

# SUBMISSION TO THE VICTORIAN ROYAL COMMISSION INTO FAMILY VIOLENCE

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*FOOTSCRAY COMMUNITY LEGAL CENTRE INC.*

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Footscray Community Legal Centre Inc. (**FCLC**) is pleased to respond to the Victorian Government's call for submissions to the Royal Commission into Family Violence. FCLC is submitting in relation to the Victorian justice system's response to dealing with family violence, specifically in regards to the experience of victims in the justice system.

All questions or comments in the first instance should be directed to:

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## Introduction

Footscray Community Legal Centre Inc. (**FCLC**) is a non profit, non government organisation managed by the local community. Established in 1982 as a pilot poverty law practice, the Centre's mission is to address systemic injustice by providing free legal and financial counselling services through casework and more broadly through community education, law reform and advocacy.

Core funding for the legal services of FCLC is received from the Commonwealth and State governments. FCLC also receives funding from philanthropic and other sources. Volunteers have been an integral part of the operation of the service since its inception and continue to be an important resource providing input to the day and night services, as well as making up the Committee of Management.

The Western suburbs of Melbourne are home to a diverse range of new and emerging communities. FCLC has a long history of working with these communities. Over the past five years, more than 45% of our clients spoke a language other than English as their first language. We have developed specialty advisory services and education programs that address the particular legal and social problems encountered by newly arrived communities.

As well as operating a family violence duty lawyer service at Sunshine Magistrates' Court, FCLC also attends the Sunshine Family Relation Centre to provide family law legal assistance.

The lawyers who attend the family violence duty service provide legal assistance predominantly to applicants or Aggrieved Family Members (AFM) on the two listing days of Tuesday and Wednesday. Tuesday's list is predominantly hearings of family violence intervention order applications taken out by individuals. Conversely, Wednesday's list is largely police initiated applications. As well as providing legal assistance at the court, lawyers also (to the degree that they are able to due to capacity issues) will work with local family violence agencies, and in particular refugee groups, to provide a range of other services including assistance with tenancy and VOCAT matters.

FCLC makes submission on the basis of extensive experience with representing clients applying for, or responding to, family violence intervention orders in the Magistrates' Courts, pursuant to the *Family Violence Protection Act 2008 (Vic)*.

The focus of our submissions will be to tease out the issues that have arisen from our experience in the Sunshine Magistrates' Court, but also our observations and reports from clients of the policing process in the Western Region.

## Recommendations

- Greater emphasis on early triage for family violence intervention order matters being dealt with by the Victorian Magistrates' Court, ensuring priority to victims where there is greater risk of violence.
- Applicants should be provided with legal advice and support before the first mention date so that they have better opportunity to understand their legal and other options. We propose better resourcing of CLC's and the enhancement of the referral protocols utilised by the Magistrates' Courts when dealing with matters of family violence.
- Where a cross application is made, the magistrate must be satisfied that grounds exist for both orders before making mutual orders. This is the system operating in New Zealand."<sup>1</sup>
- FCLC submit that s.63 of the *Family Violence Protection Act 2008*, which allows any number of FVIO applications to be heard together "where it is the interests of justice to do so", be amended to include the above condition.
- Where a cross application is made, that it be mandatory that a magistrate must be satisfied that grounds exist for both orders before making mutual orders. Therefore s.63 of the *Family Violence Protection Act 2008*, which allows any number of FVIO applications to be heard together "where it is the interests of justice to do so", be amended to include the above condition.
- There is greater scrutiny of cross-applications at the application stage. As part of family violence training with registrars and Magistrates, the gendered nature of family violence should be emphasised, with particular focus on how the court system itself can be used by perpetrators to further abuse. FCLC also submits that there should be further practice directions issued to ensure that cross-applications of this nature are able to be administratively struck out.
- Improved communication and coordination between the numerous stakeholders dealing with family violence matters, to ensure that matters of family violence are dealt with consistently and efficiently by the Victorian court system;
- Greater consistency in the Judiciary's approach to matters of family violence; and
- Independent auditing of Victoria Police's compliance with the *Code of Practice for the Investigation of Family Violence*.<sup>2</sup>

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<sup>1</sup> Ibid, p.282.

<sup>2</sup> Victoria Police, *Code of Practice for the Investigation of Family Violence*, 3<sup>rd</sup> edition, 2014.

- Increased funding for the provision of further family violence lawyers in Community Legal Centres (CLCs) to enable the follow-up family law and other legal support required to provide holistic support to victims of family violence, to ensure accountability of perpetrators of family violence and compliance by police to provide greater protection for victims, and to lessen future family violence in our community;

## Issues

### 1. The Magistrates' Court Process

#### 1.1 Lack of an early intervention and triage system

FCLC sees a huge variation in the nature of allegations as outlined in Family Violence Intervention Order (FVIO) applications by both police and individuals. As a generalisation, the applications are dealt with in the same way. Differences may include matters where an interim order is required at the application stage, where there are allegations of serious violence or where a victim has identified significant fear for their safety. In these cases, other court support services, including a women's applicant support worker, are available to be utilised and remote facilities ensured for the victims. However, on any given day the court will be dealing with in excess of 50 matters. The duty lawyers may meet with 5 to 10 clients, some where there are cross-applications. Further, neither duty lawyers nor the court attends to applicants in order of priority of need, but rather on a 'first come, first served' basis, except where a client requires an interpreter.

In some courts, duty lawyers, registrars and court support services meet first thing in the morning to identify and prioritise high need cases. However, this practice has become less attractive as courts struggle to deal with the enormous increase in listings. In 2013-2014, there were 35,135 family violence intervention orders finalised by the Magistrates' Court of Victoria.<sup>3</sup> This contributed to an overall increase of 83 per cent of orders finalised over the past 10 years<sup>4</sup> - clear evidence of increasing pressure on the Victorian justice system.

An alternative and preferred model would be that as described of the Neighbourhood Justice Centre: "Though the NJC operates a dedicated family violence list one day a week like many other courts, matters are triaged on the papers (to the extent that this is possible) on the day beforehand. A co-ordination meeting between agencies enables treatment and service requirements to be

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<sup>3</sup> The Magistrates' Court of Victoria, *Annual Report:2013-2014*, p.68.

<sup>4</sup> *Ibid*, p.68.

identified, with matters then attended to according to immediate need, rather than according to the customary listing practices of most courts”.<sup>5</sup>

To manage the ever increasing rate of FVIO matters being dealt with by the Magistrate’s Court of Victoria, FCLC submits that there is a need for a better triaging process at the front ends of the court in-take process so that:

- a) High risk applicants are immediately identified and provided with a priority service (including urgent referral for support, housing, financial and legal advice) prior to their next hearing. This would ensure from a legal perspective that all relevant evidence is available at the first mention so as to facilitate more effective negotiations with the respondent, assist with identifying matters requiring the need for potential Urgent Financial Assistance for safety related expenses for VOCAT applications (which can then be prepared and made at the first mention), and most importantly that the victim’s safety is ensured.
- b) Lower risk applicants are identified and their matters adjourned to enable access to services, such as (in the case of parenting disputes) urgent family dispute mediation, before the next court date. This may assist with a resolution to ongoing conflict and minimise the potential for family violence, and at the same time effectively take pressure off the already burdened court system.

FCLC submits that a more sophisticated triage process would result in a better integrated system between the family violence court system and other support services.

## **1.2 Protection of victims in the Magistrates’ Court process**

### **1.2.1 General comments**

Many have written about victim’s experience in the family violence lists of the Magistrates’ Court. In a recent report by Loddon Campaspe Community Legal Centre on women experiencing family violence in regional Victoria, those surveyed reported that they found the court process daunting due to not being adequately informed, not feeling understood by the court staff, lawyers and magistrates, not feeling safe and feeling emotionally overwhelmed. The women also found that they were not given sufficient time to feel comfortable to disclose their lived experience and rationally analyse their and their children’s options to make informed decisions.<sup>6</sup>

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<sup>5</sup> Centre for Innovative Justice, *Opportunities for Early Intervention: Bringing perpetrators of family violence into view, March 2015*, p.54.

<sup>6</sup> Loddon Campaspe Community Legal Centre, *Will somebody listen to me? Insight, actions and hope for women experiencing family violence in regional Victoria (Summary Report)*, April 2015, p.17.

Anecdotal reports to FCLS confirm that clients in metropolitan courts also have the same experiences. Notwithstanding the dedication of the duty lawyers, court staff and magistrates, the extended court lists and environment of court do little to provide victims of family violence with the support that they need to ensure the safety of themselves and their children. We applaud the Magistrates' Court of Victoria for its 'Response to Family violence: 2015-2017'<sup>7</sup> strategic overview, which will see the development of improvements to the court environment and procedures enhancing safety and security of applicants.

FCLC submit that, ideally, applicants should also be provided with legal advice and support before the first mention date so that they have better opportunity to understand their legal and other options. We propose better resourcing of CLC's and the enhancement of the referral protocols utilised by the Magistrates' Courts when dealing with matters of family violence.

### **1.2.2 Cross Applications**

FCLC has noticed an increase in the number of FVIO applications taken out against women by police, either when they attend an incident and take out applications on behalf of both parties, and where they only initiate an application against the female partner. In the last year, FCLC saw 68 clients out of 487 total clients where the client was both the respondent and the applicant. This phenomenon has also been more broadly noted. Women's Legal Service NSW research found that where their female clients were the respondents to protection orders, 87.5% were cases where the police had made the application.<sup>8</sup>

As well as applications being made by police not in compliance with Victoria Police's Code of Conduct (see below), applications are often made by respondents in a vexatious manner. Douglas and Fitzgerald, in their 2013 journal article 'Legal Processes and Gendered Violence: Cross-applications for domestic violence protection orders' stated that "research shows that, in some cases, [FVIOs] are used as a strategy on the part of the abuser to further abuse."<sup>9</sup> Further, some research suggests that police may often support both parties in applying for protection orders as a "simple and quick way to finalise their involvement in complex cases of domestic violence".<sup>10</sup>

In 2006, the Victorian Law Reform Commission identified concerns about the use of cross-applications, recommending that cross-applications should always be considered individually on

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<sup>7</sup> Magistrates' Court, 'Response to Family violence: 2015-2017', 2014, p.1.

<sup>8</sup> Women's Legal Service NSW, *Women Defendants to AVOS: What is their experience of the justice system?* pg. 12.

<sup>9</sup> H. Douglas and R. Fitzgerald, *Legal processes and gendered violence: Cross-applications for Domestic Violence Protection Orders* UNSW Law Journal, Vol 36(1,) 2013, p.61.

<sup>10</sup> *Ibid*, p.71.



their merits, and cross-orders should never be made by consent.<sup>11</sup> The report recommended that “where a cross application is made, the magistrate must be satisfied that grounds exist for both orders before making mutual orders. This is the system operating in New Zealand.”<sup>12</sup>

FCLC submit that s.63 of the *Family Violence Protection Act 2008*, which allows any number of FVIO applications to be heard together “where it is the interests of justice to do so”, be amended to include the above condition.

We further submit that greater scrutiny of cross-applications at the application stage is required in order to prevent unnecessary retaliatory applications. As part of family violence training with registrars and Magistrates, the gendered nature of family violence should be emphasised, with particular focus on how the court system itself can be used by perpetrators to further abuse. FCLC also submits that there should be further practice directions issued to ensure that cross-applications of this nature are able to be administratively struck out.

### ***1.2.3 Applications to Vary or Extend Orders***

FCLC has observed that where applications to vary or extend orders are made, they are often dealt with by the court with some confusion. FCLC believes that this is because the ‘Application to Vary or Extend an Intervention Order’ form is too limited. The form needs to be amended to enable the applicant to indicate whether an interim order is required, if/when the current order expires.

FCLC submits that, where an application to extend an order is made, that there be a rebuttable presumption that an interim order is required, overturning the common held view by the magistracy that an interim order is not required if no breach has occurred during the time that the previous order was in force. A more rational and informed view would be that the previous order had been successful in ensuring the safety of the victim.

FCLC also submits that magistrates should be more willing, in cases where intervention orders have been successfully made in the past, to hear applications for indefinite orders (even if this means that the application will proceed to a contested hearing), so as to give greater long-term protection to applicants and decrease the amount of ongoing contact an applicant must have with the courts to ensure their own protection.

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<sup>11</sup> Victorian Law Reform Commission, *Review of Family Violence: Report* (2006), p.282.

<sup>12</sup> *Ibid*, p.282.

### 1.3 Inconsistency with the way magistrates deal with family violence matters

FCLC has become increasingly concerned at the noticeable difference in the way family violence intervention orders are dealt with by various members of the Magistrates' Court. Some magistrates spend time understanding the social circumstances of the parties and the appropriate conditions that should be made, including possible therapeutic conditions for respondents. Alternatively, other magistrates deal summarily with parties.

As noted by George and Harris, in 'Landscapes of violence: Women surviving family violence in rural and regional Victoria', "in recent years magistrates' training has considered the social context, nature and impacts of family violence. However, although there are specialist family violence courts and divisions, the majority of FVIO applicants see a magistrate whose specialist focus is not family violence. Magistrates were often presiding over lengthy FVIO court lists; there could be up to 70 intervention orders listed. Discussing this heavy workload, one family violence worker remarked that in an ideal world they would have twenty-five [FV]IOs before them, not sixty-eight, because magistrates should know what's really happening in each family so that effectively they can case manage from the bench."<sup>13</sup>

This differing approach by members of the magistracy causes concern in relation to matters being dealt with consistently throughout the court system, and creates the possibility of matters being inadequately dealt with.

FCLC notes that the Magistrates' Court Family Violence Court Division is located at Ballarat and Heidelberg only. This division provides additional specialist staff and support services in relation to family violence matters. While Specialist Family Violence Services are also run out of the Melbourne, Frankston and Sunshine/Werribee Magistrates' Courts, and share most of the features of the Division, these specialist services do not have a legislative base. Magistrates who hear matters in these courts do not have the power to order respondents to attend programs such as a mandated men's behaviour change program. They may include a 'referral condition' within an order, but the respondent can not be compelled to comply, nor can they be charged with breach should they fail to attend.<sup>14</sup>

It is FCLC's submission that:

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<sup>13</sup> A. George and B. Harris, *Landscapes of violence: Women surviving family violence in rural and regional Victoria*, Deakin University School of Law's Centre for Regional Law and Justice, 2014, p.89-90.

<sup>14</sup> Judicial College of Victoria, *Family Violence Bench Book*, Sect. 2.2.3.5.

- the number of matters listed should be shortened so that Magistrates have sufficient time to properly hear and question the party's circumstances;
- there be statutory changes to allow all magistrates to incorporate mandatory conditions of therapeutic intervention, such as family mediation or counselling, into the orders they make;
- all magistrates be trained on the benefits of therapeutic interventions; and
- There be an expansion of therapeutic programs such as CISP to refer family violence respondent's to.

## 2. Improved communications and coordination between stakeholders

FCLC submits that there is a need for improved communication and coordination between the numerous stakeholders dealing with family violence matters, to ensure that matters of family violence are dealt with consistently and efficiently by the Victorian justice system.

### 2.1 Victoria Police

The Victoria Police 'Code of Practice for the Investigation of Family Violence' sets out the criteria for risk assessment and identification of the primary aggressor, explicitly stating that "only one primary aggressor should be identified. Do not make cross applications for intervention orders."<sup>15</sup> Yet, it would appear that a common approach by Victoria Police officers is to initiate cross-applications where there is uncertainty as to who is the primary victim in a domestic violence incident, resulting in an increased number of unmeritorious applications, and a drain on court and legal services.

Women's Legal Services NSW, in their report 'Women Defendants to AVOS: What is their experience of the justice system?', found that of their 93 women clients who defended Apprehended Domestic Violence Orders (AVO's) in 2010, over two-thirds of these women reported that they were the victims of violence in their relationships. Of these women clients, only 39% had final orders made against them, suggesting that a great number of these applications were inappropriately brought against the defendants.<sup>16</sup>

FCLC recommends that Victoria Police ensure that all officers who deal with matters of family violence are provided with ongoing education as to what constitutes 'family violence' for the purposes of the Act, including developing a greater understanding as to the overwhelming evidence

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<sup>15</sup> Victoria Police, *Code of Practice for the Investigation of Family Violence*, 3<sup>rd</sup> edition, 2014, p.17.

<sup>16</sup> Women's Legal Services NSW, *Women Defendants to AVOS: What is their experience of the justice system?* March 2014, p.15.

of the gendered nature of family violence.<sup>17</sup> especially where cross-applications are initiated, to ensure that officers are taking the time to correctly identify the primary aggressor and are proficient in Victoria Police's policies and procedures around risk assessment.

FCLC also recommend that there be annual independent auditing of the Victoria Police 's compliance with Victoria Police's 'Code of Practice for the Investigation of Family Violence',

FCLC has also had many complaints regarding the reporting of breaches of Intervention orders and the lack of police responses.

## **2.2 Family Relationship Centres**

FCLC has noticed reluctance by Family Relationship Centre (FRC's) to take on matters where family violence is flagged as an issue, but where proper management of the family law issues in dispute may result in ongoing violence being prevented. This can be seen in matters such as disputes over child contact, where the inability of two parents to resolve their dispute is the catalyst for increasing anger and aggression between the parties. FCLC submits that where matters of this nature are provided with appropriate family law legal assistance, at the early stages of a dispute, the risk of family violence decreases markedly. Unfortunately, FRC's are generally not open to taking on matters where violence has occurred, even if that violence hasn't been committed on a long-term basis.

FCLC proposes that all FRC's provide specialist assistance for matters where low level family violence has been raised as an issue, but where the matter has been assessed as having a high likelihood of resolution where appropriate family law assistance and relationship counselling can be provided.

## **2.3 Victoria Legal Aid**

FCLC has witnessed issues in relation to 'last minute' conflict checks performed by Victoria Legal Aid (VLA's) and vagueness in regard to VLA's conflict policy in relation to the Family Violence area. Where a client can not be represented by VLA, this often results in late referrals to CLC's, or worse, no legal representation for that client at all. It is submitted that early conflict checks (preferably the day before) enable a new lawyer to take carriage of the matter in good time to speak with the client and obtain meaningful instructions in relation to their appearance. This results in a more efficient use of court time, with less need for adjournments.

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<sup>17</sup> The Senate Finance and Public Administration References Committee, *Domestic Violence in Australia – Interim Report*, March 2015, p.2.

Greater engagement by VLA with the State's CLCs would improve service provision for parties to family violence applications, ensuring that conflicts of interest are not a barrier to receiving appropriate legal advice and representation in a timely manner, and also ensuring that family violence duty lawyer assistance is predominately provided by lawyers who are experienced in the provision of that service.

### **3. Lack of sufficient funding for family violence lawyer programs**

FCLC currently receives limited funding to provide duty lawyers to the Sunshine Magistrates' Court Family Violence List. Duty lawyers can meet with up to 10 clients per day, but have limited capacity to follow up on these clients after their day in court.

There is a great need for increased funding for the provision of family violence lawyers in CLC's, in order to provide the follow up family law advice and casework, Victims of Compensation casework, support for victims to report breaches and follow up on these reports, and other legal support required by a client. This would ensure that a holistic legal service is provided to victims of family violence and that perpetrators of family violence are held more accountable, ensuring further protection of victims and the lessening of future family violence.

FCLC further submit that there be funding for a debriefing/supervision program in line with that of Family violence services for community lawyers in recognition of the cost to CLC's of the vicarious trauma experienced by family violence lawyers and the impact that this has on the turnover of lawyers.

## **Conclusion**

While FCLC welcomes the Victorian Government's Royal Commission into Family Violence, we would like to acknowledge the extensive research that has already been done on family violence, and the clear evidence in relation to the increase of family violence intervention order applications in recent years.

FCLC recommends that an increase in funding be provided by the State and Commonwealth governments for the provision of further family violence lawyers in CLC's, to match the increase in family violence matters reaching the Magistrates' Court. This would enable applicants and respondents to access more comprehensive legal support, facilitate a smoother running of court services and more efficient triaging of family violence matters.

FCLC would also welcome improved communication, and greater continuity in approach, between the numerous stakeholders dealing with family violence, from the police who initiate applications, the lawyers and support staff who support the progression of the matters through the court system, and finally with the magistrates who hear the matters.

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