

T: 03 9607 9311

E: FamilyLawSection@liv.asn.au

20 August 2021

Stalking Consultation
Victorian Law Reform Commission
3/333 Queen St
MELBOURNE VIC 3000

By e-mail only to: stalking@lawreform.vic.gov.au

Victorian Law Reform Commission – Stalking Consultation

Dear Commissioner,

The Law Institute of Victoria (**'LIV'**) welcomes the opportunity provide a written submission in response to the Victorian Law Reform Commission's (**'VLRC'**) Stalking Consultation Paper (**'the Consultation Paper'**), in addition to the consultation meeting with the VLRC in August 2021. This submission is informed by the LIV's Family Law Section and Criminal Law Section.

GENERAL COMMENTS

The LIV recognises the purposes of reform to stalking legislation to improve community safety and access to protection for victim survivors. While law enforcement, courts and support agencies can draw from a range of developments in response to family violence where appropriate, the LIV notes that stalking behaviour must be adequately distinguished from family violence, as it may consist of lawful acts intended to intimidate or arouse fear in victims and is not generally predictable or triggered by certain events. The LIV is of the view that considerable training is required to support victims, police and the courts to identify stalking dynamics and risk factors.

Stalking behaviour can be met with the protection of an intervention order – either in the family violence or personal safety context. However, LIV members report that legislation relating to Personal Safety Intervention orders (**'PSIO'**) can be used inappropriately, such as in circumstances of neighbourhood or personal disputes. The LIV submits that behaviour that constitutes stalking can sometimes be missed in the context of other disputes where dispute resolution would be more appropriate. To address the likelihood of these matters overwhelming court resources, the LIV recommends the development of a risk assessment framework to delineate which disputes are appropriate for mediation. Improved access to alternative dispute resolution for community-based

disputes would ensure that the PSIO application system is not over-utilised by parties with low-risk disputes and stalking behaviour can be identified early, and appropriately addressed.

The LIV is concerned by the prevalence of personal safety intervention orders against child respondents. Under the *Personal Safety Intervention Orders Act 2010* (Vic), an order cannot be made against a child under the age of ten years old.¹ The LIV also recommends that PSIOs should not be ordered where a child respondent is aged between 10-14 years old, based on the presumption of *doli incapax*, that children do not sufficiently understand the consequences of their actions at this age.² The LIV recommends an obligation for decision-makers, that in determining whether to order a PSIO against a child, to specifically turn their mind to the broader consequences of an interim or final order and its impact upon where the child is living or if it will prevent the child from attending school.

Additionally, the LIV is concerned that children are not appropriately represented for PSIO applications at court. PSIOs can be made in the family division of the Children's Court or the criminal division of the Magistrates' Court. However, orders for PSIOs cannot be made in the criminal division of the Children's Court. This is of particular concern when orders are made at regional and metropolitan courts, where Magistrates may not be specifically trained in the nuanced impacts of PSIOs on children.

CONSULTATION QUESTIONS

Q1. What are the factors that influence whether people who experience stalking report their experiences to police? Are there barriers to reporting that need to be addressed?

LIV members note that for vulnerable, marginalised victims, barriers to reporting include a range of factors including language and fear of law enforcement. Individuals who have previously experienced violence or intimidating behaviours may also normalise the prevalence of this behaviour. Additionally, behaviour which constitutes stalking may be lawful, although the conduct is designed to arouse apprehension or fear in the victim for his or her safety and the safety of others. Victims may perceive a greater barrier to reporting stalking behaviour where the alleged perpetrator is not actually engaging in otherwise illegal activity.

¹ *Personal Safety Intervention Order Act 2010* (Cth) s 18.

² Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) quoting Nicholas Lennings and Chris Lennings, 'Assessing Serious Harm Under the Doctrine of Doli Incapax: A Case Study' (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794. See also [LCA and AMA Policy Statement on Minimum Age of criminal responsibility](#).

LIV Case study:

An Affected Person ('AP') engaged in a friendship with a Respondent after meeting at an event with shared interests. Initially the friendship was appropriate, but it quickly escalated to behaviour that made the AP feel uncomfortable and concerned. The Respondent started to arrive at locations where the AP worked, collected coffee and met with friends. Then the text messages and incessant phone calls followed. The further harassment of the AP continued with otherwise lawful conduct, with an intention to aggravate and upset her.

The Respondent made a report to police that the AP was breaching COVID-19 restrictions. The police attended the AP's home, where it was apparent that she had not breached restrictions, and this was part of the perpetrator's offending. It was confronting and intimidating for the AP to have police attend at her home. The police were then able to identify that the Respondent had a history of Intervention Orders made against him which include similar behaviour which in isolation would be lawful, but in combination was a course of conduct classified as stalking.

The LIV acknowledges that considerable education on family violence identification and response is available for Victoria Police, although family violence is an ongoing concern in Australia. Where perpetrators and victim survivors are not living together or are not in a family violence dynamic, this can present as a barrier to reporting because stalking dynamics are not commonly understood by police. Additionally, insufficient protective mechanisms in current legislation, such as the fact that a Personal Safety Intervention Order will not prevent a Respondent from directly cross examining a complainant, limits confidence in victim survivors to report to police. Victim survivors subjected to stalking are likely to be hypervigilant as a result of their negative experiences of stalking. The LIV recommends significant training on the risks, dynamics and consequences of stalking to appropriately support victim survivors.

Q2. Should a risk assessment framework be developed to help police and courts identify the course of conduct and manage risk of serious harm in the context of stalking? If so, how should it work?

A risk assessment framework would assist victim survivors, police and the courts to identify the course of conduct attributed to stalking and manage the risk of serious harm. The LIV recognises that the common understanding of stalking and prohibitive behaviour in the community differs from the legal definition. The LIV supports the development of a risk assessment framework which would provide a tangible mechanism in which police or the courts could determine if a victim survivor is experiencing prohibited behaviour or stalking and requires legal protections against a perpetrator.

Q4. What approaches or techniques should be used by law enforcement agencies when investigating stalking complaints?

The Family Violence MARAM Training, and the previous Common Risk Assessment Framework ('CRAF') Training, has provided some relevant approaches and techniques that could be applied to stalking complaints. However, stalking can involve behaviour that is more unpredictable than family violence and is not generally tied to a significant event or action. Conduct that constitutes stalking and prohibitive behaviour is not so readily identified by risk factors that are evident in family violence, including for example, a pregnancy, recent birth, or relationship breakdown.

The LIV acknowledges that certain elements of the PSIO legislation are distinct from the *Family Violence Protection Act 2008* (Vic) ('FVPA'), noting the inclusion of a reasonableness requirement in the test for making an order under the *Personal Safety Intervention Orders Act 2010* (Vic) ('PSIO Act'). The reasonableness requirement is not captured by the FVPA but is important in establishing the inappropriateness of stalking behaviour.

LIV members are concerned that stalking complaints are not afforded serious consideration by law enforcement agencies, particularly as a course of conduct can involve behaviour which would otherwise be lawful. For example, behaviours including reporting someone to police, driving down a particular street multiple times, repeated social media requests – while not inherently unlawful – may be performed with an intention to cause fear or harm to the victim.

Complainants have the capacity to bring their own PSIO applications.³ However, stalking complaints are often used as a strategic tool by the offender or in circumstances of an escalated neighbourhood dispute. The LIV recommends that stalking and prohibitive behaviour should be distinguished from low-risk matters which may be managed by mediation or alternative dispute resolution.

LIV members report that police may be less inclined to make the application on behalf of the affected person where the complainant can bring the application themselves. Instead, police direct people to court, even in circumstances where there are real risks for the affected person's safety. Conversely, LIV members have also experienced an overreliance on PSIOs by police in some matters, which may be more appropriately referred to mediation. This results in an abundance of PSIOs which increases the difficulty of policing subsequent breaches. In particular, police and court resources are wasted where parents have complained of an innocuous breach of an inappropriate PSIO between young school students. While police involvement must ultimately depend on the individual circumstances of each case, greater consistency is needed in how law enforcement agencies respond to stalking complaints.

Q5. In the family violence intervention order system, information sharing is allowed. Should there be a similar framework for information sharing between agencies providing services for stalking? If so, what should it cover?

The LIV submits that a similar framework for information sharing between jurisdictions and agencies providing services for stalking would be beneficial to improve protections for parties experiencing stalking or prohibited behaviour. The LIV recommends that any information sharing framework be

³ *Personal Safety Intervention Order Act 2010* (Vic) s 15.

extended to include proceedings involving the same alleged perpetrator and strongly supports judicial determination regarding the availability and extent of orders for information sharing. Such judicial determination would prevent fishing expeditions, unnecessary breaches of the party's privacy and limit undue stress on the basis of unfounded allegations.

Q7. Should there be an option under the *Personal Safety Intervention Orders Act 2021 (Vic)* for police to be able to issue the equivalent of a Family Violence Safety Notice? Why/Why not?

The LIV supports an option for police to issue the equivalent of a Family Violence Safety Notice ('FVSN') under section 24 of the *Family Violence Protection Act 2008 (Vic)* ('FVPA') against an adult perpetrator. However, the LIV notes that the equivalent notice must be accessible to victim survivors within a shorter turnaround timeframe than FVSN applications. The LIV strongly rejects applications for Safety Notice under the PSIO Act where the respondent is a child, in line with the provisions of the FVPA.⁴

A common issue for applicants is the delay in getting to court to make a Personal Safety Intervention Order (PSIO), particularly in regional, rural and remote areas.

LIV Case Study: The applicant was experiencing stalking and prohibitive behaviour in a country location, which involved police coming in and out from a central regional hub on multiple occasions. This meant there was inconsistent police representation in the local area. The police directed the applicant to go to court to obtain an order, but the regional court only had opening hours on specific days at specific times, so this was a barrier to access for the complainant. Police said this perpetrator had a previous PSIO and agreed that the conduct could be considered as stalking behaviour but did take any steps to assist in applying for an order.

Under the PSIO Act, police can apply for a complaint and warrant on behalf on an applicant, although it requires the approval of the court and must be served on the respondent.⁵ A FVSN has immediate effect and grants immediate protection to the victim survivor. There is no mechanism in the PSIO Act that allows for the ease and immediacy of protection provided by an FVSN. The introduction of such a mechanism would avoid the waste of police resources spent attempting to serve a PSIO complaint and warrant in circumstances where the perpetrator avoids contact or cannot be easily located once police involvement has commenced.

The LIV submits that if an equivalent Safety Notice is made available under the PSIO Act, further training should be made available to police to ensure these Safety Notices are made effectively and appropriately. This should include ongoing risk assessments in stalking matters, education on the risks of misidentification of perpetrators and the appropriateness of conditions on safety notices.

⁴ *Family Violence Protection Act 2008 (Vic)* s 24(a).

⁵ *Personal Safety Intervention Orders Act 2010 (Vic)* s 21.

Q8. Should a person making an application for a personal safety intervention order be able to do so online? If yes, in what circumstances?

The LIV cautions against allowing complainants to make applications for PSIOs online, given that obtaining a PSIO against another person, turns otherwise lawful conduct by the perpetrator into a potential criminal offence. LIV members report that PSIOs can be misused or overused by people, particularly in circumstances of neighbourhood disputes or breakdowns between business associates.

Given the significant volume of PSIO applications, the LIV is concerned that the number of applications would increase dramatically if online applications were available, particularly if it meant that applicants could avoid appearing in court.

Court processes are transitioning to an online environment and the transition must be balanced against the need to manage vexatious applications. LIV members are concerned that the use of Registrars alone to vet applications may not be sufficient. In the context of COVID-19, court processes have changed to enable people to swear an affidavit or make a statutory declaration online.⁶ The LIV would support online applications for PSIOs if an equivalent or similar process were put in place.

Q9. Should respondents be prevented from personally cross-examining the affected person in some personal safety intervention order matters? If so, in what circumstances?

The LIV strongly agrees that respondents should not be able to personally cross-examine the affected person. If an affected person has obtained an order, particularly an interim order, which says it is necessary to protect the affected person from stalking or prohibitive behaviour by the respondent, the respondent must not be allowed to use the court system to facilitate further access to or cause more harm to the affected person. The ban on direct cross-examination in family law matters has been shown to prevent re-traumatisation of victims of family violence in court proceedings.⁷

If direct cross-examination were prohibited in certain circumstances based on seriousness, the LIV is concerned that considerable difficulty would arise for decision-makers to appropriately triage applications. It is not in the interests of the applicant to allow direct cross-examination where the stalking or prohibitive behaviour is severe, such as assault. However, most serious applications for PSIOs are often connected to a police charge and the police are more likely to be involved in the application. In these circumstances, the accused is less likely to cross examine an applicant directly.

The LIV also notes that a prohibition against direct cross-examination would require increased funding for Legal Aid services to enable legal representatives to act for the respondent.

⁶ *Oaths and Affirmations Act 2018* (Vic) s 18A, s 29A

⁷ Victoria Legal Aid, *Common Questions About the Commonwealth Family Violence and Cross-Examination Scheme*, (1 May 2019). Available at <<https://www.legalaid.vic.gov.au/about-us/news/common-questions-about-commonwealth-family-violence-and-cross-examination-scheme>>.

Q10. Should courts be able to order respondents to personal safety intervention order applications to attend treatment programs? If so, what kind of programs and in what circumstances?

A PSIO is a civil order which can be consented to without admission and therefore not an acknowledgement of responsibility for the behaviour. The system of allowing agreement without admission is an effective pathway to deal with concerns relating to an affected person's safety. The LIV queries the efficacy of orders to attend a treatment program, where the respondent has not consented to participate or acknowledged responsibility for the behaviour. Additionally, if the respondent were unable to access a treatment program, this would result in a criminal charge for breaching the conditions of an order.

Whilst referrals to men's behaviour change programs can be a consideration in a family violence order, there would need to be a program specific to the individualised treatment needs of the alleged perpetrator. LIV members report that the availability of effective programs is very limited. The LIV is concerned that without additional funding, orders for an alleged perpetrator to participate in treatment programs will impose conditions with which the person will not be able to comply, through lack of access or ineffectiveness of treatment.

The LIV notes that respondents from culturally and linguistically diverse backgrounds may also require access to translators to participate in these programs, as language and/or cultural appropriateness may be a barrier to accessibility.

Additionally, LIV members report that persons who engage in stalking behaviour often have behavioural issues or intellectual disabilities. For example, people with intellectual disabilities may not understand appropriate relationship boundaries or that their behaviour is causing harm. These situations should not be treated as a criminal issue. While specialised therapy and intervention services may assist in these cases there are very limited support services to address underlying issues.

The LIV is of the view that it is more appropriate that treatment programs be dealt with as a consequence of criminal conduct, which would include a breach of a PSIO, given the extensive Criminal Corrections Order systems in place for offences of that nature.

Q11. Should there be additional offences in the *Personal Safety Intervention Orders Act 2010 (Vic)* to address more serious breaches? If so, what should they cover?

The LIV recommends the legislative inclusion of a provision addressing persistent contravention of notices and orders. This could mirror section 125A of the FVPO Act which stipulates that a person must not persistently contravene a Family Violence Safety Notice ('FVSN') or a Family Violence Intervention Order ('FVIO').⁸ The applicant must prove that the accused engaged in conduct that would constitute an offence against section 37 or 123 on at least two other occasions in a 28-day period in relation to the protected

⁸ *Family Violence Protection Act 2008 (Vic)* s 125A.

person or a related person. The accused must know or ought to have known that the conduct constituted a contravention of the FVSN or FVIO.⁹

The LIV is not aware of an equivalent provision for the persistent contravention of orders or notices relating to personal safety under the PSIO Act. The nature of stalking involves multiple instances of prohibited behaviour against the affected person and can be severely traumatic for victim survivors. It is particularly concerning that penalties are not available for the persistent contravention of an order or safety notice where a risk of safety for the affected person has already been established.

Q13. Should there be free legal representation in some personal safety intervention order matters? If yes, what eligibility criteria should apply?

The LIV supports free legal representation in some PSIO matters, noting personal safety matters should be distinguished from family violence - which ought to be prioritised. A personal safety order will not necessarily have the same immediate consequence on a perpetrator's living or family situation as a family violence order, which is likely to displace a person from their home and may restrict access to their children.

LIV members also report that many orders are made with consent because respondents have insufficient access to lawyers or financial aid and wish to avoid extended engagement with the court system.

The LIV recognises that legal aid organisations must balance the provision of free legal representation with the availability of limited resources and would defer to Victoria Legal Aid's insight in this regard.

Q17. You might like to consider whether:

a) There are any challenges in identifying when a person has engaged in a course of conduct or in obtaining evidence, to demonstrate a course of conduct?

The term 'course of conduct' is well-established in law relating to stalking. Due to the often covert nature of stalking offences, it can be difficult to establish a course of conduct where the conduct cannot be easily attributed to the same person to meet the civil standard of proof.

The LIV also recognises the detrimental impact of the victim-survivor being exposed to protracted intimidation and prohibited behaviour by the accused before legal protection under a PSIO will be granted. The effect and consequences of stalking or prohibited behaviour may be severe even if confined to a single experience, where there is a real possibility that the behaviour will be repeated.

⁹ *Family Violence Protection Act 2008 (Vic)* s 125A.

b) The list of conduct in s 21A(2) of the *Crimes Act 1958 (Vic)* covers all types of stalking behaviour?

The LIV considers the conduct listed in section 21A(2) of the *Crimes Act 1958 (Vic)* to be fairly inclusive and sufficiently broad to provide protection to victim survivors, while the provisions are suitably technologically neutral to allow for evolving technology.

The inclusion of a *mens rea* element provides an appropriate threshold to exclude applications which do not meet the requisite level for stalking. The LIV supports the legislative decision to prohibit conduct based on an objective assessment, even where the victim is not aware or afraid of the conduct. For example, victim survivors may be subjected to surveillance without their knowledge or an act by the perpetrator may not actually cause fear in the victim survivor, although this was the intended result. The LIV notes the public interest in preventing stalking behaviour, particularly before it negatively impacts or causes harm to a victim.

c) Cyberstalking is adequately covered

The LIV agrees that the provisions related to stalking are sufficiently technologically neutral to cover most aspects of cyberstalking and continuing developments to the technology industry. The predominant concern in cyberstalking complaints is that the identity of an alleged perpetrator may not be easily identifiable. There are very minimal identity verification steps required when creating a new email or social media and other online accounts, which creates significant difficulties in identifying alleged perpetrators. LIV members report meta data evidentiary issues are being explored to determine whether a perpetrator can be identified based on an IP address.

The LIV recognises that cyberstalking is particularly prevalent in younger generations but notes a distinction between cyberbullying or harassment and cyberstalking. Children and young people do not understand or protect their privacy as well as adults. LIV members report that it is very common for young people to share a device or access to online accounts which may be used to engage in stalking behaviour, increasing the difficulty of identifying a specific perpetrator.

d) The law presents any barriers to investigating, charging, and prosecuting offenders for stalking conduct?

A predominant barrier to investigating, charging, and prosecuting offenders for stalking is the difficulty in establishing the requisite course of conduct and clearly attributing all the behaviour to the same alleged perpetrator. For example, stalking behaviour may include leaving offensive material where it will be found by or brought to the attention of the victim or interfering with the property of the victim;¹⁰ neither of these acts will necessarily enable the victim or law enforcement to establish a clear connection to the

¹⁰ *Crimes Act 1958 (Vic)* s 21A (2).

perpetrator. The LIV acknowledges that public tolerance for acts of family violence is very low and reiterates that stalking requires multiple instances of prohibited behaviour, which may be extremely traumatising, before victims can seek legal protection.

Q20. Should electronic monitoring be introduced to monitor people who have been assessed as posing a high risk of ongoing stalking behaviour?

The LIV does not support electronic monitoring in relation to PSIOs. The LIV is of the view that electronic monitoring in civil proceedings is excessive and inappropriate, predominantly due to the lower standard of proof compared to criminal proceedings. The imposition of electronic monitoring in civil cases infringes disproportionately upon human rights.

From a practical perspective, the cost of funding electronic monitoring programs and the associated difficulties with prosecution of breaches related to tampering or removing equipment would likely be prohibitive.

Q23. How can we better integrate victim services with relevant public and private services and systems so that people are supported while they are being stalked?

LIV members report that victim services, such as the Domestic Violence Resource Centre and Red Cross, will provide support for family violence victims to change the door locks in their homes and obtain a new phone. The LIV sees considerable merit in extending these services to victim survivors of stalking.

Q25. Could some specialist courts and programs help address some of the issues that may co-occur alongside stalking behaviour? If so, how?

The LIV submits that specialist family violence courts are likely to be equipped to deal with the issues that commonly occur alongside stalking behaviour, including options for victims to give statements via audio-visual link to prevent further contact through the court process.

The Assessment & Referral Court has appropriate resources to support persons accused of stalking with a mental illness, intellectual disability or other eligible diagnosis.¹¹ If the accused person lives within the relevant catchment area, the Drug Court could also be beneficial for accused persons with a drug or alcohol dependency.¹²

¹¹ Magistrates' Court of Victoria, *Assessment and Referral Court*, < <https://www.mcv.vic.gov.au/about-us/assessment-and-referral-court-arc>>.

¹² Magistrates' Court of Victoria, *Drug Court Postcode Areas*, < <https://www.mcv.vic.gov.au/sites/default/files/2018-12/Drug%20Court%20catchment%20area.pdf>>.

Q28. What are the barriers that some victim survivors experience when seeking help for cyberstalking?

The LIV submits that victim survivors may feel embarrassment when detailing certain experiences that have happened to them online or feel that their concerns will not be taken seriously. Additionally, victim survivors may doubt the likelihood of effective prosecution, particularly where the identity of a perpetrator is not easily identifiable.

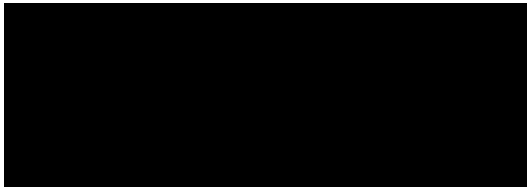
Q29. If a person suspects that they are being kept under surveillance using cyberstalking, what kind of help do they need to ensure they are kept safe?

The LIV recommends direct consultation with victim survivors to determine how people experiencing cyberstalking through surveillance could be better supported.

The LIV notes that public understanding of tracking services on mobile phones or electronic devices may facilitate stalking behaviour is limited.

Should you wish to discuss further, please do contact Family Law Section Policy Officer Andy Kuoch or Paralegal Sarah Cooney at FamilyLawSection@liv.asn.au.

Yours sincerely,



Tania Wolff
President