



Victorian Council for Civil Liberties Inc

Reg No: A0026497L

GPO Box 3161
Melbourne, VIC 3001

t 03 9670 6422

info@libertyvictoria.org.au

PRESIDENT

Julia Kretzenbacher

SENIOR VICE-PRESIDENT

Sam Norton

VICE-PRESIDENTS

Jamie Gardiner OAM

Thomas Kane

Monique Mann

IMMEDIATE PAST PRESIDENT

Julian Burnside AO QC

TREASURER

Michelle Bennett

SECRETARY

Martin Radzaj

PATRON

The Hon. Michael Kirby AC CMG

10 August 2021

Victorian Law Reform Commission
GPO Box 4637
Melbourne Victoria 3001

stalking@lawreform.vic.gov.au

Submission to the Victorian Law Reform Commission

Review of Victoria's responses to stalking, harassment and similar conduct, including the framework for, operation and enforcement of the Personal Safety Intervention Order (PSIO) system

1. The Victorian Law Reform Commission (**VLRC**) has been asked to review and report on Victoria's legal responses to stalking, harassment and similar conduct, including the statutory framework for and operation of the Personal Safety Intervention Order (**PSIO**) system, drawing upon best practice from the family violence system, criminological research and victim support services.¹

¹ VLRC, Stalking: terms of reference: <https://www.lawreform.vic.gov.au/projects/stalking/stalking-terms-reference>.

2. Liberty Victoria welcomes the release of the Victorian Law Reform Commission's Consultation paper on Stalking (**Consultation paper**) and appreciates the opportunity to provide this submission to the VLRC.

About Liberty Victoria

3. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil liberties., Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.
4. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for both prosecution and the defence. More information on our organisation and activities can be found at: <https://libertyvictoria.org.au>.
5. The focus of our submissions and recommendations reflect our experience and expertise as outlined above. Some of the following is drawn from work undertaken by Liberty Victoria in response to previous inquiries and proposed legislative reforms.
6. This is a public submission and is not confidential.

The need for reform in the non-family violence stalking system

7. We acknowledge the serious nature of stalking behaviours. As outlined in the Consultation paper, this offending can have a profound and lasting negative impact on victim survivors and can sometimes foreshadow more serious offending that it is in the public interest to prevent and reduce.
8. The principal objective of this organisation is to ensure people's rights, freedoms and dignity are valued and protected. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), specifically enshrines the rights to freedom from torture and cruel, inhuman or degrading treatment (s 10), freedom of movement (s 12), privacy and freedom from interference with your home life, correspondence and reputation (s 13), protection of families and children (s 17), and liberty and security (s 21). As set out in the Consultation paper, these rights are often violated for victim survivors of stalking. Protection of these rights must be balanced with fundamental tenets of the criminal

justice system, including the accused's right to a fair hearing (s 24 of the Charter) and to be presumed innocent when charged with criminal offending (s 25 of the Charter).

9. We note that this Consultation paper discusses the PSIO system, where at a hearing it is sufficient for the Court to be satisfied 'on the balance of probabilities' rather than 'beyond reasonable doubt' that the respondent has committed prohibited behaviour, is likely to continue to do so, and that the prohibited behaviour would cause a reasonable person to fear for his or her safety.²
10. The following submission seeks to address particular questions posed by the Consultation Paper which are relevant to Liberty Victoria's work and offer some broad observations in relation to the contemplated reforms.

Questions 1 & 18, 21-23 – Influential factors and barriers to the reporting of stalking behaviour, protections for victim survivors in stalking prosecutions and improving support for victim survivors

11. We acknowledge the research cited in the Consultation paper indicating that:
 - a. From the age of 15, 17 per cent of women and 6.5 per cent of men have been a victim of stalking at least once during their lifetime;³
 - b. Men are more likely to be stalked by another male than a female;⁴
 - c. Women with disabilities and long-term health issues are more likely to be stalked than women without disabilities and long-term health issues;⁵
 - d. There is a high prevalence of stalking among LGBTIQ individuals and there is also low rate of reporting in this community due to fear of discrimination;⁶
 - e. Aboriginal and Torres Strait Islander women and girls are more likely to experience stalking;⁷

² *Personal Safety Intervention Orders Act 2010* (Vic) s 61.

³ VLRC Stalking Consultation Paper p4 [1.18] citing Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0, 8 November 2017) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>.

⁴ VLRC Stalking Consultation Paper p4 [1.18] citing Heng Choon (Oliver) Chan and Lorraine L Sheridan, *Psycho-Criminological Approaches to Stalking Behavior: An International Perspective* (John Wiley & Sons, 2020); Michelle Sibenik, 'A Critical Analysis of the Applications of Anti-Stalking Legislation in Victoria, Australia' (PhD Thesis, Monash University, 2018).

⁵ VLRC Stalking Consultation Paper p4 [1.18] citing Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (Catalogue No 4906.0, 8 November 2017) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>.

⁶ VLRC Stalking Consultation Paper p5 [1.18] citing Lisa Langenderfer-Magruder et al, 'Stalking Victimization in LGBTQ Adults: A Brief Report' (2020) 35(5–6) *Journal of Interpersonal Violence* 1442, 1443.

⁷ VLRC Stalking Consultation Paper p5 [1.19] citing K Cripps et al, *Attitudes towards Violence against Women and Gender Equality among Aboriginal People and Torres Strait Islanders—Findings from the 2017 National*

- f. Women from culturally and linguistically diverse communities may struggle accessing support and therefore be less likely to report stalking behaviour due to structural, familial and language barriers;⁸
 - g. Migrant women with a temporary visa status are at greater risk of experiencing technology facilitated stalking and being kept under surveillance;⁹
 - h. Police have historically responded to interpersonal violence inconsistently within some communities (such as Aboriginal and Torres Strait Islander communities, those with culturally or linguistically diverse backgrounds, or people with disability) resulting in police mistrust and reluctance to report offending;¹⁰ and
 - i. LGBTIQ individuals may fear discrimination by police officers who hold transphobic, homophobic or heterosexist views.¹¹
12. We reiterate the following submission that Liberty Victoria made to the VLRC in relation to the Inquiry into the Role of Victims in the Criminal Trial Process:

Liberty Victoria strongly supports the view that victims of crime should be treated with courtesy, respect and dignity throughout the criminal trial process. We similarly support the governing principles set out in the *Victims' Charter Act 2006* (Vic) in relation to treatment of persons adversely affected by crime.¹²

13. Liberty Victoria supports the introduction of additional protections for complainants in stalking prosecutions, insofar as the accused's fundamental right to a fair hearing and the presumption of innocence are not adversely affected. As outlined in our previous

Community Attitudes towards Violence against Women Survey (NCAS) (ANROWS Insights No 3/2019, 2019) <https://nla.gov.au/nla.obj-1797750465>.

⁸ VLRC Stalking Consultation Paper p5 [1.19] citing Nicola Henry et al, 'Technology-Facilitated Domestic Violence Against Immigrant and Refugee Women: A Qualitative Study' (2021) *Journal of Interpersonal Violence* 1–27 <https://journals.sagepub.com/doi/abs/10.1177/08862605211001465>.

⁹ VLRC Stalking Consultation Paper p6 [1.19] citing Bridget Harris, Heather Douglas and Molly Dragiewicz, 'Migrant Women Are Particularly Vulnerable to Technology-Facilitated Domestic Abuse', *The Conversation* (Web Page, 1 February 2019) <http://theconversation.com/migrant-women-are-particularly-vulnerable-to-technology-facilitated-domestic-abuse-110270>.

¹⁰ VLRC Stalking Consultation Paper p13 [2.25] citing Marcia Langton et al, 'Family Violence Policies, Legislation and Services' (ANROWS Research Report 26/20, Australia's National Research Organisation for Women's Safety, 2020) 124; Jane Maree Maher et al, *Women, Disability and Violence—Barriers to Accessing Justice: Final Report* (Horizons No 02/2018, ANROWS Australia's National Research Organisation for Women's Safety, 27 April 2018) <https://www.anrows.org.au/publication/women-disability-and-violence-barriers-to-accessing-justice-final-report/>; Dr Cathy Vaughan footnote item to: Cathy Vaughan et al, 'Promoting Community-led Responses to Violence against Immigrant and Refugee Women in Metropolitan and Regional Australia. The ASPIRE Project: Key Finding and Future Directions', (Compass No 8, ANROWS Australia's National Research Organisation for Women's Safety, December 2016) 10.

¹¹ VLRC Stalking Consultation Paper p14 [2.27] citing Angela Dwyer, 'Policing Lesbian, Gay, Bisexual and Transgender Young People: A Gap in the Research Literature' (2011) 22(3) *Current Issues in Criminal Justice* 415, 416. See also *Royal Commission into Family Violence: Report and Recommendations* (Report, March 2016) vol 5, 145–146 <http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html>.

¹² Liberty Victoria Submission to VLRC Inquiry into the Role of Victims in the Criminal Trial Process (accessed online), <https://libertyvictoria.org.au/sites/default/files/LibVicSub-Victims-of-Crime-Crim-Trial%20-VLRC-2016web.pdf> [15].

submission on the Role of Victims in the Criminal Trial Process, Liberty Victoria's position is that:

- a. Further harm to complainants and victims should not arise from the criminal trial process whether it is a consequence of participation as a witness or harm arising through lack of information or advice with respect to procedural matters or decisions made by the prosecution;¹³
 - b. It is important to recognise that witnesses in criminal prosecutions are protected by s 41 of the *Evidence Act 2008* (Vic), which provides that the Court must disallow questioning that is misleading or confusing; unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; belittling, insulting or otherwise inappropriate; or has no basis other than a stereotype. Witnesses are also protected by prohibitions against adducing evidence of confidential communications and the witness' sexual history;¹⁴ and
 - c. Aboriginal and Torres Strait Islander victims, and other victims from significantly different cultural backgrounds or legal systems, should be provided with culturally appropriate services and advice as a means to address the additional disadvantages these groups may face with respect to the conduct of the criminal trial process, consistent with s 6 of the Victims' Charter.¹⁵
14. We agree with the provision of specialist services and increased financial support for victim survivors of stalking, given the disproportionate representation of already vulnerable populations among stalking victims.
15. However, we would urge caution and further consultation with respect to any proposed changes to the trial (or summary hearing) process, to ensure there is no erosion to the accused's right to a fair hearing and to the presumption of innocence.

Questions 2 and 19 – Risk assessment frameworks for the Courts and police to identify serious harm and Court ordered risk assessment reports

16. We accept the difficulty associated with calculating risk of future harm and escalation with regarding to stalking behaviour. As noted in the Consultation paper at [3.31], actuarial risk assessment tools have been 'developed and tested on predominantly non-Indigenous populations' and can be biased against Indigenous and culturally and

¹³ Ibid, [9].

¹⁴ Ibid, [11]-[12].

¹⁵ Ibid, [17]-[19].

linguistically diverse communities meaning Aboriginal people are more likely to be classified as high-risk than non-Aboriginal people,¹⁶ which limits the utility of actual risk assessment tools in accurately reflecting risk. As such, use of actuarial risk assessment tools should be approached with caution.

17. We also note that police and Courts responding to allegations should be wary of inverting the presumption of innocence by making assessments of risk based on assertions that have not yet been proven.
18. Further, as outlined in our submission to the VLRC on Improving the Response of the Justice System to Sexual Offences¹⁷, the assessment of risk of future harm based on past behaviour is notoriously problematic. The Human Rights Committee of the United Nations in *Fardon v Australia*¹⁸ and *Tillman v Australia*¹⁹ criticised the capacity for psychiatric experts to properly predict dangerousness:

The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. [The legislative regime] on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender, which may or may not materialise.

19. We are concerned by Court ordered assessments of risk intended for use in sentencing which the Consultation paper notes at [5.51] are unreliable and of varying quality. Where material relied upon in sentencing is ordered at the Court's direction and used to impose a more onerous sentence or deprive an offender of their liberty, the judiciary is at risk of being perceived as occupying a prosecutorial role in the adversarial system. Notwithstanding that, we note that third party risk assessment already forms part of the Court's determination as to whether a sentence with primarily rehabilitative aims is suitable, such as a Community Correction Order assessment.

If any use of risk assessment tools is to be recommended, those risk assessments should comply with *Supreme Court of Victoria Practice Note SC CR 3 – Expert Evidence*

¹⁶ VLRC Stalking Consultation Paper p18 [3.11] citing Bernadette McSherry, 'Risk Assessment, Predictive Algorithms and Preventive Justice' (Palgrave Macmillan, 2020).

¹⁷ Liberty Victoria Submission to the VLRC – Improving the Response of the Justice System to Sexual Offending (accessed online), <https://libertyvictoria.org.au/sites/default/files/210125%20-%20Liberty%20Victoria%20-%20VLRC%20submission%20Sexual%20Offences%20-%20Final.pdf> [82]. See also <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20-%20Submission%20Grab%20and%20Drag%20Addendum%20-%202001042021%20-%20Final.pdf>

¹⁸ (UNHRC, Communication No 1629/2007, 18 March 2010).

¹⁹ (UNHRC, Communication No 1635/2007, 18 March 2010).

in Criminal Trials and the Supreme Court Practice Note SC CR 7 – Sentencing Hearings Expert Reports on Mental Functioning of Offenders. The risk assessments should include information about the limitations of particular risk assessment tools as well as other limitations as to the accuracy or reliability of risk assessment tools.

20. Such limitations have been made clear by experts such as Professor Ian Coyle, who wrote “The Cogency of Risk Assessments” (2011) *Psychiatry, Psychology and Law*, 1-27. Many risk assessment tools remain unvalidated, and with very non-representative sample populations. Thus any expansion of the use of risk tools to curtail particular rights, such as the right to privacy and the right to a fair hearing should be approached cautiously.

Questions 5-13 – The Personal Safety Intervention Order system

21. As noted above, a court considering an application for a contested final PSIO need only be satisfied ‘on the balance of probabilities’ that the respondent has committed prohibited behaviour, is likely to continue to do so, and that the prohibited behaviour would cause a reasonable person to fear for his or her safety.²⁰ Accordingly, such orders can be made even where there is clearly more than a reasonable doubt as to whether the alleged conduct occurred.
22. Final orders can also be made where the parties consent to the order and, in these cases, the Court does not need to be satisfied of the alleged facts or that the alleged behaviour is likely to occur again in order to support the making of the order.²¹ In practice, respondents often consent to the making of a final PSIO “without admissions”, meaning that they do not admit to the alleged particulars of the application but agree to abide by the conditions of the order.
23. Contesting a PSIO application can be a lengthy and (if legally represented) expensive process for respondents. For those who cannot afford private representation, it is often difficult to have funding by Victoria Legal Aid approved for a contested hearing or the preliminary steps in a PSIO proceeding. Unrepresented litigants are likely to increase delay in proceedings, due to the Court having additional responsibilities to ensure that the party understands the proceeding and that the proceeding is fair. Courts are currently experiencing an increased delay due to the COVID-19 pandemic and contesting an order of this nature (which would usually have a 12-month duration) could easily take more than 12 months. There is often significant pressure on the parties to

²⁰ *Personal Safety Intervention Orders Act 2010* (Vic) s 61.

²¹ *Ibid* s 64.

resolve matters, even where the alleged prohibited behaviour is denied or the evidence is weak.

24. Given the nature of the PSIO system, where a Court need only to be satisfied on the balance of probabilities or, in consent applications, without being satisfied that the allegations occurred at all, Liberty Victoria advocates for a very cautious expansion of police and Court power in regard to these applications. Although a PSIO proceedings are civil in nature, the consequences of a PSIO can be severe and can include, for example a person being made homeless. These consequences can also flow from Family Violence Safety Notices, thus any expansion of these types of notices in the PSIO system ought to be considered very carefully (in particular given the lengthy delay that currently faces a person in finalising a proceeding if they have had a notice issued against them).

Information Sharing

25. Liberty Victoria appreciates that information sharing systems are intended to provide a more holistic approach and that information sharing was recommended by the Royal Commission into Family Violence in a specific context. However, information sharing has serious impacts on the right to privacy and at present it is unclear what gaps are alleged to exist in the system without information sharing. Liberty Victoria also notes that information sharing is likely to affect Aboriginal and Torres Strait Islander people differently and even more severely. Any information sharing systems aimed at risk assessment between agencies and police issuing of safety notices should only be implemented carefully and based on evidence that it is a necessary and proportionate limitation on the right to privacy.
26. In May 2020, Monash University completed a *Review of the Family Violence Information Sharing Legislative Scheme*,²² which noted a number of concerns about the system, including the disparate impact it can have on Aboriginal and Torres Strait Islander people. Any expansion of information sharing in the PSIO context ought to be evaluated carefully before it is introduced and consider the pitfalls identified in the above research.

²² McCulloch J, Maher, J, Fitz-Gibbon, K, Segrave, M, Benier, K, Burns, K, McGowan, J and N, Pfitzner (2020) *Review of the Family Violence Information Sharing Scheme Final Report*, Monash Gender and Family Violence Prevention Centre, Faculty of Arts, Monash University available at <https://content.vic.gov.au/sites/default/files/2020-08/FVISS%20Review%20Final%20Report.pdf>.

Mandated treatment programs

27. Due to the lower evidentiary threshold in PSIO proceedings, Liberty Victoria opposes legislative changes enabling Courts to order respondents to PSIO applications to attend treatment programs. Subjecting people to compulsory programs based on allegations that are not subject to the criminal standard of proof is a significant limitation to civil liberties. There is also a question about the efficacy of treatment and rehabilitation that is mandated, as opposed to voluntary treatment. Liberty Victoria supports treatment programs being made available to those in the PSIO system and that this then might be taken into consideration in the determination of a PSIO proceeding. However, such programs should not be made compulsory.

Additional Offences

28. As outlined in our recent VLRC Submission on Improving the Response of the Justice system to Sexual Offending and in more detail in our 2014 submission to the Department of Justice Review of Sexual Offences, we advocate for a very cautious and selective evolution of the criminal law. Liberty Victoria generally opposes the creation of new offences which are essentially aggravated versions of existing offences.²³
29. We would oppose additional offences being introduced to the PSIO Act. The Family Violence Intervention Order system includes an offence of persistently breaching an IVO with a higher maximum penalty than is available for contravention, and our position is that any additional offending would overlap with existing offences. Judicial discretion in sentencing is sufficient to address IVO contravention and stalking behaviours.

Legal representation

30. With respect to any changes to the PSIO system, we agree with the Consultation paper at [4.38] which acknowledges the trauma that participating in the Court system can induce, especially for people who have already experienced disadvantage. Proper

²³ See, for example, Liberty Victoria Submission: Crimes Amendment (Carjacking and Home Invasion) Bill (September 2016): <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-submission-CrimesAmendment-Carjacking-and-Home-Invasion-Bill-2016-20160914-web.pdf>; and Liberty Victoria Submission: Justice Legislation Amendment (Police and Other Matters) Bill 2019

(2019):<https://libertyvictoria.org.au/sites/default/files/police%20and%20other%20matters%20bill%202019.pdf>.

⁴ Liberty Victoria Submission: Sentencing Guidance Reference (8 February 2016)

<https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20%28SAC%20Submission%29%20Web%200160208.pdf>.

⁵ Liberty Victoria Submission: Crimes Amendment (Carjacking and Home Invasion) Bill (September 2016):

<https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-submission-CrimesAmendment-Carjacking-and-Home-Invasion-Bill-2016-20160914-web.pdf>.

resourcing, including the provision of mediation and legal representation where appropriate, is essential to ensure the fairness and efficacy of the system.

31. The *Family Violence Protection Act 2008* (Vic) includes provisions (ss 71 and 72) enabling legal representation for parties undertaking cross-examination of protected witnesses, which must be provided by Victoria Legal Aid. These provisions can assist to an extent in assisting individuals to access legal advice. However, representation in these circumstances is limited to cross-examination only. The Victorian Bar has issued an Ethics Bulletin in 2020 advising its members of the limitations of such a brief and that Courts cannot require barristers to represent a person for a whole proceeding.²⁴
32. Given the serious consequences that can flow from the making of a PSIO (whether final or interim), Liberty Victoria is in favour of increasing access to legal representation for parties to PSIO proceedings. This representation should not, however, be limited only to cross-examination, but should be broader, to ensure that it is effective. There should be an increase in funding to Victoria Legal Aid, the Victorian Aboriginal Legal Service (and other community legal centres) in order to ensure that parties to PSIO proceedings can be properly represented. Increased access to legal representation is also likely to ensure that courts are properly assisted, that PSIO proceedings can run more smoothly as issues can be narrowed and that individuals receive proper advice early on, in respect of whether or not to contest a PSIO application.²⁵ This is likely to lead to an increased rate of resolution (on the basis of, which would save considerable public expense in the long run.

Question 20 – Electronic monitoring of persons assessed as a high risk of ongoing stalking behaviour

33. People are entitled to privacy without arbitrary interference as protected by s 13(a) of the Charter.
34. We note the comparison with other Australian states outlined in the Consultation paper including at [5.56], legislative amendment in Queensland to allow for electronic monitoring to be imposed as a bail condition following evaluation, and at [5.57], provisions for electronic monitoring to be imposed as part of a civil intervention order in

²⁴ Victorian Bar Ethics Bulletin 1 of 2020 available at <https://www.vicbar.com.au/sites/default/files/Bulletin%201%20of%202020%20-%20ss%2071%20%26%2072%20of%20the%20Family%20Violence%20Protection%20Act%202008%20%28Vic%29.pdf>.

²⁵ Although outside the scope of this submission, Liberty Victoria would be in favour of also increasing funding so that parties to Family Violence Intervention Order proceedings have similar and broad access to legal representation.

Tasmania, which differ from all other States where electronic monitoring is only used in the criminal setting.

35. Liberty Victoria understands that the VLRC seeks to ascertain whether the risk of serious harm following stalking behaviours can be accurately identified sufficiently to enable an alternative model for dealing with cases where stalking behaviour escalates severely and irreparably. However, we are concerned by any proposal to erode people's right to privacy, especially where current methods of assessing of future harm are notoriously unreliable and can be racially and socially biased as outlined above.
36. We are also concerned by any proposal to diminish the rights to privacy, freedom of movement and liberty in circumstances where there has not yet been any finding based on the criminal standard of proof. It would mean there could be a reasonable doubt (or even much more than a reasonable doubt) as to whether a person has engaged in such behaviours, and yet they could be potentially subjected to significant intrusions into their most basic rights. Liberty Victoria opposes the electronic monitoring of individuals where there has been no finding in accordance with the criminal standard.

Conclusion

37. Thank you for the opportunity of making this submission. Please contact Julia Kretzenbacher, President of Liberty Victoria or Michael Stanton, Liberty Victoria Criminal Policy Committee member via info@libertyvictoria.org.au if you have any questions about this submission.

Yours faithfully,

Julia Kretzenbacher

President, Liberty Victoria

president@libertyvictoria.org.au

Ph: 03 9670 6422

www: <https://libertyvictoria.org.au>

Facebook: libertyvictoria

Twitter: @LibertyVic