metropolitan Magistrates' Courts and at most of the Magistrates' Courts located in rural and regional areas. Community legal centres and Victoria Legal Aid-funded private practitioners provide an alternate duty lawyer service in many Magistrates' Courts across the state. This is essential to ensuring both applicants and respondents receive duty lawyer services through our staff practice, a community legal centre or a private practitioner. This mixed-model of service delivery ensures both parties have access to legal assistance at court and helps overcome challenges arising from lawyer-client conflict situations.

However, this model has not been implemented across all courts in Victoria. As a result, there is currently differential access to legal assistance at courts based on geographic location, with reduced levels of access in regional locations. At some locations there is only one duty lawyer service and where there is no alternate service, only one party to a family violence intervention order application may have access to a court-based family violence legal service. This was described by one of our regional family violence duty lawyers as follows:

*'...services are offered on a 'first come first served' basis, which often results in the 'second-served' party who is unrepresented feeling disadvantaged. In terms of justice being done but also being seen to be done, the situation created by only one party having access to a duty lawyer is very damaging...'*

Victoria Legal Aid Duty Lawyer, Regional Office

A second concern is that even where two alternate duty lawyer services are in place, the demand for assistance in terms of numbers of applicants and respondents at court each listing day means that duty lawyer services are currently simply unable to assist all those who need help.

Similar to the recent findings of the Queensland Taskforce, Victoria Legal Aid's practice experience indicates that the key benefits of the duty lawyer service for both applicants and respondents include:

- **Accessibility:** duty lawyer services make the legal system more accessible by helping applicants and respondents understand their legal rights and responsibilities, the court process, and the nature of family violence intervention orders
- **Suitability:** orders are more likely to be suitable to respond to the individual circumstances of applicants and respondents from both a safety and practical perspective
- **Accountability and compliance:** helping respondents understand the nature and terms of the order and the consequences for breaching the order. Where a perpetrator does not understand the law, engagement with legal services is more likely to increase understanding and encourage conduct that is compatible with compliance.
- **Identification of interrelated issues:** identification and referrals to legal assistance providers for related legal issues, such as family law and child protection, may assist to diffuse the crisis in families who experience family violence

<sup>4</sup> Special Taskforce on Domestic and Family Violence in Queensland (2015), p 313.

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- **Referrals:** access to legal and non-legal support services through timely and effective referrals supports better outcomes for applicants and respondents by helping to address the surrounding and interrelated issues.

We provide more detail on each of these benefits in **Appendix 2**.

### **Recommendation 1 - Family Violence Legal Services**

That the response to family violence continue to include access to court-based family violence legal services.

## Opportunities to improve the legal response to family violence

There are several opportunities to improve the operation and effectiveness of the legal response to family violence. In our experience, the legal response is not realising its potential due to an imbalance between demand and resource investment and because it transcends jurisdictions. The response would have a more meaningful impact on the lives of people who need assistance by addressing system congestion and slowing down the pace of the service response to achieve a more thorough and coordinated legal response.

Our key recommendations for improvements to the legal response to family violence include to:

- mainstream certain elements of the current Family Violence Court Division Model to open up better pathways for people who use or experience violence.
- resource the demand for family violence legal services to promote effective access to justice for people who need court-based legal services
- improve court safety to ensure that the court experience does not create additional trauma for victims of family violence.

We also support a legal response to family violence that does more than simply shepherd people through court processes and apply a patch to the immediate problem. While it is entirely appropriate that the immediate safety concerns be paramount and addressed first, we can do more to provide continuity of support necessary to tackle and resolve underlying issues and to ensure that a person's interaction with the justice system also makes a lasting and meaningful difference to their lives.

In our view, the legal response to family violence should not simply aspire to achieve a legal resolution or finalise matters. It should also aspire to outcomes that reduce the prevalence of violence in the community. We consider that the current design of the system can support these outcomes but again, substantial resource investment is needed to achieve this goal.

## Mainstreaming elements of the Family Violence Court Division model

Victoria Legal Aid provides court-based legal services at both the Family Violence Court Division at the Ballarat and Heidelberg Magistrates' Courts and non-Divisional Magistrates' Courts at other locations.

In our experience, the family violence court division model maximises the benefits of the legal intervention because legal services are complemented by the systems, resources and powers available at the court under the model. In particular, we have observed a sound understanding of the dynamics of family violence in the approach and decision-making by magistrates, court staff, legal services and non-legal support workers at these locations.

We recognise that there are substantial resource and practical obstacles to mainstreaming the full divisional court model at all court locations. However, we consider that key features of this model can be replicated at other court locations to enhance victim safety, promote better coordination between the court and legal and support officers and ensure that respondents are connected with the services they need to address their offending behaviour.

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We support the extension of elements of the divisional court model to other locations. In particular, we recommend:

- greater resourcing of applicant and respondent support workers
- greater court powers to mandate respondent participation in behaviour change programs
- further and regular training to build the capacity of court staff and the judiciary to deal appropriately with family violence matters.

The key benefits of these elements are discussed further below.

### **Access to applicant and respondent support workers**

In our practice experience, court interventions are more effective where non-legal support workers for both applicants and respondents are available.

In our view, the co-location of non-legal specialist services is a particular strength of the divisional court model. Applicant and respondent support workers at the Ballarat and Heidelberg courts identify the non-legal needs of the respective parties and begin to arrange the appropriate non-legal supports. Support workers can link applicants with housing or counselling services and can link respondents to a men's behaviour change program, alcohol and drug abuse services, and housing support services. This maximises the opportunity presented by court intervention to address the cluster of non-legal issues that applicants and respondents regularly present with. This promotes a holistic response and supports long-term change

The coordination and collaboration between lawyers and support workers to address the legal and non-legal needs of both applicants and respondents is a key advantage of this model. The family violence duty lawyer services provided within the Family Violence Court Division are generally more complex and time consuming than non-division court family violence matters. They deal with both intervention orders and criminal matters occurring in a family violence context. The capacity to work with the applicant or respondent support worker who brings the relevant training and expertise to the situation ensures that non-legal needs are identified and addressed by individuals with the necessary expertise.

We have welcomed the commitment by the Magistrates' Court of Victoria to expand the provision of applicant and respondent support workers to all metropolitan courts. This resource commitment acknowledges that the availability of this service should not be dependent on the court at which the intervention order matter is listed.

Ideally, support workers would also be available to people charged with breach offences throughout the court process. We recommend that the Magistrates' Court be resourced with dedicated support workers to assist affected family members, respondents to family violence intervention orders, people charged with breach of family violence intervention orders and those accused of other criminal offences in a family violence context.

We consider that the benefits of the assessment and referral processes usually undertaken by applicant and respondent support workers should also be available to people attending regional courts. Given the smaller volumes of family violence matters at some regional courts this may be best achieved by the expansion of the Court Integrated Services Program across the State. This

would promote better access to support services in regional locations for all people attending court, including for family violence matters.

### **Recommendation 2 - Applicant and Respondent Workers**

That applicant and respondent support workers be available at all Magistrates' Court locations and available to assist people at all stages of matters related to family violence.

### **Referral to behaviour change programs**

Currently, only magistrates at Family Violence Court Division locations are able to mandate participation in programs that address violence supporting attitudes and aim to reduce the risk of future family violence. At other courts, respondents may be advised of the availability of behaviour change programs by duty lawyers, respondent support workers or magistrates and may be given a warm referral to a local program.

We do not support mandated participation in behaviour change programs for all respondents to family violence intervention orders. In our experience, including a condition requiring attendance at counselling on a family violence intervention order can lead to delay in the making of the final order because a respondent may be reluctant to consent to the order. This, we expect, would lead to a significant increase in contested hearings. Further, it may cause increased system trauma for the victim.

However, we consider that all magistrates should have the discretionary power to require participation by suitable candidates and we support the extension of the discretion to order participation in men's behaviour change programs to all court locations. We propose that magistrates retain discretion to order participation where the circumstances indicate there would be benefit. This may include, for example, situations where the applicant and respondent wish to remain in the relationship, children are listed as affected family members on the order, or where there have been multiple family violence intervention orders against the same respondent.

While we support measures that seek to reduce recidivism and the prevalence of family violence in the community - including those that seek to address violence supporting attitudes - we recognise that the lack of research on the effectiveness of behaviour change programs in Victoria has impeded the evidence base for consideration of the utility of these programs.

Research from other jurisdictions suggests that participation can improve victim safety by reducing recidivism rates. A recent evaluation in Western Australia, for example, found 12.4 percent of family violence offenders who completed a behaviour change program re-offended within one year. In contrast, 26.8 percent of family violence offenders who did not participate in a program re-offended within one year.<sup>5</sup> Recent research from the UK has also shown that men's behaviour change programs can drive behaviour change in the vast majority of participants, demonstrated particularly

<sup>5</sup> Government of Western Australia (Department of the Attorney-General) (2014) *Evaluation of the Metropolitan Family Violence Court and Evaluation of the Barndimalgu Court Evaluation*, viewed 14 June 2015, <[http://www.department.dotag.wa.gov.au/\\_files/fvc\\_evaluation\\_report.PDF](http://www.department.dotag.wa.gov.au/_files/fvc_evaluation_report.PDF)>.

in reduced use of physical and sexual violence. Participants also demonstrated a broader understanding of family violence that included patterns of coercive control.<sup>6</sup>

Anecdotally, our clients have indicated that they have found participation in behaviour change programs beneficial, particularly where they were seeking to maintain a family relationship.

However, a significant problem experienced regularly by our lawyers is that the demand for places in these programs exceeds current supply. As a result the opportunity to engage respondents in timely and effective interventions is diminished.

Based on our experience, we encourage the Commission to consider the following issues when making any recommendations about behaviour change programs:

- **Timely participation is important.** Victoria Legal Aid's experience supports the position taken by *No to Violence*.<sup>7</sup> Lawyers are regularly in contact with respondents in the two to three week period following a family violence incident that has been attended by Victoria Police and routinely make referrals where appropriate. In our experience it is most effective to recommend participation in behaviour change programs early. Furthermore, where there is a desire to stay in the relationship or to continue spending time with or living with children, there is a greater motivation to participate.
- **Sufficient places must be available to meet demand.** Currently, there are an insufficient number of places available for respondents who would like to enrol in a behaviour change program. At the time of writing this submission, we understand that places in behaviour change programs in the Frankston catchment for 2015, for example, have already been exhausted.
- **Programs must be suitable for respondents from culturally and linguistically diverse (CALD) communities and non-English speaking backgrounds.** There is a lack of programs available to respondents who do not speak English as a first language nor are interpreters available for these respondents to participate in mainstream programs. This creates an access issue but also is indicative of a lack of appropriate programs for respondents from a CALD background.
- **Broaden the availability of behaviour change programs beyond male intimate partner perpetrators.** Currently, behaviour change programs are only available to respondents who are male and who perpetrate violence in an intimate partner relationship. While this is the majority of respondents, this focus results in a lack of appropriate programs for women who perpetrate family violence or family violence that is not within an intimate partner relationship, such as adolescents who use violence in the home.

### **Recommendation 3 - Discretion to mandate participation in behaviour change programs**

That magistrates at all court locations have the discretionary power to mandate participation by suitable candidates in behaviour change programs.

### **Recommendation 4 - Relevant considerations for behaviour change programs**

<sup>6</sup> Kelly, L and Westmarland, N (2015) *Domestic Violence Perpetrator Programs: Steps towards change* (Project Mirabal, Final Report) (London and Durham: London Metropolitan University and Durham University).

<sup>7</sup> RMIT University (Centre for Innovative Justice) (2015) *Opportunities for Early Intervention: Bringing perpetrators of family violence into view*, (Melbourne, RMIT University), p 32.

That the Commission considers making recommendations relating to behaviour change programs that give effect to the following:

- timely and effective participation
- sufficient places to meet demand
- culturally appropriate and accessible programs
- programs appropriate to other less common forms of family violence.

### **Specialist knowledge and understanding of family violence**

There is a good understanding of the complexities of family violence within the judiciary, registry staff and lawyers working in the family violence jurisdiction.

We have identified, however, two specific scenarios where decision-making could be better informed by the dynamics of family violence and how it can impact victim safety: where a victim has decided to separate from the perpetrator and where the perpetrator's controlling behaviour is escalating.

A victim is at greater risk of family violence when leaving a relationship or separating from a violent partner. The making of an interim ex parte family violence intervention order in this scenario, while not responding to a recent incident of family violence, would be an appropriate preventative measure which is consistent with promoting victim safety.

There is general acceptance that a victim of family violence continues to be at risk of further violence even if there has not been a recent incident. An indicator of further violence is an escalation in the perpetrator's controlling behaviour. In this scenario, the making of an order while in the 'tension building phase' in the cycle of violence would also be consistent with promoting victim safety.<sup>8</sup>

Both are situations where the risk factors of family violence are present but there may not have been any marked family violence incidents in the lead up to the application for a family violence intervention order.

We do not consider that specialisation is required for all magistrates at all locations. However, we consider that there has been substantial progress towards increased judicial understanding of family violence and support the continued delivery of training and education to all magistrates to deepen the current knowledge and understanding of the nature of family violence. This is particularly important given the increasing volume of family violence matters dealt with at all court locations across the state. Even at locations where there are relatively low volumes of family violence matters, there is benefit in ensuring that magistrates have access to suitable training.

Victoria Legal Aid is currently embarking on a similar process to improve our own service delivery. We have already accepted that family violence is a specialist area of law given the dynamic factors

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<sup>8</sup> See 'Cycle of Violence' from Walker, L.E. (1979) *The Battered Woman*. (New York, Harper & Row) reproduced in White Ribbon Australia: *Fact Sheet 6 - Family and domestic violence*, p 3, viewed 14 June 2015, <[http://www.whiteribbon.org.au/uploads/media/updated\\_factsheets\\_Nov\\_13/Factsheet\\_6\\_Family\\_and\\_domestic\\_violence.pdf](http://www.whiteribbon.org.au/uploads/media/updated_factsheets_Nov_13/Factsheet_6_Family_and_domestic_violence.pdf)>

that are usually present. We have introduced dedicated training and a specialist family violence panel<sup>9</sup> in recognition of the need for specialist knowledge for lawyers who assist these clients.

We also consider that given the various complex intersections associated with family violence, the Commission should consider whether multidisciplinary training would contribute to a shared understanding among different people working in the family violence system. This approach has been used successfully in child protection.<sup>10</sup> In a family violence context, this could include civil, criminal and family lawyers, Victoria Police, magistrates, prosecutors, child protection practitioners, applicant and respondent support workers, court and registry staff and women's and men's support services.

### **Recommendation 5 - Specialist training for magistrates**

That all magistrates and court staff continue to receive specialist training on family violence to deepen the current knowledge and understanding of the nature of family violence.

### **Recommendation 6 - Multi-disciplinary training**

That consideration be given to the funding and delivery of multi-disciplinary training to promote shared understanding of family violence and related issues.

## **Meeting demand for Family Violence Legal Services**

The most significant issue for the legal response to family violence is the level of demand in the system. Over the last ten years, there has been an 83 percent increase in the number of family violence intervention order applications finalised by the court.<sup>11</sup> There has been a 70 percent increase in the number of family incidents recorded by Victoria Police since 2010.<sup>12</sup>

The level of demand in the system is a positive reflection that family violence is taken seriously by the community and law enforcement and that legal steps are being taken to promote victim safety. However, this increase has not been met with equivalent resource investment to manage the downstream impact for courts and legal and non-legal services.

There were 35,135 family violence intervention orders finalised in 2013-14.<sup>13</sup> Victoria Legal Aid provided 10,609 duty lawyer services.

The effect of this is that many people are missing out on services or receiving an abbreviated service. Until the level of demand is met with sufficient resources, the full potential of the court based intervention to achieve broader legal and therapeutic outcomes will not be realised.

There is a community expectation that people will be able to access a family violence legal service. While we seek to increase the reach of our services through publications and online content, many people are still unable to access court-based family violence legal services.

<sup>9</sup> See Victoria Legal Aid (2015) 'Practitioner Panels' viewed 14 June 2015 <<http://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels>> v

<sup>10</sup> See, for example, Children's Court of Victoria (2015) 'Multidisciplinary Training', viewed 14 June 2015 <<http://www.childrenscourt.vic.gov.au/about-us/multi-disciplinary-training>>.

<sup>11</sup> Magistrates Court of Victoria (2014) *Annual Report 2013/14*, (Melbourne, Magistrates' Court of Victoria) p 68.

<sup>12</sup> Crime Statistics Agency (2015) 'Family Incidents', viewed 14 June 2015 ,<<http://www.crimestatistics.vic.gov.au/home/crime+statistics/year+ending+31+december+2014/family+incidents>>

<sup>13</sup> Magistrates' Court of Victoria (2014) *Annual Report 2013/14*, (Melbourne, Magistrates' Court of Victoria), p 68.

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Family violence duty lawyer services across Magistrates' Courts are already at saturation point.

Duty lawyers have not been able to keep up and assist everyone who needs help. Within existing resources, duty lawyers are unable to assist more people without compromising effective access to justice or the quality of legal service provided. The opportunity for an effective intervention is often lost where the court list is too busy and a person cannot be provided with legal advice properly tailored to their individual circumstances.

### **High demand locations**

The pressure of demand for family violence legal services is more acute at some court locations. This is due to a number of factors including local law enforcement efforts by Victoria Police, geographic court boundaries and population growth. We recognise that access to legal assistance is not consistent across the state. We know that many people are missing out on legal services and that some services are so time challenged as to be sub-optimal.

Our data indicates that our duty lawyers are experiencing significant demand at Dandenong, Broadmeadows, Heidelberg, Latrobe Valley (Morwell and Moe), Ringwood, Sunshine and Werribee Magistrates' Courts. Service delivery has not been able to keep pace with the increase in family violence intervention order applications at these courts due to resource constraints.

Court observations have shown that duty lawyers in high volume courts have assisted up to 17 clients on a single day, selected from an even busier list with many other potential clients, not being seen or assisted in a meaningful way. According to our data, Broadmeadows family violence duty lawyers are typically seeing an average of 12 people each family violence listing day.<sup>14</sup> In comparison, current staffing and initiations mean that Melbourne family violence duty lawyers see an average of 6 to 7 people each listing day.

As outlined above, the delivery of duty lawyer services is usually fragmented and must be more than simply shepherding people through the legal process. It requires an individualised response that addresses the broad range of circumstances of each person on the list. It also requires multiple instances of shuttle negotiation with a number of parties (for example Victoria Police or lawyers for the other party). A substantial amount of time can also be spent in court working towards an order that is appropriate and contains relevant safeguards.

The more clients a duty lawyer assists in one day the less opportunity there is to spend time with each client to ensure that the response is suitable to their individual needs. An effective service is one that addresses a client's legal needs - including negotiating and tailoring appropriate orders, advising on the merits of an application, appearing in court, identifying family law and related issues and making referrals to other legal or non-legal services. Duty lawyers that are able to spend sufficient time with a client to ensure that all relevant information is taken into consideration when providing advice and assistance contribute to safety and a more effective justice system.

In the recent State Budget, Victoria Legal Aid received \$2.1 million for one year to increase family violence legal assistance services. This additional funding is welcome and we will apply it immediately to increase service provision, in particular at the high demand locations noted above as well as to relevant alternate community legal centre services.

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<sup>14</sup> At some locations, we have responded to the high demand by rostering an additional lawyer to the duty lawyer service but this has not provided a sustainable or effective solution to the high level of demand at the location and results in the diversion of resources away from other legal services.

However, we will not be able to sustain this increased family violence legal service provision without securing recurrent additional funding.

### **Recommendation 7- Meeting demand for family violence legal services**

That additional recurrent funding be provided to increase capacity to deliver family violence legal services.

### **Regional service response**

There is a separate set of challenges for regional delivery of family violence legal services.

In some regional locations, the issue is not one of demand but a lack of court-based legal services, particularly at some smaller courts. As discussed earlier, this can result in inconsistent levels of service across the state.

Furthermore, family violence workers in regional areas have reported that obtaining legal representation in regional areas is often difficult for applicants in intervention order matters as the respondent in the family violence intervention order matter has often already accessed legal services in the same area for criminal or business legal advice.<sup>15</sup>

Our regional offices have attempted to develop workable solutions to support service delivery to these courts. In some cases they have done so by providing outreach services. However, this has not always provided an effective solution due to the low volumes at these locations and the need for regional offices to prioritise finite resources to the areas of highest demand.

The capacity to provide an effective service is also impacted by court listing practices. Smaller regional courts do not have specific family violence listing days. Rather, family violence intervention order applications are listed amongst other criminal and civil court matters. This makes it difficult to manage our resources to ensure that a family violence duty lawyer is available to assist at these locations when family violence matters are listed.

A hot spot of need – which has received recent public attention – is Mildura.<sup>16</sup> Victoria Legal Aid does not have an office in Mildura and it is not currently feasible for the Victoria Legal Aid staff practice to deliver in-person family violence duty lawyer services at the court in Mildura. The community legal centre servicing the Mildura court has been impacted by recent funding uncertainty. In 2013-14 private practitioners provided assistance in only 145 of a possible 753 family violence matters at Mildura. Our data also suggests that there are current service gaps in Wangaratta and Wodonga.

We know that we need to do better in regional areas to support consistent access to services across the state. Gaps in regional areas need to be addressed as victims in regional locations are

<sup>15</sup> Kyle, Coverdale and Powers (2014) *Conflict of Interest in Victoria Rural and Regional Legal Practice* (Melbourne: Deakin University).

<sup>16</sup> ABC Radio (2015), 'Left in Harms Way', [Background Briefing](http://www.abc.net.au/radionational/programs/backgroundbriefing/2015-03-08/6277930#transcript), 8 March 2015. Transcript available at <http://www.abc.net.au/radionational/programs/backgroundbriefing/2015-03-08/6277930#transcript>.

particularly vulnerable due to physical distance and geographic and social isolation.<sup>17</sup> Isolation is recognised as a family violence risk factor that can contribute to the frequency and escalation of violence for families.<sup>18</sup>

Again, funding is an essential part of the solution. Victoria Legal Aid intends to apply part of the recent \$2.1 million in one-off additional funding discussed above to ensure family violence legal service delivery can be increased in regional locations. However, again without an injection of recurrent additional funding, an inconsistent level of family violence legal service will persist across court locations and these service gaps will be felt most acutely in remote and regional Victoria. This undermines victim safety and perpetrator accountability as one or both parties will not benefit from legal advice prior to the finalisation of the family violence intervention order.

### **Recommendation 8 - Meeting demand for regional service delivery**

That additional recurrent funding be provided to increase family violence legal service delivery in regional locations.

### **More effective use of referrals to legal and non-legal support services**

We are committed to working with law enforcement, the courts and support services to connect people with the services they need to deal with their legal and non-legal needs. The current demand in the system has limited the capacity to open up effective pathways for referrals as services that are making and receiving referrals are overburdened and often do not have sufficient time to forge these connections. This means that there are numerous missed opportunities for early and effective intervention.

Research suggests that immediate and early intervention is likely to be most effective<sup>19</sup> and that police (following a call out) play a key role in forging connections with legal and non-legal supports for both victims and perpetrators.<sup>20</sup> This is particularly important in Victoria given that Victoria Police make the majority of applications for family violence intervention orders.<sup>21</sup>

For this reason, we consider that effective referrals to support services (including legal services) should be provided upon, or shortly following, police involvement in a family violence incident.

We appreciate the difficult task that confronts Victoria Police when they attend a family violence incident and that their effort is focused on conducting a prompt assessment of risk and the implementation of any urgent interventions. As for all aspects of the response to family violence, the immediate need to secure safety is paramount.

The role of referrals in breaking the cycle of violence is recognised by the Victoria Police Code of Conduct. As part of the Police Options Model outlined in the Code of Conduct, Victoria Police

<sup>17</sup> See generally, George A & Harris B (2014) *Landscapes of Violence: Women Surviving Family Violence in regional and rural Victoria* (Melbourne: Deakin University).

<sup>18</sup> *Ibid*, p 33.

<sup>19</sup> Centre for Innovative Justice (2015), p 48.

<sup>20</sup> *Ibid*.

<sup>21</sup> In 2013-14, Victoria Police made 66 percent of family violence intervention order applications.

members are encouraged to make appropriate referrals. These referrals may be either formal or informal.<sup>22</sup>

We consider that Victoria Police should take up the option to make a greater number of formal or warm referrals to support better engagement with support services and more effective interventions. In our experience, there are better outcomes that flow from warm referrals to support services. We consider that Victoria Police should aim to make warm referrals where safe and appropriate to do so, as often informal referrals are not pursued and an opportunity is lost.

Ideally, Victoria Police should also make a referral to Victoria Legal Aid's Legal Help telephone service to begin to address the legal needs of both victims and perpetrators of violence. This will assist to maximise the value and effectiveness of the intervention within this critical window by assisting both parties to prepare for any future court event and identify other legal and non-legal needs. The importance of taking steps to address legal and non-legal needs can then be reiterated and progress reviewed throughout the court process.

We state ideally, as an increase in effective referrals from Victoria Police would result in increased demand for legal advice services from Legal Help, duty lawyer services and legal advice services for secondary legal issues. Victoria Legal Aid would struggle to manage this additional demand without additional resourcing.

#### **Recommendation 9 - Better referrals to legal and non-legal support services**

That the system be resourced to open up better referral pathways, including warm referrals, that result in actual connection and engagement with support services.

#### **Improving safety at all court locations**

The issue of court infrastructure and its impact on victim safety is not a new one, but an important one. Lawyers at Kyneton Court for example, are providing legal services to parties outside, in front of the court building. At Broadmeadows Court there are multiple duty lawyers providing advice in the one room. As a result, confidentiality is difficult to maintain. At Dandenong Court, the waiting area is cramped and busy, creating a frenetic environment where applicants and respondents must sit in the same area. These are just a few examples.

Addressing inadequate court facilities is essential to minimising system trauma. It is also important as the current facilities may be a deterrent for applicants considering pursuing a family violence intervention order if they believe they will not be safe while attending court.

We welcome recent State budget announcements of additional investment in remote witness facilities to reduce any trauma for applicants associated with giving evidence in court in relation to family violence intervention orders. We note also that the Magistrates' Court of Victoria has identified the need to improve waiting areas in courts for applicants and has prioritised this as an issue in its *Response to Family Violence 2015-17*. This is an important commitment and we support these efforts.

<sup>22</sup> Victoria Police (2014) *Code of practice for the investigation of family violence*, (Edition 3 V2), p 44. Formal referrals are when police forward parties' information to appropriate agencies; informal referrals are when police give details of appropriate agencies to the parties to make contact themselves.

Victoria Legal Aid will work with any recommendations made by the Commission aimed at increasing court safety and reducing system trauma. We will work with Victoria Police and the Magistrates' Court to adjust our service delivery model to ensure we can continue to provide family violence legal services to applicants and respondents attending court. We are conscious that this may require additional resourcing or careful design and implementation if, for example, changes require lawyers to attend at several locations on any given listing day to ensure all clients are seen.

### **Recommendation 10 - Improving safety at court locations**

That the safety of applicants and respondents at all court locations continue to be improved.

### **Recommendation 11- Continued access to legal assistance from a safe location**

That additional safety measures do not limit the effective access to legal advice and assistance for applicants and respondents.

## **Other issues relating to the family violence legal response**

### **Vicarious trauma for lawyers providing family violence legal services**

Research indicates that lawyers who work with clients who have experienced trauma or family violence are more susceptible to experiencing vicarious trauma.<sup>23</sup> The experience of lawyers responding to family violence was recognised in a report by the Australian Institute of Criminology, which noted:

Given that the level of exposure to trauma is a predictor of vicarious traumatisation levels, the number of cases workers see within a given time period needs to be appropriate. It is also important that workers do not feel pressure to see more than this because of 'waiting lists' (if waiting lists are a problem, more workers need to be funded).<sup>24</sup>

As discussed earlier in this submission, duty lawyers try to assist as many clients as possible while ensuring the quality of service is not undermined by the time pressures created by long family violence court lists. Yet, the service is not able to meet current demand for family violence duty lawyer services. The nature and volume of matters and the unmet demand contributes to vicarious trauma and burn out of duty lawyers.

There are also challenges associated with dealing with some respondents to family violence intervention orders or accused in criminal matters who may direct their anger and hostility toward their lawyers. While we provide organisational support to assist people mitigate the impact of vicarious trauma and try to manage delivery of services in a way that does not result in excessive caseloads for staff, there are still heavy demands on our lawyers.

<sup>23</sup> Vrkleviski & Franklin (2008) '*Vicarious Trauma: The Impact on Solicitors of Exposure to Traumatic Material*' 4(1), *Traumatology*, p 106-118.

<sup>24</sup> Morrison, Z (2007) *Feeling heavy: Vicarious trauma and other issues facing those who work in the sexual assault field* (ACSSA Wrap, 4 September 2007) (Melbourne, Australian Institute of Family Studies), viewed 14 June 105, <[https://www3.aifs.gov.au/acssa/pubs/wrap/acssa\\_wrap4.pdf](https://www3.aifs.gov.au/acssa/pubs/wrap/acssa_wrap4.pdf)>

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Any retraction of service provision to assist to manage these issues is likely to result in an effective reduction in access to justice for people seeking duty lawyer services. This is a challenging dilemma but ultimately we must act to safeguard the health and wellbeing of our staff. Again, additional recurrent funding is ultimately required to enable us to continue to meet high demand for family violence legal services in an appropriate and safe manner for our staff.

### **Family Violence Safety Notices**

Victoria Legal Aid considers that the current regime for family violence safety notices (FVSN) is working adequately. FVSNs are being used appropriately to protect affected family members before a family violence intervention order application is heard by the Magistrates' Court. The ability for the police to apply for a FVSN has provided flexibility to Victoria Police in its efforts to protect victims of family violence.

We consider that the current timeline for bringing a matter before the court is appropriate and we would not support an extension of the maximum time for which a FVSN may operate. The current time frame provides the appropriate flexibility for court listing days while providing prompt consideration of an application for a family violence intervention order, particularly in situations where the respondent has been excluded from the family home.

### **Interim Family Violence Intervention Orders containing finalisation conditions**

The *Family Violence Protection Amendment Act 2014* introduced interim family violence intervention orders containing finalisation conditions into the legislative framework. The Government has indicated its intention to defer commencement of these changes until after the Royal Commission reports.

Victoria Legal Aid supports this decision and consideration of the legislation by the Royal Commission, as we maintain our concern that interim orders containing a finalisation condition will not achieve greater safety for women and their children.

Interim family violence intervention orders containing finalisation conditions would be automatically finalised unless the respondent seeks to contest the order. The purpose of the condition is to reduce the number of parties who attend court.

Yet, we know that victim safety is enhanced by the ability to tailor family violence intervention orders through at-court negotiation and advice. Furthermore, a court date provides an opportunity for the court, police, lawyers and support services to provide positive preventative interventions for perpetrators, including appropriate legal advice, referral to non-legal support services and direct case management. This is also essential to promoting victim safety.

The assistance provided by duty lawyers at court cannot be replicated external to the court, for example through telephone advice. This is because effective assistance will require an understanding of information provided by other parties to the family violence intervention order matter. As such, most respondents who receive legal advice over the telephone after being served with an interim order, will still require an at-court duty lawyer service. Furthermore, tailoring a family violence intervention order requires negotiation with the other party's lawyer. This is most efficiently done through a duty lawyer service.

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To this end, where previously a respondent may have received their first Victoria Legal Aid assistance from a duty lawyer at an early stage in the process, under an interim order containing a finalisation condition, that client will likely require telephone advice and/or face to face legal advice via an appointment (so that a lawyer can read the court documentation and provide informed advice), in addition to the potential for subsequent duty lawyer services at court later in the process.

We also expect that the introduction of interim orders containing a finalisation condition would lead to an increase in the number of times applicants and respondents will need to attend court to hear variation and revocation applications at a later stage, as they have not received assistance from a duty lawyer at the point the order was made.

A particular concern is that fewer respondents would seek legal advice before a final order is made (or comes into effect). A survey of respondents who received a duty lawyer service at the Wyong Local Court in New South Wales found, for example, that 78 percent of respondents would not have obtained legal advice had the duty lawyer service not been available at court.<sup>25</sup> Without legal advice, we would expect a greater number of criminal charges for breaches of family violence intervention orders, as orders are not tailored and respondents are not advised of their obligations under the order.

This is inconsistent with a commitment to victim safety. It also raises concerns about the likely disproportionate impact of the change on vulnerable respondent clients, including those who are unable to read or understand English, or who are mentally or cognitively impaired, who require legal assistance (particularly in person) due to their vulnerabilities.

#### **Recommendation 12 - Interim orders with a finalisation condition**

That the provisions of the *Family Violence Protection Amendment Act 2014* providing for interim orders with a finalisation condition be repealed.

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<sup>25</sup> Central Coast Community Legal Centre (2014), *Lawyerless and Lost at Court: Are we really helping?* (Evaluation Report Funded by the Law and Justice Foundation of NSW), p 13.

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## Responding to people accused of committing criminal offences in the context of family violence

Offences committed in the context of family violence should be subject to the same criminal law sanctions that apply to other serious criminal offending.

As discussed earlier in this submission, we consider that the response to family violence should be embedded in the existing processes of the justice system. Departure from existing laws and processes through the creation of specific categories of offences to respond to family violence may undermine efforts to bring family violence into focus and make perpetrators of family violence accountable in the same way that people who commit offences in other contexts are made accountable.

Victoria Legal Aid has extensive experience providing legal services to people who are accused of committing family violence related criminal offences. By providing these services we do not condone or excuse the conduct. By providing legal services to accused, respondents and offenders, we uphold their rights to a fair hearing and ensure that all relevant information is put before the court, necessary for the court to decide or arrive at fair and appropriate disposition. There are also secondary benefits that flow to the legal system and victims of crime where an accused has access to legal representation.

As discussed earlier in this submission, there are a number of improvements that can be made to the operation of the legal response to family violence, including better processes for assessment and referral, and increased investment in legal and non-legal services to reduce system congestion and maximise the opportunity presented by a person's interaction with the justice system. These improvements are equally relevant when responding to criminal offending in the context of family violence. The importance of early intervention for people who use violence was discussed earlier in this submission.

We consider that the best way to keep victims safe in the long term and reduce the prevalence of family violence in the community is by addressing the causes of violence. Perpetrator accountability processes should also advance rehabilitative goals. This requires attention to the individual circumstances of criminal offending. For this reason, we support the maintenance of judicial discretion to deal with criminal offences committed in the context of family violence and a response that forges connections with support services to deal with the causes of offending.

Better information supports better decision-making. Our lawyers play an important role in ensuring that relevant information is before the court when making decisions. Criminal offending in the context of family violence is complex and there is often complicated historical and contextual factors that are relevant to the offence. A proportion of cases can be linked to past exposure to violence or abuse. Some people who have experienced abuse or family violence may go on to commit violence against their partner. While these factors are not an excuse, this information can assist decision makers to understand the context of offending behaviour and, in appropriate circumstances, deliver an outcome that connects people to support services that will reduce the likelihood of future offending.

There will of course be cases where a prison sentence will be a necessary and proportionate response. In others, referral to a support service to deal with substance addiction or some other contributing factor may be a more suitable and effective response, perhaps under a Community

Corrections Order. This will rely on Corrections Victoria being able to manage offenders in a way that ensures that the potential for positive change is realised.

The key issue is that the system should allow for flexibility to ensure that the sentencing outcome in each matter promotes rehabilitation to the extent possible, reduces recidivism and contributes to a reduction in the prevalence of family violence in the community.

The complexity of responding to criminal offences committed in the context of family violence is illustrated by the following case example.

### **CASE EXAMPLE – ADIA**

Adia is a 36 year old mother of three children. Adia has an acquired brain injury, and has been the subject of violence in successive relationships, including by her current partner.

During the course of her current relationship Adia has been physically assaulted, has had her income and Centrelink benefits controlled and stolen, has been forced to engage in unwanted sexual activity, and has been subjected to daily taunts about her appearance and value. Adia has no family supports and has started abusing alcohol.

An argument erupted between Adia and her partner when he started yelling at one of her children for knocking over his bottle of beer. During the course of this argument, Adia's partner struck her across the face with the empty bottle. Adia grabbed a kitchen knife and stabbed her partner in the back and also cut his cheek. Adia then picked up her daughter and ran into the bathroom where she locked the door and called police, fearing her partner was going to come after her with the knife.

Adia was charged, and with legal assistance from Victoria Legal Aid pleaded guilty to recklessly causing serious injury. Due to the seriousness of the offending Adia was at risk of a sentence of imprisonment, however following the assistance of her lawyer, Adia was sentenced to a one year community corrections order.

### **Offences**

Existing laws prohibit the range of offending behaviour that may occur in a family violence context. Existing offences covering threats, assaults, injuries and causing death (as well as breach of intervention order) cover the spectrum of family violence and are already available to law enforcement and prosecutors to respond to offences committed in this context. It is appropriate that the established criminal law be used to respond to serious offences committed in the context of family violence just as it would be to respond to serious offences committed in other contexts.

There have been recent suggestions for the creation of specific family violence offences and further sub-categories of offending behaviour - such as attempted strangulation or controlling behaviour – that are said to enable prediction of risk to personal safety. We strongly agree that efforts to predict and manage risk are critical, but in our view these are more properly and effectively directed at earlier points in the system, rather than increasing the range of offences available once allegations or incidents of family violence have already occurred. The stated objectives of these suggested categories of offences – such as being able to track certain perpetrators and predict future risk –

can be advanced through existing offences supported by better data capture, risk assessment and referral to relevant agencies for a targeted response where risk factors are identified.<sup>26</sup>

In our view, the creation of new offences or the recasting of existing offences to apply specifically to family violence will not necessarily deliver any additional protective outcomes and may result in fragmentation and uncertainty in the criminal justice response. The criminal law has continued to grapple with the challenges of developing specific measures to respond to family violence. For example, this has been seen in the context of women who kill a partner in response to family violence. There have been concerted efforts over the past decade to strike an appropriate balance in the laws relating to people who kill in the context of family violence – specifically to accommodate cases involving the killing of a family member or intimate partner in circumstances where there may be lower degrees of moral culpability due to a history of experiencing family violence. Recent legislative reforms abolished defensive homicide and introduced a new test for self-defence which aims to increase the availability of this defence to women who have been victims of family violence and who have not enjoyed equality of access to the laws of self-defence which have historically operated to the benefit of men who kill their partners.<sup>27</sup> These reforms commenced in November 2014. We consider that these changes should be monitored and an assessment made of their impact before initiating further changes to offences and laws in this context.

## Penalties and sentences

The criminal law already provides scope to take family violence into account when sentencing for criminal offences. The breach of trust, defenceless victims and the history of assaults and abuse that is associated with offending in this context is recognised by the courts as an aggravating feature for the purposes of sentencing. The Court of Appeal recognises that specific deterrence and general deterrence in particular are important sentencing factors in cases involving domestic violence.<sup>28</sup>

Victoria Legal Aid does not support mandatory sentencing for any type of offending, nor overreliance on imprisonment in the sentencing exercise. Judicial discretion is necessary to meaningfully respond to individual circumstance. As discussed above, every criminal case is different and requires a tailored response. In some cases lengthy terms of imprisonment will be required to do justice while in others a paramount focus on rehabilitation is appropriate.

The importance of maintaining discretion and not imposing higher or mandatory sentences for everyone who commits offences in the context of family violence is demonstrated by Adia's story above. As illustrated by that example, it is important for the court to retain discretion so that it can respond to the particular circumstances of the offender.

<sup>26</sup> For example, if an assault or injury charge is on the basis of an alleged strangulation, Victoria Police or respondent workers could be required to record this data and to make certain referrals or take certain interventions as appropriate to the circumstances of the individual case.

<sup>27</sup> Introduced by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014*. This Act also introduced jury directions on family violence to address common misconceptions and provide greater context about family violence to juries; and also amended provisions relating to admissibility of evidence to reduce attacks of the character and reputation of a deceased.

<sup>28</sup> See *Pasinis v R* [2014] VSCA 97 at [56-57]; *Earl v R* [2008] VSCA 162 at [23]; *Hester v R* [2007] VSCA 298 at [19].

The courts are exercising their existing discretion in a way that affirms that offending in the context of family violence is extremely serious and warrants high sentences.<sup>29</sup> The following extracts from three recent matters heard in the Court of Appeal demonstrate this firm approach:

*As this Court said in DPP v Johnson, the terms of an [family violence] intervention order must be strictly adhered to and can only serve to protect victims at risk of violence if they are effectively enforced and if the breach of an order attracts a sentence that reflects the true gravity of that offending.*<sup>30</sup>

*Historically perpetrators of family violence were rarely prosecuted. Even when offenders were convicted of such offences, they often received lenient sentences. Fortunately the criminal law now gives greater recognition to the devastating effects of family violence. It has also been recognised that women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner.*<sup>31</sup>

*Senior counsel for the applicant rightly conceded that general deterrence is a significant sentencing factor in this case...most particularly in relation to violent offending against a former domestic partner. Of particular significance is the fact that the applicant was already subject to a Family Violence Intervention Order. Offending of this nature is too often perpetrated by men whose response to the breakdown of a relationship is one of possessive, violent rage. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. This Court has made it clear that such offending will attract serious consequences and even harsher penalties where it involves the breach of an order which exists for the victim's protection.*<sup>32</sup>

Given that the Court of Appeal has made such strong pronouncements on the seriousness of family violence, we consider that the precedential value of these cases will continue to influence outcomes in family violence matters. For that reason, we do not consider that any legislative change is currently required to introduce additional guidance or requirements on sentencing for family violence offences.

In addition, Sentencing Advisory Council (SAC) research on contraventions of family violence intervention orders and safety notices concluded that a transformation in approach to family violence offenders is already being reflected in sentencing outcomes for these matters.<sup>33</sup>

The SAC also found that the shift away from fines as a sentencing outcome was unique to sentencing outcomes for contraventions of family violence intervention orders and was not

<sup>29</sup> See *DPP v Johnson* [2011] VSCA 288; *Filiz v the Queen* [2014] VSCA 212; *Johnston v The Queen* [2013] VSCA 362; *DPP v Meyers* [2014] VSCA 314; *Pasinis v The Queen* [2014] VSCA 97.

<sup>30</sup> *Johnston v The Queen* [2013] VSCA 362 at [26].

<sup>31</sup> *Pasinis v The Queen* [2014] VSCA 97 at [53].

<sup>32</sup> *Filiz v the Queen* [2014] VSCA 212 at [21].

<sup>33</sup> Sentencing Advisory Council (2013), *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention*, p 33, viewed 14 June 2015, < <https://www.sentencingcouncil.vic.gov.au/publications/family-violence-intervention-orders-and-safety-notices> >.

consistent with sentencing trends in the Magistrates' Court as a whole.<sup>34</sup> This indicates that offending in the context of family violence is being taken seriously by the Magistrates' Court.

In NSW, there is research that indicates that sentences for criminal matters in the context of domestic violence are lower and not comparable with sentences for matters that occur in a non-family violence setting.<sup>35</sup> This analysis has not been done in Victoria. While the combination of SAC data analysis and the statements by the Court of Appeal suggest that there has been a positive shift in judicial approach to family violence, comprehensive data is not available to advance evidence-based consideration of recent sentencing outcomes.

We consider that any adjustments to the current laws relating to offences and sentencing should be supported by a strong evidence base. At this time, we do not consider that there is sufficient data to support change. However, we suggest that there be a thorough analysis of sentencing outcomes to assess whether or not there is evidence to support a shift in the current approach, similar to that referenced above in NSW.

If further research reveals notable discrepancies in sentencing practice, we support the examination of options to address the issue. We consider that the first step would be to assist judicial officers to exercise their discretion in a way that reflects the seriousness of family violence rather than confining this discretion. This would ensure that they also remained able to respond appropriately to the individual circumstances and complexities of family violence matters, including people who defy the perpetrator stereotype such as the example of Adia whose story is outlined above.

### **Recommendation 13 – Offences and Sentencing**

That offences committed in the context of family violence should be treated as seriously as offences committed in other contexts and perpetrators should be made accountable for their actions through existing criminal laws.

The Sentencing Advisory Council should conduct a full examination of current sentencing outcomes for summary and indictable offences to ensure that sentencing outcomes for criminal matters in the context of family violence are comparable with sentences for matters in a non-family violence context.

### **Fast tracking of family violence offences**

Victoria Legal Aid supports the current pilot of a listing model that fast tracks criminal charges arising in a family violence context at Dandenong Magistrates' Court.

The purpose of this pilot is to improve perpetrator accountability and enhance the safety of victims by having criminal matters arising in a family violence context dealt with as early as possible. The pilot will test the hypothesis that the ordinary timeline for matters returning to court means that those in breach of family violence intervention orders are not seeing immediate consequences arising from their actions; which then does not deter further breaches. Under the pilot, family violence related criminal charges, including contraventions of intervention orders, are being listed before the

<sup>34</sup> Sentencing Advisory Council (2013), p 33.

<sup>35</sup> Olding, R.(2015) 'Researchers see discrepancies in judiciary's handling of NSW domestic violence cases', *Sydney Morning Herald*, 22 February 2015, viewed 14 June 2014, <<http://www.smh.com.au/nsw/researchers-see-discrepancies-in-judiciarys-handling-of-nsw-domestic-violence-cases-20150221-13k9va.html>>.

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court within set timeframes. This results in prompt legal consequences for offending in the context of family violence.

If successful, we support this model being rolled out to Magistrates' Courts across the rest of the state with appropriate resourcing to support the increased demands on criminal law duty lawyers.

### **Responding to breaches of family violence intervention orders**

The use of the criminal law to respond to breaches of family violence intervention orders reflects the seriousness of the conduct. As a criminal matter, the seriousness of the consequences of breaching a family violence intervention order engages the procedural rights that attach to our criminal law processes.

Earlier we noted the importance of applicants and respondents accessing early advice and information in relation to family violence intervention order matters to enhance safe outcomes and prevent family violence. It is also essential that respondents have access to early advice and information that will support compliance with the conditions of an intervention order given the serious criminal consequences of breaching an order.

Where a person does contravene an intervention order, we support enforcement action that ensures victim safety, holds the perpetrator accountable, and takes into account the particular circumstances and any underlying causes of the contravention. While we acknowledge that responding to the crisis is challenging and the dynamics can be unpredictable, we consider (as discussed above) that more effective use can be made of referrals to relevant support services at the point where perpetrators come into contact with the legal system.

The importance of responding to the particular needs and circumstances of people who contravene intervention orders is highlighted by our client data. Our client data reveals that 15 percent of our clients who breach family violence intervention orders have disclosed a disability. Of that group, over half had a mental health issue. Seven percent had an intellectual disability and four percent had an acquired brain injury.

Victoria Legal Aid's experience assisting these clients informs our view that police members should be supported to make firm yet flexible decisions following contraventions. A decision making tool would support consistent decision making and respond, for example, to complaints by affected family members that contraventions of their intervention order are not taken seriously. It would also assist police members to deal with respondents who inadvertently contravene as a result of a genuine inability to understand the nature of their obligations.

Our data does not capture other issues - such as drug and alcohol dependency - that may also need to be addressed to assist people who contravene family violence intervention orders to change their behaviour.

Where police decide not to pursue a criminal charge due to insufficient evidence to meet the standard of proof, we note that there are also civil law options available to promote victim safety. For example, the family violence intervention order could come back to court to be varied. Where the original final order did not exclude the respondent from the home it could be varied to do so. Where the family violence intervention order permitted contact via text message or telephone call to arrange care arrangements for a child, and this is being used to continue controlling behaviour, the

order can be varied to only permit written or strictly limited text communication that can more easily be produced as evidence in any subsequent breach proceedings.

#### **Recommendation 14 – Consistent response to breaches of family violence intervention orders**

That Victoria Police work with legal and non-legal services to develop a decision-making tool to support a consistent response to breaches of family violence intervention orders, including the making of referrals to services and the consideration of civil options even if criminal charges are not being pursued.

### **Maximising the effectiveness of sentencing outcomes to reduce recidivism**

As noted above, Victoria Legal Aid supports sentencing outcomes that advance the protective goals of the family violence system and promote accountability for the actions of perpetrators. In many cases this may include connecting offenders with programs to give them the best opportunity to change their behaviour.

Programs allow for preventative steps to be taken to reduce the risk of future offending or reoffending. Offenders should be able to access behaviour change and other programs while on bail, on a community corrections order or in custody. Participation could also be mandated as part of a court order if considered appropriate in the circumstances. Earlier in this submission, we supported a broadening of the discretion to order counselling for respondents to civil family violence intervention orders and we consider that this should also be available in the criminal offending context.<sup>36</sup>

As noted above, in some cases imprisonment will be a proportionate response to serious family violence offending. It is important to ensure that the processes supporting perpetrator accountability also advance rehabilitative goals. By addressing the causes of offending behaviour we are more likely to begin to see a reduction of the incidence of family violence in the community.

Victoria Legal Aid considers that the best way to keep victims safe in the long term is to stop perpetrators from offending by addressing the causes of this offending, not just by removing the opportunity to offend through imprisonment. Programs are not a complete solution and will only be effective if they are tailored to deal with the particular risks and needs of participants. While it is acknowledged that the majority of perpetrators of family violence are male, this should also include programs that assist women or adolescents that perpetrate family violence and family violence in a non-intimate partner context.

#### **Recommendation 15 - Access to programs and support services for offenders**

All perpetrators of family violence, including those on bail, community corrections orders or serving a custodial sentence, have access to relevant support programs to address the contributing factors to their offending behaviour.

<sup>36</sup> See Recommendation 3.

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## **Better processes for sharing information between civil and criminal response**

We have also identified a need for more integrated processes for the sharing of information about civil family violence intervention orders relevant to criminal proceedings.

Currently, in some matters where a person is remanded in custody following an allegation of violence, the existence of an application for a family violence intervention order is noted on the police summary. However, sometimes this information is not made available and a defence lawyer may only find out during the conduct of a bail or remand hearing that there is a related family violence intervention order application.

In these circumstances, the defence lawyer has to seek quick instructions from their client during the hearing, and the accused person usually consents to an intervention order without admissions to allow release on bail. This does not provide sufficient opportunity to provide legal advice that is tailored to the individual circumstances and that will promote better compliance. As a result people may be released on bail without fully understanding the conditions of the order or the consequences for breaching the order.

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## A better response to children and young people who use violence in the home

Victoria Legal Aid supports a separate legal response to children and young people who use violence in the home.

Family violence is broadly defined and captures violence perpetrated by children and young people in the home. Recently, there has been increased attention on the particular challenges for parents, carers and siblings who experience this violent conduct. While there has been increased attention on the unique challenges for these families,<sup>37</sup> the policy and legal response has not yet accommodated the different considerations that arise in this context.

Victoria Legal Aid is the largest provider of youth crime legal services in the state. We have significant experience assisting young people presenting with challenging behaviour or violence perpetrated in the home. We are also the largest provider of child protection legal services in Victoria, which includes providing advice and representation in family violence intervention orders where a child or young person is the respondent.

Our experience delivering these services has highlighted the need for the response to children and young people who use violence in the home to be different to the response to intimate partner family violence.

We support a revised approach that:

- is responsive to the unique circumstances and considerations that arise where a child or young person is using violence in the home (and is distinguished from the response to other forms of family violence on that basis);
- matches the intensity of the intervention with the circumstances and risks for the particular family;
- maximises the use of therapeutic and diversionary interventions by connecting the child or young person and their family with holistic support services;
- provides case management and support to the family through a dedicated Youth Liaison Officer (modelled on the existing Victoria Police Family Violence Liaison Officers); and
- diverts children and young people away from the criminal justice system where possible.

It is also important that the response to concerning behaviour and violence be immediate so that young people understand that there are consequences to their actions, which include needing to confront how they are treating family members and how family members may experience their behaviour. In addition, the response must also be sufficiently flexible so that it can respond to the individual circumstances of each family. The response should identify, address and treat the

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<sup>37</sup> This issue is also receiving increasing media coverage. For example, *The Age* reported in January of this year that the number of family violence intervention orders finalised where a child or young person was the respondent has almost doubled over the past five years. See Bucci, N (2015) 'Children Lash Out in Surge of Aggression' *The Age* 14 January 2015, p.2.

underlying causes of problematic and violent behaviour so that prevalence of such behaviour is reduced.

The response should also, where possible, limit the negative consequences arising from unnecessary labelling of behaviour that may stigmatise the child or young person. How a young person perceives himself or herself after a label is applied can be detrimental to their development and lead to repeated police interaction, court attendance and criminal convictions.<sup>38</sup>

### Why do we need a different response?

Victoria Legal Aid's practice experience confirms that children and young people who use violence usually present with a range of complex behavioural, mental, physical and emotional issues. There is usually, but not always, at least one of the following factors involved: neurobiological harm caused by developmental trauma (exposure to family violence or neglect), emotional harm caused by recent exposure to family violence or abuse, abandonment or chronic neglect, substance abuse, family breakdown, unresolved grief and loss. These experiences may manifest themselves in challenging adolescent behaviours. Children and young people are also still developing and can be experiencing undiagnosed mental health issues.

The relationship between children and young people and their parents also raises a different set of considerations. Often parents do not want to expose their child to a criminal justice response and are not usually seeking to end the relationship with the child or young person.<sup>39</sup> The dynamics of control and influence between a young person and their parent, carer or sibling is also different. Often parents hold economic power in the relationship and the children can hold emotional and psychological power.<sup>40</sup>

The complex issues and relationships that arise in these matters and need for appropriate intervention to limit the escalation of violence is highlighted in the following case example.

#### CASE EXAMPLE - BOBBY

Bobby's parents separated when he was five years old, and Bobby occasionally witnessed his dad assaulting his mum. Bobby is now 16 years old and has attention deficit disorder which manifests in poor impulse control and aggressive behaviour. In the past, he has demonstrated concerning behaviour such as breaking tree branches and kicking shrubs when he is unable to communicate his feelings.

Bobby was upset when he came home from school to see his mother's partner, whom he doesn't get along with, at the home. When still upset, his sister didn't let him change the TV channel. He went to go outside but because it was raining he went into the laundry instead. He shut the door and yelled in there and ended up denting the door when he punched it. Bobby's mum tried to calm him

<sup>38</sup> Richards, K (2011) 'Trends in juvenile detention in Australia (Australian Institute of Criminology *Trends & Issues in crime and criminal justice*, No 409) (Canberra, Australian Institute of Criminology), p 6, viewed 14 June 2014, < [http://www.aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi416.pdf](http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi416.pdf)>.

<sup>39</sup> Howard and Abbott (2013) *The Last Resort: Pathways to Justice – adolescent violence in the home*, p 10; Horsburgh (2012) *Adolescent Violence in the Home – a scoping study and mapping of Victorian Services*, p 8, viewed 14 June 2015, < [https://www.goodshepvic.org.au/Assets/Files/Adolescent\\_Violence\\_in\\_the\\_Home\\_Scoping\\_Study.pdf](https://www.goodshepvic.org.au/Assets/Files/Adolescent_Violence_in_the_Home_Scoping_Study.pdf)>; See also Centre of Innovative Justice (2015) p 30.

<sup>40</sup> Department of Justice, (2012) *Victorian Family Violence Database: Eleven Year Trend Analysis (1999-2010)* (Volume 5, 2012), (Melbourne, Department of Justice), p 73.

down but he swore at her to leave him alone. The partner, concerned about Bobby's mum's safety, contacted police to assist in de-escalating the situation.

Police attended about 30 minutes later by which time the situation had de-escalated. Police charged Bobby with criminal damage and proceeded to apply for an intervention order after hearing that Bobby had previously demonstrated challenging behaviour.

Bobby was anxious about police involvement and worried about his upcoming court attendance. The day before court he ended up skipping school and hanging out with friends at the local park. When he came home that day his mother's partner was home and Bobby ended up pushing him out of the way, in the process breaking a vase. The next day Bobby's mum, unsure of what further steps could be taken to address Bobby's behaviour, agreed to support the Victoria Police in the family violence intervention order application.

Bobby's negative behaviour continued to escalate. The police were called again which led to a breach of the family violence intervention order. This angered Bobby further and when police attended they found him damaging property in the home. Police remanded Bobby as they were concerned for his mother and his sister's safety if the behaviour continued, and in addition to the breach offence charged Bobby with assault and criminal damage. At Court, Bobby's lawyer was able to convince the Court to bail Bobby back to the family home, consistent with the wishes of Bobby's mother.

The eight hours in police custody scared Bobby into participating in group conferencing with his family. In group conferencing when the opportunity arose, Bobby spoke about his feelings towards his mother's new partner and how it brings up feelings about his abusive father. Bobby is given some counselling and taught some anger management and coping management strategies. Three months following the initial breach, Bobby has stayed out of trouble.<sup>41</sup>

## Key elements of a better response to children and young people who use violence in the home

### Matching the intensity of the response to the individual circumstances

Consistent with the legislative framework and the principles set out in the *Children, Youth and Families Act 2005* (Vic) it is appropriate for policy towards young people and children to reflect the principle that intervention is only appropriate to the extent required for the safety of the affected family members and the young person. The legislative framework recognises that adolescents may not benefit from police interaction and court involvement, nor will a justice response necessarily deter young people from behaving in concerning ways, without parallel therapeutic interventions.

In our view, responding to children who use violence in the home by preventing contact with their parents and criminalising their behaviour is not always appropriate and may sometimes be counterproductive. It may result in parent victims not seeking assistance from the police or support

<sup>41</sup> We use case examples in this section which demonstrate the typical circumstances for young clients we assist with these issues.

services for fear of the repercussions for their family life.<sup>42</sup> This reduces victim safety and may also result in a missed opportunity to connect the child or young person with support services that will assist them to develop respectful relationship skills that they can carry with them through life.

### **CASE EXAMPLE – ALI**

Ali is 16 years old and has been displaying concerning behaviour both at school and in the home over the last 12 months. His parents found some cannabis in his school bag, and attribute his drug use and behaviour to new class mates. Ali's parents have discussed this with the school principal, and have requested that Ali be moved to a different home class, but the school principal doesn't think there is a basis for this. Ali has been disruptive at school and been suspended a few times and he is now at risk of being asked to leave.

Ali is smoking cannabis after school most days with new classmates, and when he gets home he is aggressive and abusive to his parents and younger brother, and has thrown a toaster and intentionally broken a plate. Ali's mother takes him to see their local doctor to see if Ali can be assisted either with some counselling, or assessments, or even a mental health plan of some sort. The general practitioner provides Ali's mother with the Kids Helpline number and gives Ali a lecture about drug use. That week Ali's dad is able to collect him straight after class so that Ali can't smoke cannabis with his class mates.

In the following weeks, Ali's dad has to work afternoon shifts and can no longer collect him from school. Ali resumes smoking cannabis with his mates, who also talk him into experimenting with ICE. Ali comes home one day after school and sees his younger brother going through his room. He becomes angry and pins him against the wall by his neck, punches him in the head and threatens to kill him. Ali's mum is able to break up the incident, but calls the local police station to get some advice about what she can do. Police attend the home and apply for a family violence intervention order against Ali so that he doesn't commit family violence against his brother. Ali's mother only wanted advice from the police about how to manage his behaviour and drug use, and tries to reason with police not to take out a family violence intervention order but police say they have no choice.

There is a danger in matters such as Ali's case that his parents will be fearful to contact police again if another violent incident occurs because they are worried about the consequences for Ali. The effect of this may be to place Ali's family at greater risk. We consider that better outcomes would flow to Ali and his family if a revised approach was implemented that would give his parents confidence that the legal response would facilitate the outcomes they consider appropriate for their family. Later in this submission we recommend the creation of dedicated Youth Liaison Officer positions to work closely with each of these families.<sup>43</sup> This would help to ensure that the response

<sup>42</sup> Evidence suggests that family members may not seek assistance or report adolescents who use violence because of feelings of shame, concerns about being blamed, and feelings of guilt about their parenting. See Haw A (2010) *Parenting over violence- understanding and empowering mothers affected by adolescent violence in the home*, p 34. Additionally, reluctance to contact police can be informed by prior experience of having police minimise their victimisation, contributing to feelings of hopelessness and being discouraged from seeking police assistance in the future. See Howard and Rottem,(2008) *It all starts at the home – male adolescent violence to mothers*, p 20, citing Cottrell & Monk (2004).

<sup>43</sup> See Recommendation 19.

was appropriately tailored to the young person and family circumstances and deal with the relevant risks and concerns.

To facilitate a targeted response, we recommend that Victoria Police practice guidelines be revised to allow for better use of discretion in cases involving children and young people using violence in the home. This should not be regarded as a shift away from a firm stance against family violence. Rather it should be seen as step towards a more appropriate and effective response that is informed by a deeper understanding of violence in this context, that recognises the long-term risks of a young person's involvement in the justice system and the need to address the underlying factors contributing to challenging behaviour and the use of violence in the home.

At the point of initial police response, we recommend a focus on therapeutic and diversionary options if an assessment of risk demonstrates that such an approach is also consistent with victim safety. In this situation, the police response could range from a graduating scheme which includes informal cautions, formal cautions, and pre-charge diversion.

If violence continues or escalates, existing referrals or interventions can be reviewed, and the intensity of the response can be revisited or adjusted accordingly.

Even in circumstances where an intervention order may be necessary to address immediate safety concerns, we consider that there is scope for greater flexibility in the approach to seeking an intervention order.

#### **CASE EXAMPLE - EMILY**

Emily is 14 years old and has always been a low achiever at school. She has been held back a year, and although she had the assistance of a learning aid throughout primary school this was not possible for her during high school. Emily is struggling with high school and is frustrated. Her step-dad tries to help her with her homework but she often gets angry when she doesn't understand things.

Emily has stopped attending school. She's been stealing money from her mother's purse and going to the cinema or shopping centre food courts instead of going to school. Emily's mother attends the shopping centre one day after the school contacts her about Emily's continued absences. When confronted at the shopping centre by her mother, Emily becomes angry and hits her mother while resisting her attempts to guide Emily to the car to take her home. A security guard intervenes, police are called and a family violence intervention order is issued. In addition, Emily is charged with assault and criminal damage as she knocked over a sunglasses stand in frustration.

Emily's parents do not support the family violence intervention order or the criminal charges – they just want Emily to receive some learning assistance and to get some support to help Emily deal with her frustrations and emotions, and to support them in ensuring Emily attends school.

In our experience, it is common for Victoria Police to pursue applications for family violence intervention orders against children and young people that are not supported by the victim and their family. We consider that there a range of actions short of a final family violence intervention order which may be more appropriate in these circumstances and may be more consistent with the

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interests of the parent (or sibling) who want the violence to stop but want the relationship with the young respondent to continue.

For example, it may be appropriate to delay the making of a final family violence intervention order to allow a child or young person to access support services. There are already examples of this working well in practice.

Current Children's Court practice, for example, of adjourning a family violence intervention order hearing for a short period of time (where appropriate) and referring the young person to the Children's Court Clinic provides the time needed to assess the young person, identify the necessary non-legal support services for the young person and their family, and begin addressing issues that may be exacerbating the use of violence (such as, for example, mental health issues).

During the adjournment period, we often find that the situation in a family can settle, assisted by appropriate non-legal supports. As a result the need for a final family violence intervention order to address safety concerns is reduced. Sometimes this can be attributed to the court event triggering an assessment which has diagnosed a mental health issue or disability and resulted in appropriate support being made available to the family. In this situation an interim family violence intervention order remains in place in the meantime to ensure victim safety.

In other situations it may be appropriate to make a final family violence intervention order for a shorter period of time (than the typical 12 month order). This recognises that a family situation may take a little more time to settle but the concern for victim safety over the longer term is likely to be reduced because relevant support services have been put in place for the family and the child or young person.

The Dispute Settlement Centre of Victoria previously assisted in this type of scenario. It provided a very successful mediation service to families with intervention order proceedings in the Children's Court. However, the service has since limited its casework to personal safety intervention order matters. This was an important service for families who could achieve better safety outcomes by addressing changes in the family dynamic through mediation. We would strongly recommend that resources be allocated to a dedicated dispute settlement service for family violence intervention order matters in which an adolescent is the respondent.

In some cases an initial police contact can cause some children and young people to change their behaviour. It would be suitable to allow young respondents in some cases to agree to an undertaking, rather than requiring them to consent to a final order. This is consistent with the principle that intervention is only appropriate to the extent that is required for safety.

We consider that the use of police discretion should extend to the response to breach of a family violence intervention order by a young respondent. Any response to a breach of a family violence intervention order needs to ensure victim safety while reducing the risk of the young person entering a cycle of interactions with the criminal justice system. The intensive, well-resourced non-legal support services proposed above will be critical to supporting and case managing these young people.

Victoria Legal Aid accepts that there will be children and young people who even at an early age will not respond to repeated attempts to support their reform. A criminal justice response may be

appropriate in such cases. However, we consider that the more nuanced responses discussed above should be engaged at the outset and that diversionary options remain available to these children and young people.

**Recommendation 16 – Guidelines for use of police discretion when responding to children and young people who use violence in the home**

That Victoria Police develop policy guidelines which support the exercise of discretion in intervention order applications against children, and that it include the use of undertakings, family group conferencing and other suitable interventions, including intensive case management.

**Recommendation 17 – Guidelines for use of police discretion when responding to breach of family violence intervention orders by children and young respondents**

That Victoria Police, the Children’s Court and other stakeholders develop guidelines for decision-making in response to breaches which prioritises continued engagement in non-legal support services and interventions and appropriate case management.

**Better connections with support services**

We recommend that a network of non-legal support services buttress the work of Victoria Police and the broader justice response to children and young people who use violence in the home.

Targeted support programs and non-legal interventions are essential to support the young person and their family and divert people away from criminal behaviour. The response should be holistic and address the underlying causes of behaviour through the provision of family support services, including victims support services, family counselling, services which offer short term out-of-home respite for the young person, diagnosis of and ongoing support for mental health issues, cognitive impairments or acquired brain injuries and assistance with the development of strategies within the home to support young people who are unwell or demonstrating difficult behaviours. This will promote victim safety in the short and long term.

The initial police response to an incident should include an assessment of non-legal needs and immediate referral to non-legal support services. The intensity of non-legal support services should be informed by the assessment of risk and the needs of the particular family. This may include, for example, out-of-home respite to assist in diffusing the situation, counselling for the young person and/or the family, and a case management approach to the delivery of non-legal support services.

These services should also be able to escalate in intensity if needed. Furthermore, there should be acknowledgement that a non-legal support plan may not result in immediate behaviour change. Acting out and testing behaviour can be expected and any program should acknowledge that young people in these situations should not be charged or further charged whilst there is progress being made in the program.

There is an existing model within Victoria Police – the Family Violence Liaison Officer (FVLO) roles – that can be replicated for the response to children and young people who use violence in the home. Dedicated liaison officers could be trained in the specialist response that is necessary to support a young person and their family during a crisis. If they do not end up attending the family

home during the incident, they could complete a formal interview with the young person and the family to assess the needs of the young person and the family, and to assess risk and the family dynamic and what, if any, referrals, supports and interventions may be appropriate.

Although a similar function is already provided by Family Violence Liaison Officers, Victoria Legal Aid considers that specialist youth aid roles are needed. As the considerations that arise when children and young people use violence in the home are significantly different to those that arise in intimate partner family violence, these workers would need to have specialist expertise.

### **Recommendation 18 - Referral to support services**

That the response to children and young people who use violence in the home prioritise therapeutic and diversionary responses that connect children, young people and their families to support services to address the underlying causes of violence and concerning behaviour.

### **Recommendation 19 - Dedicated Youth Liaison Officers for children and young people who use violence in the home.**

That Victoria Police engage dedicated Youth Liaison Officers (or youth aid officers) to provide support to children, young people, their families and carers following interaction with police.

### **Recommendation 20 – Investment in support programs for children, young people and their families**

That there be further investment in non-legal programs and services which address concerning relevant behaviour and which can assist young people and families to deal with such behaviour before it requires police assistance.

## **Focus on diversion from the criminal justice system**

There will be situations in which the relevant behaviour by a young person is violent, is escalating and is on the scale of conduct which does require court involvement.

There is significant evidence about the benefits of diversion and the role of diversion in preventing criminalisation of children and young people.<sup>44</sup> We suggest that efforts should be made to resolve matters through diversion or a deferral of sentence, where appropriate. Consideration should also be given to using pre-plea group conferencing.

The Children's Court Clinic and more intensive supports services, including periods of out-of-home respite and some form of case management, may support parents during this time. To assist parents and families to access such services there is an ongoing role for the Youth Liaison Officer (see Recommendation 19)

<sup>44</sup> Steinberg, L (2009) 'Adolescent Development and Juvenile Justice' *Annual Review of Clinical Psychology* 47, p 65–68, cited in Report to Prime Minister of New Zealand by Chief Scientific Advisor (2011) *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence*, p 28; Richards, K (2011), *What makes juvenile offenders different from adult offenders* Australian Institute of Criminology Trends & Issues in Crime and Criminal Justice, No 409, March 2011, viewed 14 June 2015, < <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi409.html>>.

Diversion for children and young people across the state is a broader policy issue, not just one for children and young people who use violence in the home. Rather than being available as a discretionary option, Victoria Police Guidelines should be amended so that members are required to consider diversion following a charge, or to not oppose a referral to diversion. Victoria Legal Aid has also previously called for a legislated youth diversion scheme.<sup>45</sup> We reiterate that recommendation here.

Research suggests that young people who are diverted from the criminal justice system are less likely to reoffend than those who are processed by the courts;<sup>46</sup> and of those who do commit further crime, their offending is generally less serious than it might otherwise have been.<sup>47</sup> Furthermore, statistics indicate that 'the later a young person enters the criminal justice system, the less likely they are to have continued involvement.'<sup>48</sup>

Therefore, a unique opportunity exists in relation to young people to reduce or even prevent offending by intervening at the early stages of police contact, and directing young people away from more formal interventions to community-based programs.<sup>49</sup> Yet, Victoria is the only Australian state that does not have a legislative court based diversion scheme to address offending by children and young people.<sup>50</sup>

Legislated diversion also enables the court to attach more onerous conditions that may not have been utilised in earlier stages of the young person's interaction with police. This is appropriate where the young person's behaviour is of particular concern.

### **Recommendation 21 – Diversion from criminal justice system**

That a legislated youth diversion scheme be established in Victoria.

### **Recommendation 22 – Guidelines to support diversion**

That Victoria Police develop policy guidelines which prioritise cautions and diversion and utilise the Children's Court Clinic and group conferencing, based on the premise that therapeutic and diversionary responses are appropriate for children and young people.

## **Increasing awareness to encourage and support victims to seek assistance**

Evidence suggests that family members may not seek assistance or report adolescents who use violence because of feelings of shame, concerns about being blamed, and feelings of guilt about

<sup>45</sup> See Victoria Legal Aid (2012) 'Supporting diversion programs to help young offenders avoid a life of crime' *Media Release*, 17 October 2012, viewed 12 June 2015, < <http://www.legalaid.vic.gov.au/about-us/news/supporting-diversion-programs-to-help-young-offenders-avoid-life-of-crime>>.

<sup>46</sup> Latimer, J et al, (2001) 'The Effectiveness of Restorative Justice Practices: A Meta-analysis' (Ontario, Department of Justice, Canada).

<sup>47</sup> YouthConnect (2012) *A step in the Right Direction: Diverting Young People from the Victorian Justice System*, Pilot Evaluation Report p 9.

<sup>48</sup> Victoria Police, *Child and Youth Strategy 2009-2013*.

<sup>49</sup> Murphy, P (2010) *Review of Effective Practice in Juvenile Justice*, p 68.

<sup>50</sup> Jordan, L and Farrell, J, (2013) 'Juvenile Justice Diversion in Victoria: a Blank Canvas?' 24(3) *Current Issues in Criminal Justice* 419, p 419.

their parenting.<sup>51</sup> This behaviour may be considered by families as a private matter and one that they should be able to deal with unassisted.

Additionally, as noted above parents or carers may be reluctant to call the police when behaviour escalates as they are concerned about the criminal justice consequences that may follow a police call out. This reluctance can be informed, for example, by prior experience with police, with one report stating that the experience of having police minimise their victimisation contributed to families' feelings of hopelessness and discouraged them from seeking police assistance in the future.<sup>52</sup>

A comprehensive response to adolescents who use violence in the home will require increased community awareness of its prevalence and the assistance available to victims when they seek help. This should be coupled by a commitment to therapeutic and diversionary responses by Victoria Police as recommended above, so that victims are confident a call to Victoria Police will lead to a restorative response. Contact to Victoria Police is often a last resort for families subject to adolescent violence in the home and an earlier intervention by appropriate services could prevent violence in the home and the need for more intensive interaction with police, lawyers and the Courts.

We need to assist parents and carers to address developmental and behavioural issues and to prevent violence and police involvement where possible. An increase in awareness and an established network of support services, coupled with community legal education<sup>53</sup> (including to schools and general practitioners) would encourage victims to seek assistance and appropriate intervention before the family reaches a crisis point.

There is broad community interest in ensuring that any issues or concerning behaviours that children and young people experience are addressed and are not exacerbated or perpetuated in adulthood.

### **Recommendation 23 – Increasing community awareness of adolescent violence in the home**

That there be a community awareness and legal education program to encourage children, young people and families to seek assistance earlier in relation to adolescent violence in the home.

### **Recommendation 24 – Increasing awareness in the justice system**

That the implementation of a new approach to children and young people who use violence in the home be supported by training of Victoria Police, the judiciary, court staff, and lawyers in the jurisdiction on the different considerations that arise when children use violence in the home.

<sup>51</sup> See Haw A (2010) *Parenting over violence- understanding and empowering mothers affected by adolescent violence in the home*, p 34.

<sup>52</sup> Howard and Rottem, (2008) *It all starts at the home – male adolescent violence to mothers*, p 20, citing Cottrell & Monk (2004).

<sup>53</sup> See for example, Relationships Australia (SA), Flinders University & Southern Junction Community Services (2012) *Walking on eggshells – child and adolescent violence in the family*, viewed 14 June 2015, <[http://www.flinders.edu.au/ehl/fms/law\\_files/Law%20Resources/Walking%20on%20Eggshells%20Family%20Booklet.pdf](http://www.flinders.edu.au/ehl/fms/law_files/Law%20Resources/Walking%20on%20Eggshells%20Family%20Booklet.pdf)>

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## Responding to families with complex and multiple needs

### Responding to children who experience violence

Although there are limitations to data collection, research has consistently shown that family violence is more likely to be used in households with children than households without children.<sup>54</sup>

In our experience, many people who experience family violence attempt to act protectively in response to family violence but fear seeking assistance due to the consequences that may arise from the involvement of child protection authorities. We consider that any response by the Department of Health and Human Services (DHHS) following a notification of risk should recognise the dynamics of family violence and seek to support the non-offending parent to provide a safe environment for their child/ren.

DHHS may become involved in the family if there is a notification of risk arising from an incident (or incidents) of family violence in the home. In this situation children may be a direct victim of family violence or a victim due to witnessing family violence. The latter is informed by the research which shows that witnessing family violence can have as significant an impact on a child as being directly affected by family violence.<sup>55</sup>

Due to the history of family violence, the 'protective' parent may be making every effort to act protectively but struggling to do so effectively. For example, the parent may allow the perpetrator to return to the home or spend time with the child as they feel disempowered by the history of violence and are unable to counter the demands of the perpetrator.

In these situations, the DHHS may intervene and remove the child from the home as they remain concerned about the risks to the child. We are concerned that this response may not adequately recognise the dynamics of family violence and the impact of violence on a 'protective' parent's capacity to parent. The DHHS is well placed to play an important role in this situation. It is important that an assessment of the necessary supports is provided and that these supports are provided to the 'protective' parent to prevent the situation escalating to one where the DHHS decides to remove the child from the home.

Furthermore, a parent may need and want assistance from non-legal support services but be scared to ask for assistance because of the risk that DHHS involvement will lead to removal of the child from the home. Thus, a more nuanced approach is required so that victims are not scared to seek help.

A particular issue identified in Victoria Legal Aid's practice experience, is the lack of available and affordable housing. Either the perpetrator parent returns to the family home (even if excluded from doing so by the family violence intervention order) due to lack of alternative accommodation or the 'protective' parent is unable to find alternative accommodation where the children will be safe from the perpetrator parent.

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<sup>54</sup> Richards, K (2011) 'Children's Exposure to Domestic Violence in Australia' (Australian Institute of Criminology's *Trends and Issues Report*, Number 149, June 2011). (Canberra, Australian Institute of Criminology).

<sup>55</sup> Ibid.

### **Recommendation 25 – Providing support to families following a notification of risk**

That the “non-offending” or “protective” parent in families where DHHS has become involved following a notification of risk related to family violence receive the support necessary to provide a safe environment for the child. This should include attention to accommodation arrangements for both parents.

### **Responding to families whose legal issues cross over the family violence, family law and child protection jurisdictions**

As noted earlier in this submission, the response to family violence requires peripheral vision as families often present with multiple legal and non-legal issues.

One of the challenges of responding to family violence is the complexity associated with the siloed legal response to the various civil, criminal and family law issues that are usually present in families at this time of crisis.

A broader issue for consideration is how the legal system responds to families presenting with complex needs. These are families that are involved in concurrent court or sequential court proceedings in different jurisdictions due to the siloed nature of the legal system: family violence, family law and child protection legal issues are each separate jurisdictions.

There is an imperative to consider how the jurisdictions interface and what design elements could be incorporated to maximise the effectiveness of the justice system as a whole so that the needs of vulnerable children in these families with complex issues are addressed.

Victoria Legal Aid has welcomed the Family Law Council’s investigation into ways in which the family law system can better support families with complex needs. Victoria Legal Aid made a submission through the first round of consultation.<sup>56</sup> Our submission recognises that there may not be the will to effectively combine jurisdictions and we have offered pragmatic suggestions for improvement in the way families, especially those at risk, are supported. Some of our recommendations propose changes within the Commonwealth family law jurisdiction, which we acknowledge is beyond the scope of the Royal Commission. However, there are changes that can be made within the State family violence and child protection jurisdictions as well as whole of justice system responses that will require coordination between the State and Commonwealth jurisdictions to achieve a joined-up response. An example of the latter is a national database of family law, family violence and child protection orders that would be accessible by the courts. Access to better information translates into better decision-making.

There are barriers to information sharing resulting in children and parents telling their stories over again in different assessment processes. The risk of conflicting orders persists. This leads to duplication and perceived delay in resolving care arrangements which creates anxiety and frustration for families. It can also lead to confusion for families because there is a lack of clarity on who is making decisions about the care and safety of their children.

<sup>56</sup> See further Victoria Legal Aid (2015) Submission to Family Law Council’s Terms of Reference. Available at <http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/appropriate-interventions-for-children-and-young-people>

Victoria Legal Aid recommends a suite of changes that improve the system for families with complex needs. There are changes that could be introduced that would reduce the need for families to access multiple courts and others that would improve information sharing between the courts which ultimately enables more informed decision-making. More information about our recommendations and the basis for them is contained in our submission to the Family Law Council but our recommendations are also summarised below.

### **Recommendation 26 - One Court Principle**

That the response to families with complex needs be improved through the following measures:

- clarifying the threshold test for adjourning Family Law Court proceedings due to DHHS involvement in the family.
- DHHS appearing at the Family Law Court return date to present to the court the findings of its investigation so that the Family Law Court can make orders that address protective concerns and there is reduced need to initiate a second round of court proceedings in the Children's Court to address protective concerns.
- the Children's Court adopting a practice of making family law orders by consent where the DHHS plans to withdraw on the condition that family law orders are made.
- where DHHS seeks to withdraw from a family but the parents do not consent to family law orders, DHHS appearing at the first Family Law Court date to assist the family in the transition to the Family Law Court jurisdiction.
- better assisting Magistrates to make decisions about suspending time provided by a family law order due to allegations of family violence by making available information on existing family law orders which can then inform analysis of the adequacy of the current care arrangement.
- establishing a process for the Magistrates' Court to notify the relevant Family Law Court when a decision is made to suspend time provided under existing Family Law Court orders via section 68R; with the notification prompting the Family Law Court to list the matter (if interim orders are in place) or prioritise an application from the parent who has had time suspended (under a final order) within twenty-one days.

### **Recommendation 27 - Better Information Sharing**

That there be better information sharing between courts and agencies to support decision-making by:

- the DHHS establishing and communicating a consistent and structured approach for receiving and responding to Notices of Risk.
- considering the expansion of the Co-Located DHHS Liaison Officers program in the Family Law Courts.
- establishing a database of orders that provides a single repository of family law, family violence and child protection orders that can be accessed by each of the relevant courts (the Family Law Courts, Magistrates' Courts and Children's Court) and by state child protection authorities.
- clarifying Family Law Court Rules to assist with streamlined sharing of expert reports prepared in Family Law Court proceedings with the Children's Court and child protection authorities.

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- amending the Victorian *Children, Youth and Families Act 2005* to enable the sharing of Court Clinic and Expert reports with the Family Law Courts.

## Responding to the broader consequences of family violence

Victoria Legal Aid also encounters some of the broader social, economic and legal consequences of family violence. While some of these matters relate to the operation of Commonwealth laws, we consider that they are relevant to the way the legal system intersects with family violence and will benefit from consideration by the Commission.

### Child support

Victoria Legal Aid's Child Support Legal Service provides casework and advice services, duty lawyer assistance, a daily telephone advice line, community legal education and information kits for self-represented litigants to both payee and payer parents. In 2013-14, Victoria Legal Aid provided 595 grants of aid for child support matters, the majority of which were conducted by staff lawyers with expertise in child support.

Many of our child support cases involve high conflict families. Victoria Legal Aid seeks to secure just and equitable financial support outcomes for children without exacerbating family violence or the risk of family violence.

As a general principle, the perpetrator of family violence should not be exempted from their responsibility to financially support their child. However, this must be balanced against the priority to protect parents and children who have experienced or are at risk of family violence. The decision by a payee parent to request an exemption from the general obligation to seek child support payments from the other parent is a difficult one as it requires the parent to balance safety considerations against the financial challenges created by lack of child support from the perpetrator of the violence.

The impact of family violence and the use of exemptions is a perennial challenge that has been regularly discussed in the child support policy and legal community. It is in this context that Victoria Legal Aid has previously recommended the consideration of two additional processes to assist payee parents in situations of family violence or at risk of family violence. Both recommendations seek to reduce the interaction between ex-partners and the exposure of the payee parent to retaliatory violence linked to attitudes around economic control.

First, private collection methods should not be permitted in cases where family violence or a risk of family violence is identified; instead the Commonwealth Department of Human Services (Child Support) should collect payments in such cases. Second, in situations of family violence where other factors lead to regular change of assessment applications, we recommend that these cases are flagged so that an 'independent' party – again, the Commonwealth Department of Human Services (Child Support) – initiate change of assessments rather than the payee parent.

Both measures above may assist in challenging the perception that the payee parent is 'nominating', 'seeking' or 'registering' the payer parent (perpetrator of family violence) for child support. Rather it is an obligation imposed by legislation on the payer and administered by the state.

### **Recommendation 28 - Child Support**

That the Commission support changes by the Commonwealth to the administration of child support payments to ensure that people who experience family violence are not disadvantaged.

## Centrelink payments

We provide advice and assistance to people who seek to challenge administrative decisions made by Centrelink including decisions to raise debts, and to people who have been charged with social security offences.

We regularly encounter women whose conduct has been influenced by the dynamics of their relationship and in a number of cases women have disclosed family violence as a contributing factor. For example, one client continued to claim parenting payment and family tax benefit as a single parent despite being in a marriage-like relationship as she was totally reliant on the Centrelink payment to support her children due to the economic abuse by her partner combined with threats of violence should she disclose the nature of their relationship to Centrelink.

The Commonwealth *Social Security Act* does not currently explicitly recognise family violence as a vitiating factor in these circumstances. The *Social Security Act* provides a discretion to treat a partnered person as single if there is a “special reason” and a discretion to waive recovery of a debt in “special circumstances”. However, in our experience family violence is rarely, if ever, accepted as a “special reason” by Centrelink officers. Further the discretion to waive a debt is rarely able to be relied upon to assist victims of family violence to have debts waived or reduced as a person must be able to demonstrate that they did not knowingly make a false statement or omit to comply with a notification obligation before the discretion can be considered. In these cases women are generally aware of the need to advise of their relationship but are not in a position to take any different action for fear of the consequences.

Issues and anomalies with Centrelink payments may also arise during the course of family law proceedings, with one partner using their knowledge of the overpayment as a bargaining tool and threatening to disclose the overpayment to Centrelink if the other partner does not agree to the terms of a proposed family law order.

### **Recommendation 29 - Impact of family violence on social security payments**

That the Commission support further consideration being given by the Commonwealth to issues relating to family violence that arise in relation to social security payments.

## Infringement offences (fines)

Similar circumstances arise in relation to infringement offences where enforcement action is taken against women in circumstances where their partner should be legally responsible for the infringement. In these cases, women are unable or unwilling to nominate their partner or former partner for fear of aggravating the relationship.

For example, a family car may be registered to one partner and used by the other. Where traffic infringements and tollway offences are accrued, a person may not be able to nominate the relevant driver due to safety concerns. Debt may then accumulate and enforcement action may be taken.

The Victorian *Infringements Act* (and the *Fines Reform Act 2014*) does not recognise family violence as a special circumstance for the purpose of infringement offences.

**Recommendation 30 - Recognition of family violence in infringement matters**

Amend the *Infringements Act 2006* to include family violence as a special circumstance.

**Recommendation 31 - Better processes for driver nomination**

Review the processes for nomination of other drivers to accommodate the dynamics of family violence.

**Equality and non-discrimination**

Evidence suggests that there are lower rates of violence against women in communities with greater gender equality.<sup>57</sup> We consider that the Victorian Equal Opportunity and Human Rights Commission should have sufficient power and resources to effectively examine issues of systemic discrimination and inequality. The capacity to effect social change through our current equality laws is limited by an over-reliance on an individual complaints based model that puts the onus on women who have experienced discrimination or sexual harassment to pursue an individual complaint.

We have spoken to a number of women who have lost their jobs because of circumstances outside of their control caused by family violence. For example, women have reported being dismissed because: their estranged partner telephoned them constantly at work; they had to take time off work to report property damage and stalking to the Police, attend intervention order proceedings and ensure their child's safety; and their employer refused to make adjustments to enable compliance with an intervention order. We support measures that would provide protection against discrimination for people who have experienced family violence.<sup>58</sup>

**Recommendation 32 - Addressing systemic discrimination**

That the Commission note the potential for increased gender equality to reduce violence against women and consider making recommendations that will increase the capacity of the Victorian Equal Opportunity and Human Rights Commission to examine issues of systemic discrimination. This should include increased resources and enhanced compliance powers.

**Recommendation 33 - Protection against discrimination**

That the *Equal Opportunity Act 2008* be amended to provide protection against discrimination based on a person's experience of family violence by including "being a victim of family violence or stalking" as a protected attribute under section 6 of that Act.

<sup>57</sup> See generally, Wall, L (2014) *Gender equality and violence against women – what's the connection?* (Melbourne, Australian Centre for the Study of Sexual Assault), viewed 14 June 2015

<<http://www3.aifs.gov.au/acssa/pubs/researchsummary/ressum7/ressum7.pdf>>

<sup>58</sup> See, for example, Victoria Legal Aid (2012), *Submission to the Senate Legal & Constitutional Affairs Committee Inquiry on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012*, viewed 14 June 2015, <<http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities/past-activities>>; Victoria Legal Aid (2012) *Submission to the Commonwealth Attorney-General and Minister for Finance and Deregulation on the Consolidation of Anti Discrimination Laws*, viewed 14 June 2015, <<http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities/past-activities>>; Victoria Legal Aid (2015) *Submission to the Productivity Commission Inquiry into the workplace relations framework*, viewed 15 June 2015, <<http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities>>.

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## Victims of Crime compensation

We provide assistance to people to access statutory victims of crime compensation under the *Victims of Crime Assistance Act 1996* (the VOCA Act). In our experience, the arrangements for victims of crime compensation for victims of family violence could be improved as the VOCA Act is of greatest assistance where the act of violence is a "one off" or the victim and perpetrator are not known to each other.

By comparison, the New South Wales *Victims Rights and Support Act 2013* (the NSW Act) expressly accommodates the dynamics of family violence in the consideration of claims for statutory compensation. For example, the NSW Act allows for claims in relation to a series of related acts against the one victim, allows for an extended period for making a claim in relation to domestic violence, and allows for the consideration of the nature of the relationship between the victim and the offender when assessing whether the victim has taken reasonable steps to mitigate their injuries. Finally, there is no time limit for claims of sexual assault under the NSW Act if the victim was under 18 at the time of the offence. This would assist victims of serious family violence, where the victim is often reluctant to immediately report acts of violence due to their relationship with the offender and/or concerns about their own wellbeing and that of others in the home.

### **Recommendation 34: Access to victims of crime compensation**

That consideration be given to the adequacy of current arrangements for victims of family violence under the *Victims of Crime Assistance Act 1996*.

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## Resourcing Implications

As discussed in this submission, ongoing demand for family violence legal services is one of the significant challenges for our organisation. We understand that this experience is shared by Victoria Police and the Magistrates' Court of Victoria. The system is labouring under the current levels of demand and the effectiveness of the response is being compromised as a result.

The current congestion in the family violence system is a cautionary tale. The current demand in the system is positive evidence that the community and law enforcement agencies are taking family violence very seriously. However, the growth of the system has fallen out of step with the resource investment required to realise the objectives of the system.

Any future adjustment to the legal and policy settings for responding to family violence needs to be matched with sufficient resource investment for the services, including legal services, that play an active role in responding to family violence and reducing its impact.

For example, it is important to recognise that any proposals for changes to penalties and sanctions will also have downstream impacts on the courts and the legal assistance sector. Currently many orders proceed by way of consent without admissions. Where the conditions of an order are more onerous or where the consequences for breach are more severe, there will be an increase in the number of contested matters in the Magistrates' Court. This will have a substantial impact on our resources and service delivery.

In our view, if the response to family violence is to be credible and effective, it must include sufficient funding for legal services. Current resource constraints mean not all those who need assistance are able to access a legal service and some service provision is so time challenged that it is sub-optimal. Given what we know about the value of family violence legal services it is essential that resourcing be matched to demand.

Investment in legal services can also reduce overall system impacts by promoting early intervention and reducing the need for a more intensive service down the track.

If changes to the policy settings for the legal response to family violence are made, this may further impact on demand for legal services. We submit that any recommendations in this regard also take into account the estimated impact on the legal assistance sector and measures required to address this impact.

### **Recommendation 35 – Funding the legal response to family violence**

That the Commission consult with Victoria Legal Aid on the anticipated impact for the legal assistance sector of any changes to the policy settings for the legal response to family violence.

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## Looking Ahead

As noted in the recent report by the Centre for Innovative Justice, the justice system can be an 'active and involved participant that can interrupt'<sup>59</sup> the use of family violence. We consider that legal services should have an active role in the prevention of family violence.

We support additional investment that will enable the types of interventions that help prevent family violence and reduce its impact. We need to ensure that interventions target the risks and needs of particular cases. We need to ensure that applicants and respondents are receiving the right services at the right time and to find ways to continue that support beyond the family violence incident or court proceeding to resolve underlying issues crucial to safety and long term well-being.

We need to proceed cautiously and not prematurely dismiss the potential of the current system to realise its objectives. Unfortunately, it is not enough to have a solid legal framework for responding to family violence. The system needs to be enlivened with adequate resources to enable it to operate with maximum effectiveness. This requires substantial increases in investment for legal services, court resources and infrastructure, social support programs and law enforcement.

We are also committed to being part of the solution. This submission identifies areas where we have taken steps to improve how we work within the system and outlines some of the steps we will take in the future to improve our family violence service delivery.

We acknowledge that there is more work that can be done. Already the work of the Royal Commission has been a potent force for critical reflection. Consistent with our Our Strategy 2015-18, we will continue to work with our partners in justice and social support sectors to act on the recommendations of the Commission to deliver an effective system response to family violence.

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<sup>59</sup> Centre for Innovative Justice (2015), p 6.

## **Appendix One: Our Family Violence Legal Services**

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## Our Family Violence Legal Services

Our family violence legal services include:

- Legal information and advice through our Legal Help telephone service
- Direct assistance in relation to Victorian *Family Violence Protection Act* matters
  - Duty lawyer services in relation to applications for family violence intervention orders
  - Assistance in contested hearings
  - Court ordered representation
  - Duty lawyer services in relation to breaches of family violence intervention orders
- Family, Youth and Children's law services
  - Duty lawyer services in relation to parenting disputes in the Family Court of Australia and Federal Circuit Court
  - Family Dispute Resolution Service, our family mediation service
  - Advice and representation in relation to parenting disputes
  - Independent representation for children in family law proceedings
  - Assistance in relation to child protection matters
  - Advice and representation in relation to child support matters
- Criminal Law Services, including:
  - Duty lawyer services in the Magistrates' Court
  - Advice and representation for criminal charges heard in the Magistrates', County and Supreme Courts
  - Prisoner advice services
- Community legal education (including publications)
- Community Legal Centre Funding and Development Program
- Other assistance with some broader impacts of family violence, including migration and social security issues, infringements, equality and discrimination

In 2013-14, we provided 11,269 clients with 14,796 family violence legal services.<sup>60</sup> Family violence intervention order duty lawyer services were provided to woman and men in almost equal measure (48 percent to 52 percent).

## Legal Help

Legal Help is Victoria Legal Aid's free information and advice phone service. Legal Help is the main telephone entry point for Victorians seeking legal assistance. Our service aims to provide an

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<sup>60</sup> This comprises substantive grants, subsequent grants, legal advice, court attendance records, duty lawyer services and minor work files..

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accessible, holistic triage, intake and referral service that connects people to the legal and non-legal services they need. It is also the central point of access to our in-house legal services.

Legal Help takes over 100,000 calls each year. We provide information, advice and referral on a wide range of legal problems and related social issues, including family violence, family law, parenting disputes and child protection matters.

Legal Help is accessible for culturally and linguistically diverse communities. Many callers can access our services and speak to someone in their own language as we provide 20 dedicated language lines and use the telephone interpreter service to assist callers who require assistance in other languages without a dedicated phone line.

This is a unique and valuable service given the barriers to access to justice experienced by people from CALD communities - and is particularly valuable for victims of family violence who are able to talk about their circumstances and assess their options in their own language.

Legal Help facilitates much needed access to legal advice and information for people living in rural or regional areas who may not be able to travel to a legal office. This isolation could be a result of a person's geographic location, the lack of access to public or private transportation or as a direct result of experiencing family violence.

In 2013-14, Legal Help provided assistance in 8,432 family violence matters and 4,247 referrals in family violence matters.

## Family Violence Protection Act matters

We contribute to the safety of adults and children impacted by family violence and assist in reducing the incidence of family violence by providing legal information, advice and representation to affected adults and children in relation to family violence intervention order matters.

### Duty Lawyer Services

We coordinate and provide duty lawyer services across the state for family violence intervention order matters under the Victorian *Family Violence Protection Act 2008*. In 2013-14 we provided 10,609 family violence duty lawyer services relating to applications for family violence intervention orders.

Our lawyers are available to applicants and respondents to family violence intervention orders. In some locations, an alternate duty lawyer service is provided by a community legal centres.

Our duty lawyer service is available to help applicants and respondents in the following ways or in a combination of the following ways:

- **Legal Information:** By providing information in writing to help an applicant or respondent to understand the legal matter that they face, the process to be followed, how to represent themselves in court and where to access services.
- **Legal Advice:** By a lawyer providing advice to either an applicant or respondent but not representing that person in court. This can include negotiation with the other party and referral for further legal assistance. The lawyer will also refer clients to appropriate non-legal services.

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

Applicants and respondents may receive assistance from the duty lawyer service on the first date the matter is listed at the court after the application has been filed (or the Family Violence Safety Notice is issued) (“the mention date”). There are no eligibility requirements for access to this service. However, we may not provide legal advice or in-court advocacy if we have a client conflict due to a legal conflict of interests. If this occurs, we endeavour (where available) to ensure the person receives assistance from an alternate service, such as a community legal centre.

Many matters resolve at the mention date, for example because the applicant and respondent both consent to the making of an order. Matters that do not resolve at the mention date, for example because the respondent contests the making of a final intervention order, are listed for a subsequent directions hearing (and following that a contest hearing to decide the matter, if the matter is proceeding). Applicants are also able to receive assistance from a legal aid duty lawyer at the directions hearing. Respondents may only receive assistance in the form of in-court advocacy or legal advice at the directions hearing if they are eligible for a substantive grant of aid (about which, see below). For respondents who do not qualify for a grant of aid, legal information may be provided in the form of written publications.

## Contested Hearings

We also provide assistance where an application for an intervention order is contested. Subject to meeting the eligibility requirements and satisfying the means test, grants of assistance are available to applicants and respondents to family violence intervention orders where a matter is listed for a contested hearing. Grants of assistance pay for a lawyer to act for the client in the matter in an ongoing manner, often referred to as legal casework or ongoing representation.

An adult applicant will be eligible for a grant of assistance where the matter is listed for a contested hearing and the applicant is more likely than not to succeed in obtaining a family violence protection order.<sup>61</sup>

A respondent will be eligible for assistance where the respondent is more likely than not to succeed in contesting the making of the family violence protection order in the terms sought by the applicant. In addition, one of the following must also apply:

- the respondent is under 18 years of age; or
- the order would deprive the respondent of an important right (for example, it would exclude the respondent from their home); or
- the respondent is in custody as a result of the alleged family violence.

In 2013-14 we provided grants of assistance to 190 adult applicants, 132 adult respondents and 130 child respondents in contested hearings. This does not include where representation is ordered by the court. This is discussed below.

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<sup>61</sup> VLA will not normally make a grant of legal assistance to an affected family member where the application has been brought by the police.

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## Court Ordered Representation

Victoria Legal Aid may also be ordered to provide representation under the *Family Violence Protection Act 2008*. Section 70 of the Act introduced limitations on the ability of an unrepresented respondent to cross-examine protected witnesses. Essentially, if a respondent wishes to cross-examine a protected witness then the respondent must do so through a legal representative. This is to minimise any additional trauma for victims of family violence and to guard against the misuse of the court process by respondents.

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

Similarly, section 72 of the Act provides that where an applicant is not a police officer and is not legally represented, the court must order Victoria Legal Aid to provide legal representation to the applicant for the purpose of cross-examination unless they object.

These orders override our merits and means tests though Victoria Legal Aid may still apply all or any of the conditions under section 27 of the *Legal Aid Act 1978*, for example to impose a requirement for the client to pay a financial contribution towards the cost of their assistance. If a respondent refuses legal representation, they face evidentiary burdens during the contested hearing including restrictions on their ability to cross examine the applicant or affected family member.

In 2013-14 we provided court ordered representation to 248 applicants and 298 adult respondents for the entire contested hearing. We also provided court ordered representation for the cross examination only to 308 applicants and 192 adult respondents.

## Breach Offences

Our criminal law duty lawyers provide assistance to respondents who have been charged with breach of a family violence intervention order. Our duty lawyers may provide assistance in breach of intervention order proceedings or in bail applications relating to breach of a family violence intervention order.

In 2013-14 we provided duty lawyer services in 2,990 matters relating to a breach of a family violence intervention order.

## Family Youth and Children's Law

Victoria Legal Aid is the largest provider of family and children's law legal services in Victoria. Our work in family, youth and children's law aims to help people resolve parenting disputes and achieve safe, workable and enduring care arrangements for children. This also involves helping parents to build the capacity to resolve future disputes without legal assistance.

We prioritise children and adults who face serious issues that affect their children, and we aim to keep families out of court by targeting assistance early using family dispute resolution services.

## Duty Lawyer Services in Parenting Disputes

Victoria Legal Aid also provides family law duty lawyer services in the Commonwealth Family Law Courts. These services are available to people who require assistance at court in Commonwealth parenting matters on the day of hearing. However, people who do not meet an income test or who are eligible for a grant of legal assistance (but have not sought one) are not provided with multiple duty lawyer services and unless the matter is urgent, for example seeking an airport watch list order or a recovery order, only legal information and referrals will be provided to people who do not meet the income test.

## Family Dispute Resolution Service

We provide timely, legally assisted family dispute resolution services to vulnerable people. Our Family Dispute Resolution Service helps parents and other adult family members resolve substantial family disputes about:

- parenting arrangements and children's issues
- division of property (where parents have superannuation or a home mortgage)
- partner maintenance
- child support or adult child maintenance.

This service involves a family dispute resolution practitioner chairing a conference where the parties to the mediation may be legally represented to discuss the family's dispute and help them make future parenting arrangements that are in the best interests of the children. Most conferences occur at an early stage in family law matters, avoiding the need to go to court.

Grants of assistance are available for lawyers to assist in the resolution of disputes through this service.<sup>62</sup>

## Parenting Disputes

We provide information, advice and representation to separating or separated parents who are in dispute about their children's living and care arrangements. We aim to assist them to achieve safe, workable and sustainable living and care arrangements for children. Often, allegations of family violence are raised in the context of parenting disputes and family violence intervention orders may already be in place.

Parents who have been unable to resolve parenting dispute issues through family dispute resolution services, may be eligible for a grant of aid to commence proceedings in the Family Law Courts.<sup>63</sup>

We also provide assistance for applications to discharge or vary parenting arrangements where there has been a change of circumstances.<sup>64</sup>

## Independent Children's Lawyers

Victoria Legal Aid can be requested to fund an Independent Children's Lawyer (almost always by Commonwealth Family Law courts) to represent a child's interests in family law proceedings where

<sup>62</sup> Victoria Legal Aid (2015) *Handbook for Lawyers* 'Guideline 1 – Early intervention and dispute resolution'.

<sup>63</sup> *VLA Handbook for Lawyers* 'Guideline 2 – Litigation Guideline 2 – Litigation'.

<sup>64</sup> *VLA Handbook for Lawyers* 'Guideline 4 - Assistance for applications to vary or discharge parenting arrangements'.

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a child is at risk of harm due to the conduct of one or both parents. The Independent Children's Lawyer role is to assist judicial officers to make decisions based on the best available evidence so that arrangements ordered by the court are in the children's best interests.

We may make a grant of legal assistance for a child or children to be represented by an Independent Children's Lawyer in family law court proceedings if:

- a court orders separate representation and asks Victoria Legal Aid to appoint an Independent Children's Lawyer to provide this representation; and
- Victoria Legal Aid, based on guidelines, determines it is reasonable in the circumstances to make a grant of legal assistance for separate representation.<sup>65</sup>

If the court requests the appointment of an Independent Children's Lawyer, the child or children do not need to apply for a grant of legal assistance. Victoria Legal Aid will appoint the lawyer once a request is received from the court and it is reasonable in the circumstances.

## Child Protection

Victoria Legal Aid arranges or provides the legal representation for almost every child and parent represented in child protection legal proceedings in the Family Division of the Children's Court. We assist children, young people and parents responding to child protection applications brought by the state by helping to ensure that any legal intervention is limited to that which is necessary to promote the child's or young person's health, safety and wellbeing. This assistance may arise due to concerns of family violence within the home. We also aim to assist children and their parents to reach safe, workable and sustainable care arrangements.

We provide legal information, advice and representation, as well as community legal education designed to help protect and promote the rights of children, young people and parents before, during and after child protection proceedings.

A grant of legal assistance is available to a child who is the subject of an application in the Family Division of the Children's Court if the child is considered to be mature enough to provide instructions. We may also make a grant of assistance to a person (including a parent, guardian or other interested person) involved in the proceedings in certain circumstances.<sup>66</sup>

The effect of this is that we may often fund assistance to more than one party in proceedings in the Family Division of the Children's Court.

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<sup>65</sup> *VLA Handbook for Lawyers Guideline 5 – Independent Representation of Children*

<sup>66</sup> This includes where:

- they are a parent and are seeking to retain or regain primary care of the child in a protection application proceeding
- they oppose an application to vary or extend an order
- the Department of Human Services (DHS) is applying for a guardianship order or permanent care order
- for matters other than protection applications, they seek an order different to an order recommended by DHS (including an interim accommodation order)
- for matters other than protection applications, they oppose certain conditions being made, or seek to include other conditions, in an order relating to a substantive issue which will significantly affect their lifestyle or their family's lifestyle

## Child Support

Victoria Legal Aid's Child Support Legal Service provides casework and advice services, duty lawyer assistance, a daily telephone advice line, community legal education and information kits for self-represented litigants, to help ensure that children are cared for. Victoria Legal Aid child support lawyers assist clients with administrative processes available through Department of Human Services (DHS) (Child Support) to change assessments, object to decisions, draft agreements and enforce or discharge arrears. In some matters, if all administrative avenues are exhausted, the child support lawyer may assist the parent at an appeal hearing before the Social Security Appeals Tribunal (SSAT) or the Administrative Appeals Tribunal.

## Criminal Law Services

In our Criminal Law Program we act for both men and women charged with criminal offences, including charges of violent crimes committed in the context of family violence. Our lawyers provide legal advice and representation for matters heard in the Magistrates', County and Supreme Courts.

In 2013-14 the Criminal Law Program assisted 46,016 unique clients.<sup>67</sup> We fund approximately 80% of all criminal trials and spend approximately \$33.2 million per year on indictable crime. Overall, 70% of all grants of legal assistance in indictable crime cases are conducted by private practitioners. The remaining 30% are conducted by Victoria Legal Aid's in-house staff practice.

We currently do not collect or record specific data on the number of criminal law matters that occur in the context of family violence. A recent examination, though, of assistance provided in matters over a three-year period where an accused was charged with murder or attempted murder suggests that just under 50 percent of these matters occurred in the context of family violence. This sample, while including only two matter types, indicates the level of impact family violence has on the delivery of our legal services.

## Community Legal Education (including website and publications)

We extend the reach of our services through the provision of legal information and community legal education. Our Community Legal Education program comprises a range of activities to educate the Victorian community about family violence. These activities are designed to:

- raise awareness about the legal issues associated with family violence and the harm it can cause with a view to preventing it
- assist people who have experienced family violence or who perpetrate family violence to understand their rights and responsibilities and navigate the legal system.

Victoria Legal Aid offers both targeted and broadly based education strategies that address family violence. This includes tailored programs such as *Settled and Safe*, *What's the law? Australian law for new arrivals* and *Australian law in orientation*, which are delivered in collaboration with key agencies. These programs target new arrivals and CALD communities at different stages in the settlement process.

<sup>67</sup> These are clients who accessed one or more services during the year, including early intervention services, duty lawyer services and grants of legal assistance.

In 2013-14, 2,114 people attended a Victoria Legal Aid community legal education session in connection with family violence.

Victoria Legal Aid also provides 41 free print and digital publications on family law and family violence. These make up a third of Victoria Legal Aid's total suite of community legal education publications. These resources are available to all Victorians free of charge in print or via the Victoria Legal Aid website and are in high demand.

Publications that address family violence make up almost one quarter of Victoria Legal Aid's total annual publication distribution. Victoria Legal Aid distributes:

- 20,000 copies per year of *Safe at home: how to get a family violence intervention order*. Versions of this booklet were produced in Arabic, Chinese and Vietnamese and 2,500 copies are distributed in each language per year.
- 5000 copies per year of the factsheet *Family violence intervention order applications* - for affected family members.
- 15,000 copies per year of the booklet *How to respond to a family violence intervention order* for respondents.
- 10,000 copies per year of the factsheet *Family violence intervention order applications* - for respondents.

Victoria Legal Aid also has two online videos which use storytelling to explore dealing with family violence from the perspective of both an affected family member and a respondent seeking counselling.

Other plain language information on family violence is also available on Victoria Legal Aid's website.

In 2013-14 there were 42,445 website sessions relating to family violence intervention orders.

Victoria Legal Aid regularly reviews its family violence publications and community legal education strategy to ensure it is effective in reaching a wide range of Victorians. Further work is underway and will be completed over the next two years to ensure that our material continues to be relevant and effective for a range of people who need accessible legal information.

### **Snapshot - Settled & Safe**

People from new and emerging communities often face significant barriers accessing legal help. The development of our *Settled and Safe* family violence prevention project commenced via a Legal Services Board grant. Settled and Safe uses targeted training and information sessions to increase knowledge of family law, family violence and child protection laws to people from new and emerging communities and settlement workers who work with them so that they can seek legal assistance early.

We provide training to settlement agencies and then collaborate with them to deliver culturally tailored legal education to the people that they work with. Settled and Safe has been delivered from our Morwell, Shepparton, Ringwood, Dandenong and Melbourne offices and will continue in targeted areas. The sessions also provided us with insights to improve our services for people from new and emerging communities with family-related legal issues.

We produced a training package that contains all of the resources, information and session plans required for Victoria Legal Aid or other legal service providers to deliver the Settled and Safe program to their local community. We will continue this important work as part of a strengthened focus on delivering family violence legal services that not only benefit individual clients but also contribute to the overall prevention of family violence.<sup>68</sup>

## Community Legal Centre Funding and Development Program

Victoria Legal Aid administers funding to community legal centres and some of these funds are provided specifically for the delivery of family violence legal services.

State source funds support:

- Family violence legal services in the Family Violence Division courts at Ballarat and Heidelberg by two community legal centres.
- Family violence legal services at non specialist Courts and locations by eleven other community legal centres.

These specifically directed funds totalled \$1.2 million in 2014/15.

This investment is separate to the core funding provided to centres (State and Commonwealth source) which some centres - notably, Women's Legal Service, Peninsula Community Legal Centre and Hume Riverina CLS - choose to use to support at-court and after-court family violence legal services as a service priority. We support these centre-initiated priority service delivery decisions.

Some centres may also receive specific funding for family violence legal services from other sources, for example directly from the Commonwealth government or from a philanthropic institution.

Periodically, we are also able to make one off-grants which allow us to explore innovative responses to family violence through pilot projects. In some cases, funding has been made recurrent following a successful pilot period. An example of this is the project to create Goulburn Valley Community Legal Centre which has made family violence a focus, funding to Brimbank-Melton Community Legal Centre for at-court services at Bacchus Marsh Magistrates' Court and out-of-court advocacy services in Bacchus Marsh and Melton, an increase in at-court capacity of Eastern Community Legal Centre at Ringwood Magistrates' Court, and a Community Legal Centre family violence lawyer advocacy skills development program, Safer Families, run by Women's Legal Service.

Our Community Legal Centre Funding Program works closely with centres to build capacity where we identify gaps or opportunities for improvements to service delivery.

<sup>68</sup> More information about Settled & Safe is available on our website at <https://www.legalaid.vic.gov.au/about-us/community-education-and-projects/settled-and-safe>.

**Appendix Two: SUPPORTING SAFETY - The benefits of duty lawyer services for applicants and respondents**

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## Accessibility

The court environment can be stressful. For many applicants and respondents it is their first time experiencing the legal system and the terminology used can be new and confusing. The process can be confusing particularly given a family violence intervention order is a civil order but the legislation applies criminal charges if the order is breached.

Duty lawyers are often one of the first points of contact applicants and respondents have with the legal system. The provision of legal assistance helps both applicants and respondents to develop realistic expectations of the outcome of the proceedings and to have a clear understanding of their rights, responsibilities and the legal consequences of their actions. Duty lawyers play an important role in simplifying the terminology and assisting parties to navigate the system. It is an early opportunity for applicants and respondents to ask questions if they do not understand the obligations created by the order. Parties who have access to legal advice before, during and after court processes are better equipped with knowledge of their legal rights and responsibilities so as to protect against inappropriate or unsafe agreements being made.

Most applications for family violence intervention orders are made by, or on behalf of, women. Family violence duty lawyer services can also increase accessibility by redressing power imbalances between the parties and promoting access to justice for women who have experienced family violence. Women may experience significant power imbalances and other psychological and economic disadvantage that may make the court process particularly challenging. Without minimising the strength of women who take action to protect themselves and their families from family violence, access to legal advice can mitigate factors such as a lack of understanding of the law, trauma and intimidation that may impact on their ability to form persuasive arguments and achieve fair, safe and durable outcomes.

A family violence duty lawyer will be able to assist applicants to make decisions that will enhance their safety and the safety of children and assist them in countering the power imbalance of negotiating directly with the alleged perpetrator of family violence on things such as the conditions of the order, whether children are listed on the order and what, if any, parenting arrangements will be put in place.

For respondents, duty lawyers also have a role in assisting them to understand the serious consequences that may flow from their conduct. In our experience, many respondents may not understand the legal repercussions of their conduct and that their behaviour falls within the definition of family violence. The duty lawyer plays a key role in assisting respondents to understand the operation of the law, how the law defines family violence and how their conduct may constitute family violence. This sometimes encourages the first steps towards accountability for their conduct and may assist to manage their expectations for the conduct of future court proceedings.

If a respondent does not understand what behaviour is prohibited by an intervention order there is a high risk they will continue to commit family violence or fail to engage in future court processes because they do not consider their conduct to be unlawful. This is inconsistent with fostering perpetrator accountability and promoting victim safety. Therefore, ensuring that respondents have access to legal advice and representation has primary and secondary benefits to the legal system and for victim safety.

## Improving the suitability of orders

Access to legal assistance by both applicants and respondents supports victim safety.

In our experience, family violence intervention orders may not be tailored to the particular needs of the parties if applicants and respondents do not have access to legal advice. Applicants may not be advised (especially where assisted by the Police) of what conditions they can seek to keep them safe, what is workable for their individual needs and how intervention orders can coincide with parenting arrangements including family law court orders. Similarly affected family members (in police applications) may not be advised of their ability to seek less restrictive orders where they are appropriate and desired by the applicant.

Not putting in place suitable, tailored orders can result in further return dates to vary the order which may cause additional trauma for the applicant. Additionally, it may result in avoidable breaches in circumstances where the order does not accommodate the legitimate needs of the parties. For example, it may be necessary to include a condition permitting communication through mediation if the parties are also seeking to resolve separate family law proceedings. Another common example, is where the distance that a respondent must keep from an applicant's home or workplace may need to be modified (but still at a safe distance) where the applicant lives or works in a central location such as the central business district.

Importantly, legal advice to the respondent also focuses on educating the respondent on the nature of the order, the conditions in the order and the consequences of breaching those conditions. Our lawyers encounter a common misconception held by respondents: that an applicant controls the order rather than it having the effect and status of an order of the court. There can be particular confusion for respondents where Victoria Police is the applicant who is seeking to protect the victim. This can be explained by the duty lawyer in the advice session with the respondent, to ensure that they are aware of the serious nature of their past behaviour as well as the criminal nature of breaches and enforceability of orders by the Police and the Courts

Respondents receiving a similar type of court-based legal service through NSW pilot projects provided positive feedback on their experience when surveyed about the impact and benefits of the court-based legal services.<sup>69</sup> Furthermore, respondents in the pilot at the Wyong (NSW) Local Court demonstrated a marked improvement in their knowledge of the impact of an apprehended violence order on their contact with the applicant.<sup>70</sup> The majority of respondents interviewed in the Trimboli study stated they would recommend the legal service to people in a similar situation as the duty lawyer provided information, advised on the available options, and meant their matter was handled professionally. This was supported by interviews with stakeholders who agreed that the duty lawyer provided an important service. It resulted in negotiated and practicable orders being made and informed perpetrators about the conditions on the order and the ramifications of breaching the order.<sup>71</sup>

<sup>69</sup>Trimboli, L (2014) 'Legal Service for defendants in Apprehended Domestic Violence Order (ADVO) proceedings: An evaluation' 179 *Contemporary Issues in Crime and Justice* 1; Central Coast Community Legal Centre (2014), *Lawyerless and Lost at Court: Are we really helping?* (Evaluation Report Funded by the Law and Justice Foundation of NSW), p 19.

<sup>70</sup> Central Coast Community Legal Centre (2014) p 13.

<sup>71</sup> Trimboli (2014) p 13.

## Supporting compliance with orders

Based on our practice experience, we believe access to legal advice has a positive impact in reducing the likelihood of a respondent breaching a family violence intervention order. There are a number of reasons we believe this is the case:

- respondents are more likely to understand the nature of the order
- respondents are more likely to understand the terms of the order
- the terms of the order are more likely to be appropriate to the circumstances
- respondents are more likely to understand the consequences of breaching the order
- respondents are more likely to receive assistance for their related legal problems, such as family law issues
- respondents are more likely to be referred on to non-legal support services to address violence supporting attitudes.

This position is supported by our data. Our data indicates that the provision of legal advice to respondents is important in promoting applicant safety. Of the 868 clients assisted by the Victoria Legal Aid in-house practice in 2013-14 with criminal charges arising from the breach of a family violence intervention order, only 168 of these clients had received a family violence duty lawyer advice for a family violence intervention order in the year prior. This data shows that almost 80 percent of respondents who are being assisted with criminal breaches may not have received any previous legal assistance by a duty lawyer for the family violence intervention order application.

The evaluation of the duty lawyer service piloted at the Wyong (NSW) Local Court also showed a reduced breach rate following its implementation. In the 12 month period following the commencement of the pilot, there was a 21 percent decrease in the number of breach charges at the Court.<sup>72</sup>

## Appropriate and effective referral to support services

Court-based family violence legal services provide a vital link between the justice system and non-legal support services such as homelessness support, crisis support and medical support.

As noted in the Centre for Innovative Justice's recent report, the justice system can be an 'active and involved participant that can *interrupt*<sup>73</sup> the use of family violence. A perpetrator's contact with the legal system provides an opportunity to refer that person to non-legal support services that address violence supporting attitudes and related problems such as drug and alcohol abuse, mental health and housing. Where a respondent is also charged with a criminal matter, Victoria Legal Aid lawyers assisting an accused will make these referrals. These not only provide critical support for an accused person (and reduce the risk of further acts of family violence) but are also the subject of inquiry by sentencing courts when examining what supports and services are in place for a person appearing before the court.

<sup>72</sup> Central Coast Community Legal Centre (2014), p 22. There was an increase in the following period, the report hypothesises that this may be attributed to the usual increase in intervention order breaches over the Christmas and New Year period.

<sup>73</sup> Centre for Innovative Justice (2015), p 6.

Assessment of the non-legal support services targeting the long-term behaviour change needed to prevent further acts of family violence needs to happen as soon as possible following the incident of family violence.<sup>74</sup> While assessment should happen at the earliest opportunity, sometimes the referrals will be most effective when a person has had the opportunity to move through the point of crisis. A coordinated approach between legal and non-legal support services to ensure that the intervention is timely (whether this be by way of early intervention or a slight delay if that is appropriate in the circumstances) taking into consideration the needs of the individual is desirable. The effectiveness of the processes supporting referral to support services is one of the key advantages of the divisional court model.

### **Identification of family law issues and related legal problems**

Legal assistance at court also enables identification of related family law issues. While it may not always be appropriate to deal with these issues at the time of crisis it may be possible to put in place the appropriate referrals and appointments to ensure that these interrelated issues are dealt with.

In our experience, family violence intervention order lists at the Magistrates' Court are increasingly a first point of contact into the legal system for a large number of people who also need family law legal services. Screening for family law issues by duty lawyers providing legal advice to parties in family violence intervention order matters at the Magistrates' Courts may further reduce the likelihood of future family violence by diffusing some of the tension and anxiety associated with unresolved parenting arrangements and family law issues. Advice on or resolution of these issues at an early opportunity may also avoid the additional costs and demand on the legal system associated with the escalation of parenting disputes.

Our data reveals a clustering of family law and family violence issues for a significant minority of clients. This is consistent with other research findings.<sup>75</sup> From 2009-2014, Victoria Legal Aid assisted 99,294 clients with either a parenting dispute, family violence or child protection issue. 11,264 clients of these clients received assistance with two or more legal issue types. Of this subgroup, 76 percent received assistance for a family violence issue in addition to the parenting dispute issue.

Our data also reveals that a proportion of people accessing our family violence legal services also seek assistance with a parenting dispute within a year. Of the parents who received a grant of assistance for a parenting dispute in 2013-14 (1,604 clients), approximately 14 percent also received assistance with a family violence legal service in the year prior.

The benefits of screening for family law issues are demonstrated by the following scenario.

#### **CASE EXAMPLE - GEORGE**

George is a respondent to a family violence intervention order. The two children are listed as affected family members on the order.

George mistakenly believes that it is not possible to see your children at all when a family violence intervention order is made. Two weeks later he is frustrated that he hasn't seen the children and

<sup>74</sup> Centre for Innovative Justice (2015), p 6.

<sup>75</sup> See, for example, Higgins, D and Kaspiew, R (2001) *Child protection and family law...joining the dots* (National Child Protection Clearinghouse No 34,) (Canberra: Australian Institute of Family Studies), viewed 14 June 2015, <<https://aifs.gov.au/cfca/sites/default/files/publication-documents/issues34.pdf>>

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decides to pick the children up from school and take them to the park without prior agreement from his partner. In doing so, he breaches a condition of the family violence intervention order. Victoria Legal Aid first comes into contact with George through our criminal law duty lawyer service when he is charged for breach of the order.

George did not receive legal advice when the family violence intervention order was made. Legal advice could have assisted George to understand how he could arrange to see his children while still complying with the family violence intervention order. Access to legal advice would have reduced the risk of breach by tailoring the order to the circumstances of his family and providing for safe contact arrangements where appropriate. The duty lawyer would also detect the interrelated family law issues and could have allayed George's concerns about not seeing his children by providing preliminary advice and a warm referral for further legal assistance to resolve the longer term care arrangements for the children.

Currently, duty lawyers at the Magistrates' Courts do not have the resources or time to screen all applicants and respondents for possible family law issues and provide advice or arrange warm referrals to a family lawyer. As part of our Family Law Legal Aid Services Review,<sup>76</sup> Victoria Legal Aid is exploring ways to assist duty lawyers to identify family law issues, provide referrals to parenting dispute lawyers, and provide better continuity of service to these clients.

However, it is already clear that the pace of the current court environment and the demand pressures on our duty lawyer services mean the service cannot systematically accommodate the additional time that needs to be spent with applicants and respondents to undertake routine screening for family law and related legal issues. Additional resource investment in duty lawyer services will be required to enable the additional time required to be spent with each client to undertake an assessment and if appropriate make referrals without reducing existing services.

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<sup>76</sup> The Review, initiated in 2014, is looking at ways to improve family law legal aid services to ensure they are fair, as widely accessible as possible and sustainable. The Review has mapped and examined existing services and identified opportunities for improvement. The process has actively sought input from stakeholders and the community. The final report will be available in mid-2015. Further information about the Review can be found on our website at <http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/family-law-legal-aid-services-review/family-law-review-process>.