

# INTERVENTION ORDERS

## Procedure, Contests, Revocation, Variation and Practical Tips

‘Understanding Intervention Orders, conditions and their implications as a Criminal Lawyer’



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### Acts

*Family Violence Protection Act 2008 (FVP Act)*

- s.8 – ‘Family member’ includes a person who is, or has been a spouse or domestic partner, been in an intimate personal relationship with the relevant person or a person or a child who resides with the person. Section 8(2) provides that an intimate personal relationship does not need to be sexual in nature.

*Personal Safety Intervention Order Act 2010 (PSIO Act)*

- s.4 – Broad definition includes guardian, child and police officer

### Useful Terminology

AFM – Aggrieved Family Member (FV)

AP – Affected Person (PSIO)

‘Safe Contact’ orders are not defined in the respective Acts but a commonly used term referring to the specification of the following clauses: 1 (not to commit family violence), 2 (not to damage property) and 7 (agency).

‘Non-Contact Orders’ or ‘Full Orders’ are not defined in the respective Acts but a commonly used term referring to the specification of all available conditions.

## Family Violence / Prohibited Behaviour

**'Family Violence' - s.5 FVP Act:** Behaviour by a person towards a family member that is (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 the behaviour.

### Economic Abuse s.6 FVP Act

### Emotional and Psychological Abuse s.7 FVP Act

**'Prohibited Behaviour' - s.5 PSIO Act:** assault, sexual assault, harassment or property damage or interference or making a serious threat.

### 'Stalking' definition s.10 PSIO Act

## Purpose

### ▪ s.1 FVP Act

The purpose of this Act is to—

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

### ▪ s.1 PSIO Act

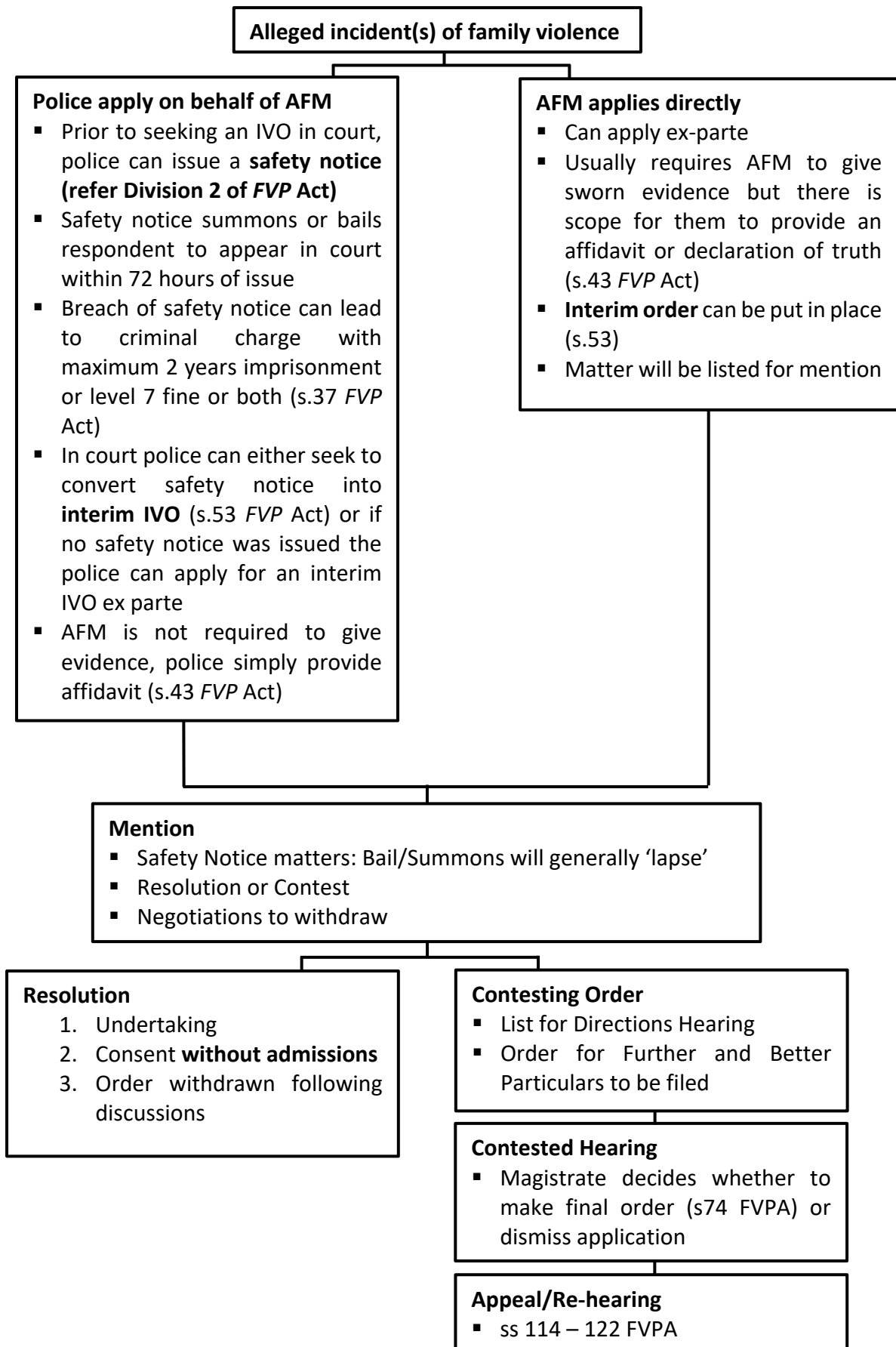
The purpose of this Act is to—

- (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.

## Powers of Magistrate

Magistrates have significant powers to make intervention orders and any conditions despite an agreement of parties e.g. A Magistrate has powers to grant an interim order to remove a parent from the family home, refuse to allow the police to withdraw an application and with particular relevance to relevant to the criminal law, and suspend a firearms authority or weapons exemption or approval.

## Procedure



## Should the application proceed to contest?

### The Test

The court may make a final order if satisfied on the balance of probabilities, that the respondent

#### s.74 (1) FVP Act

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

#### s.61 (1) PSIO Act

- (a) ... has
- (i) 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 behaviour would cause a reasonable person to fear for his or her safety; **or**
  - (ii) stalked the affected person and is likely to continue to do so or do so again.
- (b) the respondent and the affected person are not family members; and
- (c) it is appropriate in all the circumstances of the case to make a final order.

Note: s.63 of the PSIO Act provides that a final order can be made without the consent of the affected person but only with limited conditions.

#### Of note:

- Both tests involve proof of the offending being likely to occur again
- Note: Civil test - Balance of Probabilities

## Options

1. Undertaking between parties (rare on police applications)
2. Consent to order without admissions
3. Contest

## Things to Consider Where Correlating Criminal Investigation or Charge

### General Rule - Criminal Matter proceeds first

- Where there is a potential criminal investigation and charges arising from the incident giving rise to the application, as a general rule the criminal proceeding should proceed first noting that the respondent has a right, *inter alia* to be cautioned., exercise his/her rights including the right to silence or comment in an interview and have full disclosure of the evidence in relation to the charges.

### Contest Resolution - Benefit in Consent without Admissions

- A contested hearing may expose your client to criminal charges, disclose drug use, expose their mental health/psychiatric or raise other personal matters that they may not want ventilated in public/media or used in another jurisdiction (e.g. Family Law/Criminal Law/VCAT guardianship). Further, and the implications and criminal sanctions are far more serious than the making of a civil intervention order against the respondent (albeit exposing the respondent to breach of intervention order in the event of a breach).
- Consider whether there is a merit in terms of costs and delay in consenting without admissions for 6 – 12 months noting that an interim order which has the full effect and implications of an intervention order may be in existence for 1 year or longer due to the delays resulting from Covid.
- **COSTS:** Note each party generally bears their own costs unless the court decides that exceptional circumstances warrant otherwise or if the court is satisfied in a particular case that the making of any application under this Act was vexatious, frivolous or in bad faith s.154 FVP Act / s.11 PSIO Act
- Where there has been an incident that may satisfy the first limb of family violence or prohibited behaviour but no risk of a breach as the parties no longer have contact it may in your client's interests due, *inter alia* to costs and delay to consent to an order without admissions. An order by consent without admissions is not an adverse finding in the Family Court and may be considered as a factor in favour of your client in the event of a criminal charge arising out of the incident/s if there is no breach of the order.
- Conditions can be negotiated. An intervention order may simply constitute a single clause – not to commit family violence or prohibited behaviour (as defined).
- Where there is a relationship that has broken down but a prospect of reconciliation from your client's perspective then consider consenting without admissions.

## Conditions

Standard Conditions contained in a 'full order' are listed under:

- Division 5 *FVP Act*
- Division 7 *PSIO Act*

Intervention Orders may be 'full orders' referring to the complete set of standard conditions.

The court may include any conditions that appear to the court 'necessary or desirable' – s.81 *FVP Act*.

## Appeals and Rehearing

### Appeals

Division 9 Subdivision *FVP Act* / Division 11 *PSIO Act*

- Who may appeal s.114 *FVP Act* / s.91 *PSIO Act*
- Court to which appeal must be made - s. 115 *FVP Act* /s. 92 *PSIO Act*
- Notice of Appeal – s.116 *FVP Act* /s.93 *PSIO Act*
- Appeal must be filed within 30 days after the day the relevant decision was made: s.116(2)(c) *FVP Act* / s.93(2)(c) *PSIO Act*.
- Appeal does not stay the operation of the decision s.117(1) *FVP Act*/97(1) *PSIO Act*

Note: There is no right of appeal in relation to interim orders or the refusal to grant an interim order: s.114(2)(c) *FVP Act* / s.91(2)(b) *PSIO Act*

### Rehearing

Pursuant to s.122(1) *FVP Act* and s.99(1) *PSIO Act*

The respondent for a final order may... apply to the court for a rehearing of the proceeding only if—

- (a) the application for the order—
  - (i) was not personally served on the respondent; and
  - (ii) 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.

Note: Standard of proof - Balance of Probabilities

## Revocation and Variations

Application to Vary or Revoke Intervention Order: ss.100 – 109 *FVP Act*, s.80 *PSIO Act*.

s.100(2) *FVP Act* provides that in deciding whether to make an order under subsection (1), the court must have regard to all the circumstances of the case and, in particular, the following—

- (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;
- (e) if the protected person has a guardian, the guardian's views.

s.100(3) *FVP Act* provides that 'if the court decides not to grant an application for the revocation of a family violence intervention order, the court may instead order the variation of the family violence intervention order in the way the court considers appropriate'.

### Application for Variation by Respondent

- It is very difficult to vary an order without the consent of the applicant in writing or verbally. It may be that once advised of the circumstance of the request for variation the police agree to the variation and in those circumstances, the application may be made without the consent of the protected person: s.110(1) *FVP Act*/s.87(1) *PSIO Act*
- Application must be made in writing in the appropriate form, and leave must be granted first, leave can only be granted if court accepts there has been a change in circumstances and the change justifies variation or revocation (and in the case of interim order, it is in interests of justice to determine immediately: s109 *FVP Act*

### Application for Variation by Police

- Police do not need the consent of the AFM to apply to vary an order: s.110 *FVP Act*. However, they can only vary the order to add limited conditions, namely; a condition not to commit family violence, agency clause or weapons clauses: ss.81(a)(f)(g)(h) *FVP Act*.

## Breaching Intervention Order

Criminal charges arise from breaches of IVO's. Increase in sanctions for breaching orders.

### s.123 FVP Act – Breach Intervention Order

- Penalty: 2 years' imprisonment or 240 penalty units or both
- Not a strict liability offence - requirement of mens rea: *DPP v Cope* (a pseudonym) [2021] VMC 014
- Defence of honest and reasonable but mistaken belief does not apply as it is not a strict liability offence: *DPP v Cope* (a pseudonym) [2021] VMC 014

### s.123A FVP Act – Breach Intervention Order with intent to cause fear/harm

- Penalty: 5 years' imprisonment or 600 penalty units or both
- Aggravated by intention to cause fear or harm

### s.125A FVP Act – Persistent breach of Intervention

- Penalty: 5 years imprisonment or 600 penalty units or both
- 2 or more breaches over 28 days
- Aggravated by persistence

## Practical Tips

- Be upfront with client prospects:
  - Magistrates and police have significant powers and can override agreement between the parties as the legislation is geared towards promoting safety of applicants.
  - Orders with significant repercussions such as removal from the family home can be made without notice
- Be pragmatic
  - When intrinsically linked criminal matters are still pending, the criminal matter should take priority – look to variation/resolution prospects early.
- Online hearings including contested hearings in a Covid World
  - Liaise with the other side as soon as practicable before the initial mention to ascertain the issues, obtain disclosure and resolve the matter.
  - Advise your client as to costs, delays and the possibility that your contested hearing may not be reached on the allocated day
- Rules of evidence generally do not apply but you are still required to comply with civil rules - *Jones v Dunkel*. Avoid second/third hand hearsay – s.65 FVP Act



## Other Resources

- Family Violence Intervention Order Proceedings – Family Law Podcast by Daniel T Cash – [Foleys Podcast Series](#)
- Family Violence Protection Act 2008 (Vic) – [FVP Act](#)
- Personal Safety Intervention Orders Act 2010 (Vic) - [PSIO Act](#)
- Judicial College Victoria – Family Violence Bench Book – [JCV FV Bench Book](#)