

6. FAMILY DIV'N – INTERVENTION ORDERS

LEGISLATION

PSIA: Personal Safety Intervention Orders Act 2010 (Vic)	[No.53/2010]
FVPA: Family Violence Protection Act 2008 (Vic)	[No.52/2008]
SIOA: Stalking Intervention Orders Act 2008 (Vic)	[No.68/2008]
VPA: Vexatious Proceedings Act 2014 (Vic)	[No.53/2014]
DVOA: National Domestic Violence Order Scheme Act 2016 (Vic)	[No.53/2016]
CYFA: Children, Youth and Families Act 2005 (Vic)	[No.96/2005]
CFVA: Crimes (Family Violence) Act 1987 (Vic)	[No.19/1987]
FLA: Family Law Act 1975 (Cth)	[No.53/1975]

REGULATIONS & RULES

PSIR: Personal Safety Intervention Orders Regulations 2011	[No. 89/2011]
FVPR: Family Violence Protection Regulations 2018	[No.161/2018]
CPSR: Children's Court (Personal Safety Intervention Orders) Rules 2011	[No. 94/2011]
CFVR: Children's Court (Family Violence Protection) Rules 2018	[No.169/2018]
CATR: Children's Court Authentication & Electronic Transmission Rules 2020	[No.126/2020]

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Some of the material in this chapter is taken from a paper dated 17/10/2008 entitled "Family Violence Protection Act 2008 – An Overview of the Changes" by Magistrate Lamble and from a paper dated 28/07/2011 entitled "Family Violence and Criminal Cases in the Magistrates' Court" by Magistrate Lamble & Catherine Caruana.

6. GENERAL PROVISIONS RELATING TO INTERVENTION ORDERS

6.1 Intervention Order

An intervention order is a court order that imposes prohibitions, restrictions or other obligations on a person ('the respondent') who-

- has used or threatened violence towards another person or his or her property or has committed prohibited behaviour against a person ('the victim'); and
- is likely to continue to do so or to do so again.

The primary purpose of an intervention order is to regulate future conduct of the respondent and in family violence cases future conduct of one or more associated respondents:

- towards the victim; and/or
- in relation to children who are likely to be subjected to such conduct; and/or
- in family violence cases - towards one or more associated victims.

It is important to note that a court cannot make an intervention order unless it is satisfied on the balance of probabilities of two matters, one past, one future-

- 1. There has already been certain proscribed conduct by the respondent towards the victim; and**
- 2. Proscribed conduct is likely to continue or to occur again.**

6.1.1 Powers of court until 07/12/2008 derive from the CFVA

Until 07/12/2007 a court's power to make, vary, extend or revoke an intervention order or an interim intervention order derived from the Crimes (Family Violence) Act 1987 (Vic) [No.19/1987] [as amended] ('the CFVA') and from s.21A(5) of the Crimes Act 1958 (Vic) [No.6231] [as amended by s.3 of Act No.95/1994].

6.1.2 Powers of court from 08/12/2008 derive from the FVPA and the SIOA/PSIA

On 08/12/2008 the CFVA was repealed and replaced-

- insofar as it relates to family violence intervention orders by the Family Violence Protection Act 2008 (Vic) [No.52/2008] ('the FVPA'); and
- insofar as it relates to non-family intervention orders by the Stalking Intervention Orders Act 2008 (Vic) [No.68/2008] ('the SIOA').

The repeal provision is in s.212 of the FVPA.

On 05/09/2011 the SIOA was itself repealed and replaced by the Personal Safety Intervention Orders Act 2010 (Vic) [No.53/2010] ('the PSIA'). The repeal provision is in s.186 of the PSIA.

A court's powers to make, vary, extend or revoke an intervention order or interim intervention order derive primarily from-

- ss.53, 74, 100, 106 & 107 of the FVPA; and
- ss.35, 61, 80, 83 & 84 of the PSIA.

There was a very significant difference between a court's procedures and powers under the FVPA and the SIOA. The procedures and powers under the FVPA and the PSIA are very much closer, the latter being substantially modelled on the former. When it is possible to do so without confusion, the writer has referred to related or identical provisions of the FVPA and the PSIA in the sub-chapters prefixed "6". Otherwise the writer has referred to specific FVPA provisions in sub-chapters prefixed "6FV" and to specific PSIA provisions in sub-chapters prefixed "6PS".

6.1.3 Transitional provisions in the FVPA and the PSIA

Broadly speaking, the effect of the transitional provisions in ss.212-218 & 220 of the FVPA is to deem intervention orders, interim intervention orders, counselling orders, applications and proceedings under the CFVA to be orders, applications and proceedings under the FVPA. The transitional provisions in ss.187-190 of the PSIA are to like effect.

Acts committed before the commencement day of the FVPA or the PSIA are relevant to proceedings under the legislation in question: s.221 of the FVPA and s.193 of the PSIA.

6.2 Jurisdiction of the Children's Court of Victoria

The Magistrates' Court has jurisdiction to hear and determine intervention order applications whether all the parties are adults, some are adults and some are children or all are children. Initially the Children's Court had no jurisdiction at all. Limited concurrent jurisdiction was initially granted to the Children's Court on 29/05/1990 and has since been extended but it still remains a limited jurisdiction.

6.2.1 Under the CFVA 01/12/1987 – 28/05/1990 & 29/05/1990 – 07/12/2008

Prior to 29/05/1990: The Children's Court had no jurisdiction to hear and determine applications for intervention orders. As originally enacted, s.4(1) of the CFVA conferred power on a 'court' to make an intervention order and 'Court' was defined in s.3 as "a Magistrates' Court". Section 7(c) of the CFVA provided that if the victim was a child, various persons could make a complaint for an intervention order on his or her behalf. It is clear that such a complaint was to be heard in the Magistrates' Court. There were no provisions in the CFVA referring to a child respondent.

From 29/05/1990: The CFVA was amended by the Crimes (Family Violence)(Amendment) Act 1990 (Vic) [No.17/1990], s.1 of which provided:

"(1) The main purposes of this Act are to amend the CFVA so as...(a) to confer concurrent jurisdiction under that Act on the Children's Court if either the aggrieved family member or the respondent is under the age of 18 years..."

While this gave the Children's Court a limited jurisdiction with respect to intervention orders, it also made it clear that the "transfer" provisions in ss.3A(2) & 3A(3) of the CFVA did not confer jurisdiction on the Children's Court to hear and determine any applications in which aggrieved family member/victim of stalking and respondent were both adults. The CFVA was revoked from 08/12/2008.

6.2.2 Current jurisdiction under the FVPA and the PSIA

Section 515(2) of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] ('the CYFA') provides that the jurisdiction of the Family Division of the Children's Court includes the jurisdiction given to the Family Division by the FVPA and the PSIA.

Section 234 of the FVPA and s.221 of the PSIA amend the definition of "child" in s.3(1) of the CYFA by adding:

"(aa) in the case of a proceeding under the FVPA, a person who is under the age of 18 years when an application is made under that Act;
(ab) in the case of a proceeding under the PSIA, a person who is under the age of 18 years when an application is made under that Act."

Section 146(1) of the FVPA and s.103(1) of the PSIA give the Children's Court and the Magistrates' Court concurrent jurisdiction to hear and determine an application under the respective Act if the affected family member/person, the protected person or the respondent is a child {i.e. under the age of 18 years} at the time the application is made. Sections 146(2) & 103(2) provide that if the respondent is a child the application should, if practicable, be dealt with by the Children's Court.

Section 147 of the FVPA and s.104 of the PSIA give the Children's Court additional concurrent power to deal with related applications and related orders involving adults. This welcome added jurisdiction was not available under the CFVA or the SIOA. These sections provide that if-

- (a) the Children's Court has jurisdiction to deal with an application because either the affected family member/person, the protected person or the respondent is a child at the time the application is made; and
- (b) the application has been made in or transferred to the Children's Court; and
- (c) an affected family member/person, protected person or respondent for a related application or a related order is an adult-

the Children's Court also has jurisdiction under the respective Act in relation to the related application or related order.

Sections 147(3) & 104(3) respectively define:

- a "related application" as an application for an order on the grounds of the same or similar circumstances, and includes an application to vary, revoke or extend an order;
- a "related order" as an order made on the grounds of the same or similar circumstances.

As from 01/12/2013 s.147A of the FVPA and s.104A of the PSIA give the Children's Court additional concurrent power to hear and determine an adult-adult intervention order application if there is a

related child protection proceeding. An intervention order application is related to a child protection proceeding if-

- (a) the child who is the subject of the child protection proceeding is the child of, or is under the care and supervision of, the affected person/family member or protected person or the respondent for the application; and
- (b) the application under the FVPA or PSIA raises issues relating to the safety of the child that are the same as, or similar to, the issues forming the basis for the child protection proceeding.

Section 149(1) of the FVPA gives a court jurisdiction to revoke, vary or extend a family violence intervention order or a counselling order made by it or any other court. Section 106(1) of the PSIA confers a similar power on a court to revoke, vary or extend a personal safety intervention order made by it or any other court. On their face, these sections are very broad and might be read as conferring jurisdiction on the Children's Court to revoke, vary or extend even if all of the parties involved are adults. However, the writer believes they must be read subject to ss.146-147A & ss.103-104A.

Further, under ss.149(2) & 149(3) of the FVPA and ss.106(2) & 106(3) of the PSIA, the Magistrates' Court or the Children's Court may revoke, vary or extend an intervention order confirmed or varied by the County Court or Supreme Court on appeal only if there are relevant new facts or circumstances.

6.2.3 Transfer of applications from Magistrates' Court to Children's Court or vice versa

If an application is made to the Magistrates' Court and that Court considers that in all the circumstances the matter should be dealt with in the Children's Court – or vice versa – the initial court may discontinue the proceeding and order that it be transferred to the other court: s.148 of the FVPA and s.105 of the PSIA.

Tracing the legislative history of these provisions back to ss.3A(2) & 3A(3) of the CFVA, the writer is of the strong view that ss.148 & 105 are merely transfer provisions. They do not confer power on the Magistrates' Court itself to confer jurisdiction on the Children's Court in any case which falls outside ss.146-147 & 149 of the FVPA or ss.103-104 & 106 of the PSIA.

It follows that the writer considers that-

- the Magistrates' Court has full jurisdiction to hear and determine any application under the FVPA or the PSIA;
- the Children's Court has concurrent jurisdiction under the FVPA or the PSIA only in the circumstances set out in ss.146-147 & 149 of the FVPA or ss.103-104 & 106 of the PSIA.

6.3 Concurrent criminal proceedings no bar to making intervention order

A court may make an intervention order, interim intervention order or counselling order in respect of a person even though the person has been charged with an offence arising out of the same conduct referred to in the application: s.155 of the FVPA and s.112 of the PSIA.

6.4 Proceedings for intervention orders are civil in nature

Proceedings for an intervention order are civil, not criminal, in nature: *YY v ZZ & Anor* [2013] VSC 743 at [45]; *Gunes v Pearson*; *Tunc v Pearson* (1996) 89 A Crim R 297; *Hickman v Smith & Anor* [2003] VSC 126 [MC14/03] at [17]-[19]; *Miles v Barca* [2003] VSC 376 at [23]; *Fisher v Fisher* [1988] VR 1028. Some of the changes in terminology in both the FVPA and the PSIA are intended to emphasize this. For example "applicant" replaces "complainant", "respondent" replaces "defendant", "contravention" replaces "breach".

6.5 Relationships between the FVPA and the PSIA

6.5.1 Concurrent applications may be heard together

Section 176B(1) of the FVPA and s.133(1) of the PSIA provide that any number of applications for personal safety intervention orders may be heard together with any number of applications under the FVPA for family violence intervention orders if the court considers that-

- (a) the applications are sufficiently related; and
- (b) it is appropriate for the applications to be heard together.

A decision to hear applications together may be made on the application of the applicants or the respondents or on the court's own initiative: s.176B(2) of the FVPA and s.133(2) of the PSIA.

6.5.2 Family violence intervention order/DVO to prevail in event of inconsistency

A family violence intervention order or a recognised DVO (within the meaning of the DVOA or a variation or extension thereof) prevails to the extent of any inconsistency with a personal safety intervention order: s.176C of the FVPA and s.134 of the PSIA.

6.5.3 Where applications under FVPA become applications under PSIA or vice versa

Division 2 of Part 8 of the PSIA [ss.135-148] deals with a court's procedures and powers where certain applications under the FVPA may be heard under the PSIA. The cornerstone is s.136 which provides:

- (1) This section applies to-
 - (a) a hearing of an application for a FV intervention order;
 - (b) a hearing of an application for a variation or revocation of an interim FV intervention order;
 - (c) a mention date in relation to any of the above proceedings.
- (2) If the court is satisfied that the affected family member and the respondent are not family members the court may-
 - (a) strike out the application for the FV intervention order; or
 - (b) determine to continue to hear the application as an application for a PS intervention order.
- (3) If the parties consent to the making of a determination under sub-section (2)(b), the court may make the determination without being satisfied that the affected family member and the respondent are family members.
- (4) The court may make more than one determination under sub-section (2)(b) during the proceeding.

Division 2 of Part 9A of the FVPA [ss.176D-176O] deals with a court's procedures and powers in the converse situation, namely where certain applications under the PSIA may be heard under the FVPA. The cornerstone is s.176E which is in effect the mirror image of s.136 of the PSIA.

These 'interchange provisions' do not apply to applications for variation, revocation or extension of a final intervention order or of a registered corresponding interstate order: s.176D of the FVPA and s.135 of the PSIA.

6.6 Relationships between the FVPA/PSIA and other Acts

6.6.1 "Best interests" principles in the CYFA are not mandatory

The Children's Court is not required to have regard to the "best interests" principles set out in ss.8-14 of the CYFA in making any decision or taking any action in the course of exercising jurisdiction given to it under the FVPA or the PSIA: s.172 of the FVPA and s.128 of the PSIA. These sections do not say that "the Court must not have regard to" the best interests principles. They merely say that "the Court is not required to have regard to [those] principles". While the writer understands why the best interests principles may usually not be able to be applied *in toto* to child respondents, it is difficult to see why they should ever need be displaced so far as children who are protected persons are concerned.

6.6.2 Intervention orders prevail over inconsistent child protection orders

A family violence intervention order or recognised DVO applies despite any child protection order: s.173(1) of the FVPA.

A personal safety intervention order applies despite any child protection order: s.129(1) of the PSIA.

If the Children's Court is hearing an application for a child protection order in relation to a child who is a protected person or respondent under an existing intervention order or recognised DVO, s.173(2) of the FVPA and s.129(2) of the PSIA provide a power to revoke or vary, on the court's own initiative, the intervention order to the extent it would be inconsistent with the order the court proposes to make under the CYFA.

In *DOHS v Mr D & Ms W* [Children's Court of Victoria, unreported, 07/01/2009] the writer had heard a contested child protection case in which it had come to light – on the second day of the hearing – that there was a current intervention order against the father in relation to the mother and three children. That order, which had been made *ex parte*, was inconsistent in material respects with the supervision order that DOHS and the father were requesting the writer to make. Ultimately the writer applied s.173(2) of the FVPA and varied the intervention order, holding at p.110:

“The operation of s.173(2) is not entirely clear. However, it seems to me that it does not operate as a quasi-appeal against an intervention order nor does it give the court an unfettered discretion to vary an intervention order. On the evidence I have heard in this case, I would not have made an intervention order against Mr D in relation to any of the three children. But that does not mean that I can vary the intervention order to exclude conditions even though I believe there is no proper evidentiary basis for them. I can only vary the intervention order to remove any inconsistencies between it and the supervision orders.”

In that case the father had also been the subject of a counselling assessment order and a counselling order. At p.111 the writer doubted that s.173(2) had any application to these orders:

“Given the definition of ‘counselling order’ in s.3 of the FVPA and the wording of ss.129(1) & 130(1) and given the definition of ‘family violence intervention order’ in s.11 of the FVPA, the counselling assessment order made on 13/03/2008 and the counselling attendance order made on 18/03/2008 are probably not part of the intervention order. If that is right they could not be varied by operation of s.173(2). But, in any event, there is no need to vary them. They are not inconsistent with any terms of the supervision orders and they are now spent.”

The only pre-condition to the exercise of the power in s.173(2) of the FVPA and s.129(2) of the PSIA is that the rules of natural justice apply. Section 173(3) of the FVPA and s.129(3) of the PSIA provide that if the court proposes to revoke or vary an existing intervention order or recognised DVO it cannot do so until-

- a court registrar has given notice of intention to revoke or vary to all the parties to the proceeding in which the order was made; and
- all parties have had an opportunity to be heard.

However, the Court may make an interim order varying the intervention order pending all parties being given an opportunity to be heard.

In *DOHS v Mr D & Ms W* the only parties to the proceeding in which the intervention order was originally made were the mother and the father. Both were legally represented before the writer in the child protection case. Rather than send them out to a court registrar, the writer gave verbal notice to counsel of the fact that if the protection orders he ultimately considered to be in the best interests of any of the children proved to be inconsistent with the intervention order, then he intended to vary the intervention order. He also invited counsel to take the opportunity to be heard and – if they wished – to lead evidence on this in the course of the contest on the protection applications. The writer justified assuming the role of the registrar under s.173(3) as follows:

“Rather than send counsel upstairs to the Principal Registrar to be given notice pursuant to s.173(3)(a), notice which I would have had to have communicated to the Principal Registrar in any event, I considered that I had implied power to cut out the middleman and give that notice to counsel directly: see *Grassby v The Queen* (1989) 168 CLR 1,16 per Dawson J.”

A registrar for the Court must give written notice to the Secretary to the Department of Health & Human Services of the making of an intervention order that is or may be inconsistent with a child protection order or recognised DVO: s.174 of the FVPA and s.130 of the PSIA.

6.6.3 Relationship between bail conditions and orders/notices under the FVPA

Sections 175 & 175AA-175AC of the FVPA deal with inconsistency between bail conditions and orders/notices under the FVPA. There is no equivalent provision in the PSIA.

Section 175: If a respondent to an application for a family violence intervention order is arrested under a warrant under s.50 of the FVPA and subsequently granted bail subject to conditions, the bail conditions prevail to the extent of any inconsistency with a child protection order: s.175 of the FVPA.

Sections 175AA, 175AB & 17A5C: If a person is on bail subject to conditions and

- the person is subject to a family violence intervention order or recognised DVO or safety notice; and
- there is an inconsistency between the bail conditions and the family violence intervention order or recognised DVO or safety notice which makes it impossible for the person to comply with both- the family violence intervention order or recognised DVO or safety notice prevails to the extent of such inconsistency.

6.6.4 Relationship between orders under the Sentencing Act and orders under FVPA/PSIA

Sections 175A of the FVPA and 130A of the PSIA provide that-

- if the Court makes a family violence intervention order or a personal safety order in respect of a respondent; or
- if a court of any jurisdiction makes, varies or extends a recognised DVO- that is inconsistent with a residence restriction or exclusion condition, a place or area exclusion condition or a curfew condition attached to a community correction order under the Sentencing Act 1991 to which the respondent is subject at the time the intervention order or DVO is made, the intervention order or DVO prevails to the extent of any inconsistency.

6.7 Service of documents & orders / Substituted service

See also Order 5 of the relevant Rules.

6.7.1 Manner of service

Section 202 of the FVPA provides that any document required to be served on a person under the FVPA must be served-

- by giving a true copy to the person personally; or
- except in the case of a family violence safety notice or any document that is to be served on a child, by alternative service under s.202A.

Section 202A of the FVPA provides that a court may order – on application of a party or on the court's own initiative – that a document required to be served on a person other than personally be served by **alternative service** by any means specified in the order, if satisfied that-

- (a) service other than personal service is likely to bring the document to the attention of the person to be served and will not pose an unacceptable risk to the safety of the affected family member, protected person or any other person; and
- (b) it is appropriate in all the circumstances to make the order.

Section 202B of the FVPA sets out presumptions as to effective service by post or by electronic communication.

Section 202C of the FVPA provides that if for any reason it is not possible to serve a document (other than a family violence safety notice) in the manner required by s.202, a court may make an order for substituted service involving such steps as the court specifies for the purpose of bringing the document to the notice of the person to be served.

Section 176 of the PSIA provides that any document required to be served on a person under the PSIA must be served by giving a true copy of the document to the person personally, save that service on the Attorney-General is effected by giving a true copy of the document to the Victorian Government Solicitor. However, if it appears to the court that personal service of any document (other than a family violence safety notice) is not reasonably practicable, the court may-

- (a) order that a copy of the document be served by any other means it considers appropriate; or
- (b) make an order for substituted service.

See s.176 of the PSIA.

Provisions relating to proof of service and a certificate of service are in ss.203 & 206 of the FVPA and ss.177 & 180 of the PSIA.

Provisions relating to inability to effect service are in s.204 of the FVPA and s.178 of the PSIA.

Where the court is required to effect personal service of a document or order on a person, the court normally uses Victoria Police as its agent if the person to be served is not present at court. Section 205 of the FVPA and s.179 of the PSIA authorise service by an agent.

If a document is being served out of Victoria under Division 1 of Part 2 of the Service and Execution of Process Act 1992 (Cth), the notice that is to be attached to the document under s.16 of that Act must include the particulars detailed in Form 1 of the Service and Execution of Process Regulations 2018.

6.7.2 Service of application for intervention order

As soon as practicable after an application for a family violence intervention order is made, the appropriate registrar for the court must serve the application on-

- (a) the respondent; and
- (b) if the applicant is not the affected family member/affected person ('afm/ap')-

- (i) the afm/ap;
- (ii) if the afm/ap is a child and the application was made with the consent of the child's parent, that parent;
- (iii) if the afm/ap is a child and the application was made with the leave of the court, a parent of the child (other than the respondent) with whom the child normally or regularly lives;
- (iv) if the afm/ap has a guardian, the guardian.

See s.48 of the FVPA and s.19 of the PSIA.

Under the CFVA the court was expressly prohibited from making a final intervention order unless a summons had been served on the respondent or the respondent had been bailed to appear at the hearing of the complaint: s.12(a). A similar consequence – albeit arrived at by a different path – derives from s.61 of the FVPA and s.44 of the PSIA which permit a court to hear an application for a final order on a mention date if satisfied the respondent has been served with a copy of the application for an intervention order and has not attended court on the mention date.

6.7.3 Service of application to vary, revoke or extend intervention order

The appropriate registrar for the court must serve an application to vary, revoke or extend an intervention order on the following persons, other than the applicant-

- (a) each party to the proceeding under which the intervention order was made (including the protected person whether or not the person is the applicant for the original order); and
- (b) if the protected person is a child, a parent of the child other than the respondent;
- (c) if the protected person has a guardian, the guardian.

See s.113 of the FVPA and s.90 of the PSIA.

6.7.4 Preparation, filing and service of interim or final intervention orders

If the court makes, varies, extends or revokes an interim or final intervention order or varies, extends or revokes a recognised DVO, s.201 of the FVPA and s.174 of the PSIA require the appropriate registrar for the court to-

- (a) arrange for the order to be drawn up and filed in the court; and
- (b) serve a copy of the order on the respondent (unless the respondent has been given an explanation of the order under ss.57(1), 60G(1) or 96(1) of the FVPA); and
- (c) give a copy of the order to-
 - the Chief Commissioner of Police and the officer in charge of the police station closest to the place of residence of the protected person;
 - each party to the proceeding;
 - a parent of a child who is a protected person in certain circumstances;
 - a guardian if the protected person has a guardian.

6.7.5 Copy of personal safety intervention order may be given to school

If the court makes, varies, extends or revokes a personal safety intervention order and the respondent or protected person under the order is a student or wishes to become a student, s.175 of the PSIA applies. It provides that the court may order that the appropriate registrar give a copy of the order to the principal of the school at which the respondent or protected person is, or wishes to become, a student if the court considers that it-

- (a) would assist to ensure the safety of the protected person; or
- (b) is necessary for the effectiveness of the order; or
- (c) is otherwise necessary in the interests of justice.

There is no equivalent provision in the FVPA.

6.8 Procedure under the FVPA and the PSIA – General

6.8.1 Filing - Content and form of documents – Refusal to accept documents

Under Rule 1.10 of the relevant Rules, a document is filed by being lodged with the registrar in the office of the Court at the proper venue of the Court or in accordance with Order 3 of the CATR (if applicable).

Under Rule 3.02(1), the court may require any document in a proceeding to be prepared in any manner it thinks fit. If a document for use in the court is not prepared in accordance with the Rules or any order of the court, Rule 3.02(2) permits-

- a registrar to refuse to accept it for filing without the direction of the Court; or
- the Court to order that the party responsible is not entitled to rely on it in any manner in the proceeding until a document which is properly prepared is filed.

Under Rule 3.03(1), a registrar may also refuse to accept a document for filing if the form or contents of the document show that the document, if accepted, would constitute an abuse of the process of the court. Rule 3.03(2) empowers the court to direct the registrar to accept a document for filing.

If a document for use in the court contains scandalous, irrelevant or otherwise oppressive matter, Rule 3.04 empowers the court to order that the offending matter be deleted or the document be taken off the file. Order 6 empowers the court to stay, strike out or amend a proceeding which is scandalous, frivolous or vexatious or is otherwise an abuse of process of the court.

Rule 14.02 of the CFVR and rule 14.03 of the CPSR give the court a general power to amend any document for the purpose of determining the real question in issue between the parties, of correcting any defect or error in the proceeding or of avoiding multiplicity of proceedings.

6.8.2 Request for further and better particulars of application

Rule 4.06(1) provides that a party may only seek further and better particulars of an application with leave of the Court. Rule 4.06(2) empowers the Court to fix a time for the provision of the particulars and give any appropriate directions for seeking and providing particulars.

6.8.3 Withdrawal of application requires leave of the court

Rule 4.07 permits an application under the FVPA or the PSIA to be withdrawn only with the leave of the Court. A party seeking to withdraw an application must-

- file a written notice of withdrawal, to be served on the respondent by the registrar; or
- attend court and make an oral application to the Court.

6.8.4 Hearings – Directions - Mention date - Adjournment to seek legal advice

Rule 9.01 empowers the court to give directions as to the order of evidence and generally as to the conduct of the hearing of a proceeding. Rule 9.02 prohibits opening and closing addresses unless the court otherwise orders. Rule 14.04 gives the court a general power at any stage of a proceeding to give any direction for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination.

Rule 9.03 provides that if any party is absent when the hearing of a proceeding is called on, the court may-

- proceed with the hearing; or
- strike out or dismiss the application; or
- adjourn the hearing; or
- make any other order the court considers appropriate; or
- if the absent party is the respondent – issue a warrant for his or her arrest.

Section 61(1) of the FVPA and s.44(1) of the PSIA prohibit the court from hearing a contested application for a final order on the mention date unless-

- all the parties have had an opportunity to seek legal advice and legal representation; and
- all the parties consent to the hearing of the contested application on the mention date; and
- it is fair and just to all the parties to hear the application on the mention date.

However, s.61(2) of the FVPA and s.44(2) of the PSIA make it clear that a court is not prevented from making a final order on the mention date if-

- all the parties consent to or are not opposed to the making of the order in accordance with s.78 or s.64 respectively; or
- the respondent has been served but has not attended court.

Section 151(1) of the FVPA and s.108(1) of the PSIA empower a court hearing a proceeding under the respective Act – on its own initiative or on application by a party – to adjourn the hearing to give a party a reasonable opportunity to obtain legal advice.

6.8.5 Informal procedure – Role of the rules of evidence – Balance of probabilities

Under s.215(1) of the CYFA, the Family Division of the Children's Court:

- must conduct proceedings in an informal manner; and
- must proceed without regard to legal forms.

However, these broad sounding provisions do not authorize a judicial officer to depart from the procedures followed by courts acting judicially: *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248.

As from 01/12/2013, s.215B of the CYFA gives judicial officers in the Children's Court much greater power to manage the conduct of child protection proceedings in a less adversarial way. The heading of s.215B is "Management of child protection proceedings" but the section refers to "any proceeding before the Family Division under this Act". Although the wording of s.215B is ambiguous, the writer has been advised that it was intended to be read within the context of the section heading which restricts its operation to child protection proceedings and that it does not apply to the conduct of intervention order proceedings.

Section 215(1)(d) of the CYFA provides that the Family Division of the Children's Court may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary. Section 65(1) of the FVPA and s.47(1) of the PSIA are very similar. They provide that, subject to the Act, in a proceeding for a family violence intervention order (but not in a proceeding for an offence under the Act) the court may inform itself in any way it thinks fit, despite any rules of evidence to the contrary.

Despite s.65(1) of the FVPA, Rule 14.01 provides that a risk assessment – a summary prepared by a registrar under the Common Risk Assessment and Risk Management Framework relating to an affected family member's risk of family violence – is confidential and must not be-

- (a) used in evidence in any proceeding; or
- (b) disclosed to the respondent or an associate of the respondent to the proceeding to which the risk assessment relates.

In a footnote reference in *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 at [28] Maxwell P (with whom Neave & Weinberg JJA agreed) noted that the power invested in the Family Division of the Children's Court by s.215(1)(d) of the CYFA was subject to an obligation to accord procedural fairness to the parties. It is clear that an obligation to accord procedural fairness and to comply with the rules of natural justice is also implied in s.65(1) of the FVPA and s.47(1) of the PSIA.

However, s.65(2)(b) of the FVPA and s.47(2)(b) of the PSIA preserve the application of Division 2A of Part II of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) which deals with confidential communications in relation to proceedings with respect to sexual offences. They also specifically preserve the application of the following provisions of the Evidence Act 2008 (Vic):

- s.13 which deals with the competence of a person to give sworn or unsworn evidence;
- s.30 which provides for a witness to give evidence through an interpreter;
- s.31 which provides for the giving of evidence by a witness who is deaf or mute;
- s.41 which empowers the court to disallow improper questions; and
- Part 3.10 which provides for the application of privileges.

In addition, s.47(2)(b) of the PSIA preserves the application of Division 8 of Part I of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) which provides for confidentiality of mediation conferences conducted under that Division. There is no equivalent in the FVPA.

Section 65(3) of the FVPA and s.47(3) of the PSIA allow the court to refuse to admit, or limit the use to be made of, evidence if the court is satisfied-

- (a) it is just and equitable to do so; or
- (b) the probative value of the evidence is substantially outweighed by the danger that the evidence may be unfairly prejudicial to a party or misleading or confusing.

Since s.65 of the FVPA and s.47 of the PSIA are later enactments than s.215(1) of the CYFA, it appears to the writer that they take precedence over s.215(1)(d) for proceedings in the Children's Court in the event of any inconsistency. However, there do not appear to be any provisions of the FVPA or the PSIA which are actually or potentially inconsistent with ss.215(1)(a) & 215(1)(b) of the CYFA.

Section 215(1)(c) of the CYFA has now been repealed and replaced by s.215A which provides that the standard of proof of any fact in an application under the CYFA in the Family Division is the balance of probabilities. Hence, in its terms s.215A does not apply to intervention order applications. However, that the balance of probabilities is also the test to be applied in intervention order proceedings is clear from all of the substantive provisions relating to the making or extension of intervention orders: see, for example, ss.53(1)(a), 53(1)(c), 53AA(1)(b), 53AB(1), 74(1), 76(1)(b), 76(2)(b), 77(1)(b) & 106(2) of the FVPA; ss.35(1)(a), 61(1) & 83(2) of the PSIA.

6.8.6 Evidence by affidavit

Section 66 of the FVPA and s.48 of the PSIA empower the court to admit evidence by affidavit or sworn statement despite any rules of evidence to the contrary or anything to the contrary in any Act (other than the Charter of Human Rights and Responsibilities). However, a party to the proceeding may, with the leave of the court, require a person giving evidence by affidavit or sworn statement to attend the hearing of the proceedings to be called as a witness and to be cross-examined.

Order 7 of the Rules regulates affidavits, including their form and content. Rule 7.06 requires documents referred to in an affidavit to be described as exhibits and not to be annexed to the affidavit. Rule 7.07 enables affidavits which are irregular in form to-

- (a) be filed unless the Court otherwise orders; and
- (b) be used in evidence with the leave of the Court.

6.8.7 Evidence by children – Restriction on the presence of children

Section 67 of the FVPA and s.49 of the PSIA prohibit a child, other than an applicant for an intervention order or a respondent, from giving evidence in a proceeding under the respective Act unless the court grants leave for the child to do so.

Section 150 of the FVPA and s.107 of the PSIA prohibit a child (other than the respondent or accused) from being present in court during a proceeding under the respective Act unless the court so orders if the child is-

- (a) the affected family member/affected person or protected person;
- (b) a family member of the respondent or the affected family member/affected person or protected person; or
- (c) in relation to a proceeding for an offence against the respective Act, the victim in relation to the alleged offence or the child of the alleged victim.

In deciding whether or not to grant leave under s.67 of the FVPA or s.49 of the PSIA or make an order under s.150 of the FVPA or s.107 of the PSIA, the court must have regard to-

- (a) the desirability of protecting children from unnecessary exposure to the court system; and
- (b) the harm that could occur to the child – and in the case of proceedings under the FVPA to family relationships – if the child gives evidence or is present in court.

6.8.8 Alternative arrangements for a proceeding

Section 69(1) of the FVPA and s.52(1) of the PSIA empower the court to direct that the following alternative arrangements may be made for a proceeding in respect of an intervention order-

- closed circuit television or other facilities that enable communication between the courtroom and another place or using screens to remove the respondent from a party's or witness' direct line of vision [see also Rule 9.04];
- permitting a person to be beside a party or witness to provide emotional support;
- requiring legal practitioners to be seated during the proceeding;
- any other alternative arrangements the court considers appropriate.

If a witness is an adult, the court may make such a direction on its own initiative or on the application of a party to the proceeding: s.69(2) of the FVPA and s.52(2) of the PSIA.

If a witness is a child and the proceeding is under the FVPA, the court must make such a direction unless it considers it is not appropriate to do so: s.69(3). If the witness is a child and the proceeding is under the PSIA, the court may make such a direction: s.52(2).

In making a direction for alternative arrangements for a witness, the court must have regard to:

- (a) the wishes expressed by the witness; and
- (b) the age and maturity of the witness; and
- (c) the facilities available for the conduct of the proceeding; and
- (d) any other matters the court considers relevant.

6.8.9 Court may be closed to the public

Section 68(1) of the FVPA and s.51(1) of the PSIA empower both the Magistrates' Court and the Children's Court to-

- (a) order that the whole or part of the proceeding be heard in closed court; or
- (b) order that only persons or classes of persons specified in the order may be present during the whole or any part of the proceeding-

if necessary to prevent an affected family member or protected person or witness from being caused undue distress or embarrassment.

Section 523(2) of the CYFA confers a broader power of closure on the Children's Court. This is discussed in Chapter 2 of the Research Materials. In the event of any inconsistency, it is the writer's view that the FVPA and the PSIA, being the later enactments, prevail.

6.8.10 Restriction on publication of proceedings

Stringent restrictions on publication (except with the permission of the President) of-

- a report of any proceeding in the Children's Court which contains any particulars likely to lead to the identification of a child, party, witness or venue; and
- a picture of a child, party or witness; and
- any matter containing particulars likely to lead to the identification of a child as being the subject of an order made by the Court-

are set out in s.534 of the CYFA.

Sections 166-168 of the FVPA and ss.123-125 of the PSIA contain broadly similar restrictions on the publication of identifying particulars and pictures in proceedings (including litigation restraint order proceedings) in the Magistrates' Court under the respective Acts.

Section 166(2)(c) of the FVPA prohibits the publication of "a picture of or including a person concerned in a proceeding for a family violence intervention order or a variation, extension or revocation of a recognised DVO unless the court orders under s.169 that the picture may be published". Section 123(2)(b) of the PSIA is somewhat narrower. It prohibits the publication of "a picture of or including a child concerned in a proceeding for a personal safety intervention order, unless the court orders under s.125A that the picture may be published".

Under s.169 of the FVPA the Magistrates' Court – not just the Chief Magistrate – may make an order allowing publication of restricted material if but only if-

- the court reasonably considers it is in the public interest or is just to allow the publication of the particulars or picture; and
- a picture is not of and does not include a child and will not be likely to lead to the identification of a child.

Publication in breach of any of the above restrictions is an offence punishable by fine or imprisonment.

6.9 Assessment reports in proceedings in the Children's Court

In a proceeding for a family violence intervention order or the variation or revocation of a family violence intervention order, s.73A(1) of the FVPA empowers the Children's Court to order the Children's Court Clinic (described as the Secretary to the Department of Justice) to provide an assessment report in respect of a respondent or an affected family member or protected person.

In a proceeding for a personal safety intervention order or the variation or revocation of a personal safety intervention order, s.53(1) of the PSIA empowers the Children's Court to order the Children's Court Clinic to provide an assessment report in respect of a respondent or an affected person or protected person.

Section 73A(2) of the FVPA and s.53(2) of the PSIA prohibit the Children's Court from making such an order unless the person in respect of whom the report will be prepared-

- (a) if that person is a child, has legal representation; and
- (b) in any case, consents to the making of the order.

The consent referred to is not specifically limited to children who are capable of giving consent, so the writer assumes it applies to a child of any age.

Sections 73B to 73I of the FVPA and ss.54-60 of the PSIA regulate various matters in relation to Clinic assessment reports, including their content [s.73E; s.57], their confidentiality [s.73H; s.60] and the use which the court may make of a disputed report [s.73D; s.56]. Order 8 in both sets of Rules regulating expert evidence does not apply to these Clinic assessment reports.

6.10 Representation of children in intervention order proceedings

Rule 1.09(1) of both sets of Rules provides that subject to the CYFA and either the FVPA or the PSIA (as the case may be), a party may appear in person or with legal representation.

Guidelines for child legal representatives are contained in Louise Akenson's "[Guidelines for Lawyers Acting for Children and Young People in the Children's Court](#)". See also "Representing Children and Young People – A Lawyers Practice Guide" by Lani Blackman (Victoria Law Foundation, 2002).

6.10.1 Under s.524 of the CYFA

Section 524(1)(a) of the CYFA gives the Children's Court power to adjourn a proceeding for an intervention order if a child aged 10 years or more is not separately legally represented. An intervention order proceeding is not one of the proceedings listed in s.525(2) for which it is mandatory that a child aged 10 years or more be legally represented. However, it is usual at the Melbourne Children's Court for a child respondent to be legally represented. Subject to leave being granted under s.62 of the FVPA [as to which see paragraph 6.10.2 below], s.524 of the CYFA is also applicable to legal representation of a child victim, whether or not the application has been taken out by a parent or other adult on the child's behalf.

Section 524(8) prohibits a parent from representing a child but permits the Court to grant leave to a non-lawyer, other than a parent, to represent the child.

Sections 524(9) & 524(10) of the CYFA require a person representing a child in the Family Division of the Children's Court to "act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so having regard to the maturity of the child". It is clear from ss.524(9)-(10) that the Victorian legislature has generally adopted '**the traditional model**' for child representation, a model which requires the advocate to argue a case strictly upon the child's instructions {ALRC Issues Paper #18, [3.12] p.18}.

This is the converse of the situation in the Family Court of Australia where 'separate' child representation under ss.68L & 68LA of the FLA are based on '**the best interests model**', a model which requires the advocate to present and argue his or her own professional view as to the child's best interests, even if this is inconsistent with the child's expressed wishes on the issue {ALRC Issues Paper #18, p.19}.

However, in exceptional circumstances, if the Children's Court determines that it is in the best interests of a child aged under 10 years or a child aged 10 years or more who is not mature enough to give instructions for the child to be legally represented in any proceeding in the Family Division, s.524(4) empowers the Children's Court to adjourn the hearing to enable that legal representation to be obtained. A legal practitioner representing a child in those circumstances must act in accordance with what he or she believes to be in the best interests of the child and, to the extent that it is practicable to do so, must communicate to the Court the instructions given or wishes expressed by the child. 'Best interest' representatives are usually only appointed in child protection proceedings. The writer cannot remember encountering a case where a child under 10 was separately represented in stand-alone intervention order proceedings.

6.10.2 Under s.62 of the FVPA where child is not an applicant or respondent

Section 62(1) of the FVPA provides that if an affected family member in the proceeding is a child and is not the applicant, the child may have legal representation in the proceeding only if the court, on its own initiative-

- (a) considers it appropriate in all the circumstances of the case; and
- (b) gives leave for the child to be represented.

Section 62(2) of the FVPA provides that in deciding whether to grant such leave, the court must have regard to-

- (a) the desirability of protecting children from unnecessary exposure to the court system; and
- (b) the harm that could occur to the child and to family relationships if the child is directly represented in the proceeding.

In relation to the representation of children in proceedings under the FVPA, there is a conflict in policy between s.524 of the CYFA and s.62 of the FVPA and a patent inconsistency where a child is neither the applicant nor the respondent to proceedings in relation to a family violence intervention order. To the extent of any inconsistency, it is the writer's view that s.62, being the later enactment, prevails.

6.10.3 Under the PSIA

In the PSIA there is no equivalent of s.62 of the FVPA. It is therefore the writer's view that s.524 of the CYFA applies to representation of children in proceedings under the PSIA in the Children's Court, whatever the children's role in the case.

6FV FAMILY VIOLENCE PROTECTION ACT 2008

6FV.1 Background to the FVPA

The FVPA was introduced into the Victorian Parliament on 24/06/2008. It was passed on 12/09/2008 and was assented to on 23/09/2008. Its commencement date was 08/12/2008.

The FVPA replaced and repealed the 21 year old CFVA. It adopted the majority of the recommendations of the *Victorian Law Reform Commission Review of Family Violence Laws Report (February 2006)*. The Report noted that there had not been a comprehensive review of the *Crimes (Family Violence) Act 1987* since its inception to determine whether it provides the best legal response to family violence. Since 1987, attitudes to family violence have changed with “increased public recognition of family violence as a social problem and a burgeoning body of research about its broad nature, dynamics and effects” [p.3]. The Report also noted that new legislation to address family violence has also been enacted in other Australian states and overseas jurisdictions allowing the VLRC an opportunity to learn from different approaches.

The FVPA is more complex and prescriptive than the CFVA. Part of the explanation for this is that the VLRC noted significant variation in attitudes and approaches of Victorian magistrates to family violence. The VLRC attributed this partly to lack of guidance from the current legislation on matters that should be taken into account when deciding an intervention order application and partly to different levels of understanding about family violence: see p.175 of the VLRC Report.

6FV.2 Preamble & Purpose Provisions of the FVPA

The FVPA contains a lengthy preamble that sets out the context in which the Act is to be interpreted and can be used to clarify any ambiguity: see s.35 of the Interpretation of Legislation Act 1984 (Vic). In his Second Reading Speech (at p.80) the then Attorney-General said:

“This preamble will ensure that those using, applying or subject to this legislation have a shared understanding of what family violence is, and why it must be prevented. It will promote consistency in the justice system and guide training and implementation initiatives.”

The preamble states that the Parliament of Victoria recognises that-

- (a) non-violence is a fundamental social value that must be promoted;
- (b) family violence is a fundamental violation of human rights and is unacceptable in any form;
- (c) family violence is not acceptable in any community or culture;
- (d) in responding to family violence and promoting the safety of persons who have experienced family violence, the justice system should treat the views of victims of family violence with respect.

The preamble also states that Parliament recognises the following features of family violence-

- (a) that while anyone can be a victim or perpetrator, family violence is predominantly committed by men against women, children and other vulnerable persons;
- (b) that children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing;
- (c) that family violence affects the entire community and occurs in all areas of society, regardless of location, socioeconomic and health status, age, culture, gender, sexual identity, ability, ethnicity or religion;
- (d) that family violence extends beyond physical and sexual violence and may involve emotional or psychological abuse and economic abuse;
- (e) that family violence may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of abuse over a period of time.

It will be interesting to see whether statement (a) above proves to be compatible with the Charter of Human Rights and Responsibilities Act 2006 (Vic), especially ss.8 & 24.

Section 1 of the FVPA states that the purpose of the Act is to-

- (a) maximise safety for children and adults who have experienced family violence;
- (b) prevent and reduce family violence to the greatest extent possible; and
- (c) promote the accountability of perpetrators of family violence for their actions.

For a discussion on this see *AA v BB* [2013] VSC 120 at [79]-[82] per Bell J.

6FV.3 Meaning of “family violence”

For the purposes of the FVPA, family violence is defined in s.5(1) of the FVPA as-

- (a) behaviour by a person towards a family member of that person that-
 - (i) is physically or sexually abusive; or
 - (ii) is emotionally or psychologically abusive; or
 - (iii) is economically abusive; or
 - (iv) is threatening; or
 - (v) is coercive; or
 - (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
- (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in s.5(1)(a).

The Explanatory Memorandum accompanying the FVPA states (at p.3) that a respondent does not need to intend a child to hear, witness or otherwise be exposed to family violence. It is sufficient if any of these things result from the respondent's action.

Section 5(2) provides a non-exhaustive list of examples of behaviour constituting family violence-

- (a) assaulting or causing personal injury to a family member or threatening to do so;
- (b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;
- (c) intentionally damaging a family member's property, or threatening to do so;
- (d) unlawfully depriving a family member of the family member's liberty or threatening to do so;
- (e) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.

Section 5(3) makes it clear that behaviour may constitute family violence even if it would not constitute a criminal offence.

In the FVPA “assault” has the same meaning as in s.31 of the Crimes Act 1958 (Vic). Section 5 of the FVPA lists a number of examples of behaviour constituting exposure of a child to family violence. For an analysis of the word “threat” in s.4(1) of the predecessor CFVA, see the judgment of Bongiorno J in *Kirby v Phelan* [2003] VSC 43 [MC02/03] at [12]-[15].

6FV.3.1 Meaning of “economic abuse”

Section 6 of the FVPA defines economic abuse as behaviour that is coercive, deceptive or unreasonably controls another person without that person's consent-

- (a) in a way that denies that person the economic or financial autonomy the person would have had but for that behaviour; or
- (b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the person or the person's child if that person is entirely or predominantly dependent on the respondent for financial support to meet those living expenses.

A number of examples of economic abuse are set out in section 6, including coercion to relinquish control over assets and income, coercion to claim social security payments, removing or keeping or threatening to remove or keep a family member's property without permission and coercion to sign a contract.

6FV.3.2 Meaning of “emotional or psychological abuse”

Section 7 of the FVPA defines emotional or psychological abuse as behaviour towards a person that torments, intimidates, harasses or is offensive to the person.

A number of examples of emotional or psychological abuse are set out in section 7. These have been drawn, in part, from findings of research into family violence which show that these forms of emotional or psychological abuse are particularly common in violent relationships. The examples are-

- repeated derogatory taunts, including racial taunts;
- threatening to disclose a person's sexual orientation without consent;
- threatening to withhold medication;
- prevention of contact with family, friends or culture;

- threatening to commit suicide or self-harm with the intention of tormenting or intimidating a family member, or threatening the death or injury of another person.

6FV.3.3 Meaning of “safety” & “property”

Section 4 defines “safety” as used in the FVPA as “safety from family violence”.

Section 4 defines “property” in relation to a family member as used in the FVPA as including-

- property of the family member; and
- property that is situated in premises in which the family member lives or works whether or not it is the family member’s property; and
- property that is being used by the family member whether or not it is the family member’s property.

6FV.4 Affected family member/Protected person

A person who under the CFVA was referred to as an “aggrieved family member” is referred to in the FVPA as an “affected family member” until a police safety notice is issued or an intervention order is made. Thereafter the person is referred to as a “protected person”.

There are three categories of affected persons who may be protected by a family violence intervention order-

- (1) a family member;
- (2) a child who has been subjected to family violence;
- (3) an additional applicant who is an “associate” of the affected family member or protected person.

6FV.4.1 Family member

“Family member” is very broadly defined in ss.8 & 10 of the CFVA as a person having any of the following relationships with the respondent-

- a person who is, or has been, the respondent’s spouse or domestic partner;
- a person who has, or has had, an intimate personal relationship (whether or not the relationship is sexual in nature) with the respondent;
- a person who is, or has been, a relative of the respondent (whether of whole blood or half-blood or by marriage or by adoption), namely-
 - a father, mother, grandfather or grandmother;
 - a son, daughter, grandson or granddaughter;
 - a brother or sister;
 - an uncle or aunt;
 - a nephew, niece or cousin; or
 - for an Aboriginal or Torres Strait Islander person – a person who by tradition or contemporary social practice is a relative-
 and, in the case of domestic partners, includes a person who would be a relative if the domestic partners were married to each other;
- (d) a child who normally or regularly resides with the respondent or has previously resided with the respondent on a normal or regular basis; or
- (e) a child of a person who has, or has had, an intimate personal relationship with the respondent; or
- (f) a person whom the respondent regards or regarded as being like a family member if it is or was reasonable to regard that person as being like a family member having regard to the circumstances of the relationship.

In his Second Reading Speech (at p.80) the then Attorney-General said that the last mentioned category “is designed to cover those relationships which may not be strictly family but which are so close that the dynamics of the relationship are family-like” and “any violence in the relationship approximates the features of family violence”.

“Domestic partner” of the respondent is defined in ss.9(1) & 9(2) of the FVPA as-

- a person in a registered relationship within the meaning of the Relationships Act 2008; or
- an adult to whom the respondent is not married but with whom the respondent is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material support of the other, irrespective of their genders and whether or not they are living under the same roof.

Under s.9(3) of the FVPA “domestic partner” does not include-

- a person who provides domestic support and personal care to the respondent for fee or reward or on behalf of another person or organization; or
- a mere co-tenant.

Section 9(4) provides that in deciding whether persons who are not in a registered relationship are domestic partners, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in s.35(2) of the Relationships Act 2008 (Vic) as may be relevant in a particular case.

6FV.4.2 Child subjected to family violence – Additional protection of children

“Child” is defined in s.3(1) of the FVPA as “a person who is under the age of 18 years”.

Under ss.53(1)(a)(iii) of the FVPA the court may make an interim order if satisfied on the balance of probabilities that an interim order is necessary, pending a final decision about the application, to protect a child who has been subjected to family violence committed by the respondent.

Under s.53AA the court must make an interim order for a child who has been subjected to family violence committed by the respondent whether or not that child is also an affected family member.

Under s.53AB the court may, on its own initiative, make an interim order which is necessary to protect a child who has been subjected to family violence committed by the respondent even if the court does not make an interim order under s.53(1) in relation to an affected family member.

Under ss.77 or 77A of the FVPA-

- if the court makes a final order in relation to an affected family member or an additional applicant who is an associate of the protected person; and
- the court is satisfied, on the balance of probabilities, that a child has been subjected to family violence committed by the respondent or additional respondent (whether or not that child is also an affected family member)-

the court must make a final order to protect the child unless it is not necessary to do so to protect the child from family violence committed by the respondent or additional respondent.

Under s.77B the court may, on its own initiative, make a final order which is necessary to protect a child who has been subjected to family violence committed by the respondent or additional respondent even if the court does not make an order under s.74 or s.76 in relation to an affected family member or an additional applicant.

6FV.5 Associates and associated final orders

The FVPA enables final intervention orders to be made against associates of the respondent and for the protection of associates of the protected person. “Associates” do not necessarily have to be family members.

The “associate” provisions were included in response to a finding by the Victorian Law Reform Commission that associates of victims of family violence are often subject to violent and threatening behaviour from the perpetrator, particularly after an intervention order has been made.

There is no power to make interim orders for the protection of an associate of the affected family member/protected person or against an associate of the respondent.

An associated final order is not affected if the original final order is varied, extended, revoked or otherwise ends: s.76(3)(c) of the FVPA.

6FV.5.1 Associate of the affected family member or protected person

Under s.4 of the FVPA an “associate” of an affected family member is a person who provides the affected family member with assistance or support. Section 76(2) empowers a court to make an “associated final order” to protect an associate of a protected person if satisfied on the balance of probabilities that the respondent has subjected the associate to behaviour that would be family violence if respondent and associate were family members, and is likely to do so again.

6FV.5.2 Associate of the respondent

Under s.4 of the FVPA an “associate” of a respondent is a person who is so closely connected with the respondent that the respondent can influence the actions of the person whether directly or indirectly. Section 76(1) empowers a court to make an “associated final order” against an associate of the respondent if satisfied on the balance of probabilities that the associate has subjected the protected person to behaviour that would be family violence if associate and protected person were family members, and is likely to do so again.

6FV.6 Additional Police Powers

The FVPA retains, with a few amendments, the police holding powers inserted into the CFVA in 2006. In addition, it establishes a system of police-issued family violence safety notices for use in certain circumstances outside court hours. Neither the power to issue family violence safety notices nor the police holding powers are applicable if the police officer believes on reasonable grounds that the respondent is a child.

6FV.6.1 Holding Powers

Under s.13(1) of the FVPA a police officer may exercise a holding power in relation to a person if the officer-

- (a) intends to make an application against the person for-
 - (i) a family violence intervention order;
 - (ii) a variation of a family violence intervention order; or
 - (iii) a family violence safety notice; or
- (b) reasonably believes that a family violence intervention order has been made or family violence safety notice issued against the person but not served and the police officer intends to serve a copy of the order or notice on the person.

However, under s.13(2) the police officer must not exercise this power unless-

- (a) the officer has reasonable grounds for suspecting the person is an adult; and
- (b) the officer believes on reasonable grounds the exercise of the power is necessary to ensure the safety of a family member of the person or to preserve any property of the family member.

Similar powers exist in s.13A where a police officer-

- (a) intends to make an application against a person for an order varying a recognised DVO; and
- (b) reasonably believes that the person is a respondent to a recognised DVO and the officer-
 - (i) intends to obtain a copy of the recognised DVO; and
 - (ii) if the recognised DVO has not been served, serve a copy on the person.

Holding powers enable a police officer to direct a person, orally or in writing, to remain at or go to a particular place or to remain in the company of a particular person: s.14. If the person does not comply with such a direction, the person may be detained and the police officer may use reasonable force to apprehend and detain the person. The person may be detained at a police station or other place but not in a police gaol unless the officer considers it necessary to do so for the protection of any person or property or to prevent the person from escaping from detention: ss.15 & 17. Under s.17(2)(b) a police officer must give the directed or detained person a notice prescribed under reg.6 of the FVPR.

If a person has been held or detained under ss.14 or 15, a police officer may search the person and any vehicle, package or thing in the person's possession if the officer suspects, on reasonable grounds, that the person possesses any object that may cause injury or damage or may be used to escape: s.16.

The maximum period for which a person may be held or detained is 6 hours after the direction is given or such period of not more than 10 hours in total as is ordered by a court: ss.18 & 19. Holding powers are frequently used but their only intersection with the court is an occasional application for extension of a direction or detention. Such extension may only be ordered in exceptional circumstances but only if the application is not for a family violence safety notice: s.19. After-hours applications for extension may be made by telephone, fax or other electronic communication to the After Hours Service: s.20.

Even though police holding powers cannot be exercised against child respondents, the Children's Court does have jurisdiction to extend a direction or detention under police holding powers in a case where an affected family member is a child. However, in practice, applications for extension are always made to the Magistrates' Court.

6FV.6.2 Family Violence Safety Notices

Under ss.24-25 of the FVPA a police officer who responds in person to an incident involving family violence may apply in person or by fax, telephone or other electronic communication to another police officer of or above the rank of Sergeant before 9am or after 5pm on a weekday or on a Saturday, Sunday or public holiday if the police officer-

- (a) has reasonable grounds for suspecting the respondent is an adult;
- (b) has no reasonable grounds for suspecting the respondent has a cognitive impairment;
- (c) has no reasonable grounds for suspecting there is a Family Law Act order or child protection order in force that may be inconsistent with the proposed terms of the family violence safety notice, after making reasonable enquiries of the respondent, the affected family member and any other adults at the scene of the incident;
- (d) believes on reasonable grounds there is no family violence intervention order in place between the affected family member and respondent;
- (da) has no reasonable grounds for suspecting there is a community correction order under the Sentencing Act 1991 in force that may be inconsistent with the terms of the family violence safety notice; and
- (e) believes on reasonable grounds that until an application for a family violence intervention order can be decided by the court, a family violence safety notice is necessary-
 - (i) to ensure the safety of the affected family member; or
 - (ii) to preserve any property of the affected family member; or
 - (iii) to protect a child who has been subjected to family violence committed by the respondent.

Under s.26(1) of the FVPA a police officer of or above the rank of Sergeant may issue a family violence safety notice if the police officer believes on reasonable grounds-

- (a) there is no family violence intervention order in place between the affected family member and the respondent; and
- (b) that issuing the notice is necessary-
 - (i) to ensure the safety of the affected family member; or
 - (ii) to preserve any property of the affected family member; or
 - (iii) to protect a child who has been subjected to family violence committed by the respondent.

The police officer to whom the application is made must hear the police officer responding to the incident, must be satisfied that the grounds on which the applicant formed an opinion about the matters in s.24 are reasonable and may, if practicable, hear the respondent or the affected family member: s.26(2).

Under s.26A(1) a police officer may issue a family violence safety notice for the protection of a person against a respondent whether or not there is a recognised DVO in relation to the same respondent and protected person.

Under s.29 the conditions of a family violence safety notice are limited to those in s.81(2)(a) to 81(2)(f) of the FVPA, namely:

- (a) prohibiting the respondent from committing family violence against the protected person;
- (b) excluding the respondent from the protected person's residence;
- (c) relating to the use of personal property;
- (d) prohibiting the respondent from approaching, telephoning or otherwise contacting the protected person, unless in the company of a police officer or a specified person;
- (e) prohibiting the respondent from being anywhere within a specified distance of the protected person or a specified place, including the place where the protected person lives; and
- (f) prohibiting the respondent from causing another to engage in conduct prohibited by the notice.

A family violence safety notice must be returned to court at the first mention date stated in the notice: s.31(2). Although a safety notice cannot be issued against a child respondent [s.24(a)], it may protect a child who has been subjected to family violence [s.26(1)(b)]. However, s.34(c) requires a police officer to file an authorisation form or a safety notice form with the Magistrates' Court. It thus appears the Children's Court has no power to deal directly with a safety notice and cannot therefore deal with applications commenced by the issue of a safety notice unless the application has first been formally transferred from the Magistrates' Court under s.148(1) of the FVPA.

The form of the safety notice is set out in s.27, the procedure upon issue is in s.28 and the information to be included in the notice is in s.32. Service of the notice and the obligation of the serving police officer to provide an explanation to the respondent are detailed in ss.33-35.

If a police officer serves on a respondent a family violence notice that includes an exclusion condition, the officer must consider the accommodation needs of the respondent and any dependent children of the respondent and take any reasonable steps to ensure they have access to temporary accommodation: s.36(1). Conversely, if a police officer serves a family violence notice on a respondent that does not include an exclusion condition, the officer must consider the accommodation needs of the protected person and any dependent children of the protected person and take any reasonable steps to ensure they have access to temporary accommodation: s.36(2). These provisions do not require the police to provide free accommodation: s.36(3).

Section 39(2) provides that to the extent of any inconsistency between a family violence safety notice and an existing family violence intervention order, the latter prevails.

Under s.30(1) a family violence safety notice-

- (a) starts when the notice or a safety notice form is served on the respondent; and
- (b) ends when the earlier of the following occurs-
 - (i) the court adjourns the application for the family violence intervention order or refuses to make a family violence intervention order on the first mention date for the application for the order;
 - (ii) if the court makes a family violence intervention order on the first mention date – the order is served on the respondent.

Under s.30A(1) if at the time the family violence safety notice was issued, there was a recognised DVO in relation to the same respondent and protected person, the family violence safety notice ends when the earlier of the following occurs-

- (a) on the first mention date, if the application for the family violence intervention order is withdrawn on the first mention date;
- (b) if the court varies or extends the recognised DVO on the first mention date – when the order is served on the respondent.

The Court's existing arrangements for issuing warrants and interim intervention orders after-hours are retained in ss.50 & 58 of the FVPA because police safety notices are not appropriate in all cases.

6FV.7 Application for family violence intervention order

Under ss.42 & 43 of the FVPA and Rule 11.01 of the CFVR [Rule 12.01 of the Magistrates' Court (FV) Rules] an application for a family violence intervention order must be made by filing the application-

- at the proper venue of the Magistrates' Court or Children's Court; or
- in accordance with Order 3 of the CATR (if applicable); or
- if the applicant is a police officer, by fax or other electronic communication to the proper venue of the court between the hours of 9am and 5pm on a working day.

Such application must-

- (a) include the information prescribed by Rule 4.02 of the CFVR or the Magistrates' Court (Family Violence Protection) Rules 2008; and
- (b) if the applicant is a police officer, be made on oath or by affirmation or by affidavit or certified (i.e. signed by the police officer and including the police officer's name, rank and station); or
- (c) if the applicant is not a police officer, be made on oath or by affirmation or by affidavit or by declaration of truth.

"Proper venue" of the court is defined in s.3(1) of the CYFA and in s.3(1) of the Magistrates' Court Act 1989 in slightly different terms, reflecting the fact that there is a Family Violence Court Division of the Magistrates' Court {see ss.4H & 4I of the Magistrates' Court Act 1989 (Vic) (as amended)} but there is no such separate Division of the Children's Court. For a proceeding in the Children's Court brought under the FVPA, "proper venue" is defined in paragraph (d) of s.3(1) as-

- (i) the venue of the Court (including the Neighbourhood Justice Division if it has jurisdiction) that is nearest to the place of residence of the child or the place where the subject-matter of the application arose; or
- (ii) the venue of the Court determined by the Court as the most appropriate venue, having regard to-
 - (A) the safety of the parties;
 - (B) the need to prevent disclosure of a party's whereabouts;
 - (C) the ability of the parties to attend a particular venue of the court, taking into account their places of work, residence or any childcare requirements;
 - (D) the availability of family violence support services at particular venues of the Court;
 - (E) the need to manage case flow;
 - (F) any other considerations the Court thinks relevant.

6FV.7.1 Who may make application?

Under s.45 of the FVPA, an application for a family violence intervention order may be made by:

- (a) a police officer; or
- (b) an affected family member ('afm'); or
- (c) if the afm is an adult, any other person with the written consent of the afm; or
- (d) if the afm is a child [i.e. "a person under the age of 18 years": s.3(1) of the FVPA]-
 - (i) a parent of the child; or
 - (ii) any other person with the written consent of a parent of the child or with the leave of the court; or
 - (iii) the afm with the leave of the court if he or she is of or above the age of 14 years; or
- (e) if the afm has a guardian [under the Guardianship and Administration Act 1986 (Vic)], the guardian or, with the leave of the court, any other person.

The form of consent for an application made under paragraphs (c) & (d)(ii) is set out in Rule 4.05.

Section 76(4) of the FVPA provides that an application for an intervention order may also be made by-

- (a) an associate of the protected person for the original final order; or
- (b) a person who, under s.45, would be entitled to make an application for the associate if the associate were an affected family member.

Rule 4.03 lists matters that must be included in an application for an associated final order.

6FV.7.2 Application for leave to apply for order

Section 46 provides that if an application for leave is made under s.45(d)(ii) or s.45(e)(ii), the court must grant leave if it is satisfied that it is in the best interests of the affected family member to do so. If an application for leave is made by a child under s.45(d)(iii), the court must not grant leave unless it is satisfied the child understands the nature and consequences of a family violence intervention order.

6FV.7.3 Joint applications

Section 47(1) of the FVPA permits an application for a family violence intervention order for a child to be included in an application for the protection of the child's parent if the applications arise out of the same or similar circumstances.

There is a presumption that joint applications will be heard together. However, s.47(2) permits them to be heard separately, on the application of the applicant or the respondent, if the court thinks fit having regard to any advantages of the matters being heard together. In deciding whether or not to hear the matters separately, the Court will normally accord the convenience of the parties significant weight. However, severance is likely if the Court considers there is a potential conflict of interest between an adult and a child.

6FV.7.4 Summons or warrant

Under s.49 of the FVPA, if an application for a family violence intervention order has been made to the court, the appropriate registrar may issue a summons requiring the respondent to attend court for the hearing of the application.

There is no power to issue a warrant to arrest a child respondent. Under s.50(1) a magistrate or an appropriate registrar may issue a warrant for the arrest of an adult respondent, as if the application alleged the commission of an offence, if the magistrate or registrar believes on reasonable grounds it is necessary-

- (a) to ensure the safety of the affected family member; or
- (b) to preserve any property of the affected family member; or
- (c) to protect a child who has been subjected to family violence committed by the respondent; or
- (d) to ensure the respondent attends court at a mention date for the application.

In determining whether or not it is necessary to issue a warrant under s.50(1), the magistrate or registrar is not to take into account whether or not the respondent has been given a direction or detained in an exercise of police holding powers: s.50(3).

Section 51 provides that if the applicant seeks a warrant to issue in the first instance for the arrest of the respondent-

- (a) the application must be in writing and be made by affidavit or be certified; and
- (b) the application and the warrant must be in the same document and must contain the particulars prescribed in Rule 4.02.

The Bail Act 1977 (Vic) applies to and in respect of a respondent to an application for a family violence intervention order arrested under a warrant as if the respondent were an accused person charged with an offence to whom s.4 of the Bail Act applies: s.52(1). Under ss.52(2) & 52(3), an appropriate registrar (in the case of a bail application to a court) or a police officer (in any other case) must advise the affected family member of the outcome of the application for bail and if bail is granted must-

- advise the afm of any conditions imposed on the respondent intended to protect the afm; and
- give the afm a copy of the undertaking of bail.

6FV.7.5 Family Violence Safety Notice deemed to be application & summons

Section 31 of the FVPA provides that a family violence safety notice [even if it has ended under s.30(1)(b)] is taken to be-

- (a) an application by the police officer who applied for it for a family violence intervention order for the protected person against the respondent; and
- (b) a summons for the respondent to appear at the first mention date for the application stated in the notice.

A family violence safety notice must be returned to the Magistrates' Court at the first mention date stated in the notice: s.32(2). Under s.32(3) this must be-

- (a) as soon as practicable if the safety notice includes a condition that excludes the respondent from the respondent's primary place of residence and the applicant believes that the respondent may not have access to temporary accommodation; and
- (b) in any case, not later than 14 days after the safety notice or a s.27(3) notice is served.

6FV.7.6 After-hours application for interim intervention order or warrant

Rule 11.01(2) of the CFVR [rule 12.01(2) of the equivalent Magistrates' Court Rules] {formerly in repealed s.44 of the CFVA} enables a police officer to apply for a family violence intervention order or variation thereof by fax or other electronic communication if the police officer is seeking an interim order and the application is made before 9am or after 5pm on a working day or at any time on a Saturday, Sunday or public holiday.

A protocol between the Magistrates' Court, the Children's Court and Victoria Police enables a police officer who wishes to make an after-hours application for an intervention order:

- to apply to the after-hours duty registrar pursuant to s.50(1) of the FVPA for a warrant to arrest an adult respondent as if the application alleged the commission of an offence; or
- to apply to an after-hours magistrate via the duty registrar for an interim intervention order pursuant to ss.53 & 58 of the FVPA.

If a warrant is issued, it is often endorsed with conditions of bail that replicate the prohibitions or restrictions sought by the applicant.

6FV.8 Procedure – Applications under the FVPA

In addition to the procedure detailed in the first sub-chapter which is applicable to applications under both the FVPA and the PSIA, the procedure set out in ss.70-73 of the FVPA is also applicable to applications under the FVPA. There is no equivalent in the PSIA.

6FV.8.1 Expert evidence about family violence

Section 73 of the FVPA empowers the court to admit evidence about the dynamics and characteristics of family violence from a witness with relevant qualifications, training or expertise in family violence.

Rule 8.01(1) requires a party who intends to adduce the evidence of an expert witness at a hearing to file – at least 5 working days before the date of the hearing – a statement in accordance with Rule 8.01(2) or a copy of the expert's report in accordance with Rule 8.01(3). Under Rule 8.01(4) a failure to comply results in the party being unable to adduce evidence from an expert witness at the hearing unless the Court grants leave, the other parties consent or the evidence is adduced in cross-examination.

6FV.8.2 Cross-examination of “protected witness” – Consequential legal representation

Under s.70 the following persons are “protected witnesses” for the purposes of the FVPA-

- (a) the affected family member or protected person;
- (b) a child;
- (c) any family member of a party to the proceeding;

- (d) any person whom the court is satisfied has a cognitive impairment or otherwise needs the protection of the court.

Section 70(3) prohibits a protected witness from being personally cross-examined by a respondent unless the protected witness is an adult who has given informed consent and the court is satisfied that it would not have a harmful impact on the protected witness to be cross-examined by the respondent. The court must inform an unrepresented respondent of this prohibition and must grant an adjournment if satisfied the respondent has not had a reasonable opportunity to obtain legal representation: s.70(4).

Section 71(1) provides that if the respondent does not obtain legal representation for the cross-examination of 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.

Section 72 provides that if-

- the respondent is legally represented; and
 - the protected witness is the applicant, is not a police officer and is not legally represented-
- the court must order Victoria Legal Aid to provide legal representation for the protected witness for the purposes of cross-examination by the respondent's legal representative unless the protected witness objects.

Sections 71-72 "impose an unconditional obligation on Victoria Legal Aid to provide legal assistance in the limited circumstances to which those provisions apply": *Slaveski v Smith* [2012] VSCA 25 at [17].

If the respondent refuses the legal representation offered under s.71(1) or otherwise refuses to co-operate, the court must warn the respondent that if the respondent is not represented and not permitted to cross-examine the protected person about events relevant to the application, neither the respondent nor the respondent's witnesses may give evidence about those events: s.71(4).

It is unlikely that ss.71-72 will often be applicable to child respondents and child applicants in the Children's Court because they will usually be legally represented for the whole proceeding.

The FVPA does not expressly state whether the legal representative provided by Victoria Legal Aid to a protected witness who is a child must represent the witness on the "instructions" model or the "best interests" model: cf. ss. 524(10) & 524(11) of the CYFA. The writer believes that a legal representative appointed under either s.71 or s.72 to represent a child (who will presumably be mature enough to give instructions) will have to act on those instructions insofar as they are compatible with law.

6FV.9 Interim family violence intervention order

In *Hickman v Smith & Anor* [2003] VSC 126 {MC14/03}, Ashley J sounded a warning about interim intervention orders under the CFVA, a warning equally applicable to orders under the FVPA or under the PSIA:

"Something should be said...about the jurisdiction to grant an interim intervention order. Whether such an order is made in the presence or absence of the respondent, it is an order which has far-reaching consequences. Of course, the safety of the complainant is a crucial consideration. But it must be remembered that if such an order is made the consequences for a respondent are serious indeed. His or her conduct is inhibited; and any failure to abide the order constitutes an offence which may lead to the imposition of substantial penalties. Moreover, the order is made having heard one side of things only."

6FV.9.1 Power to make interim order

Sections 53 & 54 of the FVPA give a court power to make an interim family violence intervention order – whether or not a copy of the application has been served on the respondent and whether or not the respondent is present – if-

- (a) the court is satisfied on the balance of probabilities, that an interim order is necessary-
 - (i) to ensure the affected family member's safety from family violence; or
 - (ii) to preserve any property of the affected family member; or
 - (iii) to protect a child (whether or not the child is an affected family member) who has been subjected to family violence committed by the respondent; or
- (b) the parties to the proceeding have consented to, or do not oppose, the making of an interim order; or

- (c) [in Magistrates' Court] a family violence safety notice has been issued [under s.26] and the court is satisfied on the balance of probabilities there are no circumstances that would justify discontinuing the protection of the person until a final decision about the application {see *Zion-Shalom v Magistrates' Court of Victoria & Ors (No.1)* [2009] VSC 476; *Zion-Shalom v Magistrates' Court of Victoria & Ors (No.2)* [2009] VSC 477}.

In deciding whether or not to make an interim order the court must not take into account whether or not the respondent has been given a direction or detained in an exercise of police holding powers: s.53(2). Before deciding whether to make an interim order under s.53, the court must consider whether there are any children who have been subjected to family violence by the respondent: s.52A.

Section 53(3) of the FVPA provides that the court may make an interim order whether or not-

- (a) some or all of the alleged family violence occurred outside Victoria, so long as the affected family member was in Victoria at the time at which that alleged family violence occurred;
- (b) the affected family member was outside Victoria at the time at which some or all of the family violence alleged in the application for the family violence intervention order occurred, so long as that alleged family violence occurred in Victoria.

The threshold test for making an interim intervention order in s.53(1)(a) is expressed in different terms from the test for making a final intervention order in s.74. However, in practical terms, the requirement to ensure the safety of the affected member will usually lead to the same outcome as the pre-conditions for the making of a final order, namely that-

- (1) the respondent has committed family violence against the affected family member; and
- (2) is likely to continue to do so or do so again.

An interim order may apply to more than one affected family member if the pre-conditions in s.53 are met for each: s.56.

6FV.9.2 Interim order for protection of children

Section 52A of the FVPA requires the court, before making an interim family violence intervention order under s.53, to consider whether there are any children who have been subjected to family violence committed by the respondent. Sections 53AA & 53AB empower the court to make interim orders to protect such children in two different circumstances.

S.53AA: If the Court makes an interim order under s.53(1) in relation to an affected family member and the court is satisfied, on the balance of probabilities, that a child (whether or not the child is also an affected family member) has been subjected to family violence committed by the respondent, the court **must**-

- (a) if the child's need for protection is substantially the same as that of the affected family member, include the child in the interim order as a protected person; or
- (b) otherwise, make a separate interim order for the child as a protected person.

S.53AB: If the Court does not make an interim order under s.53(1) in relation to an affected family member, the court **may**, on its own initiative, make an interim order for a child as a protected person if satisfied, on the balance of probabilities, that-

- (a) the child has been subjected to family violence committed by the respondent; and
- (b) an interim order is necessary to protect the child pending a final decision about the application.

Procedural matters in relation to such an interim order are contained in ss.53AB(2) to 53AB(4).

6FV.9.3 Interim order made on electronic communication

If the court makes an interim order under s.53 on an application made by a police officer by fax or other electronic communication, s.58 requires the court to inform the applicant police officer of-

- the terms of the order; and
- the period of operation of the order; and
- the court venue and the date and time of the first mention date for the application.

6FV.9.4 Procedural pre-requisite

Section 55(1) of the FVPA provides that unless the order is by consent or uncontested by all parties, the court must not make an interim intervention order unless the application-

- (a) is supported by oral evidence or an affidavit unless the court waives this requirement in the circumstances detailed in s.55(1A); or
- (b) is made by the issue of a certified family violence safety notice.

However, s.55(2) makes it clear that the affected family member is not obliged to give evidence before an interim intervention order can be made.

In *Zion-Shalom v Magistrates' Court of Victoria & Ors (No.2)* [2009] VSC 477 a magistrate in the Magistrates' Court had made an interim family violence intervention order which had continued the protection provided by a family violence safety notice. Harper J held that the magistrate had not failed to accord procedural fairness to the respondent when she refused to allow him to give evidence on the interim hearing. There is much in his Honour's judgment that is relevant to the making of interim intervention orders generally, whether or not the proceedings were commenced by safety notice. See in particular his Honour's dicta at [9], [10] & [12] (emphasis mine):

[9] "The Act explicitly provides, by s.54, that an interim order may be made whether or not the respondent (that is, the alleged perpetrator) has been served with a copy of the application for a family violence intervention order and whether or not the respondent is present when the interim order is made. It follows that an interim order may be made without hearing the respondent."

[10] "It is clear that on an application for an interim order a full hearing is not necessary. Indeed, it may not be possible or even appropriate. Where, then, is the line to be drawn? In this case, a magistrate allowed some five minutes for counsel to obtain instructions from the [respondent]. Counsel then put to the magistrate what, on those instructions, the [respondent] would have said in evidence in chief had he given evidence. It follows that the [respondent] was given a hearing of sorts, albeit not one which would satisfy the criteria as laid down by the authorities for a fair trial. But – and the distinction is vital – an application for an interim intervention order is not a trial."

[12] "An important conclusion, which I think necessarily follows, is that the legislation does not require, before an interim intervention order may be made, that any alleged family violence be proved. In this case, once the magistrate was satisfied that the appropriate family violence safety notice had been issued for a person the subject of an application for a family violence intervention order to protect that person, she only had to be satisfied of one other thing; namely, that there were no circumstances that would justify discontinuing the protection which the notice gave to that person. In this case, her Honour was so satisfied, albeit on material that would not allow her, were she hearing a proceeding for a final order, to be satisfied to the requisite standard that the plaintiff had committed family violence against the alleged victim."

6FV.9.5 Duration of interim order

If the court makes an interim order, it must ensure the application is listed for a decision about a final order as soon as practicable: s.59.

Under s.60, an interim order ends when a final order is made unless the interim order contains a condition that the interim order continues until the final order is served on the respondent. An interim order also ends if the court revokes it, if the court refuses to make a final order or if the application is withdrawn.

6FV.9.6 No power to make associated interim order

A court has no power to make interim orders for the protection of an associate of the affected family member/protected person or against an associate of the respondent.

6FV.10 Final family violence intervention order

It is important to note that a court cannot make a family violence intervention order unless it is satisfied on the balance of probabilities of two matters, one past, one present or future:

1. There has already been family violence in one form or another by the respondent against the victim; and
2. Family violence is likely to continue or to occur again.

6FV.10.1 Power to make final order to protect family member

Section 74(1) of the FVPA gives a court power to make a final family violence intervention order if the court is satisfied, on the balance of probabilities, that the respondent has committed family violence against the affected family member and is likely to continue to do so or do so again.

Section 74(3) of the FVPA provides that the court may make a final order whether or not-

Section 74(3) of the FVPA provides that the court may make a final order whether or not-

- (a) some or all of the family violence constituting grounds for making the order occurred outside Victoria, so long as the affected family member was in Victoria at the time at which the family violence occurred;
- (b) the affected family member was outside Victoria at the time at which some or all of the family violence constituting grounds for making the order occurred, so long as that family violence occurred in Victoria.

Compare *Director of Public Prosecutions (on behalf of Michael Jay Pena) v Brian Andrew Sutcliffe* [2001] VSC 43; *Brian Andrew Sutcliffe v Director of Public Prosecutions (On behalf of Michael Jay Pena)* [2003] VSCA 34.

For an analysis of the word "likely" in s.4(1) of the predecessor CFVA, see the judgment of Bongiorno J in *Kirby v Phelan* [2003] VSC 43 {MC02/03} at [12]-[15].

Section 74(2) provides that a final order may be made for more than one affected family member if the pre-conditions in s.74(1) & 78 are met for each.

Section 75 provides that if the applicant for a final order is a police officer, the court may make the order under s.74 – subject to a restriction on conditions in certain cases [see below] – even if the affected family member does not consent to the making of the final order.

6FV.10.2 Power to make associated final orders

Section 76(1) of the FVPA empowers the court to make a final order against an **additional respondent** if-

- (a) a final order has been made against a respondent; and
- (b) the court is satisfied, on the balance of probabilities, that-
 - (i) the additional respondent is an associate of the respondent; and
 - (ii) the additional respondent has subjected the protected person to behaviour that would be family violence if the additional respondent and the protected person were family members, and is likely to do so again.

Section 76(2) empowers the court to make a final order to protect an **additional applicant** if-

- (a) a final order has been made to protect a protected person; and
- (b) the court is satisfied, on the balance of probabilities, that-
 - (i) the additional applicant is an associate of the protected person; and
 - (ii) the respondent has subjected the additional applicant to behaviour that would be family violence if the respondent and the additional applicant were family members, and is likely to do so again.

An application for an associated final order may be heard with the application for the original final order: s.76(3)(a).

An associated final order is not affected if the original final order is varied, extended, revoked or otherwise ends: s.76(3)(c).

6FV.10.3 Consent or unopposed orders

Section 78(1) of the FVPA provides that if the parties to a proceeding for a final order, or the variation, extension or revocation of a final order, consent to the making of the order or do not oppose the making of the order, the court may make the order-

- (a) without being satisfied as to any matter referred to in ss.74, 76, 100 or 106 [as the case may be]; and
- (b) whether or not the respondent admits to any or all of the particulars of the application.

This section – which is in similar terms to s.14 of the CFVA – overrides the decision of Smith J in *Stephens v Melis and The Magistrates Court at Moe* [2002] VSC 263 which had held that an earlier version of s.14 did not obviate the need for the court to find relevant jurisdictional facts.

However under s.78(2), if the respondent is a child the court may make a final order to which the parties consent or have not opposed only if the court is satisfied as to all relevant matters referred to in ss.74 or 76 or ss.100 or 106 [as the case may be].

Despite s.78(1), a court may under s.78(4) conduct a hearing in relation to the particulars of the application if it considers it in the interests of justice to do so. Section 78(5) empowers a court to refuse to make a final order to which the parties have consented if the court believes the order may pose a risk to the safety of one of the parties or a child of the affected family member or respondent.

6FV.10.4 Final order for protection of children

Section 73I of the FVPA requires the court before making-

- (1) before making a final order under s.74 to consider whether there are any children who have been subjected to family violence committed by the respondent
- (2) before making an associated final order under s.76 to consider whether there are any children who have been subjected to behaviour that would be family violence if the child and the respondent or additional respondent were family members.

Sections 77, 77A & 77B empower the court to make final orders to protect such children in three different circumstances.

S.77: If the Court makes a final order under s.74 in relation to an affected family member and the court is satisfied, on the balance of probabilities, that a child (whether or not the child is also an affected family member) has been subjected to family violence committed by the respondent, the court **must**-

- (a) if the child's need for protection is substantially the same as that of the affected family member, include the child in the final order as a protected person; or
- (b) otherwise, make a separate final order for the child as a protected person.

S.77A: If the Court makes a final order under s.76 in relation to an affected family member or an additional applicant and the court is satisfied, on the balance of probabilities, that a child (whether or not the child is also an affected family member or an additional applicant) has been subjected to behaviour that would be family violence if the child and the respondent or additional respondent were family members, the court **must**-

- (a) if the child's need for protection is substantially the same as that of the affected family member or additional applicant, include the child in the final order as a protected person; or
- (b) otherwise, make a separate final order for the child as a protected person.

S.77B: If the Court does not make a final order under s.74 or s.76 in relation to an affected family member or an additional applicant, the court **may**, on its own initiative, make a final order for a child of an affected family member or respondent or additional applicant as a protected person if satisfied, on the balance of probabilities, that the respondent or additional respondent-

- (a) has subjected the child to behaviour that is or would be family violence; and
- (b) is likely to continue to do so or do so again.

Procedural matters in relation to such an interim order are contained in s.77B(3).

6FV.10.5 Duration of final order

Section 97 of the FVPA empowers the court to specify in a final order the period for which the order is in force. If the respondent is a child, s.98 restricts that period to not more than 12 months unless there are exceptional circumstances.

In making a decision about the duration of a final order, the court must take into account-

- (a) that the safety of the protected person is paramount; and
- (b) any assessment by the applicant of the level and duration of risk from the respondent;
- (c) if the applicant is not the protected person, the protected person's views, including his or her assessment of the level and duration of risk from the respondent; and
- (d) any matters raised by the respondent that are relevant to the duration of the order.

Under s.99 of the FVPA, a final intervention order remains in force-

- (a) if a period is specified in the order, for the specified period unless it is sooner revoked by a court or set aside on appeal; or
- (b) if no period is specified in the order, until it is revoked by a court or set aside on appeal.

6FV.10.6 No power to make final FV order if existing equivalent PS order

Section 74A of the FVPA prohibits a court from making a final family violence intervention order under s.74, 76, 77 or 78 if there is an existing personal safety intervention order for which-

- (a) the affected person is a protected person and the respondent is a respondent; or
- (b) the respondent is a protected person and the affected person is a respondent.

The writer is surprised by the scope of this section which was only included in the FVPA on 05/09/2011. While the fact situation contemplated by s.74A is likely to occur comparatively rarely, the writer wonders whether it was really intended that the jurisdiction of a court to make an order on its own initiative to protect children [s.77] could be defeated by either of the above circumstances, especially by circumstance (b).

6FV.11 Conditions in family violence intervention orders

Subject to s.75 [discussed below], s.81(1) of the FVPA empowers a court to include in a family violence intervention order any conditions that appear to the court necessary or desirable in the circumstances. In deciding appropriate conditions, s.80 requires the court to give paramount consideration to the safety of the affected family member and any children who have been subjected to the family violence to which the application relates.

6FV.11.1 A non-exhaustive list of conditions

In what is expressed to be a non-exhaustive list, s.81(2) provides that a final or an interim order may include conditions-

- (a) prohibiting the respondent from committing family violence against the protected person;
- (b) excluding the respondent from the protected person's residence in accordance with s.82 or s.83;
- (c) relating to the use of personal property in accordance with s.86;
- (d) prohibiting the respondent from approaching, telephoning or otherwise contacting the protected person, unless in the company of a police officer or a specified person [examples given include emailing or sending text messages];
- (e) prohibiting the respondent from being anywhere within a specified distance of the protected person or a specified place, including the place where the protected person lives;
- (f) prohibiting the respondent from causing another person to engage in conduct prohibited by the order;
- (g) revoking or suspending a weapons approval held by the respondent or a weapons exemption applying to the respondent as provided by s.95;
- (h) cancelling or suspending the respondent's firearms authority as provided by s.95.

The focus of the FVPA is the protection of a person against family violence committed by another. Section 81(2)(a) thus sets out the central condition on most orders. A question arises whether a blanket condition prohibiting a respondent from committing "family violence" against a protected person can be made in a case where only one form of family violence (e.g. economic abuse) has been engaged in by the respondent and where only that same form is likely in the future. Given the preamble and purpose provisions of the FVPA and the wording of the Act generally, it is the writer's view that where any form of family violence has been engaged in and is likely in the future, the court may impose a blanket condition prohibiting a respondent from committing "family violence" generally against the protected person.

6FV.11.2 Restriction on conditions in absence of affected family member's consent

If the applicant for a final order is a police officer and the affected family member does not consent to the making of the final order, s.75 restricts the final order to the conditions referred to in s.81(2)(a), (f), (g) or (h) unless the affected family member-

- is a child and
 - (i) no adult affected family member is included in the application; or
 - (ii) the adult affected family member consents to the making of the order; or
- has a guardian who has consented to the application; or
- is cognitively impaired.

6FV.11.3 Exclusion of respondent from residence

If the court decides to make a final or an interim order, s.82 of the FVPA requires the court-

- (1) to consider whether to include a condition excluding the respondent from the protected person's residence regardless of any legal or equitable rights the parties have in the residence;
- (2) in deciding whether to include an exclusion condition, to have regard to all the circumstances of the case, including-
 - (a) the desirability of minimizing disruption to the protected person and any child living with the protected person and the importance of maintaining social networks and support which may be lost if the protected person and the child were required to leave the residence or were unable to return to or move into the residence;

- (b) the desirability of continuity and stability in the care of any child living with the protected person;
- (c) the desirability of allowing any childcare arrangements, education, training or employment of the protected person or any child living with the protected person to continue without interruption or disturbance [similar language to s.10(3)(o) of the CYFA].

If the court decides that an exclusion condition is appropriate in a family violence intervention order against an adult respondent and the protected person does not oppose the inclusion of the condition, s.82(4) of the FVPA requires that the order include the exclusion condition. However, this sub-section is not easy to reconcile with s.75(2) [discussed above] which prohibits an exclusion condition in most cases where the applicant is a police officer and the protected person does not consent to the making of the final order. There is a large difference between a person not opposing something and a person not consenting to something. It is the writer's view that s.75(2) should prevail over s.82(4) to the extent of any inconsistency between them.

Division 1 of Part 6 of the Residential Tenancies Act 1997 (Vic) enables a protected person to apply for an existing tenancy agreement to be terminated and a new tenancy agreement to be entered into with the landlord if a final family violence intervention order includes an exclusion condition.

6FV.11.4 Exclusion of child respondent from residence

If the court decides to make a family violence intervention order against a respondent who is a child, s.83(2) of the FVPA requires the court, in deciding whether to include an exclusion condition, to have regard to the following matters additional to those in s.82(2)-

- (a) the desirability of the child being supported to gain access to appropriate educational services and health services; and
- (b) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance [same wording as s.10(3)(o) of the CYFA].

Despite s.80 expressing that the safety of the protected persons is of "paramount consideration", s.83(3) enables the court to include an exclusion condition in an order against a child respondent only if it is satisfied that the child will have appropriate alternative accommodation and appropriate care and supervision.

If the child is an Aboriginal or Torres Strait Islander child, s.83(4) requires the court to prioritise the child living with extended family or relatives and have regard to the need to keep the child's culture and identity through contact with the child's community.

Section 84(1) of the FVPA empowers the court to ask the Secretary to the Department of Families, Fairness and Housing [DFFH, formerly DHHS] to give the court a report about the options available for the appropriate accommodation, care and supervision of a child respondent if an exclusion condition were included in a family violence intervention order. Section 84(2)(a) requires the Secretary to give the report to the court in the period ordered by the court or, if no period is ordered, within the prescribed time. Section 84(2)(b) provides that for a request relating to a child under the age of 17 years, s.30 of the CYFA applies as if the request were a report received under s.28 of the CYFA.

If the court includes an exclusion condition in a family violence intervention order against a child respondent, s.83(5) requires the court to notify the Secretary to DFFH that the order has been made.

6FV.11.5 New address for service for excluded person

If the court includes an exclusion condition in a family violence intervention order, s.85 requires the court to-

- (a) ask the respondent to provide an address for service of documents (which may be an email address); and
- (b) advise the respondent that a police officer may, under s.207, seek information about the respondent from public sector organisations:
 - (i) to enable a police officer to locate the respondent and serve the respondent with a document under the FVPA; or
 - (ii) to enable the respondent to be served with a document under an order for alternative service.

The respondent is not obliged to comply with the request to provide an alternative address. If the respondent provides an alternative address other than where the respondent lives or works and another person living at that address advises the court that he or she does not consent to the use of that address for service, the address is not a valid address for service of documents.

6FV.11.6 Conditions about personal property

Section 86 of the FVPA empowers the court to include in a final or interim order a condition directing the respondent-

- to return the protected person's personal property or property belonging to a family member of the protected person; or
- to return personal property belonging to the protected person and the respondent that will enable the protected person's everyday life to continue with as little disruption as practicable in the circumstances.

If the order includes an exclusion condition, the court may also include in a final or interim order a condition that-

- requires the furniture or appliances in the residence that enable the normal running of the home to remain in the residence; and
- allows the respondent to return to the residence, in the company of a police officer or another specified person, to obtain any of the respondent's personal property that is not required under the order to remain in the residence or to return property in accordance with s.86(a).

Section 87 of the FVPA provides that any condition in an intervention order is subject to any order to the contrary made by the Family Court or another court or a Tribunal with relevant jurisdiction to adjudicate in property disputes. To the extent of any inconsistency, the order of the other court or tribunal prevails. Section 88 of the FVPA makes it clear that the inclusion of a condition about personal property in an intervention order does not affect any rights the protected person or the respondent may have in relation to ownership of the property.

6FV.11.7 Decision about contact with child – Inconsistency with other court order

If the court decides to make a family violence intervention order and the protected person or the respondent is the parent of a child, s.91(1) of the FVPA requires the court to decide whether or not it will or may jeopardise the safety of the protected person or child for the child to live with, spend time with or communicate with the respondent. A previous lack of violence by the respondent towards the child is not on its own sufficient reason to decide the child's safety will not be jeopardised: s.91(2).

If the court decides the safety of the protected person or child may be jeopardised, s.93 requires it to include a condition in the intervention order prohibiting the respondent from living with, spending time with or communicating with the child.

If, on the contrary, the court decides the safety of the protected person or child will not be jeopardised by the respondent living with, spending time with or communicating with the respondent, s.92 requires the court to include in the intervention order the following conditions-

- (a) a condition that any of the following arrangements agreed to by protected person and respondent must be in writing or, in exceptional circumstances, in another form stated in the condition and must comply with any other prescribed requirements-
 - (i) arrangements for the child to live with, spend time with or communicate with the respondent;
 - (ii) arrangements for how the handover of the child is to occur so that the risk of violence being committed by the respondent against the protected person is minimised; and
- (b) a condition about how arrangements referred to in s.92(1)(a) are to be negotiated to maximise the safety of the protected person.

However, under s.92(4) the court is not required to include such a condition if the protected person, the respondent and any child of the protected person or the respondent live together.

Section 89 of the FVPA requires the court to enquire whether there is a current-

- Family Law Act order; or
- child protection order-

if it decides to make a family violence intervention order in any case in which the protected person or the respondent is the parent of a child.

If the family violence intervention order and any Family Law Act order will be inconsistent, s.90 of the FVPA requires the Court, to the extent of its powers under s.68R of the Family Law Act, to revive, vary, discharge or suspend the Family Law Act order to the extent of the inconsistency.

There is no power under s.90 to vary, discharge or suspend a child protection order. Under s.173(1) of the FVPA a family violence intervention order prevails over an inconsistent child protection order to the extent of the inconsistency.

6FV.11.8 Suspension or cancellation of firearms authority or weapons approval

If a court intends to make a FV intervention order, s.94 of the FVPA requires it to enquire as to whether a respondent holds a firearms authority, weapons approval or weapons exemption. Section 95 empowers the court to include a condition-

- in an interim order, suspending-
- in a final order, revoking-

the respondent's firearms authority, weapons approval or weapons exemption.

6FV.11.9 Courtlink conditions

The Courtlink computer systems of the Children's & Magistrates' Courts contain a number of pro-forma prohibitions or restrictions which are based on s.81(2) of the FVPA. These do not, of course, restrict the power of the court to include any conditions that appear to the court necessary or desirable in the circumstances of any particular case.

The pro-forma conditions on the Courtlink system for Children's Court orders under the FVPA are as follows:

Code	Directions clause	Default wording for Conditions
1. [ASH]	THE RESPONDENT MUST NOT	commit family violence against the protected person(s). Note: The Family Violence Protection Act 2008 defines family violence as behaviour by a person towards a family member of that person that is physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening, coercive, or in any other way controls or dominates a family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person. Family violence includes behaviour that causes a child to hear or witness or otherwise be exposed to the effects of these behaviours.
2. [DAM]	THE RESPONDENT MUST NOT	intentionally damage any property of the protected person(s) property or threaten to do so.
3. [ATC1]	"	contact or communicate with a protected person by any means.
4. [BPR1]	"	approach or remain within (default to 5) metres of a protected person.
5. [EXC1]	"	go to or remain within (default to 200 metres) of(the protected person's address) or any other place where a protected person lives, works or attends school/childcare.
6. [ENG]	"	get another person to do anything the respondent must not do under this order.
7. [92]		The respondent may: (a) do anything permitted by a Family Law Act order or a child protection order; (c) communicate with a protected person through a lawyer or mediator; or (d) arrange and/or participating in counselling or mediation; BUT ONLY IF the respondent does not commit family violence while doing so.
8. [SUR]	"	attempt to locate, follow the protected person(s) or keep him/her/them under surveillance.
9. [COM]	"	publish on the internet, by email or other electronic communication any material about the protected person(s).
10. [93]	"	(a) live in the same place as; or (b) spend time with or have contact with; or (c) communicate with- any child protected by this order.
11. [PPR1]	THE COURT ALSO ORDERS:	The respondent must arrange to return personal property belonging to the protected person(s) within (default to 2) days of the service of this order.

12. PPR2	"	The respondent must arrange to return jointly-owned property within (<i>default to 2</i>) days of the service of this order.
13. FIR1	"	FOR INTERIM ORDER ONLY Until further order, any firearms authority held by the respondent is suspended. The respondent must hand any firearms in his/her possession to police immediately.
14. WEA1	"	FOR INTERIM ORDER ONLY Until further order, any weapons approval or exemption held by the respondent is suspended. The respondent must hand any weapons in his/her possession to police immediately.
15. FIR2	"	FOR FINAL ORDER ONLY Any firearms authority held by the respondent is cancelled. The respondent must hand any firearms in his/her possession to police immediately.
16. WEA2	"	FOR FINAL ORDER ONLY Any weapons approval or weapons exemption held by the respondent is revoked. The respondent must hand any weapons in his/her possession to police immediately.
17. 68R1		FOR INTERIM ORDER ONLY At the time of making this interim intervention order, the Court has also made an order under section 68R of the <i>Family Law Act 1975</i> . The Court has ordered that the parenting order made on --/-- is: This order will end on --/-- or when the interim intervention order ends or when a court makes an alternative order. Note: Victorian police cannot enforce the contravention of a Family Law Act order.
18. 68R2		FOR FINAL ORDER ONLY At the time of making this final intervention order, the Court has also made an order under section 68R of the <i>Family Law Act 1975</i> . The Court has ordered that the parenting order made on --/-- is: Note: Victorian police cannot enforce the contravention of a Family Law Act order.
19. EXC2	THE RESPONDENT MUST NOT:	(a) assault, threaten or intimidate the protected person(s); or (b) intentionally damage any property of the protected person(s) or threaten to do so; or (c) contact or communicate with a protected person; or (d) approach a protected person; or (e) go to or remain within (<i>default to 200</i>) metres of (<i>the protected person's address</i>) or any other place where a protected person lives, works or attends school/childcare.
20. EXC3	THE RESPONDENT MUST NOT:	(a) assault, threaten or intimidate the protected person(s); or (b) intentionally damage any property of the protected person(s) or threaten to do so.
21.		The respondent agrees to contact the Men's Referral Service (9248 2899 or 1300 766 491) to obtain confidential advice and information about services that may assist him.
This is a Nationally Recognised Order		

6FV.12 Counselling orders

Part 5 [ss.126-144] of the FVPA deal with counselling orders. The operation of Part 5 is restricted by s.128 to a respondent for whom a relevant court makes a final order if but only if the respondent-

- is an adult; and
- at the time of the family violence was resident in one of a limited number of postcode areas specified by notice published in the Government Gazette (currently those areas serviced by the Ballarat, Shepparton, Heidelberg & Moorabbin Magistrates' Courts).

"Relevant court" means-

- (a) the Family Violence Court Division of the Magistrates' Court; or
- (b) the Magistrates' Court sitting at a venue of the Court specified by the Minister by notice published in the Government Gazette.

Counselling orders are therefore not available in the Children's Court.

Section 127 lists the two objects of Part 5:

- (a) to provide for orders to assess the eligibility of certain respondents for counselling; and
- (b) if appropriate, to require a respondent to attend counselling for the purpose of-
 - (i) increasing the respondent's accountability for the violence he or she has used against a family member; and
 - (ii) encouraging the respondent to change his or her behaviour.

Section 129 empowers a relevant court to make an order to assess the eligibility of the respondent for counselling. Section 130 empowers it to make an order that the respondent attend counselling.

The subject matter of the other sections in Part 5 is as follows:

131	Effect of appeal against intervention order
132	Notice of hearings
133	Approval of persons and of counselling
134	Person giving report may be required to attend hearing
135	Disputed report
136	Explanation of counselling orders
137	Variation or revocation of counselling orders
138	Service of counselling orders, eligibility report etc.
139	Certificate of respondent's non-attendance: the prescribed form for the certificate is either Form 2 or Form 3 in the FVPR.
140	Confidentiality of eligibility interview and report
141	Confidentiality of counselling
142	Limited use of information by the court
143	Authorisation to collect health information
144	Delegation

6FV.13 Relationship between FV intervention order and Family Law Act order

In ss.4(1) of the Family Law Act 1975 (Cth) [as amended] ('the FLA'), a 'family violence order' is defined as "an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence". Provided that the FVPA has been prescribed as a law for this purpose, a Victorian family violence intervention order is a 'family violence order' within the meaning of Division 11 of Part VII of the FLA.

For the purposes of this paragraph the writer uses the term 'FLA contact order' to cover the 3 types of orders, injunctions or arrangements set out in s.68P(1)(a) of the FLA, namely-

- (a) a parenting order that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child;
- (b) a recovery order (as defined in s.67Q) or any other order under the FLA that expressly or impliedly requires or authorises a person to spend time with a child;
- (c) an injunction under ss.68B or 114 that expressly or impliedly requires or authorises a person to spend time with a child.

6FV.13.1 FLA contact order prevails over existing inconsistent family violence order

Section 68Q(1) of the FLA provides that if an FLA contact order is inconsistent with an existing state family violence order, the FLA contact order prevails and the State family violence order is invalid to the extent of the inconsistency. See *AA v BB* [2013] VSC 120 at [14]-[27] & [87] per Bell J where his Honour highlighted the word "existing" in s.68Q(1). However, in that case Bell J dismissed an appeal by AA against a conviction on charges of contravening a FV intervention order and rejected submissions by AA, *inter alia*, that clauses 3 & 4 of the intervention order were invalid by reason of s.68Q of the FLA and/or s.109 of the *Constitution*. At [65] his Honour said: '[T]he court dealing last in time with a relevant proceeding has the power to make orders resolving any inconsistency between State family violence protection orders and orders or injunctions of the Family Court. I cannot discern from these provisions any intention on the part of the Commonwealth Parliament that the provisions of the FLA are to represent a complete statement of the law with respect to family violence involving parents and children or parenting orders in respect of conduct amounting to family violence.'

If a court exercising jurisdiction under Part VII of the FLA makes an FLA contact order which is inconsistent with an existing family violence order, the court must explain or arrange for someone else to explain to the persons described in s.68P(2)(c) the issues set out in s.68P(2)(d). In addition the court must comply with the further obligations set out in s.68P(3).

6FV.13.2 Declaration in relation to inconsistency and effect thereof

Section 68Q(2) of the FLA provides that:

- the applicant and respondent in the proceedings for an FLA contact order; and/or
 - the victim and respondent under the family violence order-
- may apply to a court having jurisdiction under Part VII of the FLA for a declaration that an FLA contact order is inconsistent with a family violence order.

Whether the Children's Court has such jurisdiction is a question which the writer considers to be moot and about which he would need to be persuaded by argument.

Pursuant to s.176 of the FVPA, an interim or final family violence intervention order under the FVPA operates subject to any declaration made under s.68Q of the FLA by a court having jurisdiction under Part VII of the FLA.

6FV.13.3 Suspension etc. of existing FLA contact order, plan etc. by FV intervention order

Section 68R(1) of the FLA empowers a court of a State or Territory that has jurisdiction in relation to Part VII of the FLA in certain circumstances to revive, vary, discharge or suspend an FLA contact order or, to the extent that it expressly or impliedly requires or authorises a person to spend time with a child, an undertaking, a recognisance or a registered parenting plan within the meaning of s.63C.

The state court's power to revive, vary, discharge or suspend an existing FLA contact order, undertaking, recognisance or parenting plan may be exercised on its own initiative or on application by any person [s.68R(2)] and is subject to the following limitations in s.68R(3):

- (a) the court can only exercise that power if - whether by interim order or otherwise - it makes or varies a family violence order in those proceedings; and
- (b) if the court proposes to revive, vary, discharge or suspend an existing FLA contact order – the court has before it material that was not before the court that made the FLA contact order.

Section 68R(4) imposes a further restriction: the court must not exercise the power of discharge in s.68R(1) in proceedings to make an interim family violence order or an interim variation of a family violence order.

In exercising its power under s.68R(1), a court with appropriate jurisdiction must-

- (a) have regard to the purposes stated in s.68N;
- (b) have regard to whether contact with both parents is in the best interests of the child; and
- (c) if varying, discharging or suspending an existing FLA contact order that when made or granted was inconsistent with an existing family violence order – be satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of the FLA contact order.

In s.68N of the FLA, the purposes of Division 11 of Part VII of the FLA are:

- (a) to resolve inconsistencies between-
 - (i) family violence orders; and
 - (ii) certain FLA contact orders;
- (aa) to ensure that FLA contact orders do not expose people to family violence; and
- (b) to achieve the objects and principles in s.60B.

The objects of Part VII of the FLA entitled "Children" are set out in s.60B(1) and are to ensure that the best interests of children are met by-

- (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
- (b) protecting children from physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence; and
- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The principles underlying the above objects are set out in s.60B(2). They are that (except where it is or would be contrary to a child's best interests)-

- (a) children have the right to know and be cared for by both their parents, regardless of whether the parents are married, separated, have never married or have never lived together; and
- (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other persons significant to their care, welfare and development (such as grandparents and other relatives); and
- (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children;
- (d) parents should agree about the future parenting of their children; and
- (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Under s.68T(1) if, proceedings to make an interim family violence order or an interim variation of a family violence order, the state court revives, varies or suspends an order, injunction or arrangement under s.68R, that revival, variation or suspension ceases to have effect at the earlier of:

- (a) the time the interim order stops being in force; and
- (b) the end of the period of 21 days starting when the interim order was made.

It should be noted that s.68R(1) of the FLA confers power to revive, vary, discharge or suspend a relevant contact order only on those state courts which have jurisdiction under Part VII of the FLA. The writer has no doubt that a Victorian Magistrates' Court hearing a family violence proceeding in relation to a child does have jurisdiction under Part VII of the FLA and hence has the requisite power under s.68R(1). However, for reasons set out in detail in section 4.3 headed "Jurisdiction of Family Division" in the chapter entitled "Family Division – General", the writer-

- **accepts the odd situation that the President of the Children's Court of Victoria does not have power under s.68R; and**
- **considers it moot whether or not a magistrate sitting in the Children's Court has power under s.68R-**

to revive, vary, discharge or suspend an order, injunction or arrangement of the type described in paragraphs (a), (b), (c) and (d) of s.68R(1) providing for the child to spend time with the respondent. If this is right, a ridiculous paradox ensues. A Magistrates' Court hearing a family violence proceeding in relation to a child has the requisite power under s.68R(1). The President of the Children's Court hearing precisely the same family violence proceeding in relation to a child does not have. Clearly a legislative amendment is called for.

6FV.13.4 Whether power to make intervention order inconsistent with a FLA residence order

It is the writer's view that neither a Magistrates' Court nor a Children's Court has power to impose conditions in a family violence order which are inconsistent with a pre-existing residence ["live with"] order made under Part VII of the FLA.

The writer's view is based on the absence from the legislation of any provisions akin to ss.68Q or 68R of the FLA or ss.173 or 176 of the FVPA. The specific powers in those sections relate to inconsistency between state intervention orders and FLA contact orders. Both Acts are silent about any inconsistencies between state intervention orders and FLA residence orders. In those circumstances, it is probable that the ordinary rules apply and that an order made under federal legislation takes precedence over an inconsistent order made under state legislation, whichever order is made first.

If the writer's view is correct, there is a clear potential for harm to children the subject of residence orders who flee into the care of another person as a result of violence by the person who has custodial rights and responsibilities. One way that such a child can be given immediate interim protection by the Children's Court is via the irreconcilable difference provisions of ss.259-260 of the CYFA. If an application for conciliation counselling is lodged with the Secretary by a child or his or her legal representative pursuant to s.260(1), the Children's Court has power under ss.262(1)(d) & 262(2)(a) to make an interim accommodation order placing the child in the care of a person other than the impugned carer. Such an order under the CYFA will take precedence over an inconsistent residence order under the FLA. And yet, paradoxically, an IAO is subservient to any state intervention order. The whole thing continues to make no sense at all.

6FV.14 Variation, revocation or extension of FV intervention order

Section 149(1) of the FVPA gives a court jurisdiction to revoke, vary or extend a family violence intervention order or a counselling order made by it or any other court. On its face, this section is very broad and might be read as conferring jurisdiction on the Children's Court to revoke, vary or extend even if all of the parties involved are adults. However, the writer believes that s.149(1) must be read subject to ss.146-147 and considers that the Children's Court does not have jurisdiction to deal with an application to revoke, vary or extend a family violence intervention order unless-

- at least one of the parties is a child at the time the application was made; or
- the application is a "related application", i.e. an application for an order on the grounds of the same or similar circumstances [s.147(3) specifically includes a related "application to vary, revoke or extend an order"].

Section 108(1) of the FVPA provides that an application to vary, revoke or extend a family violence intervention order may be made to the court by-

- (a) a party to the proceeding in which the order was made; or
- (b) if the protected person is a child – a parent of the child (other than the respondent) or any other person with the written consent of a parent (other than the respondent); or
- (c) if the protected person is a child who is 14 years of age or more – the protected person with the leave of the court; or
- (d) if a police officer was not a party to the proceeding in which the FV intervention order was made – a police officer; or
- (e) if the protected person has a guardian and the guardian was not a party to the proceeding in which the FV intervention order was made – the guardian.

Rule 4.04 lists matters which must be included in an application to vary, revoke or extend. The form of consent for an application made under paragraph (b) is set out in Rule 4.05.

Section 109 of the FVPA allows a respondent to apply for the variation or revocation of a family violence intervention order only if the court has given leave for the respondent to make the application. The court may only grant such leave if there has been a change in circumstances which may justify a variation or revocation of the order.

6FV.14.1 Variation, revocation or extension

Section 100(1) of the FVPA empowers a court to order the variation or revocation of a family violence intervention order on-

- (a) an application under Division 8 of Part 4; or
- (b) in the case of an interim order made under s.53AB or a final order made under s.77B on the court's own initiative.

See also *Miles v Barca* [2003] VSC 376 at [24].

In deciding whether to make an order to vary or revoke a family violence intervention order, ss.100(2) & 102 require the court-

- to have regard to all the circumstances of the case and in particular-
 - (a) the applicant's reasons for seeking the variation or revocation;
 - (b) the safety of the protected person;
 - (c) the protected person's views about the variation or revocation;
 - (d) whether or not the protected person is legally represented; and
 - (e) if the protected person has a guardian, the guardian's views; and
- to decide whether-
 - (a) there has been any change in the need to protect another person protected by the order from family violence by the respondent; and
 - (b) there are any other persons who have since become family members of the respondent or protected person; and
 - (c) there are any Family Law Act orders in existence relating to where a child who is a person referred to in paragraph (a) or (b) lives or the respondent spending time with or communicating with such child.

If the court decides not to grant an application for revocation of a family violence intervention order, s.100(3) permits the court instead to order a variation of the order in the way it considers appropriate.

If a person makes an application for a variation of a family violence intervention order, s.101(1) empowers the court to make an interim order varying the FV intervention order. Section 101(2) provides that for the purposes of s.101(1), Division 2 applies (with any necessary changes) to the making of an interim variation as if it were the making of an interim order under that Division. An issue had previously arisen as to whether an application for an interim variation may be the subject of an after hours application by a police officer. A new note after s.101(2) clarifies that the court may make interim orders varying intervention orders after hours.

Section 102(2) empowers the court-

- to refuse to vary or revoke the family violence intervention order; or
- to vary it in a way that differs from the variation sought in the application-

if satisfied, on the balance of probabilities, that it is necessary to do so to ensure the safety of another person protected by the order.

Section 103 provides that if a child who is a protected person has a continuing need for protection from family violence committed by the respondent and that need is not substantially the same as that of the other protected person for whom the variation or revocation is being sought, the court may, on its own initiative-

- (a) make a new family violence intervention order under s.74 for the child as a protected person; or
- (b) vary the order to which the application under s.100 relates as the court considers necessary.

Section 104 empowers the court on an application for variation or revocation, on its own initiative, to provide protection for children who have become family members since the original order was made.

Section 106 of the FVPA empowers a court to order the extension of a final order on-

- (a) an application under Division 8 of Part 4; or
- (b) on its own initiative if the order was made by a court on its own initiative-

if the court is satisfied, on the balance of probabilities, that if the order is not extended the respondent is likely to commit family violence against the protected person.

Section 106(3) allows the court to extend a final order whether or not the respondent has committed family violence against the protected person while the final order was in force or has complied with the order.

If a person applies for an extension of a family violence final order before the expiry of the order and the respondent has not yet been served, s.107(1) empowers the court to make an interim order in the absence of the respondent extending the final order. Such interim extension order expires 28 days after it is made unless the respondent is earlier served with the application and a copy of the interim extension order [s.107(2)]. The court may make more than one interim extension order if it has not been possible to serve the respondent [s.107(3)]. If, within 28 days of making an interim extension order, the respondent is served with the application and a copy of the interim extension order, s.107(4) provides that the interim extension order remains in force until-

- a final order is made unless the interim extension contains a condition that it continues until the final order is served on the respondent; or
- the time the court refuses to extend the final order or revokes the interim order; or
- the time an application for extension is withdrawn.

6FV.14.2 If applicant is not protected person

If the applicant for the variation or extension of a family violence intervention order is a police officer, s.110(1) allows the application to be made without the consent of the protected person. However, if the protected person does not consent to the variation or extension, ss.110(2) & 110(3) provide that-

- (a) the order may be varied only to include conditions referred to in s.81(2)(a), (f), (g) or (h); and
- (b) the order may be extended only if the order is subject to conditions referred to in s.81(2)(a), (f), (g) or (h); and
- (c) conditions must not be removed from the order-
unless the protected person-
 - is a child and
 - (i) no adult is protected by the intervention order; or
 - (ii) the adult protected by the intervention order consents to the variation or extension; or
 - has a guardian who has consented to the application; or
 - is cognitively impaired.

If the applicant for the variation, revocation or extension of a family violence intervention order is not the protected person or guardian, the respondent or a police officer, s.111 provides that the application may only be made with the written consent of-

- (a) the protected person;
- (b) if the protected person is a child, a parent of the child other than the respondent;
- (c) if the protected person has a guardian, the guardian.

Section 112 of the FVPA requires the protected person's views to be heard separately if the application for variation, revocation or extension is made by the person's guardian or with the guardian's consent and the protected person objects to the application.

6FV.15 The Family Violence Information Sharing Scheme

Part 5A (ss.144A to 144SA) of the FVPA was inserted by Act No.23/2017 and commenced operation in February 2018. Part 5A establishes the **Family Violence Information Sharing Scheme** (the Scheme). The Scheme authorises the sharing of information to assess or manage risk of family violence and aims to create a cultural shift in information sharing practice to support effective assessment and management of family violence risk. Through enabling the timely sharing of relevant information, the Scheme is intended to support information sharing entities (ISEs) to keep perpetrators in view and promote the safety of victim survivors of family violence. ISEs can share information under the Scheme for two purposes — a family violence assessment purpose and a family violence protection purpose. The assessment purpose allows a greater breadth of information to be sought in order to establish if family violence risk is present.

ISEs are prescribed through Regulations and are authorised to share information with other ISEs. These ISEs will include specialist family violence services, child and family services, child protection, sexual assault services, corrections, victims' services, Magistrates Court and Children's Court, the police, mental health services, housing and homelessness services, alcohol and other drug services and Maternal and Child Health. Some exceptions apply. Only information that is relevant to assessing or managing risk of family violence is authorised to be shared between ISEs. Relevant information about a person (adult or child) who is a victim survivor, alleged perpetrator or perpetrator, or a third party can be shared. There is no requirement to obtain consent from an alleged perpetrator and perpetrator, allowing ISEs access to vital, risk-relevant information. This shifts the focus from victim survivors being responsible for their own safety to the accountability of the service system in managing victim safety and holding perpetrators to account.

Relevant information about adult victim survivors and third parties can only be shared with their consent, except when there is a serious threat or the information is relevant to assessing or managing risk to a child victim survivor. Information about any relevant person can be shared without consent to assess or manage risk to a child victim survivor. However the views of the child and parent who is not a perpetrator should be sought and taken into account where it is appropriate, safe and reasonable to do so. This places primacy on a child's safety over any individual's privacy.

Part 5A contains the following 10 Divisions:

DIVISION	SECTIONS	SUBJECT MATTER
1	144A-144J	Definitions & meanings, objects & application of Part 5A and principles
2	144K-144KD	Information sharing for family violence assessment purpose
3	144L-144LD	Information sharing for family violence protection purpose
4	144M-144MA	Information sharing with primary persons
5	144N-144ND	Consent
6	144O-144OI	The Central Information Point
7	144P-144PB	Guidelines, protected disclosures and recording requirements
8	144Q-144QE	Relationship of Part 5A with other Acts
9	144R-144RA	Offences
10	144S-144SA	Review

Part 5B (ss.144SB to 144SG) of the FVPA was inserted by Act No.11/2018 and commenced operation on 10/04/2018. The object of Part 5B is to provide for the lawful collection, use and disclosure of confidential information by specified persons and bodies for the purposes of facilitating the provision of services by Support and Safety Hubs in a way that gives precedence to safety and wellbeing over privacy.

Support and Safety Hubs, also known as 'The Orange Door', help women, children and young people experiencing family violence and families who need support with the wellbeing and development of their children. The Support and Safety Hubs also deliver perpetrator services, aimed at challenging and changing perpetrators' behaviour.

Part 5B contains the following 3 Divisions:

DIVISION	SECTIONS	SUBJECT MATTER
1	144SB-144SC	Definitions & meanings
2	144SD	Objects of Part 5B
3	144SE-144SG	Information sharing

6FV.16 The Family Violence Risk Assessment & Risk Management Framework

Part 11 (ss.188 to 196) of the FVPA was also inserted by Act No.23/2017 and commenced operation in February 2018. Section 189 permits the Minister at any time to approve a Family Violence Risk Assessment and Risk Management Framework. Section 190 obliges a body that provides services relevant to family violence risk management to ensure that its relevant policies, procedures, practice guidance and tools align with the Framework approved by the Minister.

6FV.17 Court's own motion interim orders in bail or criminal proceedings

Division 2A of Part 4 (ss.60A-60L) of the FVPA was inserted by Act No.33/2018 and commenced operation on 10 December 2019. It empowers a court hearing a bail application, an appeal relating to bail or a criminal proceeding to make an interim family violence order against an accused to protect a family member of the accused if the court is satisfied, on the balance of probabilities, that the interim order is necessary to ensure the safety of the family member pending a decision about a final order.

Division 2A contains the following 12 sections:

SECTIONS	SUBJECT MATTER
60A	Definition of application or appeal relating to bail
60B	Court hearing application or appeal re bail may make own motion interim order
60C	Court may make interim order on own motion in a criminal proceeding
60D	Prosecutor not a party to proceeding for interim order
60E	Material before the court for making interim orders under Division 2A
60F	Interim order to protect child if interim order made under ss.60B or 60C
60G	Oral explanation of interim order
60H	Documents to be given to adult accused who is before the court
60I	Service of interim order and other documents
60J	Interim order taken to be an application for a FV intervention order and treated as an application under the FVPA with the Chief Commissioner of Police taken as the applicant
60K	Interim orders made by Supreme or County Court to be transferred to Magistrates' or Children's Court for final determination
60L	Mention date and hearing for proceeding for final order

6PS PERSONAL SAFETY INTERVENTION ORDERS ACT 2010

6PS.1 Background to the PSIA

The PSIA was introduced into the Victorian Parliament on 09/06/2010. It was passed on 29/07/2010 and was assented to on 07/09/2010. Sections 1-3, 197-209 & 222-224 came into operation on 01/12/2010. The balance came into operation on 05/09/2011.

The PSIA repealed and replaced the SIOA which had come into operation on 08/12/2008 as an interim measure which preserved – with minimal amendments – the regime for stalking intervention orders previously contained in the CFVA pending a comprehensive review of the legislation.

There was a very significant difference between a court's procedures and powers under the FVPA and the SIOA. The procedures and powers under the FVPA and the PSIA are very much closer, the latter being substantially modelled on the former.

6PS.2 Purposes of the PSIA

Section 1 of the PSIA states that the main purposes of the Act are-

- (a) to protect the safety of victims of assault, sexual assault, harassment, property damage or interference with property, stalking and serious threats; and
- (b) to promote and assist in the resolution of disputes through mediation where appropriate.

Section 2 states that the PSIA aims to achieve these purposes by-

- (a) providing an effective and accessible system of personal safety intervention orders; and
- (b) encouraging the use of mediation to assist in the resolution of disputes where appropriate; and
- (c) creating an offence for contravention of a personal safety intervention order.

6PS.3 The PSIA does not apply to certain conduct involving official duties

Section 11 provides that the PSIA does not apply to conduct engaged in by a person performing official duties for the following purposes that, but for s.11, would constitute grounds for making an order under the PSIA-

- (a) the enforcement of the criminal law;
- (b) the administration of any Act;
- (c) the enforcement of a law imposing a pecuniary penalty;
- (d) the execution of a warrant; or
- (e) the protection of the public revenue.

6PS.4 Meaning of "prohibited behaviour"

For the purposes of the PSIA, "prohibited behaviour" is defined in s.5 as any of the following-

- (a) assault;
- (b) sexual assault;
- (c) harassment;
- (d) property damage or interference;
- (e) making a serious threat.

6PS.4.1 Meaning of "assault" / "sexual assault"

"Assault" is broadly defined in s.6(1) of the PSIA as meaning the direct or indirect application of force by a person to the body of, or to clothing or equipment worn by, another person where the application of force-

- (a) is-
 - (i) without lawful excuse; and
 - (ii) with intent to inflict, or being reckless as to the infliction of, bodily injury, pain, discomfort, damage, insult or deprivation of liberty; and
- (b) results in the infliction of any such consequence (whether or not the consequence inflicted is the consequence intended or foreseen).

"Application of force" includes application of heat, light, electric current or any other form of energy or application or matter in solid, liquid or gaseous form.

"Sexual assault" is defined in s.6(2) as meaning "an assault of a sexual nature".

6PS.4.2 Meaning of "harassment"

For the purposes of the PSIA, "harassment" is defined in s.7 as a course of conduct by a person towards another person that is demeaning, derogatory or intimidating and includes such conduct that is carried on by or through a third person. This is broad enough to encompass most "bullying".

6PS.4.3 Meaning of "property damage or interference"

For the purposes of the PSIA, "property damage or interference" is defined in s.8 as repeated intentional-

- (a) damage to, or destruction of, any property of a person, including a person's pet;
- (b) substantial interference with any property of a person, including withholding any property of a person;
- (c) threats to damage, destroy or substantially interfere with any property of a person.

6PS.4.4 Meaning of “serious threat”

For the purposes of the PSIA, a “serious threat” is defined in s.8 as-

- (a) a threat to kill within the meaning of s.20 of the Crimes Act 1958; or
- (b) a threat to inflict serious injury within the meaning of s.21 of the Crimes Act 1958.

6PS.5 “Stalking”

In *Miles v Barca* [2003] VSC 376 Byrne J said at [26]: “A finding of stalking is a grave one, and a finding which carries with it considerable public opprobrium.” See also *R v Bouras* [2012] VSC 77 at [17]-[19] per Hollingworth J.

6PS.5.1 Statutory definition in s.10 of the PSIA

“Stalking” is defined in s.10(1) of the PSIA in very broad terms: A person (the respondent) stalks another person (the affected person) if the respondent engages in a course of conduct-

- (a) with the intention of causing physical or mental harm to the affected person, including self-harm, or of arousing apprehension or fear in the affected person for his or her own safety or that of any other person; and
- (b) that includes any of the following-
 - (i) following the affected person or any other person;
 - (ii) contacting the affected person or any other person by post, telephone, fax, text message, email or other electronic communication or by any other means whatsoever;
 - (iii) publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material-
 - (A) relating to the affected person or any other person; or
 - (B) purporting to relate to, or to originate from, the affected person or any other person;
 - (iv) causing an unauthorised computer function (within the meaning of s.247A(1) of the Crimes Act 1958) in a computer owned or used by the affected person or any other person;
 - (v) tracing the affected person's or any other person's use of the Internet or of email or other electronic communications;
 - (vi) entering or loitering outside or near the affected person's or any other person's place of residence or place of business or any other place frequented by the affected person or the other person;
 - (vii) interfering with property in the affected person's or any other person's possession (whether or not the respondent has an interest in the property);
 - (viiia) making threats to the affected person;
 - (viiib) using abusive or offensive words to or in the presence of the affected person;
 - (viic) performing abusive or offensive acts in the presence of the affected person;
 - (viid) directing abusive or offensive acts towards the affected person;
 - (viii) giving offensive material to the affected person or any other person or leaving it where it will be found by, given to, or brought to the attention of, the affected person or the other person;
 - (ix) keeping the affected person or any other person under surveillance;
 - (x) acting in any other way that could reasonably be expected-
 - (A) to cause physical or mental harm to the affected person, including self-harm; or
 - (B) to arouse apprehension or fear in the affected person for his or her own safety or that of any other person.

The intention referred to in s.10(1)(a) is not confined to actual intention for s.10(2) of the PSIA provides for legislatively deemed intention in the following circumstances:

“For the purposes of this Act, the [respondent] has the intention to cause physical or mental harm to the [affected person], including self-harm, or to arouse apprehension or fear in the [affected person] for his or her own safety or that of any other person if-

- (a) the [respondent] knows that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear; or
- (b) the [respondent] in all the particular circumstances ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.”

Prior to 10/12/2003 the definition of "stalking" ended with the words "and the course of conduct engaged in actually did have that result". That was altered by s.4(1) of Act No.105 of 2003 which introduced the equivalent of s.10(2) into the predecessor SIOA. Hence, it is no longer necessary to prove that the impugned course of conduct caused actual harm, fear or apprehension in the affected person except in the limited circumstances referred to in s.10(2)(b) of the PSIA.

Section 10(3) provides that in s.10 mental harm includes-

- (a) psychological harm; and
- (b) suicidal thoughts.

6PS.5.2 Comparison with definition in s.21A of the Crimes Act 1958

Section 21A(1) of the Crimes Act 1958 creates the criminal offence of stalking for which the maximum penalty is 10 years' imprisonment.

Sections 21A(2) & (3) define "stalking" for the purposes of the criminal law in effectively identical terms to s.10 of the PSIA. For a discussion of the operation of ss.21A(2) & 21A(3) see *RR v The Queen* [2013] VSCA 147 at [105]-[115] per Ashley JA.

Section 21A(4) provides exemptions for persons performing official duties in effectively identical terms to s.11 of the PSIA. Section 21A(4A) provides a defence to a charge of stalking in effectively identical terms to the prohibition against making a final order which is contained in s.61(4) of the PSIA.

It follows that the case law on s.21A of the Crimes Act 1958 is centrally relevant to construction of the stalking provisions of the PSIA.

6PS.5.3 Relevant case law

The rather complex definition of stalking in s.10 of the PSIA and in s.21A of the Crimes Act 1958 raises a number of questions which remain unanswered in the legislation and about which there is limited case law. In *R v Anders* [2009] VSCA 7 Redlich JA, with whom Vincent & Kellam JJA agreed, said at [26]:

"Both parties on appeal made similar submissions as to the essential elements of the offence of stalking. The offence involves a pattern of conduct evidencing a continuity of purpose in relation to the victim and committed with the proscribed intent: *Berlyn v Brouskos* (2002) 134 A Crim R 111 [24] (Nettle J). The offender must have the intent to perform the acts associated with and directed towards the victim and which comprise a course of conduct which includes the conduct particularised in s.21A(2) – in this case particular (f) – 'keeping the victim under surveillance'. The offender must also have the subjective intent particularised in s.21(3)(a) or the circumstances must satisfy the objective test set out in s.21A(3)(b). The 'course of conduct' must be directed towards a particular victim with that continuing intent: *R v Maccia* [2003] VSC 384, [18] (Gillard J)."

6PS.5.3.1 "Harm", "Apprehension", "Fear"

Save for the definition in s.10(3) of the PSIA that mental harm includes psychological harm and suicidal thoughts, there is no definition and limited case law on the meaning of the terms 'harm', 'apprehension' and 'fear' in ss.10(1) & 10(2) of the PSIA. In upholding a no case submission on 8 of 48 charges of stalking based on covert "upskirting" in *Kokoszka v Crawford* [Magistrates' Court of Victoria-Power M, unreported, case P00675109, 28/06/2002], the writer held (at pp.25-26):

"The key word is 'harm'. That word is not defined in the Act. It has a number of meanings in common parlance. In the extract from the Oxford English Dictionary tendered by the prosecutor, its meaning as a noun is-

1. 'Evil (physical or otherwise) as done to or suffered by some person or thing; hurt, injury, damage, mischief.

2. Grief, sorrow, pain, trouble, distress, affliction.'

The Microsoft Word 2000 Thesaurus lists as synonyms of 'harm'- 'damage, hurt, injury, destruction, impairment, mischief'. Webster's New 20th Century Dictionary (2nd ed, 1959, p.827) lists as synonyms- 'physical or material injury; hurt; damage; detriment; misfortune.'

[Counsel for the defendant] urges that I construe 'harm' as 'injury' and notes that 'there is no psychiatric evidence that any of these people suffered injury'...I do not agree that

'harm' in s.21A(3) is limited to 'injury'. In my view, given the nature, scope, subject matter and object of s.21A, it is clear that the legislature did not intend 'mental harm' to be limited to 'mental injury' and to construe s.21A(3) in that restricted way would rob the legislation of much of its intended effect, both in relation to s.21A(1) & s.21A(5).

I consider that the legislature intended 'mental harm' to include 'mental or emotional hurt'. Though I agree with [counsel] that a mere 'mental reaction' falls short of 'mental harm', I consider that only the symptoms described by complainants 9 & 47 can properly be categorized as a reaction. Those charges are dismissed. Complainants 8 & 27 have referred only to an invasion of their privacy. A properly instructed trier of fact could not infer from this alone that either complainant has suffered mental hurt. Those charges are dismissed. Complainant 37 said- *"I felt this sort of thing is pathetic and that this person has abused our trust and working relationship."* Indeed it is and indeed he did. But that does not evidence mental hurt. That charge is dismissed."

In *RR v The Queen* [2013] VSCA 147 at [69] Ashley JA said that in order to prove an intention to cause "mental harm", it was not necessary to prove "an intention that the victim suffer a medically diagnosed or diagnosable condition".

6PS.5.3.2 "Likely to cause harm or arouse apprehension or fear"

In order to make out the test of intent in s.10(2) of the PSIA, the evidence adduced by applicant must satisfy the court that the respondent knew or in all the particular circumstances ought to have understood that engaging in the impugned course of conduct would be-

- likely to cause physical or mental harm to the affected person; or
- likely to arouse in the affected person apprehension or fear for his or her own safety or that of another person.

A key word is "likely". In *Kokoszka v Crawford* [Magistrates' Court of Victoria-Power M, unreported, case P00675109, 28/06/2002], counsel for the defendant had argued forcefully that the defendant's covert conduct was not likely to cause the requisite harm, apprehension or fear because the whole purpose of the conduct was that it was to be done secretly. It was from the covert nature of the "upskirting" activity that the whole purpose and pleasure of the conduct was obtained by the defendant. The writer held (at pp.22-23):

"It is an interesting argument but on close analysis I do not agree with it. In my view it focuses too much on the offender and insufficiently on the victim. I have no doubt at all that the intrusion inherent in the defendant's 'up-skirting' activities would be likely – indeed very likely – to cause, at the very least, apprehension and/or mental harm in even a mature and robust female target if the target became aware of it. Is the underlined qualification inherent in s.21A(3)? In my view it is.

Of the [various] examples of stalking set out in s.21A(2), at least one – surveillance – is an inherently covert activity. It is not hard to envisage scenarios in which the more sophisticated the surveillance, the greater the likelihood of the requisite harm being caused to the victim in the event of the cover being blown. Accordingly, I agree with the prosecutor's submission:

'By its very nature surveillance is a covert operation and it would make nonsense of the Act if the defendant could conduct surveillance on a target victim over an extended period of time and ultimately be the subject of investigation [in which] the surveillance is uncovered and it wouldn't give rise to stalking.'

In my view, given the nature, scope, subject matter and object of s.21A, it is clear that the legislature did not intend that the likelihood of the course of conduct coming to the attention of the target was to be relevant in determining the likelihood of the requisite harm being caused to the target. To construe s.21A(3) in the contrary way urged by counsel for the defendant would rob the legislation of much of its intended effect."

6PS.5.3.3 Requisite intent under s.10(2) of the PSIA & s.21A(3) of the Crimes Act 1958

An issue in *R v Loc Tien Hoang* (2007) 16 VR 369; (2007) 173 A Crim R 64; [2007] VSCA 117 was whether in order to prove the requisite intent under s.21A(3) of the Crimes Act 1958 the Crown was required to prove that the defendant subjectively intended to cause the complainant harm or to make her apprehensive or fearful. At [103]-[105] Neave JA (with whom Maxwell P & Eames JA agreed) said:

“The words ‘in all the particular circumstances ought to have understood’ import an objective element into the specific intent required for the offence where the course of conduct did cause mental harm or arouse apprehension or fear in the victim. In these circumstances, the required state of mind is not the actual state of mind of the offender, but what ‘that offender’ in those circumstances ‘ought to have understood’.

The policy rationale for this provision is clear. It may be that many stalkers falsely believe that they have a relationship with the person they pursue, even though they may have never met or spoken to the victim. A provision which required proof of a subjective intention to cause harm to the victim would not apply to an alleged stalker who obsessively pursued the victim on the basis of a false belief that these attentions were welcome. The reference to ‘in all the particular circumstances’ requires the jury to take account of the particular circumstances in which the course of conduct has occurred, in order to decide whether the accused ‘ought to have understood’ the effects of the behaviour on the victim.

The question is not whether Mr Hoang subjectively understood that the course of conduct in which he engaged would be likely to cause harm to the complainant, or arouse her apprehension or fear, but whether in all the particular circumstances he ought to have understood the effect of his behaviour on the complainant.”

6PS.5.3.4 “Course of conduct”

One aspect of the definition of stalking about which there is a significant amount of case law is the meaning of ‘course of conduct’. The writer considers that this case law is equally relevant to the definition of harassment in s.7 which also requires proof of a ‘course of conduct’.

In the related cases of *Gunes v Pearson*; *Tunc v Pearson* (1996) 89 A Crim R 297 at 306, McDonald J held:

“In order for conduct which is engaged in to be a ‘course of conduct’, the relevant conduct must be conduct which is protracted or conduct which is engaged in on more than one separate occasion”.

This dicta was approved and applied by Nettle J in *Berlyn v Brouskos* [2002] VSC 377 at [24]-[25]:

“I consider that *Gunes* was correctly decided. The essence of stalking under the American model, and thus I think an essential element of stalking as defined by s. 21A of the *Crimes Act*, is a course of conduct of the kind prescribed in the California Penal Code (cf. *Director of Public Prosecutions v Sutcliffe* [2001] VSC 43 esp. at [87]-[93] per Gillard J; and see Wiener, *Stalking, Criminal Responsibility and the infliction of harm* (1995) 69 LJ 30 at 32). And for the reasons already given that means that there must be a pattern of conduct evidencing a continuity of purpose (assuming as suggested above the importation of a similar conception of course of conduct to that adopted in the American legislation). Indeed, for those reasons, s. 21A is in some respects more limited than the legislation in other Australian States, which speaks only in terms of proscribed conduct on at least two occasions, or on one, as in New South Wales, without the requirement of a course of conduct evidencing a continuity of purpose. It is readily conceivable that conduct on two separate occasions may not always constitute a pattern of conduct evidencing a continuity of purpose and it is unlikely that conduct on only one occasion could constitute a pattern of conduct evidencing a continuity of purpose, unless the conduct were protracted. In order to constitute a pattern of conduct there must be something more, and I think with respect that McDonald J was correct when his Honour said in *Gunes*, in effect, that the something more is that the conduct must be engaged in on more than one occasion, or it must be protracted.

That is not to suggest that proscribed conduct which is engaged in on more than one occasion or which is protracted will necessarily constitute a course of conduct evidencing a continuity of purpose. It may not, and I do not take McDonald J to have suggested otherwise. Something additional about the conduct or the surrounding circumstances will need to be shown before it can be said of the conduct that it amounts to a pattern of conduct evidencing a continuity of purpose. But I think that for all intents and purposes, it will not be open to say of conduct that it amounts to a course of conduct unless it is engaged in on more than one occasion or unless it is protracted; whatever else may need to be shown.”

See also *Thomas v Campbell* [2003] VSC 460 at [42]-[51] per Nettle J; *R v Loc Tien Hoang* (2007) 16 VR 369; (2007) 173 A Crim R 64; [2007] VSCA 117 at [92]-[95] per Neave JA (with whom Maxwell P & Eames JA agreed); *RR v The Queen* [2013] VSCA 147 at [75]-[86] per Ashley JA.

In *Nadarajamoorthy v Moreton* [2003] VSC 283 at [28], Bongiorno J allowed an appeal against a Magistrate's finding that the appellant was of guilty of 2 offences of stalking. At [28] his Honour said:

"In *Berlyn v Brouskos*...Nettle J adopted the above passage from *Gunes v Pearson*, but, confronted with a more marginal case on the facts, he looked to the origins of the legislation and found that 'there must be a pattern of conduct evidencing a continuity of purpose' which requires something more than protracted conduct, or conduct on more than one occasion."

The first of the two charges arose from a protest action by some temple members, including the appellant, which involved the handing out of leaflets and the erection of a banner accusing the president of the temple, the priest and others of criminal, immoral and other bad behaviour which was said to be contrary to the Hindu religion. In allowing the appeal, Bongiorno J said at [31]-[33]:

"The charge in relation to this offence was stalking by loitering near a place frequented by the victim. Thus the charge cites actions falling within s21A(2)(c) of the *Crimes Act* 1958...Counsel submitted that loitering must involve an illegal purpose and relied on the case of *Wynne v Lockyer* [1978] VR 279, a decision of Harris J, on the meaning of 'loiters' in the *Vagrancy Act* 1966.

The matters set out in s21A(2)(a) to (f) are actions which are not necessarily unlawful. It is the confluence of these actions in a course of conduct directed to a person with a specific intent and a specific result which constitutes the criminality. The purpose of the section is to extend the law and render illegal actions which did not constitute offences at the time it was enacted. There is no basis for reading into the word 'loitering' as it appears in this section any notion of necessarily unlawful purpose. However, it does seem that the word must mean more than simply 'be and remain at'. It conveys a concept of idleness, lack of purpose or indolence. In the context of the statutory provision under consideration, s 21A(2)(c), loitering must mean being and remaining at or near the places specified for at least one or more of the purposes specified in s 21A(2), namely causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any other person. In other words it must have a similar meaning to that which Harris J, held it had in the *Vagrancy Act* in *Wynne v Lockyer* save that the intent which must be proved here is not the intention to commit a felony but rather the intention set out in the sub-section. Where the person accused is engaging in activities at the relevant time which render a description of 'loitering' inapt in the circumstances he will not be guilty of stalking by engaging in the activity described in s 21A(2)(c) of the *Crimes Act*, whatever else he may be guilty of.

As in order to find the charge proved the Magistrate would have had to be satisfied that the appellant was 'loitering', in a circumstantial case such as this he would have had to exclude all reasonable hypotheses consistent with his not having been 'loitering' beyond reasonable doubt. Having regard to his findings as to what the various parties (including the appellant) were doing at the temple on the relevant date regarding the protest which was in progress and the appellant's part in it he could not have excluded beyond reasonable doubt the possibility that the appellant was there for a purpose or purposes other than one of the statutory purposes set out in s 21A(2). Thus he could not exclude the possibility that he was not loitering within the meaning of the section. The protest, as found by the Magistrate, involved more people than just the appellant, was directed at an audience wider than the alleged victim and involved acts (such as handing out pamphlets) which were inconsistent with the concept of 'loitering' as set out in the Act."

The second charge arose from an incident in which a van driven by the appellant drove too close to and tail-gated a car in which the alleged victim was a passenger and the victim's solicitor was the driver. The appellant drove for some distance side by side with the solicitor's car during which time a passenger in the appellant's van projected his arm out of the vehicle and made threatening arm and fist movements. Both vehicles were travelling at about 80 kilometres per hour. When tail-gating, the appellant's van was 6-7 feet away and ran parallel to the solicitor's car for 3-4 minutes. Eventually the van overtook the car and presumably no further harassment occurred. In allowing the appeal, Bongiorno J said at [39]-[40]:

"The findings made by the Magistrate do not justify a conclusion that the appellant engaged in conduct which was so protracted as to constitute the course of conduct contemplated by the anti-stalking statute. At worst the appellant engaged in an episode of harassment of short duration and, happily, of no ultimate consequence. Illegal as this might be (as a driving offence) it does not constitute stalking.

The offence of stalking carries a maximum penalty of 10 years imprisonment. It is a serious indictable criminal offence. The conduct comprising it must be unambiguously a course of conduct engaged in for the prohibited purpose and which actually has the intended result. This is not to say that there would never be occasions when harassment on the highway could constitute stalking. If the course of conduct engaged in was protracted enough and had the other requisite characteristics then it would be open to a tribunal of fact to find that such conduct engaged in by driving a motor vehicle in a particular way could constitute stalking. In the present instance the conduct was not protracted enough to fall within the statutory requirement of a 'course of conduct' nor was there a sufficient 'pattern of conduct evidencing a continuity of purpose' as referred to by Nettle J, in *Berlyn v Brouskos* [2002] VSC 377."

6PS.5.3.5 Stalking by surveillance

In allowing the appellant's appeal and entering a verdict of acquittal in *R v Anders* [2009] VSCA 7 Redlich JA, with whom Vincent & Kellam JJA agreed, said at [27]-[28]:

[27] "The appellant submitted that the taking of photographs did not amount to stalking any more than looking at a victim. Such a proposition is too broad. Surveillance includes the use of cameras and other electrical equipment that enables the offender to keep watch over the victim by recording the victim's movements or activity. The elements of the offence may be satisfied where the course of conduct includes photographing the victim. That may constitute the only conduct so long as it occurs on a sufficient number of occasions to be a course of conduct evidencing a continuity of purpose and involving the necessary intent in relation to the victim.

[28] Stalking by surveillance may be made out by keeping watch over a location with the intent of observing or recording a specific victim's movements. But there was no focus in the trial upon the requirement that the appellant have the intent during the period alleged to keep the complainant under surveillance. A continuity of purpose in relation to the complainant was essential. It was for this reason that the Director acknowledged that the evidence of photos of other boys taken at the same location during the same period, did not assist the prosecution's task of establishing that the appellant had a specific intent to stalk the complainant. It would not have been enough to prove an intention to photograph young boys at random as they happened to pass by his camp site and that co-incidentally the same boy was photographed on more than one occasion. The jury directions permitted a finding of guilt on this broad basis. Thus the trial, also miscarried on this ground."

6PS.6 Extra-territorial operation of the PSIA

In *Director of Public Prosecutions (on behalf of Michael Jay Pena) v Brian Andrew Sutcliffe* [Supreme Court of Victoria, unreported, case [2001] VSC 43, 01/03/2001] the primary question was whether s.21A of the Crimes Act 1958 had operation where the impugned course of conduct took place in Victoria but the harm suffered by the victim occurred in Canada. In the course of determining that s.21A does have extra-territorial operation, Gillard J. embarked on a detailed analysis of s.21A and the purposive construction thereof. An initial appeal against the decision of Gillard J was dismissed as premature and incompetent: *Brian Andrew Sutcliffe v Director of Public Prosecutions (On behalf of Michael Jay Pena)* [Court of Appeal, unreported, case [2003] VSCA 34, 07/04/2003]. By ss.21A(6) & 21A(7) of the Crimes Act 1958 [inserted by s.5 of the Crimes (Stalking) Act 2003 (Vic)] extra-territorial operation of s.21A was confirmed provided there remains a link with Victoria.

Sections 35(5) & 61(5) of the PSIA – each of which is in substantially identical terms to ss.21A(6) & 21A(7) of the Crimes Act 1958 – empower a court to make interim or final personal safety intervention orders notwithstanding that the impugned behaviour occurred outside Victoria or the affected person was outside Victoria but not both. They correct an anomaly in ss.7(5) & 7(6) of the SIOA which appeared to confine the extra-territorial operation of that Act to final orders. Section 35(5) provides-

"The court may make an interim order whether or not-

- (a) some or all of the prohibited behaviour or stalking alleged in the application for the personal safety intervention order occurred outside Victoria, so long as the affected person was in Victoria at the time at which that alleged conduct occurred;
- (b) the affected person was outside Victoria at the time at which some or all of the prohibited behaviour or stalking alleged in the application for the personal safety intervention order occurred, so long as that alleged conduct occurred in Victoria.”

Section 61(5) provides-

“The court may make a final order whether or not-

- (a) some or all of the prohibited behaviour or stalking constituting grounds for making the order occurred outside Victoria, so long as the affected person was in Victoria at the time at which that conduct occurred;
- (b) the affected person was outside Victoria at the time at which some or all of the prohibited behaviour or stalking constituting the grounds for making the order occurred, so long as that conduct occurred in Victoria.”

6PS.7 Application for personal safety intervention order

Under ss.12 & 13 of the PSIA and Rule 11.01 of the CPSR [Rule 12.01 of Magistrates’ Court Rules] an application for a personal safety intervention order must be made at the proper venue of the Children’s Court or Magistrates’ Court or in accordance with Order 3 of the CATR (if applicable) and must-

- (a) include the information prescribed by Rule 4.02 of the CPSR or the Magistrates’ Court (Personal Safety Intervention Order) Rules 2011; and
- (b) if the applicant is a police officer, be made on oath or by affirmation or by affidavit or certified (i.e. signed by the police officer and including the police officer’s name, rank and station); or
- (c) if the applicant is not a police officer, be made on oath or by affirmation or by affidavit.

“Proper venue” of the court is defined in s.3(1) of the Magistrates’ Court Act 1989 and in s.3(1) of the CYFA. For a proceeding in the Children’s Court brought under the PSIA, “proper venue” is defined in paragraph (e) of s.3(1) as-

- (i) the venue of the Court (including the Neighbourhood Justice Division if it has jurisdiction) that is nearest to the place of residence of the child or the place where the subject-matter of the application arose; or
- (ii) the venue of the Court which the Court determines is the most appropriate venue for the matter, having regard to-
 - (A) the safety of the parties;
 - (B) the need to prevent disclosure of a party’s whereabouts;
 - (C) the ability of the parties to attend a particular venue of the court, taking into account their places of work, residence or any childcare requirements;
 - (D) the availability of mediation assessment services at particular venues of the Court;
 - (E) the need to manage case flow;
 - (F) any other considerations the Court thinks relevant.

Section 16A of the PSIA empowers a registrar to refuse to accept an application for a personal safety intervention order for filing if the registrar is satisfied that the application is frivolous, vexatious, without substance, made in bad faith, has no reasonable prospect of success, is an abuse of process or that the matter would be more appropriately dealt with by mediation.

6PS.7.1 Who may make application?

Under s.15 of the PSIA, an application for a personal safety intervention order may be made by:

- (a) an affected person (‘ap’); or
- (b) if the ap is an adult, any other person with the written consent of the ap; or
- (c) if the ap is a child [i.e. “a person under the age of 18 years”: s.3(1) of the PSIA]-
 - (i) a parent of the child; or
 - (ii) any other person with the written consent of a parent of the child or with the leave of the court; or
 - (iii) the ap with the leave of the court if he or she is of or above the age of 14 years; or
- (d) (i) if the ap has a guardian [under the Guardianship and Administration Act 1986 (Vic)], the guardian; or
- (ii) any other person with the leave of the court; or
- (e) a police officer.

The form of consent for an application made under paragraphs (b) & (c)(ii) is set out in Rule 4.05.

6PS.7.2 Application for leave to apply for order

Section 16 provides that if an application for leave is made under s.15(c)(ii) or s.15(d)(ii), the court must grant leave if it is satisfied that it is in the best interests of the affected person to do so. If an application for leave is made by a child under s.15(c)(iii), the court must not grant leave unless it is satisfied the child understands the nature and consequences of a personal safety intervention order.

6PS.7.3 Joint applications

Section 17(1) of the PSIA permits an application for a personal safety intervention order for a child to be included in an application for the protection of the child's parent if the applications arise out of the same or similar circumstances.

There is a presumption that joint applications will be heard together. However, s.17(2) permits them to be heard separately, on the application of the applicant or the respondent, if the court thinks fit having regard to any advantages of the matters being heard together. In deciding whether or not to hear the matters separately, the Court will normally accord the convenience of the parties significant weight. However, severance is likely if the Court considers there is a potential conflict of interest between an adult and a child.

6PS.7.4 Applications against children aged under 10 years

The CFVA and the SIOA did not specify a minimum age for a child respondent to an application for an intervention order. However, s.344 of the CYFA states that it is conclusively presumed that a child under the age of 10 years cannot commit an offence. This means that a child under 10 years of age cannot be charged with contravention of an intervention order. A new provision has been included as s.18 of the PSIA to prohibit the making of a personal safety intervention order against a child under 10-

- "If a person makes an application for a personal safety intervention order against a child who, at the date of making the application, is aged under 10 years-
- (a) if the court knows that the child was aged under 10 years, the court must not make a personal safety intervention order against the child;
 - (b) if the court makes the personal safety intervention order against the child, the order has no effect."

By contrast, there remains no minimum age for a child respondent under the FVPA.

6PS.7.5 Summons or warrant

Under s.20 of the PSIA, if an application for a personal safety intervention order has been made to the court, the appropriate registrar may issue a summons requiring the respondent to attend court for the hearing of the application.

Unlike the SIOA, there is no power under the PSIA to issue a warrant to arrest a child respondent. Under s.21(1) of the PSIA a magistrate or an appropriate registrar may issue a warrant for the arrest of an adult respondent, as if the application alleged the commission of an offence, if the magistrate or registrar believes on reasonable grounds it is necessary-

- (a) to ensure the safety of the affected person; or
- (b) to preserve any property of the affected person; or
- (c) to ensure the respondent attends court at a mention date for the application.

If the applicant seeks a warrant to issue in the first instance, s.22 of the PSIA requires the application for the warrant to be in writing and be made by affidavit or be certified and to be in the same document as the application for the personal safety intervention order and contain the prescribed particulars.

The Bail Act 1977 (Vic) applies to and in respect of a respondent to an application for a personal safety intervention order arrested under a warrant as if the respondent were an accused person charged with an offence to whom s.4 of the Bail Act applies: s.23(1). Under ss.23(2) & 23(3), an appropriate registrar (in the case of a bail application to a court) or a police officer (in any other case) must advise the affected person of the outcome of the application for bail and if bail is granted must-

- advise the ap of any conditions imposed on the respondent intended to protect the ap; and
- give the ap a copy of the undertaking of bail.

6PS.7.6 After-hours application for interim intervention order or warrant

Rule 11.01(2) of the CPSR [rule 12.01(2) of the equivalent Magistrates' Court Rules] {formerly in repealed s.14 of the PSIA} enables a police officer to apply for a family violence intervention order or variation thereof by fax or other electronic communication if the police officer is seeking an interim order and the application is made before 9am or after 5pm on a working day or at any time on a Saturday, Sunday or public holiday.

A protocol between the Magistrates' Court, the Children's Court and Victoria Police enables a police officer who wishes to make an after-hours application for an intervention order:

- to apply to the after-hours duty registrar pursuant to s.21(1) of the PSIA for a warrant to arrest an adult respondent as if the application alleged the commission of an offence; or
- to apply to an after-hours magistrate via the duty registrar for an interim intervention order pursuant to ss.35 & 41 of the PSIA.

If a warrant is issued, it is often endorsed with conditions of bail that replicate the prohibitions or restrictions sought by the applicant.

6PS.8 Mediation

A very large percentage of intervention order applications in non-family violence result from neighbourhood disputes or schoolyard incidents. Successful resolution of these sorts of disputes is frequently more likely if the parties attend mediation rather than if they pour kerosene on the fire in an adversarial court contest. Hence, one of the purposes of the PSIA is "to promote and assist in the resolution of disputes through mediation where appropriate". Division 2 of Part 3 of the PSIA – entitled "Mediation" – is designed to try to achieve this purpose. Section 25 authorizes a court official to provide information about mediation to a person, whether or not the person has already made an application for a personal safety intervention order. The other key provisions are ss.26-28, 30 & 33.

6PS.8.1 Mediation directions

Section 26 of the PSIA empowers the court to give various mediation directions-

- (1) At a mention date or a hearing of an application for a personal safety intervention order or for the variation or revocation of a personal safety intervention order, if the court considers in the circumstances of the case that mediation may be appropriate, the court may give-
 - (a) a direction that requires the parties to attend a mediation assessment; or
 - (b) a direction that requires the parties to attend mediation if it has received a mediation assessment certificate that specifies that the matter is suitable for mediation; or
 - (c) a direction that requires the parties to attend a mediation assessment and subsequently to attend a mediation if the matter is assessed as suitable for mediation.
- (4) A direction given under subsection (1) applies to all parties to the proceeding except-
 - (a) an applicant who is a police officer; and
 - (b) an applicant who is not the affected person and who the court has excluded from the direction.

It is not a pre-condition to the giving of a direction under s.26 that all of the parties consent to attending a mediation assessment or mediation. However, the writer believes that in practice it would be an unusual case in which a court compels an unwilling party to attend mediation.

If the court gives a mediation direction and an existing personal safety intervention order would prevent mediation occurring, s.27 requires the court to vary the order to enable mediation to occur.

Under s.32, a party who does not attend a mediation assessment or mediation does not commit an offence and is not in contempt of court.

6PS.8.2 Mediation assessment certificate

If the court gives a mediation assessment direction, s.28 requires the mediation provider to issue a mediation assessment certificate specifying-

- the current status of the mediation assessment (i.e. not yet scheduled, scheduled but not yet started or not yet completed, scheduled but some or all of the parties [specifying whom] did not attend); or
- that all parties attended the mediation assessment and the matter has been assessed as suitable or unsuitable (as the case may be) for mediation.

6PS.8.3 Mediation certificate

If the court gives a mediation direction, s.30 requires the mediation provider to issue a mediation certificate specifying-

- the current status of the mediation (i.e. not yet scheduled, scheduled but not yet started or not yet completed, scheduled but some or all of the parties [specifying whom] did not attend); or
- that all parties attended the mediation and the mediation has successfully, partially or not [specifying which] settled the matter; or
- that the matter is no longer appropriate for mediation.

Under s.30(3) the mediation certificate may include other information that the parties consent to provide to the court.

6PS.8.4 Court may take certificates and lack of attendance into account

If the court has given a mediation direction, s.33 provides that, when deciding whether or not to make, vary or revoke a personal safety intervention order, the court may take into account-

- (a) the contents of any mediation assessment certificate [s.28]; and
- (b) the contents of any mediation certificate [s.30]; and
- (c) if any party did not attend, the fact that the party did not attend and the reasons for not attending.

6PS.8.5 Mediation guidelines

The Magistrates' Court has issued guidelines which establish the court's practices and procedures in relation to the administration and referral of non-family interpersonal disputes to the Dispute Settlement Centre Victoria (DSCV) for mediation.

The purpose of the guidelines is to establish a system for the referral of disputes to DSCV for mediation/mediation assessment that-

- is consistent across all court venues;
- promotes the advantages of mediation in appropriate situations;
- diverts appropriate cases from the court to DSCV;
- supports the judicial management of personal safety intervention order proceedings; and
- makes justice more accessible.

The Children's Court has adopted the same guidelines.

6PS.9 Interim personal safety intervention order

6PS.9.1 Power to make interim order

Sections 35(1) & 37 of the PSIA give a court power to make an interim personal safety intervention order – whether or not a copy of the application has been served on the respondent and whether or not the respondent is present – if the court is satisfied-

- (a) on the balance of probabilities, that an interim order is necessary pending a final decision about the application-
 - (i) to ensure the safety of the affected person; or
 - (ii) to preserve any property of the affected person; and
- (b) that it is appropriate to make the order in all the circumstances of the case.

In addition to the above, s.35(2) empowers the court to make an interim order if the parties to the proceeding have consented to, or do not oppose, the making of an interim order. In that event, s.35(3) provides that the court may make an interim order without being satisfied as to the jurisdictional pre-requisites in s.35(1) and whether or not the respondent admits to any or all of the particulars of the application.

Without limiting s.35(1), in deciding whether it is appropriate to make an interim order the court may consider the ability of a child respondent or a respondent with a cognitive impairment to understand the nature and effect of an interim order and to comply with the conditions of the interim order: s.35(4).

Section 35(5) of the PSIA provides that the court may make an interim order whether or not-

- (a) some or all of the alleged family violence occurred outside Victoria, so long as the affected family member was in Victoria at the time at which that alleged family violence occurred;
- (b) the affected family member was outside Victoria at the time at which some or all of the family violence alleged in the application for the family violence intervention order occurred, so long as that alleged family violence occurred in Victoria.

The threshold test for making an interim intervention order in s.35(1)(a) of the PSIA is expressed in different terms from the test for making a final intervention order in s.61. However, in practical terms, the requirement to ensure the safety of the affected person will usually lead to the same outcome as the pre-conditions for the making of a final order, namely that-

- (1) the respondent has committed prohibited behaviour against or has stalked the affected person; and
- (2) is likely to continue to do so or do so again.

An interim order may apply to more than one affected family member if the pre-conditions in s.35 of the PSIA are met for each: s.39.

6PS.9.2 Interim PS intervention order where existing FV intervention order or recognised DVO

Under s.36 of the PSIA, the court must not make an interim PS intervention order if there is an existing FV intervention order or recognised DVO for which-

- (a) the affected person is a protected person and the respondent is a respondent; or
- (b) the respondent is a protected person and the affected person is a respondent.

However, despite the above the court may make an interim PS intervention order if there is an existing interim FV intervention order or interim recognised DVO for which the respondent is a protected person and the affected person is a respondent.

6PS.9.3 Interim order made on electronic communication

If the court makes an interim order under s.35 on an application made by telephone, fax or other electronic communication, s.41 requires the court to inform the applicant police officer of-

- the terms of the order; and
- the period of operation of the order; and
- the court venue and the date and time of the first mention date for the application.

6PS.9.4 Procedural pre-requisite

Section 38(1) of the PSIA provides that unless the order is by consent or uncontested by all parties, the court must not make an interim personal safety intervention order unless the application is supported by oral evidence or an affidavit or the court waives the requirement for oral evidence or affidavit.

However, s.38(2) makes it clear that the affected person is not obliged to give evidence before an interim intervention order can be made.

6PS.9.5 Duration of interim order

If the court makes an interim order, it must ensure the application is listed for a decision about a final order as soon as practicable while allowing a reasonable time for mediation assessment and/or mediation to take place if it has given a mediation direction: s.42.

Under s.43, an interim order ends when a final order is made unless the interim order contains a condition that the interim order continues until the final order is served on the respondent. An interim order also ends if the court revokes it, if the court refuses to make a final order or if the application is withdrawn.

6PS.10 Final personal safety intervention order

It is important to note that a court cannot make a personal safety intervention order merely on the basis of perceived future impugned behaviour by the respondent towards the victim. It must also be satisfied that the victim has been or is currently being subject to impugned behaviour – at a relevant level – by the respondent. Likewise, a court cannot make a personal safety intervention order merely on the basis of past behaviour by the respondent towards the victim. It must also be satisfied that impugned behaviour is likely to continue or to occur again.

6PS.10.1 Power to make final order

Section 61(1) of the FVPA gives a court power to make a final personal safety intervention order if the court is satisfied, on the balance of probabilities, that-

- (a1) the respondent has committed prohibited behaviour against the affected person and-
 - (A) is likely to continue to do so or do so again; and
 - (B) the respondent's prohibited behaviour would cause a reasonable person to fear for his or her safety; or
- (a2) the respondent has stalked the affected person and is likely to continue to do so or do so again; and
- (b) the respondent and the affected persons are not family members [as defined in s.4 of the PSIA & s.8 of the FVPA]; and
- (c) it is appropriate in all the circumstances of the case to make a final order.

For an analysis of the word "likely" in s.4(1) of the predecessor CFVA, see the judgment of Bongiorno J in *Kirby v Phelan* [2003] VSC 43 {MC02/03} at [12]-[15].

Without limiting s.61(1)(c), in deciding whether it is appropriate to make a final order the court may consider the ability of a child respondent or a respondent with a cognitive impairment to understand the nature and effect of a final order and to comply with the conditions of the final order: s.61(2). In introducing the Bill the then Attorney-General stated (at 2227-8):

"The court may also refuse to make an interim or a final personal safety intervention order if the court believes it is not appropriate to make an order in all the circumstances of the case. For example, it may be inappropriate to make an order against a young child if the child is too young or immature to understand and comply with the order. In such cases the magistrate may decline to make the order even if the grounds are technically made out."

A final order may be made for more than one affected person if the pre-conditions in s.61(1) or 61(2)(b) are met for each: s.61(3).

Despite s.61(1), the court is prohibited by s.61(4) from making a final order if satisfied on the balance of probabilities that the respondent engaged in the prohibited behaviour or stalking without malice-

- (a) in the normal course of a lawful business, trade, profession or enterprise (including that of any body or person whose business, or whose principal business, is the publication, or arranging for the publication, of news or current affairs material); or
- (b) for the purpose of an industrial dispute; or
- (c) for the purpose of engaging in political activities or discussion or communicating with respect to public affairs.

This is in similar terms to s.21A(4A) of the Crimes Act 1958 which provides a defence to a charge of stalking. It is odd that the restriction in s.61(4) is limited to a prohibition against making a final order, for it is at least arguable that the court could make an interim order under s.35 even though the court is satisfied that the respondent fell within s.61(4).

If the applicant for a final order is a police officer, the court may make the order under s.61 – subject to a restriction on conditions in certain cases [see below] – even if the affected person does not consent to the making of the final order: s.63.

6PS.10.2 No Power to make associated orders or orders protecting children on own initiative

In contrast with the provisions of ss.76, 77, 77A & 77B of the FVPA, there is no power under the PSIA to make an associated final order or an order to protect children on the court's own initiative.

6PS.10.3 Consent or unopposed orders

Section 64(1) of the PSIA provides that if the parties to a proceeding for a final order, or the variation, extension or revocation of a final order, consent to the making of the order or do not oppose the making of the order, the court may make the order-

- (a) without being satisfied as to any matter referred to in ss.61, 80 or 83 [as the case may be]; and
- (b) whether or not the respondent admits to any or all of the particulars of the application.

However under s.64(2)(a), if the respondent is a child the court may make a final order to which the parties consent or have not opposed only if the court is satisfied as to all relevant matters referred to in s.61 or ss.80 or 83 [as the case may be].

Despite s.61(1), a court may under s.64(4) conduct a hearing in relation to the particulars of the application if it considers it in the interests of justice to do so. Section 64(5) empowers a court to refuse to make a final order to which the parties have consented if the court believes the order may pose a risk to the safety of one of the parties or a child of the protected person or respondent.

6PS.10.4 Duration of final order

Section 77 of the PSIA empowers the court to specify in a final order the period for which the order is in force. If the respondent is a child, s.78 restricts that period to not more than 12 months unless there are exceptional circumstances. In making a decision about duration, the court may take into account any matters raised by the respondent relevant to the duration and must take into account-

- (a) any assessment by the applicant of the level and duration of risk from the respondent; and
- (b) if the applicant is not the protected person, the protected person's views, including his or her assessment of the level and duration of risk from the respondent.

Under s.79 of the PSIA, a final intervention order remains in force-

- (a) if a period is specified in the order, for the specified period unless it is sooner revoked by the court or set aside on appeal; or
- (b) if no period is specified in the order, until it is revoked by the court or set aside on appeal.

6PS.10.5 No power to make final PS order if existing equivalent FV order or recognised DVO

Section 62 of the PSIA prohibits a court from making a final personal safety intervention order under ss.61 or 64 if there is an existing family violence intervention order or recognised DVO for which-

- (a) the affected person is a protected person and the respondent is a respondent; or
- (b) the respondent is a protected person and the affected person is a respondent.

Section 74A of the FVPA prohibits a court from making a final FV order in the converse situation.

6PS.11 Conditions in personal safety intervention orders

Subject to s.63 [discussed below], s.67(1) of the PSIA empowers a court to include in a personal safety intervention order any conditions that appear to the court necessary or desirable in the circumstances.

Section 66 of the PSIA requires a court, in deciding the conditions to be included in a personal safety intervention order, to consider including conditions which will not prevent mediation occurring.

6PS.11.1 A non-exhaustive list of conditions

In what is expressed to be a non-exhaustive list, s.67(2) provides that a final or an interim order may include conditions-

- (a) prohibiting the respondent from committing prohibited behaviour against the protected person;
- (b) prohibiting the respondent from stalking the protected person;
- (c) excluding the respondent from the protected person's residence;
- (d) prohibiting the respondent from approaching, telephoning or otherwise contacting the protected person, unless in the company of a police officer, dispute assessment officer, mediator or a specified person [examples given include emailing or sending text messages];
- (e) prohibiting the respondent from being anywhere within a specified distance of the protected person or a specified place, including the place where the protected person lives;
- (f) prohibiting the respondent from causing another person to engage in conduct prohibited by the order;
- (g) revoking or suspending a weapons approval held by the respondent or a weapons exemption applying to the respondent as provided by s.69;
- (h) cancelling or suspending the respondent's firearms authority as provided by s.69.

A focus of the PSIA is the protection of a person against "prohibited behaviour" committed by another. Section 67(2)(a) thus sets out the central condition on most orders. A question arises whether a blanket condition prohibiting a respondent from committing "prohibited behaviour" against a protected person can be made in a case where only one form of prohibited behaviour (e.g. harassment) has been engaged in by the respondent and where only that same form is likely in the future. Given the purpose provisions of the PSIA and the wording of the Act generally, it is the writer's view that where any form of prohibited behaviour has been engaged in and is likely in the future, the court may impose a blanket condition prohibiting a respondent from committing "prohibited behaviour" generally against the protected person.

6PS.11.2 Restriction on conditions in absence of affected person's consent

If the applicant for a final order is a police officer and the affected person does not consent to the making of the final order, s.63 of the PSIA restricts the final order to the conditions referred to in s.67(2)(a), (b), (f), (g) or (h) unless the affected person-

- is a child and
 - (i) no adult affected person is included in the application; or
 - (ii) the adult affected person consents to the making of the order; or
- has a guardian who has consented to the application; or
- is cognitively impaired.

6PS.11.3 Exclusion of respondent from residence

In the PSIA there is no equivalent of s.82 of the FVPA which sets out matters which the court must take into account when deciding whether or not to include an exclusion condition in an order against an adult respondent. Note, however, the prohibition in s.63 of the PSIA of an exclusion condition [pursuant to s.67(2)(c) of the PSIA] against a respondent of any age in the circumstances referred to in the above paragraph.

If the court decides to make a family violence intervention order against a respondent who is a child [viz. a person under 18 years of age], ss.67(3) & 71(2) of the PSIA require the court, in deciding whether to include an exclusion condition, to have regard to all the circumstances of the case, including the desirability-

- (a) of minimizing disruption to the protected person and any child living with the protected person and the importance of maintaining social networks and support which may be lost if the protected person and the child were required to leave the residence or were unable to return to or move into the residence;
- (b) of continuity and stability in the care of any child living with the protected person;
- (c) of allowing any childcare arrangements, education, training or employment of the protected person or any child living with the protected person to continue without interruption or disturbance;
- (d) of the respondent being supported to gain access to appropriate educational services and health services;
- (e) of allowing the education, training or employment of the respondent to continue without interruption or disturbance [same wording as s.10(3)(o) of the CYFA].

The above matters (c), (d) & (e) respectively use substantially the same wording as ss.10(3)(o), 10(3)(n) & 10(3)(o) of the CYFA.

Section 71(3) allows the court to include an exclusion condition in an order against a child respondent only if it is satisfied that the child will have appropriate alternative accommodation and appropriate care and supervision. For the purposes of deciding this for a respondent who is an Aboriginal or Torres Strait Islander child, s.71(4) requires the court to prioritise the child living with extended family or relatives and have regard to the need to keep the child's culture and identity through contact with the child's community.

Section 72(1) of the FVPA empowers the court to ask the Secretary to DFFH to give the court a report about the options available for the appropriate accommodation, care and supervision of a child respondent if an exclusion condition were included in a personal safety intervention order. Section 72(2)(a) requires the Secretary to give the report to the court in the period ordered by the court or, if no period is ordered, within the prescribed time. Section 72(2)(b) provides that for a request relating to a child under the age of 17 years, s.30 of the CYFA applies as if the request were a report received under s.28 of the CYFA.

If the court includes an exclusion condition in a personal safety intervention order against a child respondent, s.71(5) of the PSIA requires the court to notify the Secretary to DFFH that the order has been made.

If the court includes an exclusion condition in a personal safety intervention order, s.70 of the PSIA requires the court to-

- ask the respondent to provide an address for service of documents (which may be an email address); and
- advise the respondent that if a police officer is unable to locate the respondent to serve the respondent with a document under the PSIA, the police officer may, under s.181, seek information about the respondent from public sector organisations.

The respondent is not obliged to comply with the request to provide an alternative address. If the respondent provides an alternative address other than where the respondent lives or works and another person living at that address advises the court that he or she does not consent to the use of that address for service, the address is not a valid address for service.

6PS.11.4 Conditions preventing a respondent attending school

Before including in a personal safety intervention order a condition that prohibits a respondent who is a student or wishes to become a student from-

- (a) being on the school's premises or anywhere within a specified distance of the school's premises; or
- (b) being anywhere within a specified distance of the protected person; or
- (c) approaching the protected person-

s.74(1) of the PSIA requires the court to consider whether that condition may prevent the respondent attending the school at which he or she is or wishes to become a student.

Under s.74(2), the school's principal, teacher or other representative or a representative of the Department of Education and Early Childhood Development may with the leave of the court give evidence for the purposes of s.74(1).

Section 75(1) of the PSIA empowers the court to ask the Secretary to the Department of Education and Early Childhood Development to give the court a report that contains-

- options for alternative education or training for the respondent;
- any information that may assist the court in determining whether a condition referred to in s.74(1) would prevent the respondent attending the school.

Section 75(3) requires that Secretary to give the report to the court in the period ordered by the court or, if no period is ordered, within the prescribed time.

6PS.11.5 Conditions about personal property

Unlike ss.86-88 of the FVPA, there is no specific provision in s.67(2) of the PSIA relating to the use or control of personal property but the list in s.67(2) is expressed to be non-exclusive. However, given that "prohibited behaviour" is defined in ss.5(d) & 8 of the PSIA as including actual or threatened damage to, destruction of or interference with an affected person's property, it appears to the writer that a general condition prohibiting "prohibited behaviour" is generally likely to obviate the need for a specific condition about the affected person's property.

6PS.11.6 Contact with child

If a court decides to make a family violence intervention order and the protected person or respondent is the parent of a child, ss.89-93 of the FVPA give the court specific obligations and powers to protect the child, including power under s.90(2) to exercise powers under s.68R of the Family Law Act to revive, vary, discharge or suspend any existing Family Law Act order. There are no such specific provisions in the PSIA to protect a child. There are just the general provisions of ss.67(2)(d) & 67(2)(e) of the PSIA which prohibit the respondent from approaching, telephoning or otherwise contacting an affected person (whether adult or child) or from being within a specified distance of the protected person.

6PS.11.7 Suspension or cancellation of firearms authority or weapons approval

If a court intends to make a PS intervention order, s.68 of the PSIA requires it to enquire as to whether a respondent holds a firearms authority, weapons approval or weapons exemption. Section 69 empowers the court to include a condition-

- in an interim order, suspending-
 - in a final order, revoking-
- the respondent's firearms authority, weapons approval or weapons exemption.

6PS.11.8 Courtlink conditions

The Courtlink computer systems of the Children's & Magistrates' Courts contain a number of pro-forma prohibitions or restrictions which are based on s.67 of the PSIA. These do not, of course, restrict the power of the court to include any conditions that appear to the court necessary or desirable in the circumstances of any particular case.

The pro-forma conditions on the Courtlink system for Children's Court orders under the PSIA are as follows:

Code	Directions clause	Default wording for Conditions
1. [PS1]	THE COURT ORDERS THAT THE RESPONDENT MUST NOT	stalk the protected person(s). Note: A person stalks another person if he/she engages in a course of conduct with the intention of causing physical or mental harm to that person including self harm, or arouses apprehension or fear in that person for his or her own safety or that of any other person.
2. [PS2]	"	commit prohibited behaviour towards the protected person(s). Note: Prohibited behaviour is assault, sexual assault, harassment, property damage or interference or making a serious threat.
3. [SUR]	"	attempt to locate, follow the protected person(s) or keep him/her/them under surveillance.
4. [COM]	"	publish on the internet, by email or other electronic communication any material about the protected person(s).
5. [PS3]	"	contact or communicate with a protected person by any means.
6. [PS4]	"	approach or remain within (<i>default to 5</i>) metres of a protected person.
7. [EXP1]	"	go to or remain within (<i>default to 200</i>) metres of(<i>the protected person's address</i>) or any other place where a protected person lives, works or attends school/childcare.
8. [ENG]	"	get another person to do anything the respondent must not do under this order.
9. [FIR1]	THE COURT ALSO ORDERS:	FOR INTERIM ORDER ONLY Until further order, any firearms authority held by the respondent is suspended. The respondent must hand any firearms in his/her possession to police immediately.
10. [FIR2]	"	FOR FINAL ORDER ONLY Any firearms authority held by the respondent is cancelled. The respondent must hand any firearms in his/her possession to police immediately.
11. [WEA1]	"	FOR INTERIM ORDER ONLY Until further order, any weapons approval or exemption held by the respondent is suspended. The respondent must hand any weapons in his/her possession to police immediately.
12. [WEA2]	"	FOR FINAL ORDER ONLY Any weapons approval or weapons exemption held by the respondent is revoked. The respondent must hand any weapons in his/her possession to police immediately.
13. [EXP]		The respondent may (a) communicate with a protected person through a lawyer or mediator; or (b) participate in mediation by agreement with the protected person- BUT ONLY IF the respondent does not stalk the protected person or engage in prohibited behaviour while doing so.
14. [EXP2]	THE RESPONDENT MUST NOT:	(a) stalk the protected person(s); or (b) assault, sexually assault, harass or threaten the protected person(s), or damage or interfere with the property of the protected person(s); or (c) contact or communicate with the protected person(s); or (d) approach or remain within (<i>default to 5</i>) metres of the protected person(s); or (e) go to or remain within (<i>default to 200</i>) metres of (<i>the protected person's address</i>) or any other place where the protected person(s) lives, works or attends school/childcare.
15. [EXP3]	THE RESPONDENT MUST NOT:	(a) stalk the protected person(s); or (b) assault, sexually assault, harass or threaten the protected person(s), or damage or interfere with the property of the protected person(s)

6PS.12 Variation, revocation or extension of PS intervention order

Section 106(1) of the PSIA gives a court jurisdiction to revoke, vary or extend a personal safety intervention order made by it or any other court. On its face, this section is very broad and might be read as conferring jurisdiction on the Children's Court to revoke, vary or extend even if all of the parties involved are adults. However, the writer believes that s.106(1) must be read subject to ss.103-104A and considers that the Children's Court does not have jurisdiction to deal with an application to revoke, vary or extend a personal safety intervention order unless-

- at least one of the parties is a child at the time the application was made; or
- the application is a "related application", i.e. an application for an order on the grounds of the same or similar circumstances [s.104(2) specifically includes a related "application to vary, revoke or extend an order"].

Section 85(1) of the PSIA provides that an application to vary, revoke or extend a PS intervention order may be made to the court by-

- (a) a party to the proceeding in which the order was made; or
- (b) if the protected person is a child – a parent of the child or any other person with the written consent of a parent; or
- (c) if the protected person is a child who is 14 years of age or more – the protected person with the leave of the court; or
- (d) if a police officer was not a party to the proceeding in which the PS intervention order was made – a police officer; or
- (e) if the protected person has a guardian and the guardian was not a party to the proceeding in which the PS intervention order was made – the guardian.

Rule 4.04 of the CPSR lists matters to be included in an application to vary, revoke or extend.

Section 86(1) of the PSIA allows a respondent to apply for the variation or revocation of a PS intervention order only if the court has given leave for the respondent to make the application. Under s.86(3) in the case of an interim order made when the respondent was not present and subject to the time limits in ss.86(4) & 86(5)-

- (a) the court may grant leave if satisfied it is in the interests of justice to do so, having regard to the reasons the respondent was not present when the order was made; and
- (b) if the court grants leave, it may, instead of varying or revoking the order, set aside the order if satisfied there are exceptional circumstances which justify setting the order aside.

Section 86(2) provides that in any other case the court may grant leave only if satisfied that-

- (a) there has been a change of circumstances since the PS intervention order was made; and
- (b) the change may justify a variation or revocation of the order; and
- (c) in the case of an interim order, it is in the interests of justice that the application be determined immediately, rather than waiting for the hearing of the application for the final order.

6PS.12.1 Variation or revocation

Section 80(1) of the PSIA empowers a court to order the variation or revocation of a PS intervention order on an application under Division 10 of Part 3.

In deciding whether to make an order to vary or revoke a PS intervention order, ss.80(2) & 82 require the court-

- to have regard to all the circumstances of the case and in particular-
 - (a) the applicant's reasons for seeking the variation or revocation;
 - (b) the safety of the protected person;
 - (c) the protected person's views about the variation or revocation;
 - (d) whether or not the protected person is legally represented; and
 - (e) if the protected person has a guardian, the guardian's views; and
- to decide whether there has been any change in the need to protect another person protected by the order from being subjected to prohibited behaviour or stalking by the respondent.

If the court decides not to grant an application for revocation of a PS intervention order, s.80(3) permits the court instead to order a variation of the order in the way it considers appropriate.

If a person makes an application for a variation of a PS intervention order, s.81(1) empowers the court to make an interim order varying the PS intervention order. Section 81(2) provides that for the purposes of s.81(1), Division 3 applies (with any necessary changes) to the making of an interim variation as if it were the making of an interim order under that Division. A note after s.81(2) makes it clear that the court may make interim orders varying intervention orders after hours.

Section 82(2) empowers the court-

- to refuse to vary or revoke the PS intervention order; or
 - to vary it in a way that differs from the variation sought in the application-
- if satisfied, on the balance of probabilities, that it is necessary to do so to ensure the safety of another person protected by the order.

In the PSIA there are no equivalents of ss.103-105 of the FVPA [additional protection for children].

6PS.12.2 Extension

Section 83 of the PSIA empowers a court to order the extension of a PS final order if the court is satisfied, on the balance of probabilities, that if the order is not extended the respondent is likely to commit prohibited behaviour or stalking against the protected person.

Section 83(3) allows the court to extend a final order whether or not the respondent has committed prohibited behaviour or stalking against the protected person while the final order was in force or has complied with the order.

If a person applies for an extension of a PS final order before the expiry of the order and the respondent has not yet been served, s.84(1) empowers the court to make an interim order in the absence of the respondent extending the final order. Such interim extension order expires 28 days after it is made unless the respondent is earlier served with the application and a copy of the interim extension order [s.84(2)]. The court may make more than one interim extension order if it has not been possible to serve the respondent [s.84(3)]. If, within 28 days of making an interim extension order, the respondent is served with the application and a copy of the interim extension order, s.84(4) provides that the interim extension order remains in force until-

- a final order is made unless the interim extension contains a condition that it continues until the final order is served on the respondent; or
- the time the court refuses to extend the final order or revokes the interim order; or
- the time an application for extension is withdrawn.

6PS.12.3 If applicant is not protected person

If the applicant for the variation or extension of a personal safety intervention order is a police officer, s.87(1) allows the application to be made without the consent of the protected person. However, if the protected person does not consent to the variation or extension, ss.87(2) provides that-

- (a) the order may be varied only to include conditions referred to in s.67(2)(a), (b), (f), (g) or (h); and
- (b) the order may be extended only if the order is subject to conditions referred to in paragraph (a); and
- (c) conditions must not be removed from the order-

However, s.87(3) provides that s.87(2) does not apply if the protected person-

- is a child and
 - (i) no adult is protected by the intervention order; or
 - (ii) the adult protected by the intervention order consents to the variation or extension; or
- has a guardian who has consented to the application; or
- is cognitively impaired.

If the applicant for the variation, revocation or extension of a family violence intervention order is not the protected person or guardian, the respondent or a police officer, s.88(1) provides that the application may only be made with the written consent of-

- (a) the protected person;
- (b) if the protected person is a child, a parent of the child other than the respondent;
- (c) if the protected person has a guardian, the guardian.

On such application, s.88(2) restricts the outcomes in the same way as s.87(2).

Section 89 of the PSIA requires the protected person's views to be heard separately if the application for variation, revocation or extension is made by – or with the consent of – the person's parent or guardian or by a police officer and the protected person objects to the application.

6PS.13 Power to bind over to keep the peace

There is a power, first invested in Justices of the Peace and now in Magistrates, to bind a person over to keep the peace where he or she has engaged in various types of offensive conduct against another person. The origins of the power date back to the 12th century. The power is now to be found in s.126A of the Magistrates' Court Act 1989:

"(1) The Court may, on the written application of a person, order another person to enter into a bond, with or without surety or sureties, to keep the peace or to be of good behaviour.

(2) An application under sub-section (1) must be supported by evidence on oath or affirmation or by affidavit.

(3) The parties to a proceeding under this section and any other witnesses may be called and examined and cross-examined and costs may be awarded as in any other proceeding in the Court,

(4) The Court may order that an accused who does not comply with an order under s.126A(1) may be imprisoned until he or she does comply with it or for 12 months, whichever is the shorter."

A detailed discussion of the history and operation of the binding over power is contained in a paper entitled "An Honour and Almost a Singular One – A Review of the Justices' Preventive Jurisdiction" [Monash University Law Review, Vol.8, Issue 2, December 1981].

There is a similarity between this ancient power and the power under the PSIA to make and to deal with the contravention of a personal safety intervention order. In particular, the writer believes that the binding over power remains useful to cover the gap where the conduct which puts another person in fear or apprehension is not sufficiently protracted to constitute a course of conduct under the relevant provisions of the PSIA.

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6. GENERAL PROVISIONS RELATING TO INTERVENTION ORDERS

[continued]

6.11 Explanation of intervention order

6.11.1 Interim order

If the court makes an **interim family violence intervention order**-

- s.57 of the FVPA (if the respondent is an adult); and
 - s.57A of the FVPA (if the respondent is a child)-
- require that the court-
- give a clear oral explanation to the respondent and protected person (or whichever of them is before the court) of the nine matters set out in ss.57(1) & 57A(1); and
 - give the respondent and protected person (or whichever of them is before the court) a copy of the interim order, a written notice in Form 1AA of the CFVR and any additional information the court considers necessary to explain the interim order; or
 - serve a respondent who is not before the court with a copy of the interim order and a written notice in Form 1AA of the CFVR.

If the court makes an **interim personal safety intervention order**, s.40 of the PSIA requires the appropriate registrar to give the respondent and the protected person-

- a written explanation of the order, in the prescribed form in reg.8 [Form 1] of the PSIR, that explains or the five matters set out in s.40(1); and
- any additional information pursuant to s.40(2) about any relevant services that may be available to the protected person or respondent, such as counselling or drug and alcohol services.

If the Court has given a mediation direction, s.40(3) of the PSIA requires the written explanation under s.40(1) to be accompanied by written information about mediation assessments and mediation.

The written material provided under s.40(1), (2) & (3) of the PSIA must be-

- given to the protected person and respondent if before the court and accompanied by a clear oral explanation of the matters contained in it; or
- served on the protected person or respondent if not before the court and accompanied by any additional information the court considers necessary to explain the interim order.

However, under s.40(5) of the PSIA the appropriate registrar is not required to give the protected person or the respondent an oral explanation if the registrar is satisfied that, on making the order, the magistrate gave the protected person or respondent a clear oral explanation of the matters set out in s.40(1) and any additional information under ss.40(2) & (3).

6.11.2 Final order

If the court makes a **final family violence intervention order**-

- s.96 of the FVPA (if the respondent is an adult); and
 - s.96A of the FVPA (if the respondent is a child)-
- require that the court-
- give a clear oral explanation to the respondent and protected person (or whichever of them is before the court) of the eight matters set out in ss.96(1) & 96A(1); and
 - give the respondent and protected person (or whichever of them is before the court) a copy of the final order, a written notice in Form 1AB of the CFVR and any additional information the court considers necessary to explain the final order; or
 - serve a respondent who is not before the court with a copy of the final order and a written notice in Form 1AB of the CFVR.

If the court makes a **final personal safety intervention order**, s.76 of the PSIA requires the court to give the respondent and the protected person-

- a clear oral explanation to the respondent and protected person (or whichever of them is before the court) of the three matters set out in s.76(1); and
- a written notice containing the information referred to in s.76(1) and the prescribed information in reg.11 [Form 2] of the PSIR plus any further information pursuant to s.76(4) about any relevant services that may be available to the protected person or respondent, such as counselling or drug and alcohol services.

6.11.3 Consequence of failure to provide explanation or written notice

Sections 57(3), 57A(6), 96(4) & 96A(6) of the FVPA provide that a failure by the court to explain an interim or final family violence intervention order in accordance with the relevant section does not affect the validity of the intervention order.

Sections 40(6) & 76(5) of the PSIA provide that a failure by the registrar or the court to explain an interim or final personal safety intervention order in accordance with the relevant section does not affect the validity of the intervention order.

However, the requisite explanation is a pre-condition to a contravention of the order if the order has not been served on the respondent: ss.123(2)(b) & 123A(1)(b) of the FVPA and s.100(1)(b) of the PSIA.

6.11.4 No requirement for explanation or written notice upon variation or extension

There is no express requirement in either Act to provide these explanations or written notices upon an intervention order being varied or extended.

6.12 Costs in intervention order proceedings

Section 154(1) of the FVPA and s.111 of the PSIA provide that each party to a proceeding for an intervention order or recognised DVO under the respective Acts must bear the party's own costs of the proceeding.

Section 154(2) of the FVPA and s.111(2) of the PSIA provide that in a litigation restraint order proceeding-

- (a) if the person is made subject to an extended litigation restraint order or an acting in concert order, that person must bear the cost of the proceeding other than the Attorney-General's costs if the Attorney-General is a party to the proceeding; and
- (b) if the person is not made subject to an extended litigation restraint order or an acting in concert order, each party must bear the party's own costs.

Despite the above provisions, the court is empowered in a particular case by s.154(3) of the FVPA and by s.111(3) of the PSIA-

- (a) to make an order about costs if the court decides that exceptional circumstances warrant; or
- (b) if the court is satisfied that the making of any application under the respective Act was vexatious, frivolous or in bad faith, to award costs against the applicant.

Section 154(4) of the FVPA provides that the mere fact that an application is made and then withdrawn is not exceptional and does not amount in itself to a vexatious or frivolous application or an application made in bad faith. Significantly, there is no such provision in the PSIA.

Though there is no direct caselaw on the operation of s.154 or s.111 or their predecessor s.21C of the CFVA, there is precedent in the Family Court of Australia that a costs order made in family law proceedings-

- in the absence of the other party and without notice to that party; or
- without affording the parties an opportunity to be heard-

is bad as a denial of natural justice. See for example *In the Marriage of Black* 106 FLR 154 where Nicholson CJ, Ellis & Cohen JJ held that while in other jurisdictions where costs normally follow the event it may be permissible to make a costs order without according natural justice to the parties, in light of s.117 of the Family Law Act 1975 (Cth) it is not open to the Family Court to make orders for costs without giving the parties a chance to be heard, except perhaps in very unusual circumstances. See also *In the Marriage of Knight* [Family Court of Australia, unreported, 03/08/1989].

However, s.154(5) of the FVPA and s.111(4) of the PSIA provide that if the court decides there are grounds to award costs against a person who is not present in court, the court may [not must]-

- (a) adjourn the proceeding; and
- (b) give the parties notice that an order for costs will be made on the next mention date unless the party against whom the costs will be awarded contests the making of the order on the mention date.

Perhaps because it is comparatively uncommon for costs orders to be made in the Family Division of the Children's Court, there has previously been no statutory mechanism for enforcing such orders. Since 2013 s.528A of the CYFA has filled that gap. It provides:

- (1) 'Order for costs' means an order for costs made by the Court-
 - (a) in proceedings in the Family Division; or
 - (b) under s.154 of the FVPA; or
 - (c) under s.111 of the PSIA.
- (2) A person in whose favour an order for costs is made may enforce the order by filing in the appropriate court [viz. a court that has jurisdiction to enforce an amount of costs equivalent to that required to be paid under an order for costs] a copy of the order certified by the principal registrar of the Children's Court to be a true copy.
- (3) On filing, the order must be taken to be an order of the appropriate court for payment of costs and may be enforced accordingly.

Sections 170(2) of the FVPA and 126(2) of the PSIA provide that for the purposes of enforcement of an order for costs made under s.154 or s.111 (as the case may be), Division 5 of Part 5 of the Magistrates' Court Act 1989 and any relevant rules apply. These provisions also apply to the enforcement of costs orders made under the FVPA & PSIA in the Magistrates' Court.

6.13 Rehearing

Section 122 of the FVPA and s.99 of the PSIA invest a limited express power in both the Magistrates' Court and the Children's Court to rehear a proceeding which resulted in a final order. The court may re-hear such a matter only if it is satisfied, on the balance of probabilities, that-

- (a) the application for the order was not personally served on the respondent and was not brought to the respondent's attention under an order for substituted service; or
- (b) there are exceptional circumstances and a rehearing is fair and just in all the circumstances of the case.

The latter pre-condition referring to the requirements of fairness and justice amounts to a statutory enactment of a court's implied power to set aside its orders *ex debito justitiae*, a principle approved in *Chamberlain v Deputy Commissioner of Taxation* (1991) 98 ALR 617 at 619.

An application under s.122 or s.99 does not operate as a stay of the order.

Rule 12.02 of both the CFVR and the CPSR requires that an application for a rehearing be in accordance with Form 1 of the respective Rules. Rule 12.01(2) requires a registrar of the court to list the application for hearing and serve a copy of the application and affidavit in support on the other parties to the proceeding.

If an applicant fails to appear at the time fixed for hearing of the application and the application is struck out, s.122(4) & s.99(4) each prohibit the applicant from reapplying except with the leave of the court. Rule 12.01(3) provides that any further application for rehearing in these circumstances is taken to be an application for leave to reapply under the respective section.

6.14 Appeal

Subject to the exceptions in s.114(2) of the FVPA and s.91(2) of the PSIA, s.114(1) and s.91(1) allow a party to a proceeding under the respective Act to appeal against an order of the court in the proceeding or a refusal of the court to make an order ('the relevant decision').

The appeal must be made to County Court or, if the relevant decision was made by the President of the Children's Court, to the Trial Division of the Supreme Court: s.115 of the FVPA and s.92 of the PSIA.

A person makes an appeal by filing notice of the appeal with the court that made the relevant decision within 30 days after the day the relevant decision was made: ss.116(1) & 116(2) of the FVPA and ss.93(1) & 93(2) of the PSIA. The notice of appeal must be in accordance with Form 2: r.13.01 of the CFVR and the CPSR. The appropriate registrar must serve notice of the appeal on listed persons and cause the notice of appeal to be transmitted to the appellate court: ss.116(3) & 116(4) of the FVPA and ss.93(3) & 93(4) of the PSIA.

Under s.117 of the FVPA and s.94 of the PSIA, an appeal does not stay the operation of the relevant decision (other than the operation of a counselling order stayed under s.131 of the FVPA). However, the court that made the relevant decision may, on the application of a party, stay the operation of the relevant decision or any part thereof pending the determination of the appeal. Rule 13.02 of the CFVR and the CPSR relate to stays of relevant decisions.

Section 117(3) of the FVPA and s.94(3) of the PSIA empower the court, in staying the operation of the whole or part of the relevant decision, to impose bail conditions on the appellant as if the appellant were an accused person being released from custody on bail if the court considers it necessary-

- (a) for the protection of the protected person; or
- (b) to require a party to attend court for the appeal.

If the application for the impugned order was made by a person other than the protected person, s.118 of the FVPA and s.95 of the PSIA provide that the appeal court must not start or continue the hearing of the appeal if-

- (a) the appeal is made by the applicant for the intervention order; and
- (b) any of the following object to the appeal-
 - (i) the protected person;
 - (ii) a parent who consented to an application made in relation to a child protected person;
 - (iii) a guardian of a protected person.

Nothing in s.118 of the FVPA or s.95 of the PSIA prevents an appeal on the basis of a jurisdictional error.

Sections 118A & 118B of the FVPA regulate the orders which may be made by the County Court or the Supreme Court when an appellant fails to appear for the hearing of the appeal.

The appeal is by way of a rehearing: s.119(1) of the FVPA and s.96(1) of the PSIA. On an appeal, s.119(2) & s.96(2) empower the appellate court to-

- (a) confirm the relevant decision; or
- (b) set aside the relevant decision; or
- (c) vary the relevant decision and make any other order the Magistrates' Court or Children's Court could have made and exercise any other powers that the Magistrates' Court or Children's Court may have exercised; or

In addition s.119(2)(d) of the FVPA empowers the appellate court to make a determination under s.136(2) of the PSIA and make any order the Magistrates' Court or Children's Court could have made and exercise any other powers that the Magistrates' Court or Children's Court may have exercised under Division 2 of Part 8 of the PSIA.

In addition s.96(2)(d) of the PSIA empowers the appellate court to make a determination under s.176E(2) of the FVPA and make any order the Magistrates' Court or Children's Court could have made and exercise any other powers that the Magistrates' Court or Children's Court may have exercised under Division 2 of Part 9A of the FVPA.

Further, s.96(2)(e) of the PSIA empowers the appellate court to give a mediation direction under Division 2 of Part 3 of the PSIA.

Section 120 of the FVPA and s.97 of the PSIA provide that there is no appeal against the decision of the County Court or the Supreme Court on appeal. However, nothing in these sections prevent an appeal on the basis of a jurisdictional error. See also *Peng Yuan Gao v Yan Zhang* [2002] VSCA 19.

6.15 Vexatious Proceedings Act 2014

Provisions relating to vexatious litigants, previously contained in ss.188-200 of the FVPA and in ss.160-173 of the PSIA, have been expanded and are now in the VPA.

Sections 19, 36, 39 & 74 of the VPA give the Children's Court power to make four types of orders restraining litigation but only in relation to proceedings conducted under intervention order legislation, defined as the FVPA, the PSIA, the SIOA and the CFVA. These orders are-

- an Extended Litigation Restraint Order ['ELRO'];
- an Acting in Concert Order ['AICO'];
- an Appeal Restriction Order ['ARO'];
- a Variation or Revocation Application Prevention Order ['VRAPO'].

Sections 17, 35 & 38 of the VPA give the Supreme Court, the County Court, the Magistrates' Court and VCAT broader power to make these three types of orders in proceedings generally but the power of the Children's Court is restricted to orders that relate to intervention order legislation.

The rest of this section 6.15 is confined to the powers of the Children's Court and unless otherwise specified all legislation references are to the VPA.

6.15.1 Extended Litigation Restraint Order

Making of ELRO: Under s.19 the Children's Court may make an ELRO "that relates to intervention order legislation against a person if the court is satisfied that the person has frequently commenced or conducted vexatious proceedings under intervention order legislation against a person or in relation to a matter". In determining whether it is "satisfied", the Court may take into account any matter it considers relevant. "Frequently" is not defined in the VPA. See *Murch & Ors v Annesley & Ors* [2020] VSC 837 in which the principles for making ELROs against adult defendants were discussed.

Application for ELRO: Under ss.18 & 19(3) the Children's Court may make an ELRO on its own motion or on application by-

- (a) the Attorney-General;
- (b) by a person against whom another person has commenced or conducted a vexatious proceeding under intervention order legislation; or
- (c) a person with a sufficient interest in the matter.

Persons in categories (b) & (c) cannot apply for an ELRO without leave of the Court. The Court may grant leave if it is satisfied that-

- there is merit in the application; and
- the making of the application would not be an abuse of process.

Content of ELRO: Under s.23(1) an ELRO made by the Children's Court against a person may direct that the person must not, without leave of the Children's Court, for the period specified by the court continue and/or commence a proceeding in the Magistrates' Court or the Children's Court under intervention order legislation-

- against a person protected by the ELRO and, if the person is a parent of a child, his or her child; or
- in respect of a matter described in the ELRO.

An ELRO may include any other direction or order in relation to a proceeding or the commencement of a proceeding that the court considers appropriate: s.23(2). This may include a direction that the person subject to the ELRO may commence or continue a specified proceeding in the Magistrates' Court or the Children's Court under intervention order legislation: s.23(3). A note to s.19 refers to the costs provisions in s.154 of the FVPA and s.111 of the PSIA.

Duration of ELRO: An ELRO remains in force for the period specified in the order: s.27(1). The Children's Court may specify that an ELRO remains in force indefinitely: s.27(2). The Children's Court may extend the duration of an ELRO if it considers it is in the interests of justice to do so: s.27(3).

6.15.2 Acting in Concert Order

Making of AICO: Under s.36(1) the Children's Court may make an AICO against a person who is acting in concert with a person who is subject to an ELRO that relates to intervention order legislation if satisfied that-

- the first-mentioned person has commenced a proceeding under intervention order legislation; and
- the proceeding, if commenced by the person subject to the ELRO, would contravene the terms of the ELRO.

Under s.4(1), P2 is acting in concert with P1 if P2 is-

- (a) acting on behalf of P1; or
- (b) acting for the predominant benefit of P1; or
- (c) acting on the instructions of P1; or
- (d) acting in collusion with P1.

However, under s.4(2), P2 is not acting in concert with P1 if P2 is-

- (a) a legal practitioner acting on behalf of P1; or
- (b) a litigation guardian of P1; or
- (c) a professional advocate for P1; or
- (d) any other person authorised or required by law to act on behalf of P1.

Application for AICO: Under ss.34 & 36(2) the Children's Court may make an AICO on its own motion or on application by-

- (a) a person who applied for the ELRO; or
- (b) a person named in an interlocutory application or a proceeding that, if made or commenced by the person subject to the ELRO, would contravene the terms of the ELRO.

Content of AICO: Under s.36(3) an AICO made by the Children's Court against a person acting in concert may specify all or both of the following-

- that the person is subject to an ELRO that relates to intervention order legislation in the same terms as the principal ELRO or on any of the terms that the Children's Court may order under s.23(1);
- that the proceeding commenced by the person is stayed.

An AICO may direct any other thing that the Children's Court considers appropriate in the circumstances: s.36(4). A note to this sub-section refers to the costs provisions in s.154 of the FVPA and s.111 of the PSIA.

6.15.3 Appeal Restriction Order

Making of ARO: Under s.39(1) the Children's Court may make an ARO against a person who is subject to an ELRO that relates to intervention order legislation if satisfied that-

- the person has frequently made applications for leave to proceed that are vexatious applications; and
- it is in the interests of justice that the order be made.

Content of ARO: Under s.39(2) an ARO may direct that that, for the period specified in the order, the person has no right to appeal a decision of the Children's Court to refuse leave to commence or continue a proceeding in that court.

Duration of ARO: An ARO remains in force for the period specified in the order: s.42(1). The Children's Court may specify that an ARO remains in force indefinitely: s.42(2). The Children's Court may extend the duration of an ARO if it considers it is in the interests of justice to do so: s.42(3).

6.15.4 Application for leave to proceed under ELRO

Under s.52(2) a person subject to an ELRO made by the Children's Court that relates to intervention order legislation may apply to the Children's Court for leave to commence or continue a proceeding-

- against a person protected by the ELRO or his or her child; or
- in respect of a matter described in the ELRO.

Under s.53 the Children's Court may grant leave to proceed if it is satisfied that-

- the proceeding is not a vexatious proceeding; and
- there are reasonable grounds for the proceeding.

Under s.64 leave may be subject to any conditions that the court considers appropriate in the circumstances.

General matters relating to applications for leave to proceed are set out in ss.56-63 of the VPA.

6.15.5 Variation / Revocation of ELRO

Under s.65(2)(b) a person subject to an ELRO made by the Children's Court that relates to intervention order legislation may apply to the Children's Court, with leave of the court, to vary or revoke the order.

Under s.66 a person who makes-

- an application for leave to apply to vary or revoke an ELRO must not give notice of the application unless the Court makes an order in relation to the notification of persons;
- an application to vary or revoke an ELRO must not give notice of the application unless the Court otherwise directs the applicant under s.68 or makes an order in relation to the notification of persons.

If the Children's Court considers that an application to vary or revoke an ELRO should proceed, s.68 requires the Court to direct the Principal Registrar to cause notice of the application to be given to-

- (a) the Attorney-General;
- (b) the person (if any) who made the application for the ELRO;
- (c) the person protected by the ELRO-

and may make any other order in relation to the notification of persons that the Court considers appropriate in the circumstances: s.68.

Under s.69 the Court may by order-

- vary an ELRO in any manner it considers appropriate; or
- revoke an ELRO-

if it considers it is in the interests of justice to do so. Such order may be made on the Court's own motion or on an application under s.65(2).

General matters relating to such applications are set out in ss.70-73 of the VPA.

6.15.6 Variation or Revocation Application Prevention Order

Making of VRAPO: Under s.74 the Children's Court may make an VRAPO "in respect of a person who is subject to an ELRO made by it that relates to intervention order legislation if satisfied that-

- (a) the person has frequently made applications for leave to vary or revoke the ELRO; and
- (b) the applications are vexatious applications.

"Frequently" is not defined in the VPA.

Content of VRAPO: Under s.74(4) a VRAPO made by the Children's Court may direct that a person must not, for the period specified by the Court-

- continue an application for leave to vary or revoke an ELRO; and/or
- apply for leave to vary or revoke an ELRO.

Duration of VRAPO: A VRAPO remains in force for the period specified in the order: s.77(1). The Children's Court may specify that a VRAPO remains in force indefinitely: s.77(2). The Children's Court may extend the duration of a VRAPO if it considers it is in the interests of justice to do so: s.77(3).

6.15.7 Publication of orders under the VPA

Sections 85-86 provide that when a Court makes an order under the VPA, the Attorney-General must cause a copy of any order which she or he is given to be published in the Government Gazette. A copy of an order published under this section that relates to intervention order legislation must have removed from it the name of any person protected by the order, including a child of such person, unless the Court, when making the order, otherwise orders. The Children's Court may only allow publication of such names if the court reasonably considers-

- it is in the public interest to allow the publication of the particulars; and
- it is just to allow the publication in the circumstances.

6.16 Intervention-type orders made in other jurisdictions

6.16.1 National Domestic Violence Order [DVO] scheme

Section 1 of the National Domestic Violence Order Scheme Act 2016 provides that the main purposes of the Act are-

- (a) to provide for a national recognition scheme for family violence intervention orders and family violence safety notices, and other domestic violence orders; and
- (b) to make consequential amendments to the FVPA and other Acts.

Section 3 of the Act provides that the object of the Act is to establish, in conjunction with the corresponding laws, a national recognition scheme for domestic violence orders [DVO].

Some of the most important provisions of the Act are-

PART	SECTIONS	SUBJECT MATTER
Part 2	4-9	Definitions, Local DVO, Interstate DVO, Registered foreign order, Domestic violence concerns – SA & WA orders, Special provisions for foreign orders
Part 3	10-21	National recognition of DVOs
Div 1	10-14	General principles
Div 2	15-17	Enforcement of recognised DVOs
Div 3	18-21	Enforcement of non-local DVOs
Part 4	22-26	Variation and revocation of recognised non-local DVOs
Part 5	27-29	Exchange of information

6.16.2 Registration of corresponding New Zealand orders under the FVPA

Sections 177-178 of the FVPA provide for the registration of a 'corresponding New Zealand order', defined in s.4 as-

- (a) an order made under a corresponding NZ law that substantially corresponds to an interim order or a final order; or
- (b) a notice issued or an order made under a corresponding NZ law that substantially corresponds to a family violence safety notice.

Once registered under s.177 a corresponding NZ order is enforceable against the respondent in Victoria.

However, s.179 of the FVPA provides that if a corresponding NZ order is varied, extended or revoked by a NZ court or a person or authority as authorised by a law of NZ, that variation, extension or revocation has no effect in Victoria.

Section 180 of the FVPA provides that a Victorian court, on the application of-

- a protected person;
 - the respondent;
 - a police officer; or
 - a person who has been granted leave by the court to make an application in respect of the order-may-
- (a) vary the registration of a registered corresponding NZ order as it applies in Victoria;
 - (b) extend the period during which a registered corresponding NZ order has effect in Victoria; or
 - (c) revoke the registration of a corresponding NZ order.

Requirements in relation to notice are contained in ss.181-182 of the FVPA.

6.16.3 Registration of corresponding interstate & New Zealand orders under the PSIA

Sections 149-151 & 156-158 of the PSIA provide for registration of corresponding interstate and New Zealand orders. As defined in s.4 these are orders that are made under corresponding interstate or New Zealand law that substantially correspond to a final intervention order made under the PSIA.

Sections 151 & 158 of the PSIA allow registered corresponding interstate and New Zealand orders to be enforced in Victoria as if they were final orders under the PSIA.

When an order is registered in Victoria a subsequent variation, extension or revocation of a corresponding interstate order by a court of the State or Territory in which it was made has no effect in Victoria: s.152 of the PSIA. On the contrary, if a corresponding New Zealand order registered in Victoria is subsequently varied, revoked or extended by a court in New Zealand, the registration in Victoria is varied, revoked or extended accordingly: s.159 of the PSIA.

Section 153 of the PSIA empowers a Victorian court to vary, extend or revoke a registered corresponding interstate order. By contrast, a Victorian court has no power to vary, extend or revoke a registered corresponding New Zealand order.

6.17 Enforcement powers

6.17.1 General power to enter and search premises without warrant

In addition to any other power a police officer may have to enter premises, s.157 of the FVPA empowers a police officer, without warrant, to enter and search – using reasonable force if necessary to do so – any premises where the officer on reasonable grounds believes a person to be if-

- the officer reasonably believes the person-
 - (i) has assaulted or threatened to assault a family member; or
 - (ii) is on the premises in contravention of a family violence intervention order or family violence safety notice; or
 - (iii) is not complying with a police holding power direction; or
- the officer has the express or implied consent of an occupier of the premises to do so.

In addition to any other power a police officer may have to enter premises, s.114 of the PSIA empowers a police officer, without warrant, to enter and search – using reasonable force if necessary to do so – any premises where the officer on reasonable grounds believes a person to be if-

- the officer reasonably believes a person is on the premises in contravention of a personal safety intervention order; or
- the officer has the express or implied consent of an occupier of the premises to do so.

6.17.2 Directions and powers in relation to firearms etc.

Section 158 of the FVPA and s.115 of the PSIA empower a police officer to direct a person to surrender a firearm, firearms authority, ammunition or weapon where-

- (a) an intervention order has been made against the person [or under the FVPA a safety notice has been issued] or the police officer is satisfied, on the balance of probabilities, there are grounds for making an order against the person [or under the FVPA issuing a notice]; and

- (b) the police officer is aware the person is in possession of a firearm, firearms authority, ammunition or a weapon.

Failure to comply with such a direction without lawful excuse is an offence punishable by fine.

Section 159 of the FVPA and s.116 of the PSIA empower a police officer, without warrant, to enter and search, using reasonable force if necessary to do so-

- any premises at which a person resides or has resided; or
 - the premises at which the person committed or allegedly committed family violence, prohibited behaviour or stalking; or
 - a vehicle registered in the person's name-
- if-
- (a) an intervention order has been made against the person [or under the FVPA a safety notice has been issued] or the police officer is satisfied, on the balance of probabilities, there are grounds for making an order against the person [or under the FVPA issuing a notice]; and
 - (b) the police officer is aware, or has reasonable grounds to suspect, the person is in possession of a firearm, firearms authority, ammunition or a weapon.

Sections 163 & 120 respectively provide that if a person fails to comply with a direction under s.158(2) or a police officer searches premises under s.159(2), the police officer-

- (a) must seize any firearm or firearms authority in the person's possession; and
- (b) may seize ammunition or weapon in the person's possession.

The effect of surrender or seizure of a firearm, firearms authority, ammunition or weapon is detailed-

- in s.164 / s.121 in the case where a final order has been made against the person; and
- in s.165 / s.122 in other cases.

6.17.3 Issue of warrant to enter, search & seize

Section 160 of the FVPA and s.117 of the PSIA empower a magistrate, upon application by a police officer supported by evidence on oath, whether oral or by affidavit, to issue a search warrant authorizing the police officer named in the warrant and any assistants the police officer considers necessary-

- (a) to enter the premises or vehicle described in the warrant; and
- (b) to search for and seize-
 - (i) any evidence of the offence named or described in the warrant; or
 - (ii) any firearms, firearms authority (viz. licence, permit or other authority under the Firearms Act 1996 (Vic) to possess, carry or use firearms), ammunition or weapon as specified in the warrant.

The pre-conditions for the issue of a search warrant set out in s.160(2) / s.117(2) are that the magistrate is satisfied there are reasonable grounds for suspecting that-

- an offence against the respective Act is being or is about to be committed; or
- the person is in possession of a firearm, firearms authority, ammunition or a weapon.

The matters which must be stated in such a search warrant are set out in s.160(3) / s.117(3). A search warrant must be issued in accordance with the Magistrates' Court Act 1989 (Vic) and in the prescribed form under that Act: s.160(4) / s.117(4).

6.17.4 Issue of warrant to arrest witness who fails to appear

Under s.67A of the FVPA / s.50 of the PSIA a court may issue a warrant to arrest for a witness-

- who fails to appear at a hearing when called; or
- who is avoiding service of a subpoena or summons; or
- who has been served with a subpoena or summons but is unlikely to comply with it.

See also s.194 of the Evidence Act 2008 (Vic).

6.18 Contravention

6.18.1 Proof & consequences

The FVPA and the PSIA use the term "contravention" to describe what the CFVA called a "breach" of an intervention order. The rationale for the changed terminology is to emphasise that an intervention order is a civil order of the Magistrates' Court or Children's Court. However, whatever label is used, contravention or breach proceedings are criminal proceedings in which the Children's Court can only be satisfied of an accused child's guilt beyond reasonable doubt by relevant and admissible evidence: see s.357(1) of the CYP A.

Contravention of an intervention order is a summary offence which, for a child, is dealt with in the Criminal Division of the Children's Court. Section 123 of the FVPA / s.100 of the PSIA provide that a person against whom an interim or final family violence / personal safety intervention order has been made and who-

- (a) has been served with a copy of the order; or
- (b) has had an explanation of the order given in accordance with ss.57(1), 60G(1) or 96(1) of the FVPA / ss.40 or 76 of the PSIA-

must not contravene the order. The maximum penalty for contravention is level 7 imprisonment (2 years) or a level 7 fine (240 penalty units) or both. Under the CFVA the maximum penalty for a subsequent offence was 5 years imprisonment. To achieve consistency with s.113A of the Sentencing Act 1991 (Vic) the maximum is now 2 years for both a first and a subsequent offence of contravention of an intervention order made under either Act. It follows that the reasoning of the Court of Appeal on this issue in *R v Duncan* [2007] VSCA 137 at [13]-[26] is no longer relevant.

Section 37 of the FVPA provides that if a person-

- (a) has been served with a FV safety notice; and
 - (b) has had an explanation of the notice given in accordance with s.35-
- the person must not contravene the notice. The penalty provisions for such contravention are the same as those in s.123.

As from 17/04/2013 there are three additional contravention offences – each of which is an indictable offence – provided in the FVPA but not in the PSIA.

Sections 37A(2) & 123A(2) of the FVPA each make it an offence for a respondent who-

- (a) has been served with a FV safety notice or a copy of a FV intervention order;
 - (b) has had an explanation of the notice or order given in accordance with s.35 / ss.57(1), 60G(1) or 96(1); and
 - (c) contravenes the notice or order intending to cause, or knowing that his or her conduct will probably cause-
 - physical or mental harm to the protected person, including self-harm; or
 - apprehension or fear in the protected person for his own safety or that of any other person-
- to contravene the notice / order. The maximum penalty for such contravention is level 6 imprisonment (5 years) or a level 6 fine (600 penalty units) or both.

Sections 37A(1) & 123A(1) provide that in s.37A & s.123A 'mental harm' includes psychological harm and suicidal thoughts.

Section 125A(1) of the FVPA provides that a person must not persistently contravene a FV safety notice or a FV intervention order. The maximum penalty for such contravention is level 6 imprisonment (5 years) or a level 6 fine (600 penalty units) or both. Under s.125A(2) in order to prove an offence of persistent contravention it is necessary to prove that-

- (a) the accused engaged in conduct that would constitute an offence against s.37 or s.123; and
- (b) on at least 2 other occasions within a period of 28 days immediately preceding the conduct referred to in paragraph (a), the accused engaged in conduct that would constitute an offence against s.37 or s.123 in relation to-
 - (i) the same protected person; or
 - (ii) the same FV safety notice or FV intervention order (whether an interim or a final order), whether or not in relation to the same protected person; or
 - (iii) a FV safety notice and a FV intervention order (whether an interim order or a final order) made on the FV safety notice as an application, whether or not in relation to the same protected person; and
- (c) on each of the occasions referred to in paragraphs (a) and (b) the accused knew or ought to have known that the conduct constituted a contravention of the FV safety notice or FV order.

Sections 37(2A), 37(2B), 123(2A) & 123(2B) of the FVPA provide an extra-territorial operation for all of the contravention offences. In determining whether an accused has contravened a family violence safety notice or a family violence intervention order, it is irrelevant whether:

- any or all of the accused's conduct which constitutes the contravention offence occurred outside Victoria, so long as the protected person was in Victoria at the time that the accused's conduct occurred; or
- the protected person was outside Victoria at the time when the accused's conduct which constitutes the contravention offence occurred, so long as the conduct occurred in Victoria.

Section 123(3) of the FVPA provides that in a proceeding for an offence of contravening a FV intervention order, it is a defence to the charge for the accused to prove that-

- (a) the accused was the respondent under the FV intervention order; and
- (b) a FV safety notice in relation to the same protected person and respondent was also in force at the time the offence was alleged to have been committed; and
- (c) the accused's conduct was not in contravention of the FV safety notice.

Section 37(3) provides a reciprocal defence to a charge of contravening a FV safety notice. Sections 37A(5), 123A(5) & 125A(2) of the FVPA provide similar defences to the charges of:

- contravention of a FV safety notice or order intending to cause harm or fear for safety;
- persistent contravention of a FV safety notice or order.

The onus is on the defence to establish any of these defences on the balance of probabilities: Evidence Act 2008 s.141(2); *R v Carr-Briant* [1943] KB 607.

Sections 38 & 124 of the FVPA empower a police officer to arrest and detain, without warrant, a person whom he or she believes on reasonable grounds has committed an offence against ss.37 & 123 respectively. Section 101 of the PSIA empowers a police officer to arrest and detain, without warrant, a person whom he or she believes on reasonable grounds has committed an offence against s.100. Section 459(1) of the Crimes Act 1958 provides for the apprehension without warrant of a person reasonably believed to have committed an indictable offence. This includes offences against ss.37A, 123A & 125A of the FVPA.

Section 125 of the FVPA provides that for the purposes of Subdivision (1) of Division 1 of Part II of the Crimes Act 1958 (Vic), a protected person is not involved in the commission of an offence against the FVPA, and is not punishable as a principal offender, because the protected person encourages, permits or authorises conduct by the respondent that contravenes a FV intervention order or FV safety notice. There is no equivalent provision in the PSIA.

6.18.2 Procedure applicable in certain contravention proceedings

Under s.359 of the Criminal Procedure Act 2009 (Vic), the alternative arrangements referred to below apply to all witnesses (including complainants) in a criminal proceeding that relates (wholly or partly) to a charge for-

- (a) a sexual offence;
- (b) an offence where the conduct constituting the offence consists of family violence within the meaning of the FVPA; or
- (c) an offence against s.17(1) [Obscene, indecent, threatening language and behaviour etc in public] or s.19 [Obscene exposure] of the Summary Offences Act 1966 (Vic).

It follows that the procedure outlined below will be applicable in certain contravention proceedings under either the FVPA or the PSIA depending on the circumstances leading to the charge.

Under s.360 of the Criminal Procedure Act 2009 (Vic), the court **may** direct that alternative arrangements be made for the giving of evidence by a witness. Such arrangements may include but are not restricted to-

- (a) permitting the evidence to be given from a place other than the courtroom by closed-circuit television or other facilities that enable communication between that place and the courtroom;
- (b) using screens to remove the accused from the direct line of vision of the witness;
- (c) permitting a person, chosen by the witness and approved by the court for this purpose, to be beside the witness while the witness is giving evidence, for the purpose of providing emotional support to the witness;
- (d) permitting only persons specified by the court to be present while the witness is giving evidence;
- (e) requiring legal practitioners not to robe;
- (f) requiring legal practitioners to be seated while examining or cross-examining the witness.

Under s.363, the court **must** direct use of closed-circuit television or other facilities [pursuant to s.360(a)] for a witness who is a complainant unless the prosecution applies for the complainant to give evidence in the courtroom and the court is satisfied that the complainant is aware of the right to give evidence remotely and is able and wishes to give evidence in the courtroom.

Under s.364, if the witness is a complainant and is to give evidence in the courtroom, the court **must** direct the use of screens for the complainant [pursuant to s.360(b)] unless the court is satisfied that the complainant is aware of the right to give evidence while screens are used and does not wish a screen to be used.

Under s.365, if the witness is a complainant, the court **must** direct the presence of a support person for the complainant [pursuant to s.360(c)] unless the court is satisfied that the complainant is aware of the right to have a support person and does not wish to have a support person.

6.18.3 Sentencing for contravention or for offences constituting contravention

In addition to the general sentencing principles, it is appropriate in sentencing for contravention of a intervention order to take into account the express purposes of the relevant Act.

The purposes of the FVPA, set out in s.1, are:

- to maximize safety for children and adults who have experienced family violence;
- to prevent and reduce family violence to the greatest extent possible; and
- to promote the accountability of perpetrators of family violence for their actions.

A main purpose of the PSIA, set out in s.1(a), is to protect the safety of victims of assault, sexual assault, harassment, property damage or interference, stalking and serious threats.

In *Miles v Barca* [2003] VSC 376 Byrne J said at [26]: "The making of an intervention order is a serious matter carrying very serious consequences."

Affirming a sentence of 2 years imprisonment on a charge of breaching an intervention order, one year of which was to be served cumulatively on a sentence of 3 years imprisonment on a related charge of intentionally causing injury, Vincent JA said in *R v Duncan* [2007] VSCA 137 at [37]:

"[T]he sentencing judge was clearly correct in attributing a high level of seriousness to the appellant's conduct and reflecting that in the sentences imposed. Not only did the appellant's conduct involve a savage and sustained attack upon his unfortunate victim but it must not be forgotten she had sought the protection of the law against his continued and frightening criminal harassment. He responded to her endeavours, and to the imposition of a sentence of imprisonment upon him, by seeking to punish her and damage her property. Obviously the community cannot accept that those who avail themselves of its protection may be subject to revenge or retribution if its structures and that protection are to possess credibility and operate to deter potential offenders."

The Court of Appeal has made consistent statements that the contravention of intervention orders must be severely punished. In *R v Xe Van Pham* [2005] VSCA 57 the Court of Appeal affirmed a sentence of 10 years' imprisonment with a non-parole period of 7 years on two counts of intentionally causing serious injury. The victims were the appellant's former de facto and her 6 year old son who saw the attack on his mother and bravely ran to protect her, raising his arm to shield her. The appellant struck the boy on the arm with the knife, inflicting 3 cuts and almost severing the child's hand, leaving him with a severe disability that he will carry for the rest of his life. Vincent JA, with whom Nettle JA & Cummins AJA agreed, referred at [21] to the aggravating circumstance that the appellant's offences were in breach of an intervention order:

"Offenders who disregard such orders and occasion injury to persons whose personal security is intended to be guaranteed through this means must anticipate that an extremely stern view will be adopted by the courts of their conduct and, save in the most unusual circumstances, will be subject to condign punishment."

In *R v Yasso* [2007] VSCA 306 the offender was convicted of murdering his wife after she had obtained an intervention order against him. At [60] Maxwell P (with whom Redlich JA & Habersberger AJA agreed) commented that the commission of the offence in breach of an intervention order "was itself a significant aggravating circumstance".

In imposing a sentence of 9 years of imprisonment for manslaughter of the accused's partner who had had an intervention order against the accused, Hollingworth J said in *DPP v Mahoney* [2009] VSC 249 at [45]:

"Furthermore, the resort to violence in flagrant breach of intervention orders will be met by severe punishment. Intervention orders are a process designed by Parliament to provide the protection of the law to vulnerable individuals, usually women and children, who legitimately fear for their safety. Offenders who disregard such orders, and kill or cause serious injury, must anticipate that an extremely stern view will be adopted by the courts and, save in the most unusual circumstances, they will be subject to severe punishment."

In *El Tahir v R* [2011] VSCA 46 – in dismissing an appeal against a sentence of 7y/4y imprisonment for intentionally causing serious injury – Mandie JA (with whom Buchanan & Redlich JJA agreed) said at [23]:

“The Court rightly treated with the utmost seriousness the appellant’s knife attack on his defenceless wife in the presence of their children and in circumstances which included the breach of a court order.”

In *DPP v Johnson* [2011] VSCA 288 Neave & Bongiorno JJA allowed a Director’s appeal against a concurrent sentence of IMP 6m imposed for breach of a family violence intervention order and replaced it with a sentence of IMP 12m. At [4]-[5] Neave JA detailed the following considerations relevant to punishing contraventions of FV intervention orders:

[4] “All Australian states have enacted legislation which is intended to protect potential victims of family violence from physical injury and from being placed in fear by harassment or threats. Family violence is a serious problem in Australia. In 2004, it was reported that family violence is ‘the leading contributor of death, disability and illness in women in Victoria aged 15 to 44 years’: Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006), [2.94]. Breach of intervention orders is relatively common. In its Report on *Breaching Intervention Orders*, the Sentencing Advisory Council said that, between July 2004 and June 2007, the Magistrates’ Court of Victoria and the County Court of Victoria imposed on average approximately 14,000 intervention orders per year. Over a quarter of all intervention orders imposed were breached.

[5] Further, offenders who breach orders and continue to threaten and assault their partners may go on to seriously injure or even kill them: Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006), [2.61]; Victorian Law Reform Commission, *Defences to Homicide: Issues Paper* (2002), [2.32]. As was recognised during parliamentary debates on the *Family Violence Protection Bill 2008*, intervention orders can only protect victims of threatened violence if they are effectively enforced and if breach of an order attracts an appropriate sentence. The Victorian Law Reform Commission, in its report which ‘underpin[ed]’ many of the changes in the Bill, observed:

‘The response to a breach of an intervention order is crucial to ensuring the intervention order system is effective in protecting family violence victims. If police or the courts do not respond adequately to breaches of intervention orders, they will be perceived as ineffectual – ‘not worth the paper they are written on’ – by victims and perpetrators alike: Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006), [10.67].”

At [39] Redlich JA held, dissenting, that – although lenient – the sentence of IMP 6m was not outside the range reasonable open to the sentencing judge. However, finding other error and being required to re-sentence the respondent, he imposed the same IMP 12m sentence as the majority. At [40] & [43] his Honour said:

[40] “Breach of an Intervention Order [see generally Sentencing Advisory Council, *Sentencing practices for breach of Family Violence Intervention Orders: Final Report* (June 2009) viii.], especially in contexts where the breach is a prelude to violent indictable offences and may involve the offender’s former partner has not always been viewed as seriously as it should. Their gravity is well documented in empirical research [see judgment of Neave JA at [4]-[5]; see also generally Sentencing Advisory Council, *Sentencing practices for breach of Family Violence Intervention Orders: Final Report* (June 2009)] and numerous decisions of this Court: see e.g. *El Tahir v R* [2011] VSCA 46, [23] (Mandie JA, with Buchanan and Redlich JJA agreeing); *R v Harvey* [2007] VSCA 127, [21] (Redlich JA, with Ashley JA agreeing); *R v Xe Van Pham* [2004] VSC 271, [4]-[5] (Teague J); *R v Maher* [2011] VSCA 136, [7], [16] (Ashley JA, with Bongiorno JA agreeing); *R v Crowley* [2009] VSCA 176, [14]-[15] (Buchanan JA, with Dodds-Streton JA and Lasry AJA agreeing); *Kanakaris v R* [2010] VSCA 120, [4], [27], [39], [70]-[71] (Coghlan AJA, with Neave and Redlich JJA agreeing); *R v Propsting* [2009] VSCA 45, [9], [13]-[14] (Vincent JA, with Buchanan JA agreeing); *R v Verde* [2009] VSCA 16, [14], [31]-[32] (Nettle JA, with Vincent JA and Vickery AJA agreeing); *R v Noonan* [2007] VSCA 5, [6], [34] (Nettle JA, with Buchanan and Vincent JJA agreeing); *R v Yasso* [2007] VSCA 306, [60] (Maxwell P, with Redlich JA and Habersberger AJA agreeing). The fact that it was imposed at the same time as the sentence for aggravated burglary would not have justified any reduction in the sentence for the breach of the Order, as the

sentence fixed for each individual offence must be an adequate one as *Postiglione v The Queen* makes clear.

[43] ...The observations of Charles JA, with whom Brooking and Phillips JJA agreed, in *R v Cotham* [1998] VSCA 111, [14] are particularly pertinent:

‘Intervention orders must be strictly adhered to, and it is very much in the interests of the community that those against whom such orders are made be under no misapprehension that the courts will punish severely those who breach such orders. The applicant’s actions suggest that he believed he could breach the intervention order with impunity. Only by appropriately severe penalties can the courts make clear to the applicant and the broader community that such conduct will not be tolerated.’

See also *R v Duncan* (2007) 172 A Crim R 111; [2007] VSCA 137, [37] (Vincent JA) and Sentencing Advisory Council, *Sentencing practices for breach of Family Violence Intervention Orders: Final Report* (June 2009) 37–38.”

In *R v Bouras* [2012] VSC 77 the offender was sentenced to IMP 2y9m on a count of stalking his ex-wife in circumstances which constituted a breach of a family violence intervention order. At [52] Hollingworth J said:

“Unfortunately, the story of somebody who refuses to accept that a relationship is over, and who harasses or stalks a former partner, is all too common. Furthermore, offenders who disregard intervention orders (a process designed by parliament to provide the protection of the law to vulnerable individuals, usually women and children, who legitimately fear for their safety) must anticipate that a stern view will be adopted by the courts.”

6.18.4 The importance of treatment for stalkers

In “*Stalking by law: Damaging victims and rewarding offenders*” (2004) 12 JLM 103 the authors Michele Pathé, Rachel MacKenzie and Paul E Mullen (Department of Psychological Medicine, Monash University and Victorian Institute of Forensic Mental Health) examine areas of the justice system that they consider particularly amenable to manipulation by stalkers and the impact of these abuses on stalking victims. They conclude that sentencing practices need to reflect the important role of mental health services in the management of stalking:

“The majority of stalkers have some form of psychopathology which is amenable to psychiatric treatment or other psychological interventions: Mullen PE, Pathé M, Purcell R and Stuart GW, “Study of Stalkers” (1999) 156 *American Journal of Psychiatry* 1244. Sentencing practices need to reflect the important role of mental health services in the management of stalking: Fritz JP, “A Proposal for Mental Health Provisions in State Anti-stalking Laws” (Summer 1995) *Journal of Psychiatry and Law* 295. As stalkers seldom acknowledge their problem or seek psychiatric help voluntarily, their conviction may unlock a scarce window of opportunity for crucial psychiatric intervention. Dispositions for those convicted of stalking and related behaviours should include a mandate for mental health assessment and treatment where this is indicated. Sentences should be of sufficient duration to facilitate these referrals and the conditions must be assertively enforced. Stalking is best managed by a skilled multidisciplinary approach (Mullen PE, Pathé M and Purcell R, “The Management of Stalkers” (2001) 7 *Advances in Psychiatric Treatment* 335)”.

In “*Management and Treatment of Stalkers: Problems, Options, and Solutions*” Behav Sci. Law (2011) the authors Rachel MacKenzie and David James agree that legal sanctions alone are often ineffective in preventing stalking because, in the absence of treatment, the fundamental problems driving the stalker remain unresolved. Treatment of stalkers involves pharmacotherapy when mental illness is present but the mainstays of treatment for non-psychotic stalkers are programs of psychological intervention. These depend on accurate assessment of the risks inherent in stalking and on the identification of psychological deficits, needs, and responsivity factors specific to the individual. The Problem Behaviour Program at the Victorian Institute of Forensic Mental Health (Forensicare) in Melbourne is one such model, developed not only to provide expert assessments for those who engage in problem behaviours such as stalking, but also to offer an avenue of treatment where existing services failed to treat or lacked the requisite skills.

Although s.67(1) of the PSIA empowers the Court to include in a personal safety intervention order any conditions that appear to the Court necessary or desirable, in reality the treatment so strongly recommended above is only ordered in the context of sentencing for the criminal offences of stalking or contravention of a personal safety intervention order.

6.19 Regulations, Rules, Practice Directions & Forms

6.19.1 Regulations

Section 211 of the FVPA empowers the Governor in Council to make regulations for or with respect to any matter or thing required or permitted by the FVPA to be prescribed or necessary to be prescribed to give effect to the FVPA including-

- forms;
- matters relevant to applications; and
- the content of orders, applications, notices and certificates.

Section 185 of the PSIA confers the same regulation-making power under the PSIA.

The Family Violence Protection Regulations 2018 [S.R. No.161 of 2008] came into operation on 01/12/2018. They replace and revoke the Family Violence Protection Regulations 2008 [S.R. No.153 of 2008].

The Personal Safety Intervention Orders Regulations 2011 [S.R. No.89 of 2011] came into operation on 05/09/2011. They replace and revoke the Stalking Intervention Orders Regulations 2008 [S.R. No.152 of 2008].

6.19.2 Rules & Practice Directions for the Children's Court

Section 210(1) of the FVPA empowers the President of the Children's Court, together with 2 or more magistrates of the court, to make rules for and with respect to proceedings in the court in relation to applications and orders made under the FVPA, including the non-exhaustive list of matters set out in s.210(2).

Section 184 of the PSIA confers the same rule-making power under the PSIA.

The Children's Court (Family Violence Protection) Rules 2018 [S.R. No. 169 of 2018] came into operation on 03/12/2018. They revoke and replace the Children's Court (Family Violence Protection) Rules 2008 [S.R. No. 156 of 2008]. They have since been amended by S.R. No.10 of 2020 and S.R. No. 127 of 2020.

The Children's Court (Personal Safety Intervention Orders) Rules 2011 [S.R. No.94 of 2011] came into operation on 05/09/2011.

Rule 2.01(1) of each set of Rules provides that a failure to comply with the Rules is an irregularity and does not render a proceeding or a step taken, or any document or order therein a nullity. Rule 2.02 empowers the Court to dispense with compliance with the Rules, either before or after the occasion for compliance arises.

The power of the President of the Children's Court to issue practice directions, statements or notes for the court under s.592 of the CYFA includes power to issue practice directions, statements or notes for the Children's Court in relation to proceedings under the FVPA [s.210(4)] or under the PSIA [s.184(4)]. No such practice directions, statements or notes have yet been issued.

6.19.3 Rules & Practice Directions for the Magistrates' Court

Section 219 of the FVPA confers a similar rule-making power on the Chief Magistrate, together with 2 or more Deputy Chief Magistrates.

The Magistrates' Court (Family Violence Protection) Rules 2018 [S.R. No. 182 of 2018] revoke the Magistrates' Court (Family Violence Protection) Rules 2008 [S.R. No. 157 of 2008].

The power of the Chief Magistrate to issue practice directions, statements or notes for the court under s.16A of the Magistrates' Court Act 1989 (Vic) in relation to civil proceedings includes power to issue practice directions, statements or notes for the Children's Court in relation to proceedings under the FVPA [s.209(4)] or under the PSIA [s.183(4)]. No such practice directions, statements or notes have yet been issued.

6.19.4 Forms

In the Children's Court (Family Violence Protection) Rules 2018 [as amended] there are 15 forms, most of which are related to proceedings under the VPA [see section 15 above]:

FORM	SUBJECT MATTER
1AA	Explanation of interim family violence protection order
1AB	Explanation of final family violence protection order
1	Application for rehearing
2	Notice of Appeal
3	Application for leave to apply for extended litigation restraint order
4	Application for extended litigation restraint order
5	Application for acting in concert order
6	Application for leave to continue proceeding by person subject to extended litigation restraint order
7	Application for leave to commence proceeding by person subject to extended litigation restraint order
8	Application for leave to continue proceeding by person subject to general litigation restraint order
9	Application for leave to commence proceeding by person subject to general litigation restraint order
10	Notice of application for leave to proceed
11	Application for leave to apply to vary or revoke extended litigation restraint order
12	Application to vary or revoke extended litigation restraint order
13	Notice of application to vary or revoke extended litigation restraint order

In the Children's Court (Personal Safety Intervention Orders) Rules 2011 [as amended] there are 13 forms, most of which are related to proceedings under the VPA [see section 15 above]:

FORM	SUBJECT MATTER
1	Application for rehearing
2	Notice of Appeal
3	Application for leave to apply for extended litigation restraint order
4	Application for extended litigation restraint order
5	Application for acting in concert order
6	Application for leave to continue proceeding by person subject to extended litigation restraint order
7	Application for leave to commence proceeding by person subject to extended litigation restraint order
8	Application for leave to continue proceeding by person subject to general litigation restraint order
9	Application for leave to commence proceeding by person subject to general litigation restraint order
10	Notice of application for leave to proceed
11	Application for leave to apply to vary or revoke extended litigation restraint order
12	Application to vary or revoke extended litigation restraint order
13	Notice of application to vary or revoke extended litigation restraint order

In the FVPR regulations there are three prescribed forms:

- (1) information on holding powers for a directed or temporarily detained person [reg.6 of the FVPR and s.17 of the FVPA];
- (2) certificate of non-attendance at assessment interview [reg.8(a) of the FVPR & s.139(2) of FVPA];
- (3) certificate of non-attendance at counselling [reg.8(b) of the FVPR and s.139(2) of the FVPA].

In the PSIR regulations there are two prescribed forms

- (1): Explanation of interim personal safety intervention order [reg.8 of the PSIR];
- (2): Explanation of final personal safety intervention order [reg.11 of the PSIR].

In addition a number of informal forms have been created for use in the Magistrates' Court and in the Children's Court.

6.20 Statistics

The number of applications for intervention orders finalised state-wide in the Children's Court is shown in the table below. In each year approximately half of applications resulted in a final intervention order being made. The balance were either struck out - often due to non-appearance of the applicant – or withdrawn by the applicant or, in a small percentage of cases, refused. In the Children's Court a withdrawal of an application is often associated with the respondent providing an undertaking not to engage in proscribed conduct against the victim. The number of interim orders made is not available but may be presumed to be significantly greater than the number of final orders made.

There has been a significant increase in the number of applications over the years shown save for 2019/20 where the reduction can probably be attributed to the COVID-19 pandemic. In roughly two-thirds of the orders the victim is a family member. In roughly one-third he or she is a victim of stalking or other prohibited behaviour.

ORDERS UNDER THE FAMILY VIOLENCE PROTECTION ACT 2008 AND THE PERSONAL SAFETY INTERVENTION ORDERS ACT 2010								
STATEWIDE	2006 /07	2007/ 08	2008/ 09	2009 /10	2010 /11	2011 /12	2012 /13	2013 /14
Final intervention order made	862	885	855	962	1090	1402	1567	1610
Final intervention order refused	32	32	28	32	29	35	29	35
Application struck out	395	415	443	525	612	556	484	477
Application withdrawn	449	512	509	555	707	602	636	588
Intervention order revoked	1	0	1	0	0	13	9	12
TOTAL APPLICATIONS FINALIZED UNDER BOTH ACTS	1739	1844	1836	2074	2438	2608	2725	2722
Percentage where victim is a family member	67.9%	67.5%	67.8%	63.1%	64.0%	67.5%	69.7%	67.5%
Percentage where victim is a victim of stalking	32.1%	32.5%	32.2%	36.9%	36.0%	32.5%	30.3%	32.5%

ORDERS UNDER THE FAMILY VIOLENCE PROTECTION ACT 2008								
STATEWIDE	2014 /15	2015 /16	2016 /17	2017/ 18	2018/ 19	2019 /20		
Final intervention order made	1140	1291	1144	1118	1192	996		
Final intervention order refused	19	12	14	5	15	11		
Application struck out	243	184	160	147	144	167		
Application withdrawn	336	335	400	352	414	430		
Application withdrawn with undertaking	105	103	135	120	116	137		
Intervention order revoked	12	11	13	6	11	2		
TOTAL APPLICATIONS FINALIZED UNDER THE FVPA	1855	1936	1866	1748	1892	1743		

ORDERS UNDER PERSONAL SAFETY INTERVENTION ORDERS ACT 2010								
STATEWIDE	2014 /15	2015 /16	2016 /17	2017/ 18	2018/ 19	2019 /20		
Final intervention order made	422	437	456	558	697	473		
Final intervention order refused	10	12	6	1	4	8		
Application struck out	145	109	129	98	113	96		
Application withdrawn	89	97	105	118	150	134		
Application withdrawn with undertaking	116	98	130	122	171	146		
Intervention order revoked	1	3	0	0	1	0		
TOTAL APPLICATIONS FINALIZED UNDER THE PSIA	783	756	826	897	1136	857		

**ORDERS UNDER THE *FAMILY VIOLENCE PROTECTION ACT 2008*
AND THE *PERSONAL SAFETY INTERVENTION ORDERS ACT 2010***

STATEWIDE	2014 /15	2015 /16	2016 /17	2017/ 18	2018/ 19	2019 /20		
TOTAL APPLICATIONS FINALIZED UNDER BOTH ACTS	2638	2692	2692	2645	3028	2600		
Percentage where victim is a family member	70.3%	72.0%	69.4%	66.1%	62.5%	67.0%		
Percentage where victim is a victim of stalking	29.7%	28.0%	30.6%	33.9%	37.5%	33.0%		

6.21 Undertakings

In proceedings for an intervention order, it is not uncommon for the applicant to seek to withdraw an application upon the respondent giving an undertaking to the Court not to engage in certain nominated conduct against a victim. This is particularly common in the Children's Court in cases where the respondent is a child. There is no express power in either the FVPA or the PSIA for proceedings to be determined in this way nor was there any express power in the CFVA or the SIOA. It follows that such an undertaking is not enforceable other than through any residual common law or other statutory power the Children's Court or the Magistrates' Court may have in relation to failure to comply with an undertaking given to the Court.

The writer is not aware of proceedings for breach of such an undertaking ever having been instituted in the Children's Court. In practice, what a proved breach of an undertaking does provide is potent evidence in support of any new application for an intervention order by that applicant against that respondent.

