

Victorian Law Reform Commission
Level 3, 333 Queen Street
Melbourne Victoria 3000 Australia
By email: stalking@lawreform.vic.gov.au

27 August 2021

Dear Victorian Law Reform Commission,

Re: Consultation into stalking

The Federation of Community Legal Centres (FCLC) welcomes the opportunity to contribute to the Victorian Law Reform Commission's consultation on stalking (the **Consultation Paper**).

We support reforms to improve responses to stalking, enhance the safety of victim survivors and assist them through the recovery process. We highlight the importance of victim survivors of stalking having access to legal assistance, safety planning and therapeutic support as early as possible, as well as legal representation at court.

About FCLC

FCLC is the peak body for Victoria's community legal centres (CLCs). Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problem.

For over 40 years CLCs have been part of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy. We want a community that is fair, inclusive and thriving: where every person belongs and can learn, grow, heal, participate and be heard.

The CLC sector plays an important role in promoting the safety of victim survivors, including children and young people, through the provision of legal assistance at court and within the Victorian community. CLCs work with local partners and communities to support children and families who are experiencing disadvantage and family violence. CLCs deliver a range of innovative programs, including early intervention initiatives and justice partnerships with community, health and social sectors.

Summary of recommendations

We have set out our views and recommendations in response to the Consultation Paper which are drawn from the Victorian Law Reform Commission's consultation with the CLC group on 6 August 2021.

A summary of our recommendations are set out below and our full submission is attached to this letter.

Unmet legal need – personal safety intervention order matters

We recommend that:

1. Legal services are funded to provide legal advice and representation in personal safety intervention order (PSIO) matters, in particular matters involving stalking and where there is a risk of harm, threat or violence.
2. Supports are available at court to link victim survivors into appropriate services for ongoing risk assessment, safety planning and a therapeutic response.
3. Processes are in place at court to connect respondents with counselling and other programs to address the underlying causes of the offending conduct.

Early intervention and support

4. We recommend that CLCs are funded to deliver integrated legal services to support victim survivors of stalking.

Identifying, reporting and responding to stalking

We recommend:

5. Increasing community awareness of stalking, support available and avenues for redress.
6. Increasing support and legal assistance available to victim survivors of stalking (such as, through victims of crime support services and CLCs).
7. Strengthening police responses to stalking and consistency across police units through increased training on stalking and the development of a code of practice on stalking.
8. Building capacity of police to address cyberstalking in collaboration with e-safety services and other experts.
9. Developing a risk assessment framework to assist police, courts and other agencies to identify, assess and manage risk of stalking on an ongoing basis, alongside training and guidance on stalking.

The personal safety intervention order system

We recommend that:

10. The ban on direct cross-examination by the respondent of a protected witness in the *Family Violence Protection Act 2008 (Vic)* be extended to the PSIO system.
11. Treatment programs for respondents are not mandated by court orders under the *Personal Safety Intervention Order Act 2010 (Vic)*.
12. There is further consideration of the use of online applications and family violence safety notices in the PSIO system.

Electronic monitoring

13. We do not support the introduction of electronic monitoring in stalking matters at this stage.

We welcome the opportunity to contribute further to this consultation and would be happy to provide additional information. If you require any further information, please contact Louisa Gibbs, Chief Executive Officer at [REDACTED] or Rachael Pliner, Senior Legal Policy Adviser, at [REDACTED].

Yours sincerely,

[REDACTED]
Louisa Gibbs
Chief Executive Officer

Federation of Community Legal Centre's response to the Victorian Law Reform Commission's consultation into stalking

Unmet legal need – personal safety intervention order matters

The need for legal assistance at court

While community legal centres (CLCs) provide legal assistance in family violence matters (pre-court and through court duty services), there is no corresponding government funding for personal safety intervention order (PSIO) matters. This has created a discrepancy in the legal assistance available for victim survivors of family violence and victim survivors of (non-family violence) stalking and those at risk of harm, threat or violence. This is an area of unmet legal need.

While some PSIO matters are low-level disputes suitable for mediation, others involve stalking and other forms of harm which would not be appropriate for mediation. It is particularly important that legal advice and representation from CLCs is available in those matters where victim survivors are at risk.

Due to funding constraints, CLCs have limited capacity to assist parties to PSIO matters. As acknowledged in the Victorian Law Reform Commission's Consultation Paper on Stalking (the **Consultation Paper**), the eligibility requirements for legal aid grants for PSIO matters are also narrow. In the absence of legal advice at court, parties to PSIO matters may be provided with a booklet at court about the PSIO process. This assumes that people are able to digest this information in context of the stress and pressures on the court day. We understand that the booklet is also not available in multiple languages.

The lack of legal advice and representation can act as a disincentive for victim survivors to pursue PSIO proceedings against respondents. Without adequate legal assistance and support, victim survivors can feel overwhelmed by the court process and withdraw. Victim survivors can also be deterred from pursuing proceedings against the perpetrator due to fear of having to directly confront them at court.

For example, as highlighted by a CLC during the consultation, in one PSIO matter involving allegations of sexual assault, the respondent had private legal representation, while the victim survivor was not eligible for legal aid and was unrepresented. The victim survivor withdrew their PSIO application as the prospect of confronting the respondent in court and cross-examination proved too traumatic.

Perpetrator accountability and early resolution of matters

Legal assistance for respondents to PSIO applications is important in enhancing perpetrator accountability. It enables respondents to understand the likelihood of success should they contest the matter, options to resolve matters by consent (without admission), the conditions of the PSIO and the implications of breaching an order. Legal assistance is particularly important where the respondent has a disability, cognitive impairment or mental health issue which hinders their understanding of the legal process. Respondents with ancillary criminal matters should also have access to legal advice in relation to the consequences of making admissions of criminal offending during PSIO proceedings.

Where both parties are legally represented, this can promote early resolution of matters. This is because both parties are advised by their lawyers about the most appropriate course of action in their matter; and are assisted with reaching an agreed outcome (where possible and appropriate). Early resolution avoids a drawn out and stressful court process (which can fuel conflict and heighten safety risks) while also reducing pressure on an already overburdened court system.

Opportunities to link to support services at court

We recognise that PSIOs alone are not a panacea and that PSIOs need to form part of a broader support system to protect victim survivors and make perpetrators accountable for their actions. The court process provides an opportunity to link victim survivors into support services for ongoing risk assessment, safety planning and wellbeing support.

It also provides an opportunity for respondents to be linked into counselling or other programs which seek to address the underlying causes of the offending conduct. This is particularly important where the respondent has a mental illness or cognitive impairment which limits their capacity to understand the nature of their offending conduct, the PSIO process and implications of breaching an order. This requires greater insight into the underlying drivers of the offending conduct (including, stalking) and the non-legal supports that can promote longer-term changes in behaviour.

We recommend that:

- **Legal services are funded to provide legal advice and representation in PSIOs matters, in particular matters involving stalking and where there is a risk of harm, threat or violence.**
- **Supports are available at court to link victim survivors into appropriate services for ongoing risk assessment, safety planning and a therapeutic response.**
- **Processes are in place at court to connect respondents with counselling and other programs to address the underlying causes of the offending conduct.**

Early intervention and support

In addition to the availability of legal advice and representation at court, we highlight the importance of early intervention for victim survivors of stalking.

Victim survivors of stalking should have access to legal advice and be linked into support services at an early stage. Legal advice is important in enabling victim survivors to identify the conduct which constitutes stalking, understand their legal options, compile relevant evidence, and for them to make informed decisions about the most appropriate course of action. Ancillary to this, victim survivors should be linked into tailored support for ongoing risk assessment, safety planning and therapeutic support.

Many CLCs in Victoria work in partnership with support services, community hubs, health services and schools to provide wraparound supports to clients. CLCs deliver integrated legal services consisting of lawyers and other community service professionals (such as social workers, family violence advocates and financial counsellors). The integration of multidisciplinary professionals with a range of skills and expertise enables a more holistic service response. This can assist in not only addressing a client's legal issues, but also overlapping (and potentially compounding) social, wellbeing and financial issues.

For example, Springvale Monash Legal Service (SMLS) has a long-standing partnership with the Southeast Centre Against Sexual Assault (SECASA) called the 'Integrated Services for Survivor Advocacy' (ISSA). The ISSA supports victim survivors to recover from sexual assault and/or family violence and navigate the legal system. Many of the women accessing the integrated program have faced profound challenges as a result of their traumatic experiences, including isolation, lack of support from family and psychological issues, such as PTSD, anxiety and memory loss. Many of these women have not been able to talk about their traumatic experiences and have carried these stories with them for years; finding it hard to remain in stable work due to their trauma. The integrated approach is critical in supporting these women. While SMLS provides legal assistance with Victims of Crime Assistance Tribunal applications and other legal issues (such as fines, infringements and tenancy), SECASA supports women through therapeutic intervention, counselling and crisis response.

Integrated legal practice would be beneficial in addressing the interrelated legal, social and wellbeing needs of victim survivors of stalking, while promoting ongoing safety planning. Early legal intervention, alongside wraparound supports, is critical in managing safety and reducing the level of risk of stalking. Without access to legal assistance and other supports at an early stage, victim survivors of stalking can be left to manage the stalking alone, which can place them at heightened risk and increase distress levels.

Early intervention can also reduce downstream pressures on other parts of the service system. This is consistent with the avoided cost modelling conducted by Ernest & Young for the Federation of Community Legal Centres in 2020. This demonstrated that investment in integrated legal practices delivered by CLCs could avoid significant costs to government as a result of individual unmet legal and extra-legal needs escalating.

Early intervention can assist in diffusing matters where additional supports would be more appropriate than recourse to the justice system. For example, some CLCs have observed PSIOs being used between school students, including in circumstances where the respondent child has a disability, cognitive impairment or mental health issue. This creates a significant risk that the young person will breach the order leading to involvement in the criminal justice system. This underscores the importance of early intervention and supports for the children and families involved, while also working with the school to resolve the matter early, to avoid escalation and court action.

We recommend that CLCs be funded to deliver integrated legal services to support victim survivors of stalking.

Identifying, reporting and responding to stalking

Identifying stalking conduct

Stalking often involves a pattern of conduct consisting of a series of otherwise 'lawful' acts. It can be difficult to identify stalking, particularly at the outset. Victim survivors may not be aware that the conduct is criminal, the avenues to address stalking through the police, justice system or e-safety services, or other support available.

Victim survivors of stalking may also minimise the stalking conduct, which can reduce the likelihood of reporting until the matter escalates to crisis point, placing the victim survivor at higher risk. Myths around stalking influence the views of the broader community, as well as the attitudes of police when responding to complaints of stalking. Common myths include that the perpetrator of stalking is simply making innocent advances and if the victim survivor ignores the stalking then it will stop. These attitudes can deter victim survivors from reporting stalking or progressing their complaint once they have engaged with the police.

General barriers to reporting

There are various factors that can hinder victims of crime from making a report to the police which are also applicable in stalking matters. These factors include:

- fear of not being believed or being blamed.
- sense of shame, distress and trauma.
- fear of authorities.
- past negative interactions with the police, child protection officers and other authorities.
- fear of child protection involvement and removal of children, particularly for Aboriginal and Torres Strait Islander families.
- fear of retaliation or further violence from the perpetrator or their family and associates.
- lack of a trauma-informed and culturally safe response by police.

Police reports not being actioned

We recognise the pressures on police and the need for police to balance competing demands and priorities. However, victim survivors can lose confidence in the police process where their report of stalking is not taken seriously or appropriately actioned. An example of this is where the police officer places the onus on the victim survivor to avoid the stalking behaviour. The stalking conduct can also be dismissed by police as hypervigilance on the part of the victim survivor. These challenges are compounded for victim survivors who present with mental health issues or are perceived by police as having a mental health concern.

Victim survivors can be deterred from making a formal statement to the police on the basis that the stalking cannot be proved, particularly where there is a lack of physical evidence of the stalking. For example, it has been observed that police officers may be more likely to respond to a complaint about stalking where there are a series of text messages or social media posts, rather than a complaint about the perpetrator driving past the victim survivor's home, following them at a supermarket or other public place or placing notes under their door. This reflects inconsistency in police responses which are not aligned with risk.

Where victim survivors make an initial complaint to the police, but are not invited to, or are deterred from, making a formal statement to the police, this can result in there being no record of the initial complaint. Victim survivors would then not be able to rely on their initial complaint to the police as evidence of ongoing stalking. Inadequate police responses can lead to victim survivors having to manage the stalking on their own, increasing risk to their safety.

Cyberstalking

There can be additional challenges for victim survivors when engaging with the police where the conduct involves cyberstalking, often requiring technical expertise to respond effectively. For example, there can be challenges detecting the installation of malware or spyware on a victim survivor's device and identifying who is responsible for this. Where cyberstalking involves posting denigrating material online or creating fake social media profiles, it can be difficult to trace who is responsible and to remove content from third party websites or social media platforms, particularly where there are inadequate privacy complaint processes. Evidence of cyberstalking can be erased (e.g., snapchat). There can also be jurisdictional issues where the apps, programs or data are held or administered by international companies.

Addressing barriers and strengthening responses

There needs to be greater community education, online tools and awareness raising campaigns about stalking to enhance the community's understanding of stalking, avenues for redress and support available. This should be available in multiple formats and languages to reach a broad spectrum of the community. This should be coupled with greater access to legal assistance and tailored support as noted above (see section on early intervention). We highlight that legal services, alongside other support services, can play an important role advocating on behalf of victim survivors where they have difficulty reporting to the police or where the police response has been inadequate. This is particularly important for groups who may face additional barriers to reporting due to their cultural or linguistic background, age or disability and for people experiencing mental health issues, trauma and/or alcohol and drug dependency.

Police responses to stalking could be strengthened by increasing police training on stalking and developing a code of practice for reports of stalking to promote best practice and consistency across police units. Recognising the complexity of cyberstalking and the rapid technological changes, there should be ongoing police capacity building in cyberstalking in collaboration with e-safety services and other experts.

We support the development of a risk assessment framework to assist police, courts and other agencies to identify, assess and manage risk of stalking. As stalking involves a pattern of behaviour which can pose

varying levels of risk at different points and can escalate overtime, ongoing risk assessment mechanisms by agencies is important. There also needs to be training and guidance on stalking for courts, legal practitioners, and support services to improve understanding of stalking and respond effectively.

We recommend:

- **Increasing community awareness of stalking, support available and avenues for redress.**
- **Increasing support and legal assistance available to victim survivors of stalking (such as through victims of crime support services and CLCs).**
- **Strengthening police responses to stalking and consistency across police units through increased training on stalking and the development of a code of practice on stalking.**
- **Building capacity of police to address cyberstalking in collaboration with e-safety services and other experts.**
- **Developing a risk assessment framework to assist police, courts and other agencies to identify, assess and manage risk of stalking on an ongoing basis, alongside training and guidance on stalking.**

The personal safety intervention order system

We support certain elements of the family violence intervention order (FVIO) system being applied in the PSIO context as set out below.

Family violence safety notices

As noted in the Consultation Paper, family violence safety notices (FVSNs) can be issued by police against an adult respondent for the immediate protection of victim survivors of family violence pending the court making an interim or final FVIO. This is critical in providing urgent protection to victim survivors in family violence situations.

There is no equivalent FVSN in the PSIO context. Upon application by the police, a court can issue a warrant to arrest an adult respondent, as if the PSIO application alleged the commission of an offence, including to ensure the safety of the victim survivor or preserve property.¹ If granted, the police could arrest the respondent and bail them with conditions that protect the victim survivor. We are not aware of how regularly this power is used in the PSIO context or how quickly warrants are issued by the court. Alternatively, the police can apply to the court for a PSIO on behalf of a victim survivor and seek an interim PSIO.² However, this would not be as immediate as the issue of a FVSN.

The *Personal Safety Intervention Orders Act 2010 (Vic)* (PSIO Act) covers a broad spectrum of conduct with varying levels of risk. This can range from low-level neighbourhood disputes suitable for mediation to matters involving stalking or a real risk of violence, harm or threat (where there are similar dynamics of coercion and control which are present in the family violence context).

The introduction of an equivalent FVSN in the PSIO context recognises that urgent protection of a victim survivor may be required in high-risk matters. However, the benefit of a mechanism for urgent protection needs to be balanced against certain risks. We share the concern highlighted in the Consultation Paper, that if FVSNs were introduced in the PSIO context, police may issue FVSNs in matters where mediation would have been more appropriate, thereby potentially escalating matters and increasing the number of PSIO matters being funneled through the court process.

¹ *Personal Safety Intervention Orders Act 2010 (Vic)*, s21.

² *Ibid*, s35.

Other risks include:

- misidentification of victim survivors as perpetrators by police, particularly in crisis situations or where the perpetrator uses the legal process as an extension of the abuse.
- over-policing of certain cohorts and communities who are more likely to be targeted by police.
- inclusion of conditions in the (equivalent of the) FVSN which are not tailored to the specific context (for example, resulting in a party not being able to attend school or their place of employment).

It is imperative that if an equivalent FVSN were to be introduced in the PSIO context that there is extensive training for police and robust risk assessment tools. There also needs to be appropriate supports put in place where a respondent has a mental illness or cognitive impairment.

Online applications

Applicants can apply for FVIOs online. This is not available in the PSIO system where non-police applications must be made in person at court. During the appointment at court, a registrar can refuse an application in certain circumstances, including where it is made in bad faith, is an abuse of process, is vexatious or where the matter would be more appropriately dealt with by mediation.³

We support online applications as it may be a safer option for victim survivors of stalking and other forms of harm, violence or threats and aligns with the court's current transition to online processes arising from the pandemic. Under the COVID-19 lockdown arrangements, applicants are currently able to complete a form and accompanying affidavit which are available online and contact their local court to make an application. However, we are concerned that an online PSIO application process could lead to an increase in vexatious or inappropriate applications and reduce the capacity of the court to filter PSIO applications (as occurs through the in-person application process). If an online PSIO application were introduced, there would need to be safeguards in place to vet applications which are inappropriate, vexatious or an abuse of process.

Bans on direct cross-examination

Under the *Family Violence Protection Act 2008 (Vic)* (FVPA), a respondent is barred from directly cross-examining a protected witness (e.g, protected person,⁴ child or family member of the protected person) during FVIO hearings.⁵ The court can order Victoria Legal Aid to provide legal representation to the respondent where they do not have a lawyer for the purpose of cross-examination, as well as an unrepresented applicant where the respondent is legally represented.⁶ However, there are no equivalent protections in the PSIO Act.

We support the ban on cross-examination in the FVPA extending to the PSIO system. As noted above, confrontation with the respondent in court can cause significant distress for victim survivors and can discourage people from applying for a PSIO or continuing with PSIO proceedings. We share the concern highlighted in the Consultation Paper that without a ban on cross-examination in stalking matters, this can exacerbate the stalking conduct through the court process.

We agree with the Consultation Paper that it is unlikely legal aid funding would be made available for all PSIO proceedings given the broad spectrum of matters covered by the PSIO Act, requiring the development of a set of criteria or eligibility guidelines. The availability of legal representation for cross-examination could be determined by reference to the nature and seriousness of the allegations, as well as any

³ Ibid, s16A.

⁴ A 'protected person' is defined as a person who is protected by a family violence intervention order or a family violence safety notice or a recognised domestic violence order. *Family Violence Protection Act 2008 (Vic)*, s4.

⁵ Ibid, s70.

⁶ Ibid, s71, 72.

vulnerability factors of the victim survivor. It would be anticipated that matters involving stalking or a real risk of harm, violence or threat would be captured, as well as matters where the victim survivor has particular vulnerability. For example, like the FVPA, the court could consider whether the protected witness has a cognitive impairment or otherwise needs the protection of the court.⁷ Usually the court would make an assessment, but as an alternative, this could be referred to a specialist service or an expert embedded in the justice system to conduct the assessment to assist the court in making a final determination.

Mandated treatment programs

We support respondents having access to effective treatment and alternatives to criminalisation, where appropriate. However, we have concerns about mandating participation in treatment programs through court orders with criminal sanctions for non-compliance. The therapeutic benefit of a treatment program or counselling may be undermined where a respondent is mandated to attend against their will with the risk of criminalisation for non-compliance.

Given the wide spectrum of matters covered by the PSIO Act, interventions for respondents need to be tailored to the specific circumstance and responsive to their diverse needs and experiences. While we support respondents being linked into, and encouraged to attend, programs through the court process, mandated programs may reduce flexibility in identifying the most appropriate program. From a practical perspective, there are also issues around the availability and affordability of treatment programs and accessibility due to extensive waitlists, including the availability of programs for people from culturally and linguistically diverse backgrounds.

We recommend that:

- **The ban on direct cross-examination by the respondent of a protected witness in the FVPA be extended to the PSIO system.**
- **Treatment programs for respondents are not mandated by court orders under the PSIO Act.**
- **There is further consideration of the use of online applications and FVSNs in the PSIO system.**

Electronic monitoring

While we support mechanisms which enhance the safety of victim survivors and strengthen perpetrator accountability, we have concerns about the introduction of electronic monitoring for people who have been assessed as posing a high risk of ongoing stalking behaviour. We are concerned about the erosion of civil liberties if electronic monitoring was introduced. There are also risks of introducing electronic monitoring given that misidentification of victim survivors as perpetrators is a significant ongoing issue.

As highlighted in the Consultation Paper, there is currently insufficient evidence to show whether electronic monitoring would work in the stalking context in Australia. The efficacy of electronic monitoring in strengthening the safety of victim survivors would need to be thoroughly examined in addition to less draconian options which seek to achieve the same outcome.

We do not recommend the introduction of electronic monitoring in stalking matters at this stage.

⁷ Ibid, s70.