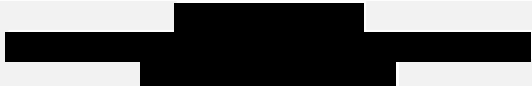




Community
driven justice.

**FITZROY LEGAL SERVICE SUBMISSION TO INQUIRY INTO
*FAMILY VIOLENCE ORDERS***

For all enquiries related to this
submission:



About Fitzroy Legal Service

Established in 1972, Fitzroy Legal Service ('FLS') is Victoria's longest standing community legal centre championing justice for the most marginalised members of our community. With deep commitment to community-driven change, we provide individuals and communities with access to justice when they need it most, and boldly agitate for high-impact policy and legislative reforms.

FLS has supported our communities to navigate family law and family violence legal systems for decades, with a substantive practice now including five family law and family violence Health Justice Partnerships across the local government areas of Yarra and Darebin, monthly divorce clinics, and duty lawyer services at the Neighbourhood Justice Centre in Collingwood and the Heidelberg Magistrates' Court's Specialist Family Violence Court. We provide high quality free legal services, including legal advice and representation, to both victim-survivors of family violence and people who engage in or use gender-based violence.

Introduction

FLS welcomes the parliamentary inquiry into family violence orders following a referral from the Attorney-General, the Hon Mark Dreyfus KC MP. We are encouraged by the Commonwealth Government's continued interest in reviewing the family law system to ensure adequate protections are offered to those affected by abuse and violence.

FLS does not seek to respond to every matter contained within the terms of reference, but rather to provide commentary and feedback on matters to which we have a specific response or recommendation as to how the family law system can be enhanced to support those affected by family violence.

We are grateful to our clients for trusting us with their stories and we acknowledge the victim-survivors of gender-based violence we work closely with, whose voices and experiences inform our advocacy for justice. The case samples in this submission are drawn from our legal practice. All identifying details have been changed or omitted, including by not using their real names.

Term of Reference 1: The risk of an escalation in the aggressive and violent behaviour of the perpetrator and heightened risk to the partner and children during family court proceedings.

FLS regularly assist clients who face significant escalations of family violence risk during family court proceedings. This escalation can occur for many reasons, including the adversarial nature of family law proceedings; perpetrators of violence feeling like they are losing control of the situation; the need to have continued contact between victim-survivors and perpetrators due to court hearings, mediation conferences and sessions with report writers; and the sensitive and personal nature of evidence that is produced throughout litigation.

The ability of victim-survivors to manage this escalation of risk is particularly complicated by the fact that many victim-survivors are still unrepresented in the family law courts due to the cost of private legal assistance and limited access to legal aid or assistance from a community legal centre. Self-represented victim-survivors often do not know how to provide evidence to the court regarding family violence, particularly in instances where the violence is not of a physical nature.

In our experience, many victim-survivors feel they are forced to manage this risk by either not commencing family court proceedings when they should; not responding to or engaging in proceedings brought by the perpetrator; or agreeing to consent orders that are not safe for the children and/or

themselves in order to avoid the likely escalation of violence if court proceedings continue. These limited options all risk keeping the victim-survivor and/or their children in unsafe circumstances, highlighting the critical need for legal assistance to be available to support victim-survivors navigate their family law matters and ensure family violence risk is appropriately and sufficiently addressed.

Our casework experience is in line with research findings that consistently demonstrate that the risk of family violence is highest during relationship separation, particularly for those involved in Federal Circuit and Family Court of Australia (FCFCoA) disputes.¹ While we recognise that Victoria's Multi-Agency Risk Assessment and Management Framework already includes family court proceedings as a risk factor that can increase the risk of family violence escalating,² we would support the inclusion of family law proceedings as a risk factor in Victoria's *Family Violence Protection Act* when determining the risk respondents pose to victim-survivors and the appropriate length of any protection order.

The escalation in family violence can also be through the family court system itself, and we have often seen how perpetrators use the legal system as a tool for perpetrating further violence against victim-survivors through many forms of systems abuse. The below case study demonstrates the variety of systems abuse tactics a perpetrator may use to harass and traumatise victim-survivors.

Bai's story – family law proceedings as a form of abuse

Bai and her children had experienced significant family violence at the hands of the children's father Michael*, including sexual, physical, emotional and financial abuse. A final [REDACTED] Family Violence Intervention Order ('FVIO') was in place to protect her and her children.*

While Bai hoped that the finalisation of family law proceedings would bring a period of safety for her and her children, Michael was able to use the system to perpetrate ongoing violence against her for years.

After final parenting orders were made, Michael filled numerous applications in both the FCFCoA and Magistrates' Court in order to maintain contact with Bai and force her to use her limited resources responding to these applications.

Michael applied for a FVIO against Bai, which was struck out. He then appealed this decision and the matter progressed to a final contested hearing. At this hearing, before the application was refused by the court, Bai had to endure cross examination, which was incredibly traumatising for her.

Michael then made multiple enforcement and contravention applications in relating to the Parenting Orders, alleging that Bai had not been complying with the order. The alleged non-compliances were minor and, after having to endure numerous court hearings over a period of [REDACTED], all the while prolonging contact between Bai and Michael and causing Bai extreme emotional distress and fear, these matters were resolved by consent.

¹ ANROWS, 'Family violence triage in family courts: Safety, efficacy and benefit'. Available at: Family violence triage in family courts: Safety, efficacy and benefit - ANROWS - Australia's National Research Organisation for Women's Safety; McCulloch, J., Maher, J., Fitz-Gibbon, K., Segrave, M., Roffee, J., (2016) Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF). Available at: review-of-craf-final-report.pdf (monash.edu).

² Victorian Government, 'Evidence-based risk factors and the MARAM risk assessment tools'. Available at: Evidence-based risk factors and the MARAM risk assessment tools | vic.gov.au (www.vic.gov.au)

Michael then filed an initiating application seeking to vary the final parenting orders. Despite Michael not having established any significant change in circumstances to warrant the Court hearing this application, the matter was listed to be heard and progressed slowly through the court system [REDACTED] before being rejected.

During this [REDACTED] period, Michael repeatedly failed to comply with court orders or file documents on time, resulting in further delays and adjournments that prolonged the process and maintained his contact with Bai. During the proceedings Michael often acted in an intimidating way towards Bai and would file documents containing baseless accusations about her, which was extremely traumatising for Bai.

For Bai, family law proceedings meant a significant escalation in Michael's violence towards her through the abuse of the court system.

**This case has been de-identified, including by not using their real names.*

Bai's story highlights the many ways perpetrators use systems abuse against victim-survivors, including:

- The perpetrator making numerous applications to the Court, in particular contravention applications;
- Frustrating or delaying the proceedings by failing to file court documents in a timely manner;
- Filing Court documents that contain irrelevant material designed to deliberately traumatise, embarrass or harass a party;
- Failing to comply with court orders, such as ignoring requests or orders to make financial disclosure; and
- Using abusive, threatening or intimidating conduct in Court hearings.

Through our experience in providing legal assistance to both victim-survivors and perpetrators of violence, it is our belief that ensuring adequate and accessible legal representation for both parties can reduce, but not eliminate, the risk of system abuse.

For victim-survivors, it can provide them with much needed support in navigating numerous applications made by the perpetrator and reduce contact between the parties by ensuring all communication goes through their lawyers. For those who use violence, lawyers can play an important role in seeking to limit vexatious applications, supporting the compliance with court orders and filing deadlines to avoid unnecessary delays, and providing legal advice to promote timely resolutions by consent when the client has limited prospects of success.

Recommendations

- 1. Increase funding to community legal centres to ensure that legal assistance is available to help victim-survivors to navigate the family law system and ensure family violence risk is appropriately addressed.**
- 2. Increase funding to community legal centres to ensure that legal assistance is available to those who use violence, to promote ethical engagements with the family law system and discourage systems abuse.**
- 3. Increased education and training for courts, lawyers, and service providers on how to recognise and appropriately respond to systems abuse in family court proceedings.**

Term of Reference 2: The current barriers for litigants in the family law system to obtain and enforce FVIOs, including but not limited to:

a. the additional difficulty for victims of violence in the family law system to attend multiple courts for their family law order proceedings and an FVIO

In our experience, the difficulties experienced by victim-survivors in the family law system is caused more by the lack of efficient information sharing between the two courts than by matters being located in separate courts.

The FCFCoA and the Magistrates' Court operate in fundamentally different ways. The Magistrates' Court is a high-volume and highly responsive jurisdiction. For example, FLS provides a duty lawyer service at Heidelberg Magistrates' Court, which is a specialist family violence court. This court will list approximately 50 matters per day and are able to list matters urgently. Parties who seek a FVIO on an urgent basis will generally have a hearing within a week of filing an application. At times, an urgent interim FVIO can be heard on the same day that an application is filled with the Court.

At the FCFCoA, it takes a substantially longer time to obtain a hearing date after an application is filed, with the Central Practice Directions indicating one to two months wait time for a first hearing. An application for an urgent hearing is available, however, urgent hearings are granted at a Court Registrar's discretion and are dependent on the Court's capacity.

These vast differences in jurisdiction and nature of the courts' functionalities are likely to only add to the stress and confusion of victim-survivors, particularly on hearing days where they could be confused about the purpose and nature of the court hearing they are attending.

Instead of co-location, the two courts should have a comprehensive information sharing system so that if an application is lodged in one Court, the other Court has access to that information. For example, if an Applicant was to apply for parenting orders at the FCFCoA, and there was FVIO proceedings on foot in the Magistrates' Court, the Magistrates' Court would be notified, and the Magistrate could access the FCFCoA file before and during the Magistrates' Court hearing.

This system would help to enhance information sharing, save the courts and both parties resources, and lead to better outcomes for court users. Given how interlinked family violence and family law matters are, many documents filed, obtained or subpoenaed will likely be relevant for both proceedings. For example, if one party is denying the allegations of family violence, a decision maker would be able to access relevant information about this from the court file, saving the victim-survivor from having to reproduce evidence. This would decrease the stress and confusion of the victim-survivor, as this would lessen the likelihood of them having to retell their story multiple times and would reduce risks of re-traumatisation.

Recommendations:

- 1. That a comprehensive information sharing system be implemented across family law and family violence jurisdictions, allowing for files to be accessed by decision makers from both courts when needed**

b. the intersection between FVIOs and parenting orders, including that a family court parenting order may override an FVIO

FVIOs regularly need to be obtained quickly and efficiently as possible. The purpose of an interim family violence intervention order is to provide immediate protection to the victim-survivors and their children. If children are involved, the Magistrate must consider any children to an order and, if those children have been exposed, include the children on the order. For example, if the FVIO prohibits the Respondent from being within five metres of the protected person/s, this would mean that the Respondent would not be able to approach a child to the relationship. This is how FVIOs function to provide immediate and vital protection to children as well as their primary caregivers.

This protection is particularly necessary in family violence cases where the children are at risk of being abducted, as was the case in the following case study.

Li Jie's story – the need for immediate protection for children

After her and her young child experienced family violence from her partner, Tan, Li Jie* was able to escape with her child. Tan initially showed no interest in spending time with the child, but then one day, without telling Li Jie [REDACTED] Tan collected the child [REDACTED]*

Li Jie was very distressed when she found out and, while the child was eventually returned, she was afraid that there was nothing to stop Tan doing this again and potentially hurting the child. FLS assisted Li Jie to obtain a FVIO to provide immediate protection for her and her child, to prevent the child from being abducted by Tan again in the future.

With this immediate protection in place, Li Jie was able to feel a degree of safety while FLS assisted her with an application for parenting orders to the FCFCoA.

**This case has been de-identified, including by not using their real names.*

Li Jie's story perfectly illustrates the effectiveness of FVIO proceedings to provide fast and effective protection for children against family violence. It also highlights how, once that immediate safety is provided, family court proceedings are required to determine final child arrangements.

Interim FVIO applications are regularly heard on an *ex-parte* basis. This is due to the risk of escalation in violence, if the perpetrator knows that the victim survivor is seeking assistance and/or legal protection. Interim FVIOs should not be used to determine what time a child spends with their parents in the long term.

The FCFCoA has the relevant expertise to determine whether a child should spend time with each of the parents. The enactment of the new section 60CC puts the safety of the child and the parent of the child as a key consideration when the court is deciding spend time arrangements. Child experts are usually engaged, who can provide reports and recommendations about spend time arrangements.

It is therefore appropriate that a family law court order can override a FVIO order insofar as there are inconsistencies, if the FCFCoA have determined this to be in the best interests of the child to do so.

If family violence or a safety issue occurs after family law parenting orders have been made, section 68R of the *Family Law Act 1975* gives the Magistrates' Court the power to revive, vary, discharge or suspend an existing parenting order to ensure the safety of the child is prioritised.

This power is a necessary stopgap in instances of an extreme escalation in violence, as it can take months to have a hearing date in the FCFCoA to vary parenting orders. Despite the existence of the *Evatt*

List, which was specifically created to fast-stream complex matters considered to be high risk and provide timely court events, it is our experience that matters are still often not listed until at least a month later – even in instances where urgent interlocutory applications have been made. Such a delay can have devastating consequences for victim survivors who are then forced to consider withholding the child and risk the perpetrator filing contravention proceedings against them.

It should, however, also be noted that we have witnessed section 68R being used as a form of systems abuse against victim-survivors. This may occur where perpetrators seek to vary parenting orders, by applying for a FVIO against victim-survivors concerning the safety of the children, and forcing the victim-survivor to spend time and resources responding to the application that is often listed for immediate hearings.

In balancing the expertise of the FCFCoA to determine whether and how much time a child should spend with each parent, and the need to prevent instances of systems abuse, with the need for FVIOs to be able to respond quickly to escalating instances of family violence to keep children safe, we believe section 68R should be used as a measure of last resort and a stopgap until the FCFCoA can fully re-evaluate the matter and determine ongoing parenting arrangements.

Recommendations

- 1. State and territory courts should continue to be the primary jurisdiction for FVIOs.**
- 2. That family court parenting orders continue to be able to override FVIOs.**
- 3. Increased education should be provided for Magistrates and legal practitioners so they understand when to use section 68R in appropriate circumstances to vary, suspend or discharge inconsistent parenting orders.**
- 4. Increased capacity and resourcing should be provided to the FCFCoA to allow it to better respond to urgent applicants and fast-stream high risk cases in a more timely manner.**