
THE VICTORIAN BAR COUNCIL AND
FAMILY LAW BAR ASSOCIATION

# SUBMISSION TO THE ROYAL COMMISSION INTO FAMILY VIOLENCE

29 MAY 2015

Owen Dixon Chambers East, Level 5, 205 William Street, Melbourne Victoria 3000
T: 03 9225 7111 | F: 03 9225 6068 | E: vicbar@vicbar.com.au | www.vicbar.com.au

# INTRODUCTION

1. The Victorian Bar Council and the Family Law Bar Association (the ***Bar***) welcome the opportunity to make a submission to the Royal Commission into Family Violence.

2. The Victorian Bar is a private, voluntary, self-funded, non-profit professional association of barristers who practice in Victoria. The work of the barrister is built on the tradition of providing independent legal representation and advice to all in the community. The Victorian Bar's Family Law Bar Association is the peak body for barristers in Victorian practising in family law.

3. This submission focuses primarily on areas with which our members come into contact when providing representation to individuals who are parties to court proceedings under the *Family Violence Protection Act 2008* (Vic) (***FVPA***) and the *Family Law Act 1975* (Cth) (***FLA***).

# SUMMARY OF RECOMMENDATIONS

4. In summary, the recommendations are as follows:

   a) A protocol be adopted whereby police and private lawyers are better able to share information and caseload in FVPA matters where there are cross applications.

   b) Consideration be given to amending the existing safety notice provisions to enable police to apply on behalf of both partners in a domestic relationship at first instance while further enquiries and referrals are made.

   c) Increasing the use of affidavits or written statements by affected family members (***AFMs***) in FVPA matters.

   d) Increasing the discretion of the Court to award costs in FVPA matters from 'exceptional circumstances' to 'reasonable circumstances'.

   e) More consideration be given to whether to include on intervention orders when the other party is their parent.

   f) Increasing the discretion of police prosecutors to negotiate settlements of FVPA proceedings.

   g) Consideration be given to developing consistency between family law court judicial officers as to the weight to be given to allegations of violence.

   h) Expanding the FVPA to enable intervention orders to state what acts of family violence are alleged or found.

   i) Increased funding for victims of violence to receive representation at trial in the family law courts.

   j) Expanding the jurisdiction of the family law courts to also hear matters under the FVPA.

   k) Piloting a programme where the state courts conduct an initial 'triage' of matters where there are both parenting and family violence matters in dispute, then transferring the entire proceeding to the family law courts for final determination.

   l) Increased judicial and court resources to reduce delays in the final determination of cases.

# FAMILY VIOLENCE INTERVENTION ORDERS

## APPLICANTS

5. In many cases AFMs are represented by Victoria Police, who make the application on their behalf.

6. Victoria Police are not able to assist an AFM where the respondent to the intervention order has also filed a cross application against them (ie there is a second application in which the AFM is the respondent). In those situations the AFM typically engages a legal representative for the cross application, either on a private basis or following an order made under s 71 of the FVPA. This can be confusing for the party as they are then represented by two different bodies for the two applications that are usually heard together. It would be of assistance to applicants if a protocol were adopted for greater communication, cooperation and sharing of information between police prosecutors and legal practitioners in these circumstances. It is often the case that if Counsel is briefed in the cross application it is appropriate for Counsel to take on the police case as well, to enable the case to be properly prepared without redundancies or issues being inadvertently overlooked. It would also streamline the process for the AFM as they would have only one representative to deal with at each court event.

7. Victoria Police are also unable to apply on behalf of both parties to a domestic relationship. Our members have experienced situations where, for instance, there has been long standing violence against the female partner, but on a particular day she is verbally or physically violent in return, and the male partner is the one to call the police. It has been the experience of our members in these circumstances that the police will take out an application on behalf of the male partner against the female partner, despite her also being a victim of violence. These situations have caused the female partner to be removed from the home and at times had the children removed from her care. That party, who has often experienced long term violence is left to make a cross application on their own behalf with no assistance from the police.

8. In circumstances where both parties are alleging family violence, it would be of assistance if the existing safety notice procedures could be amended to enable the police to apply for a safety notice on behalf of both parties, and then refer both parties to legal practitioners, community legal centres or duty lawyers when the matter is heard in Court. Alternatively, if the police wish to represent one party and not the other, utilising safety notices in the short term would enable the police to make further enquiries to determine which party they intend to represent. Suitable procedures and protocols could be put in place to assist police members in making these determinations.

## THE APPLICATION FORM PROCESS

9. Another difficulty that can be experienced by applicants is the process by which an application is taken out. If an application is taken out by Victoria Police, the AFM's statement is reduced to a summary in the typed application form. If the application is made by the AFM directly to the Court, a Registrar of the Court produces this summary. That summary then forms the basis for the intervention order application, yet applicants do not seem to have any control over what goes into that summary. These summaries are sometimes inaccurate, and when the AFM is then cross examined on the matters in the application their case is weakened. The AFM may not be able to bring evidence in chief of matters that have not been included in the application. This can result in a confusing and distressing experience for the AFM. The AFM is also placed in the situation where

they are having to re-tell their story perhaps numerous times.

10. While the FVPA does make provision for an AFM to provide an affidavit or written statement, in practice this seems to be rarely used. Perhaps it is thought that making a written statement is too onerous a requirement for an AFM. While it is not suggested that a written statement be required at first instance, if a matter is to be contested (eg after the first mention) it should be the case that the AFM then provides a written statement or affidavit. This need not be a formal document. While this may be a burden for the AFM in the short term, the long term benefits are many, including:

- The AFM would not have to tell their story numerous times to different police officers, court staff or legal representatives;
- The AFM could adopt their written statement or affidavit in the witness box, therefore shortening any evidence in chief they might give and reducing the risk of their forgetting important details when under pressure in the witness box;
- The Court would have the opportunity of reading the statement prior to a hearing, which would assist the Court in making a determination;
- If a respondent subsequently does not attend Court the AFM would not have to give lengthy oral evidence in an undefended application, but rather adopt their statement (or if the statement is in affidavit form, the AFM would not have to give oral evidence at all);
- The respondent would be able to read the allegations against them in advance which would enable them to engage in settlement discussions knowing the strength of the evidence against them. This would encourage more matters to settle without the need for a hearing;
- If a matter is to be handled by more than one police officer/prosecutor/legal representative/Judicial officer the information available is consistent.

11. It is accepted that it may be difficult for some AFMs to make a written statement. However, the existing application form could be modified such that the statement is completed with more of a 'guided' form, similar to the Notice of Risk that is completed in the Family Law Courts. For instance, the form could say 'Has the respondent engaged in physical violence?' with a space to tick yes or no, then 'Please provide as much detail as possible about occasions where this has occurred' and a space to write the information. This could then be repeated for areas such as sexual violence, emotional, financial et cetera. This would also assist AFMs in ensuring they put forward examples of each type of abuse that they have experienced, which would strengthen their case.

## RESPONDENTS

12. One of the main difficulties encountered by respondents ties in with the matters outlined above under 'The Application Form Process'. When respondents are served with an application that is, in essence, a summary, it is incredibly difficult for the respondent to know the strength of the case against them and therefore whether they should appropriately contest the application or make a settlement offer. This disadvantages all parties and causes increased delays in the court system.

13. It is worth noting that in many cases where the AFM and respondent are former domestic partners in the process of a separation both parties have been the victims of behaviour that falls within the definition of family violence. Frequently the respondent is an AFM in a cross application. Frequently the parties are co-parents of children who have been exposed to the family violence. Frequently as co-parents the AFM and respondent will be required to have ongoing dealings with one another after the intervention order proceedings are concluded. Therefore making the process more user-friendly for respondents can ultimately assist in making the future situation easier for AFMs and children also.

14. The capacity to receive costs is a relevant one. The current s 154 of the FVPA allows for costs to be

awarded only in 'exceptional circumstances'. While it is clearly the case that the threat of a costs award should not be a deterrent to protection from family violence, it should also not be the case that a respondent to a frivolous or ill-brought application must demonstrate something 'exceptional' before they are able to seek costs. It is suggested that a wording more in line with s 117 of the FLA, which requires parties to bear their own costs unless the court, in its discretion, determines it is appropriate to award costs, would be more appropriate. This would strike an appropriate balance between the needs of AFMs to prosecute their applications free from the threat of costs if they are ultimately unsuccessful versus the needs of a respondent to be able to contest an inappropriately brought application.

### INCLUSION OF CHILDREN ON INTERVENTION ORDERS

15. Greater care should be taken in ensuring that it is necessary to add a party's children to an intervention order when the respondent is their other parent. With such a broad definition of family violence it is (regrettably) often the case that each party has engaged in conduct over the course of their separation that falls within that definition. Parties that have, in the course of their separation, yelled at each other and called each other names have both committed family violence against the other. If the children have been present in the home while this has occurred they are themselves victims. While there are cases where a child should be protected from a parent, it has been the experience of our members that intervention orders are used by some people as a method of prohibiting the other parent from having contact with the children following separation. It should be considered that if a child's only experience of family violence is exposure to conflict between their parents, and those parents are now separated and an order prohibits family violence between them, it is not necessarily the case that the order needs to prohibit the children having contact with that parent when the other is not present. Prior to children being included on an intervention order the Court should be required to consider whether there is a need to protect the children specifically once an order has been made for the protection of their parent.

### PROSECUTORIAL DISCRETION

16. In matters where the police are the applicant the police prosecutors should be able to exercise their discretion regarding which matters they proceed with, which matters they settle and how. For instance, it appears to be common practice that the police prosecutors no longer accept a settlement of a matter by way of the respondent entering into an undertaking. This appears to be the position regardless of whether the AFM consents to an undertaking, whether there is a cross application which is to resolve in the same way, or the strength of the prosecution's case. If police prosecutors are able to exercise discretion appropriately when it comes to criminal matters, it seems counterintuitive that they do not appear to have the same discretion in family violence matters. This lack of discretion on the part of police prosecutors means that matters are less able to settle and are listed unnecessarily for contests, which places a significant burden on the parties and the Court's resources.

## FAMILY LAW ACT MATTERS

17. The difficulty experienced in matters under the FLA is that where the FVPA focuses merely on the presence of family violence and the likelihood of its future occurrence, the FLA requires judicial officers to balance the need to protect children from harm against their right to have a meaningful relationship with both parents. In the family law jurisdiction a distinction is drawn between 'risk' to a

child and 'unacceptable risk'. Therefore the Court is required to assess violence as almost a sliding scale, where varying degrees of family violence present different levels of risk to a child, and result in different degrees of protective orders (for instance, the court may find it acceptable to mitigate risk by requiring that parents do not come into contact with one another when exchanging their child in some cases, where in other cases the risk may be significant enough to require the time a child spends with a parent to be supervised). This therefore creates a more nuanced approach to the question of family violence and its effects.

18. There appears to be an inconsistent approach in the family law courts as to the weight to be given to allegations of family violence. Some judicial officers seem to take the approach that family violence is alleged in every case, and therefore it is of little weight. Other judicial officers treat any allegation of family violence as one that must be treated with extreme caution and therefore make extremely conservative orders.

19. The presence of an Intervention Order made in the Magistrates' Court is something that the family law courts are required to take into effect. The mere existence of an intervention order (particularly one that is made without admissions) does not necessarily assist with the nuanced approach that is required. It would assist if the Court, when making an intervention order, could specify what types of family violence it finds have been committed. For instance, when orders are made in the child protection jurisdiction they specify which subsection of s 162 of the *Children, Youth and Families Act 2005* (Vic) applies (for instance subsections c, d and e of s 162 allow the court to draw a distinction between applications that are based upon physical injury, sexual abuse and psychological harm, respectively).

20. Recent amendments to Victoria Legal Aid guidelines have seen a much larger number of parties representing themselves at final hearings in the Family Law Courts. The lack of funding for parties to be represented at trial has resulted in victims of family violence being placed in the position of having to negotiate with, cross examine, and be cross examined by, the perpetrators. This contributes to the victimisation of these parties, and also impacts upon their capacity to make their case successfully. It would assist if more resources were made available to assist these parties. It is noted that there are provisions in the FVPA that require legal aid to extend funding to parties who are to cross examine one another in circumstances where family violence exists. Consideration should be given to implementing similar provisions in the FLA.

## MATTERS WHERE THERE ARE CONCURRENT FAMILY VIOLENCE AND FAMILY LAW PROCEEDINGS

21. Often in situations where the family violence occurs in the context of the breakdown of a relationship parties are engaged in two disputes across two different courts, being the family violence dispute in the Magistrates Court and the family law dispute in the family law courts.

22. This necessarily creates difficulties. Often the family violence matters are adjourned to determine the outcome of the family law proceedings before they can proceed, and equally the family law courts are unable to properly determine the family violence matters absent a result in the Magistrates' Court.

23. The existence of an interim intervention order that prohibits contact between the parties interferes with their ability to negotiate their parenting or property dispute without the presence of lawyers, and may render the dispute unsuitable for mediation. While this may be entirely appropriate, it often requires the parties to engage the assistance of lawyers, which increases the cost and difficulty for all concerned.

24. Often clients who have these parallel proceedings spend significantly more money than they otherwise would on legal fees, and become confused and weary of fighting a fire on two different fronts. They become frustrated when matters are adjourned to see what happens in other courts. They become frustrated when they are told that the court has no jurisdiction to hear an aspect of their parenting matter because they are at an Intervention Order hearing, or that the court cannot make a variation to their intervention order because they are in the family law courts. These situations become even more difficult and costly if the parties are represented by different lawyers for the family law and family violence matters.

25. Section 68B of the FLA enables the family law courts to make an order that, on its face, seems similar to a Family Violence Intervention Order as made under the FVPA. An order made under the FLA, however, does not have the same capacity for enforcement as one made under the FVPA. While such an injunction is enforceable by state police under s 68C of the FLA, it seems to be the case that state police are either unaware of this section or unwilling to become involved in 'family law matters'. In any event, even if a person is arrested under these sections, it is not a criminal offence to breach such an injunction and it would appear that penalties are administered by the family law courts. It is therefore generally the case that when our members are asked by a client the best way to obtain an order for their personal protection they are advised to seek an Intervention Order. This then creates all the difficulties of being involved in parallel proceedings in two different courts as referred to herein.

26. It is also undesirable that the same factual dispute is then before two different courts of two different jurisdictions at the same time, with each waiting on the findings of the other.

27. A more streamlined process and greater sharing of files and jurisdictions would assist in managing this problem. First, it would assist to enable the family law courts to have jurisdiction in FVPA matters where the family violence issues exist in conjunction with a matter where there would already be jurisdiction under the FLA. The family law courts could then make interim and final orders in relation to both family violence and parenting matters at the same time and arising out of the same hearing. Only one set of proceedings, one set of legal fees and one set of affidavits or statements would be required. Parties would not have to manage multiple orders from multiple courts, which would also assist schools and police to understand specifically what the restrictions and exceptions are.

28. Another possibility is for the Magistrates' Court to exercise the jurisdiction it already possesses for family law matters when dealing with intervention order proceedings. One suggestion is that a pilot programme be introduced where magistrates who have a background in both family law and family violence matters (such as Ms Toose, Ms Stuthridge or Mr Zemljak) could exercise these jurisdictions concurrently and make parenting orders and intervention orders at the same time. This would reduce the likelihood of children missing out on an opportunity to spend time with their parents in circumstances where there is a tension between the level of risk required for an intervention order to be granted and the level of 'unacceptable risk' necessary to warrant overriding their right to a meaningful relationship with both parents.

29. It is accepted, however, that there is a limit to the resources of the Magistrates' Court and that it does not have the same resources to determine contested parenting matters as the family law courts (for instance there is not the same opportunity to access family consultants). It is suggested, however, that if the family law courts were given jurisdiction to hear family violence matters a protocol could be introduced where matters could be transferred from the Magistrates' Court to the family law courts once an initial triage process had taken place. Therefore, parties would be able to take advantage of the capacity to have urgent interim orders made in relation to both family violence and parenting matters, and then have both matters transferred to the family law courts for a final, more detailed determination. This would reduce time, costs and confusion for parties, would minimise the need for multiple adjournments in both courts, and would remove any difficulties associated with the same facts being in dispute in two courts simultaneously.

## DELAY

30. In both the Magistrates' and family law courts delay is a significant issue. The amount of time that matters take to be heard means that those affected by family violence are often involved in litigation for months or years. They are required to attend numerous hearings and live in a state of constant anxiety which serves both to further victimise them and impede their ability to move forward. It is suggested that greater judicial resources to manage these matters would be of assistance. It would also assist if the courts were to consider giving priority to matters involving family violence when organising their listings.