

SOUTH AUSTRALIAN BAR ASSOCIATION
MEMBER OF THE AUSTRALIAN BAR ASSOCIATION



18 June 2021

Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Department of the Senate

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Family Law Amendment (Federal Family Violence Orders) Bill 2021

The South Australian Bar Association (**SABA**) thanks the Committee for the opportunity to comment on the above Bill.

SABA welcomes all initiatives to improve protections to children and individuals from violence in an accountable and cost-effective way.

On SABA's reading of the Bill, some of the practical consequences arising by the creation of Federal Family Violence Orders include the following considerations:

1. The need for the Bill to expressly prioritise parenting proceedings in the best interests of the child over any criminal investigation about the need for and appropriateness of any Federal Family Violence Order. This should avoid any delay in the parenting proceedings caused by the application for the Family Violence Order. To achieve this, it may be necessary for the Federal Circuit Court to create a separate case flow management system for the Federal Family Violence Order.
2. The need for the Bill to contemplate that the docket Judge in the Federal Court will need to make findings of fact in granting the Family Violence Order and this may colour the perceived independent mind to the parenting matters at trial if heard by the same docket Judge. Again, a separate docket for the Family Violence Order applications may overcome this issue.
3. The need for consistent range of likely injunctions, orders and penalties between the Federal and State Courts for the same violence offences. This necessarily requires consistent definitions of the offences created in the Bill and outcomes to avoid forum shopping for the best outcome between in the State or Federal Court. For example, the number of metres that an injunction will be granted restraining a perpetrator of violence from the home residents of a victim of family violence or the obligation on the perpetrator to leave the area.

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4. The number of public prosecutions for Intervention Orders outweighs the number of private applications for Intervention Orders in SA. The Bill as drafted presumes that the applicant for a Federal Family Violence Order will pay for their representation in prosecuting for a Federal Family Violence Order. This is an additional cost for the applicant in the Federal jurisdiction that is otherwise usually borne by SAPOL and State prosecution in the State jurisdiction. Unless the Federal Government anticipates the appointment of Federal Prosecutors, then the Federal Family Violence Orders will be financially unattractive and potentially financially unobtainable by victims of family violence in the Federal Court in any event.
5. Also, the Bill as drafted, does not yet provide for the enforcement of Federal Family Violence Orders. It is a concern that it is unlikely that the resources of the AFP in South Australia are sufficient to action the enforcement of the Federal Family Violence Orders unless it is contemplated that the enforcement of Federal Family Violence Orders will be referred to the States and state police officers. If so, this is not included in the Bill so far. Similarly, if the protection is available under both federal and state legislation there may be ambiguity as to the priority by both agencies to grant and prosecute violence Orders at the risk of the individual or child if there is a presumption of private Order being available.
6. Lastly, in the event of duplicitous but inconsistent Federal and State Intervention Orders be granted there is the risk of further litigation and costs.

Summary

While the Bill currently creates a Federal Family Violence Order, the power of the Court to make such an Order and the terms of any Order, respectfully, the Bill does not expressly provide for the parenting proceedings to be prioritised with a separate pathway over the processing for Family Violence Orders. The issues would both be presumably handled by the same docket Judge, thereby increasing their workload and slowing the whole Family Law system.

In addition, the Bill does not provide for the practical consequences arising from the existence of Federal Family Violence Orders being available. This includes ensuring consistent wording of Orders, injunctions and penalties between States and the Commonwealth, and how the Orders will be prosecuted at no or minimal cost to the victims or the enforcement by the AFP, State Police or a combination.

The infrastructure does not currently exist in the Federal judicial system for the cost-effective prosecution of Federal Family Violence Orders or the enforcement of them with a separate focus on the protection from violence distinct and separate from the making of appropriate parenting Orders in the best interests of children under the existing Family Law Act.

The additional convenience of the availability of a Federal Family Violence Order must not obstruct, impede, distract nor hinder the clear and separate focus of Parenting Orders being made in the best interests of the child under the *Family Law Act 1975*.

Thank you again for the opportunity to comment.

Yours sincerely

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South Australian Bar Association