

Practice Note – Family Violence Protection and Personal Safety Intervention Order Appeals

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Title	Appeals under the <i>Family Violence Protection Act 2008 (Vic)</i> and the <i>Personal Safety Intervention Order Act 2010 (Vic)</i>
Subject	Common Law Division Appeals and Post Sentence Applications List
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Authorised By	Judge Misso and Judge O'Neill

Preliminary

- 1 As from the 1 August 2019, appeals from the Magistrates' Court in respect of orders made under the *Family Violence Protection Act 2008 (Vic)* ("the *FVP Act*"), and under the *Personal Safety Intervention Order Act 2010 (Vic)* ("the *PSIO Act*") (collectively, "IVO appeals") will be managed, listed and determined within the Common Law Division of the Court.
- 2 This Practice Note supersedes any practice note within the Criminal Division relating to IVO appeals.
- 3 Judge O'Neill (or such other judge as may be appointed by the Judge in charge of the Common Law Division) is the judge in charge of the Appeals and Post Sentence Applications List (APSA List), including IVO appeals.
- 4 It is the intention of the Court to manage and determine IVO appeals in a just, efficient, timely and cost effective manner.

Time within which an application may be brought

- 5 A notice of appeal must be filed within 30 days after the date of the relevant decision (s116 of the *FVP Act*; s93 of the *PSIO Act*).
- 6 There is no power to extend the time within which an appeal may be lodged – see *Carroll (a pseudonym) v Browne (a pseudonym) & County Court of Victoria* [2018] VSC 253; *Summers (a pseudonym) v McKenzie (a pseudonym)* [2015] VCC 2015.
- 7 The filing of a notice of appeal does not stay the operation of the orders of the Magistrates' Court.

No appeal against interim orders

- 8 As from 31 July 2019, there is no right of appeal against an interim FVP or PSI order, or an order refusing to make an interim order.

Power to order legal representation

- 9 Special rules apply in an appeal under the *FVP Act* if a party to the appeal wishes to cross-examine a “*protected witness*” (the affected family member, a child, any family member of a party to the proceeding, a person who has a cognitive impairment or a person who otherwise needs the protection of the Court (s70 of the *FVP Act*)).
- 10 A protected witness must not be cross-examined personally by a party, unless that person is an adult and consents to the cross-examination.
- 11 If a party seeking to cross-examine a protected witness and is not legally represented, an appeal may be adjourned if that party has not had the opportunity to obtain legal representation. If the party does not obtain legal representation after having reasonable opportunity to do so, the Court must order Victoria Legal Aid offer that party legal assistance for that purpose.
- 12 These special rules do not apply to appeals under the *PSIO Act*.

The directions hearing

- 13 Prior to the hearing of the appeal, the proceeding will be listed for a directions hearing.
- 14 The directions hearing (sometimes referred to as an Appeal (first listing or mention hearing)) will be conducted before the Judge in Charge of the APSA List or such other judge as he/she shall nominate.
- 15 If the appellant does not appear at the directions hearing, the Court may strike out the appeal.
- 16 At the directions hearing, each party shall appear in person, by a legal representative or, by videolink from a custodial or Victorian Court location.
- 17 The Judge at the directions hearing may enquire of, and make orders as to:
- (a) whether or not the respondent seeks to cross-examine a witness at the appeal hearing and whether an order ought be made for legal representation;
 - (b) whether a party to the appeal or witness seeks for *special arrangements* to be made to assist that person give evidence (s69(3) of the *FVP Act*);
 - (c) whether a party is in custody and whether that party should appear by videolink at the appeal hearing;
 - (d) whether either party intends to call other lay, medical or expert evidence, and require a written statement or report from any such proposed witness;
 - (e) the issues in dispute;

- (f) how long the appeal will take;
 - (g) whether either party seeks to subpoena any witness;
 - (h) whether either party requires an interpreter;
 - (i) whether there are orders in place in any related proceedings, for example in the Family Court, or criminal proceedings;
 - (j) such further orders as may be considered necessary.
- 18 If a party requires an interpreter at the hearing of the application, that party shall ensure a properly accredited professional interpreter is arranged and attends the hearing. In exceptional circumstances, a judge may order the registry of the court arrange an interpreter to attend the hearing. An application to that effect should be made at the directions hearing.
- 19 At the directions hearing the judge will fix a date for the hearing of the appeal.

The hearing

- 20 The hearing will be by way of re-hearing and will be conducted and the evidence presented as the judge hearing the application shall determine and in accordance with the *FVP Act* and the *PSIO Act*.
- 21 In relation to appeals in respect of orders made under the *FVP Act*, the judge hearing the appeal needs to be satisfied, on the balance of probabilities, that the respondent has committed “family violence” (as defined) against the affected family member and is likely to continue to do so or do so again (s74).
- 22 In relation to appeals in respect of orders made under the *PSIO Act*, the judge hearing the appeal needs to be satisfied, on the balance of probabilities that the respondent has:
- (a) committed prohibited behaviour against the protected person and is likely to continue to do so or to do so again, and the respondent’s prohibited behaviour would cause a reasonable person to fear for his or her safety; or
 - (b) stalked the affected person and is likely to continue to do so or do so again (s61).
- 23 Further, unless the judge hearing the appeal directs to the contrary, the following shall apply:
- (a) if either party intends to rely upon the evidence of a lay witness, that party shall file a witness statement which will stand as the evidence-in-chief of that witness;
 - (b) if either party intends to rely upon the evidence of a medical practitioner or other expert, then the report of that witness shall stand as his/her evidence-in-chief;

- (c) if one or other party seeks to cross-examine a lay witness or doctor proposed to be relied upon (save in relation to a witness referred to in s70 of the *FVP Act*), that party shall give notice to that effect at least 30 days prior to the hearing, and the party seeking to rely upon that evidence must arrange for that witness to attend;
- (d) each party shall be entitled to open their case for no longer than 20 minutes, and make final submissions for no longer than 30 minutes;
- (e) examination-in-chief of each party shall not exceed two hours. Cross-examination of each party or any other witness shall not exceed two hours.

Judge Christopher O'Neill
1 October 2019