



## **Family Law Amendment (Family Violence and Other Measures) Bill 2017**

**Submission to the Senate Legal and Constitutional Affairs Legislation Committee**

February 2018



## Contents

<b>About Victoria Legal Aid .....</b>	<b>1</b>
About Victoria Legal Aid’s family law work .....	1
<b>Executive Summary.....</b>	<b>3</b>
<b>Summary of recommendations .....</b>	<b>4</b>
<b>Introduction.....</b>	<b>5</b>
<b>Applying the one court principle.....</b>	<b>6</b>
Clarifying the jurisdiction of the Children’s Court of Victoria .....	6
Expanding the jurisdiction of the Magistrates’ Court of Victoria.....	8
<b>Removing the time limit on the revival, variation or suspension of family law orders in family violence order proceedings.....</b>	<b>9</b>



## About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner.

VLA is the biggest legal service in Victoria, providing legal information, education and advice for all Victorians. We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our clients are often people who are socially and economically isolated from society; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas. VLA can help people with legal problems about criminal matters, family separation, child protection and family violence, immigration, social security, mental health, discrimination, guardianship and administration, tenancy and debt.

We provide:

- Free legal information through our website, our Legal Help line, community legal education, publications and other resources
- Legal advice through our Legal Help telephone line and free clinics on specific legal issues
- Minor assistance to help clients negotiate, write letters, draft documents or prepare to represent themselves in court
- Grants of legal aid to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer
- A family mediation service for disadvantaged separated families
- Funding to 40 community legal centres and support for the operation of the community legal sector.

## About Victoria Legal Aid's family law work

Victoria Legal Aid's Family, Youth and Children's Law Program plays a leading role in the coordination of family law and family violence legal services in Victoria. We provide:

- duty lawyer, legal advice, representation and information services including in child support, parenting disputes, child protection and family violence matters across the state, to children and to parents
- lawyer-assisted and child-inclusive family dispute resolution to help settle disputes without going to court (through our Family Dispute Resolution Service)
- independent children's lawyers who promote the interests of children at risk
- the new Family Advocacy and Support Services (FASS) in Melbourne and Dandenong family law registries – providing specialist duty lawyers alongside specialist family violence support workers
- Family Violence to Family Law Continuity of Service Delivery pilots with two community legal centres, offering a continuing legal service from when parents first appear at the Magistrates' Court for family violence intervention orders, through to addressing family law needs

- legal advice and education in the community.

In the 2016–17 year, the Family, Youth and Children’s Law program provided:

- services to almost 33,000 clients (including 1,659 Aboriginal or Torres Strait Islander clients)
- over 17,000 duty lawyer services and over 15,000 grants for ongoing representation.

Informed by this broad experience and access to data, VLA has, over many years, worked with governments, family law courts and family law professionals to improve the family law system and the outcomes for our clients and most importantly for children.

## Executive Summary

VLA assists clients with parenting disputes, family violence and child protection matters. Our data shows that there is a small but significant number of clients with problems that cross over the Commonwealth family law, Victorian child protection and Victorian family violence jurisdictions. These clients may either be involved in concurrent court proceedings or sequential court proceedings in the separate jurisdictions.

The legal system remains confusing for families with issues that cut across jurisdictions. There are different processes and terminology in each of the jurisdictions and a risk of conflicting orders being made.<sup>1</sup> There are outstanding barriers to information sharing resulting in children and parents telling their stories over again in different assessment processes. In VLA's experience, this can lead to duplication and perceived delay in resolving care arrangements which creates anxiety and frustration for families. It can also lead to confusion for families because there may be a lack of clarity about who is making decisions about the care and safety of their children.

VLA welcomes the legislative amendments in the Family Law Amendment (Family Violence and Other Measures) Bill 2017 that we believe, based on our practice experience, will improve the intersection between the family law, family violence and child protection jurisdictions and reduce duplication, confusion, and delay in decision-making for families.

This submission focuses on three key amendments included in the Bill, of which VLA is supportive:

- Clarification of the family law jurisdiction of certain state and territory courts, including children's courts (subsection 28(2))
- Expanded jurisdiction of state and territory courts to resolve property matters up to a higher amount than previously prescribed (subsection 46(1))
- Removing the time limit on the revival, variation or suspension of family law orders in family violence order proceedings (paragraph 68T(1)(b)).

While VLA broadly welcomes these legislative amendments, there are additional factors we believe the Senate Legal and Constitutional Affairs Legislation Committee needs to consider in its inquiry to support the effective implementation of the amendments, including: additional resourcing for the courts and legal aid services to manage increased family law workload and demand, and the provision of training, in collaboration with state and territory governments, in family law for judicial officers in state and territory courts.

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<sup>1</sup> For further discussion on ongoing challenges see J. Jackson, 'Wisdom from the West' (Paper prepared for the Family Law Conference, Sydney, 10 October 2014); J. Jackson, 'Bridging the Gaps Between Family Law and Child Protection' (Research Report, The Winston Churchill Memorial Trust of Australia, 2011).

## Summary of recommendations

Giving effect to the 'one court' principle:

- The Committee support the amendment clarifying the jurisdiction of certain state and territory courts, such as the Victorian Children's Court, to make family law orders under the *Family Law Act 1975* (Cth).
- The Committee support the amendment to expand the jurisdiction of state and territory courts of summary jurisdiction, such as the Magistrates' Court of Victoria, to exercise family law jurisdiction to resolve property matters up to a higher value without requiring both parties' consent to the court exercising the jurisdiction.
- The Committee recommend that the Commonwealth Government address in collaboration with state and territory governments the resource requirements and training needs of courts of summary jurisdiction to hear more family law matters, as anticipated by the legislative amendments under consideration, and of legal aid services to respond to additional demand for family law services in state family violence and child protection courts.

More effective responses to family violence:

- The Committee support the amendment to remove the twenty-one-day time limit which applies to a family law order that is revived, varied or suspended by a state or territory court when making a state family violence order (an interim family violence intervention order in Victoria).
- The Committee recommend that the Commonwealth Government resource the provision of training on the family law system to judicial officers and lawyers working in the state and territory family violence jurisdiction, and that these training needs are identified and delivered in collaboration with state and territory governments.



## Introduction

VLA welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (the Bill).

VLA assists clients with parenting disputes, family violence and child protection matters. Our data shows that there is a small but significant number of clients with problems that cross over the Commonwealth family law, Victorian child protection and Victorian family violence jurisdictions. These clients may either be involved in concurrent court proceedings or sequential court proceedings in the separate jurisdictions.

The legal system remains confusing for families with issues that cut across jurisdictions. There are different processes and terminology in each of the jurisdictions and a risk of conflicting orders being made.<sup>2</sup>

There are also outstanding barriers to information sharing across the jurisdictions, resulting in children and parents telling their stories over again in different assessment processes. In VLA's experience, this can lead to duplication and perceived delay in resolving care arrangements which creates anxiety and frustration for families. It can also lead to confusion for families because there may be a lack of clarity about who is making decisions about the care and safety of their children.

VLA has previously advocated for legislative reform to improve the intersection between the family law, child protection and family violence jurisdictions, including the establishment of a unified court to comprehensively address the challenges experienced by families with complex needs.

Recognising the constitutional challenges in establishing a unified court and the significant change that this would encompass, and absent a reform agenda to deliver a unified court, VLA has recommended a number of other reforms to improve the system for families with complex needs.<sup>3</sup> Many of these are reflected in the proposed Bill above and are the central focus of our submission.

This submission focuses on three key amendments in the Bill:

- Clarification of the family law jurisdiction of certain state and territory courts, including children's courts (subsection 28(2));
- Expanded jurisdiction of state and territory courts to resolve property matters up to a higher amount than previously prescribed (subsection 46(1));
- Removal of the time limit on the revival, variation or suspension of family law orders in family violence order proceedings (paragraph 68T(1)(b)).

VLA welcomes these legislative amendments that we believe, based on our practice experience, will improve the intersection between the family law, family violence and child protection jurisdictions and reduce duplication, confusion, and delay in decision-making for families.

Our submission recommends resourcing and training in addition to the legislative amendments to support effective implementation of the amendments, including: additional resourcing for the relevant state and territory courts and legal aid services to respond to increased family law workload

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<sup>2</sup> Jackson, above n 1.

<sup>3</sup> See VLA, *Families with Complex Needs: Submission to the Family Law Council Terms of Reference, number 1* (2015) <<https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-gender-inequality-including-sex-discrimination-and-family-violence/families-with-complex-needs>>.

and demand, and the provision of training in family law for judicial officers in state and territory courts.

## Applying the one court principle

### Clarifying the jurisdiction of the Children’s Court of Victoria

VLA welcomes legislative amendments that will clarify the jurisdiction of relevant state and territory courts to have the same family law parenting jurisdiction as that held by state and territory courts of summary jurisdiction under Part VII of the *Family Law Act 1975* (Cth) (the Family Law Act). This amendment is consistent with the ‘one court’ principle which VLA, in previous submissions,<sup>4</sup> has recommended to reduce duplication, confusion for families, and delay in resolving matters absent the establishment of a unified family court that could deal with family law, family violence and child protection matters. The one court principle requires that:

At the earliest possible point in managing a case, the decision should be taken whether a matter proceeds under state or territory child welfare law or under the Family Law Act. Once that decision has been taken, in all but the most exceptional circumstances, the matter should proceed in the chosen court system.<sup>5</sup>

VLA’s practice experience suggests that application of the one court principle would be particularly useful in relation to the Victorian Children’s Court when the Department of Health and Human Services (DHHS, the relevant State Government department responding to child protection matters in Victoria) is satisfied that protective concerns initially identified have been addressed in a family and the existing care arrangement (brought about by a Victorian Children’s Court order) is tenable over the long run. In these situations, the DHHS regularly advises the family of its intention to withdraw from involvement with the family if the parents (or carers) seek family law orders to maintain the safe care arrangement.

At present, it can be confusing for parents to subsequently initiate an application for a family law order in a family law court. With parents finding it difficult to navigate a new and different system, it is not uncommon for Victorian Children’s Court proceedings to be adjourned multiple times before a parent makes such an application in a family law court. This has cost implications and results in unnecessary DHHS involvement in the family for an extended period of time despite protective concerns having been addressed. The story below of our 12-year-old client Jack illustrates the impact on a vulnerable child when complex family law situations do not fit neatly within Commonwealth or state jurisdictions.<sup>6</sup> The ability of the Victorian Children’s Court to make family law orders in these cases is more efficient and effective than relying on parents to navigate the transition to, and engage in a legal proceeding in, a new and different court system unassisted.

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<sup>4</sup> VLA, above n 3.

<sup>5</sup> Family Law Council, ‘Family Law and Child Protection’ (Research Report, Family Law Council, September 2002) 13.

<sup>6</sup> VLA uses case studies throughout this submission to illustrate our practice experience. The case studies are de-identified to protect the privacy of our clients.

## Case study

For Jack, decisions about his future after his mother died became unnecessarily protracted and distressing because they did not fit neatly within Commonwealth or state jurisdictions alone.

Jack was living in the care of his adult sister on a child protection order, overseen by the Victorian Department of Health and Human Services, who were working with his mother to reunite her with her son. She passed away before this could happen. (Jack's father had died when he was much younger.)

Jack wanted to continue living with his sister, and she was keen to continue caring for him as his legal guardian. But this outcome has been delayed due to the complexities of navigating two different court systems which are each overseeing one aspect alone of his future.

The Victorian Children's Court considered an application from Jack's sister which would have transitioned Jack from a state child protection order to a Commonwealth family law order. It appeared the simplest step at this point, as the Children's Court had all the information relevant to Jack's situation. This order would give his sister sole parental responsibility and provide certainty and security for Jack.

While the Children's Court agreed that it was in Jack's best interests to live with his sister, it refused to make the family law parenting order because it was uncertain whether it had jurisdiction to do so.

This led to further uncertainty and distress for Jack and his sister at an already very difficult period and required his sister to initiate separate family law court proceedings to finalise Jack's care arrangements.

VLA and a number of inquiries have previously identified the need for clarification of the jurisdiction of the Children's Court of Victoria,<sup>7</sup> as there is uncertainty as to whether the court has the power at present to make orders under the Family Law Act.<sup>8</sup> Accordingly, VLA welcomes the amendment in subsection 28(2) of the Bill which clarifies the family law jurisdiction of state and territory courts by: allowing relevant state and territory courts, such as children's courts, to be prescribed to have the same family law parenting jurisdiction as that held by state and territory courts of summary jurisdiction under Part VII of the Family Law Act.<sup>9</sup>

To support the change in practice envisaged by the clarification of jurisdiction of children's courts, it will be important that training, in parallel to the introduction of the amendment, is delivered to relevant judicial officers, court staff, child protection workers and lawyers practising in this jurisdiction on family law, the making of family law orders, and situations in which it is appropriate for the Children's Court to make such an order.

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<sup>7</sup> See Royal Commission into Family Violence, 'Report and recommendations' (State of Victoria, Parliament Paper No 132, 2016); VLA, above n 3; and Family Law Council, 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Interim Report, Family Law Council, 2016).

<sup>8</sup> Royal Commission into Family Violence, 'Report and recommendations', Volume IV, Chapter 24, Family violence and the family law system (State of Victoria, Parliament Paper No 132, 2016), 188.

<sup>9</sup> Explanatory memorandum, Family Law Amendment (Family Violence and Other Measures) Bill 2017, 2.

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## Recommendations:

- The Committee support the amendment clarifying the jurisdiction of certain state and territory courts, such as the Victorian Children’s Court, to make family law orders under the Family Law Act.

## Expanding the jurisdiction of the Magistrates’ Court of Victoria

The one court principle is also applicable in the Magistrates’ Court of Victoria, particularly for children and families experiencing family violence where there is an associated family law property matter. We welcome subsection 46(1) of the Bill which will expand the jurisdiction of relevant state and territory courts, such as the Magistrates’ Court of Victoria, to exercise family law jurisdiction to resolve property matters up to a higher value without requiring both parties’ consent to the court exercising the jurisdiction.<sup>10</sup>

The expanded power of state and territory courts of summary jurisdiction to resolve property matters of a higher value has the potential to reduce time, cost, pressure and risk for vulnerable families and children experiencing family violence, and make it easier for families to resolve such matters without having to navigate two courts. In practice, this will be reliant on the approach to implementation adopted, including simplification of the court and discovery process, training for state and territory magistrates in family law proceedings, and adequate funding for the state and territory courts to hear and determine these matters. Our experience shows that failure to implement these factors could result in negative outcomes for vulnerable self-represented clients who may be coerced into agreeing to property orders or where property is used as a bargaining tool in the family violence proceeding.

If the amendment comes into effect and the Magistrates’ Court of Victoria decides to hear property matters up to a higher value, we recommend that the change is supported with training for judicial officers so that they have the knowledge and expertise in family law to hear contested property matters, with a particular focus on metropolitan Melbourne where fewer family law matters are currently heard compared with regional Victoria.

While VLA supports the one court principle being applied in state and territory courts of summary jurisdiction such as the Magistrates’ Court of Victoria with regard to family violence and property matters, there are some cases in the state and territory courts where it will remain more appropriate for the family law aspects of the matter to be heard in the Commonwealth family law courts. These include more complex cases involving disputes about the parenting and care arrangements for children, which require specialist knowledge of family law and experience in decision-making that is in the best interests of children.

VLA anticipates, consistent with the submission of the Family Law Section of the Law Council of Australia in its submission to the Exposure Draft Bill,<sup>11</sup> that there will be increased demand for legal aid services and pressure on the list in the Magistrates’ Court of Victoria following these changes. The resource implications of the legislative changes for courts and legal aid services should be considered in collaboration with state and territory governments, and addressed by the Commonwealth Government if the amendments are to have the intended change in practice. This is

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<sup>10</sup> Explanatory memorandum, above n 8.

<sup>11</sup> Law Council of Australia, Family Law Section, Submission to the Attorney-General’s Department, Family Law Amendment (Family Violence and Other Measures) Bill 2017: Exposure draft, 17 February 2017, 4.

particularly important given the existing case load and demands arising from the primary jurisdiction of the Magistrates' Court of Victoria.

### **Recommendations:**

- The Committee support the amendment to expand the jurisdiction of state and territory courts, such as the Magistrates' Court of Victoria, to exercise family law jurisdiction to resolve property matters up to a higher value without requiring both parties' consent to the court exercising the jurisdiction.
- The Committee recommend that the Commonwealth Government address in collaboration with state and territory governments the resource requirements and training needs of courts of summary jurisdiction to hear more family law matters, as anticipated by the legislative amendments under consideration, and of legal aid services to respond to additional demand for family law services in state family violence and child protection courts.

## **Removing the time limit on the revival, variation or suspension of family law orders in family violence order proceedings**

Family violence intervention orders (FVIOs) in Victoria are an important tool for keeping children and parents safe from family violence. When making a FVIO, magistrates are permitted under section 68R of the Family Law Act to vary or suspend an existing family law order without the consent of the parties, when the conditions in a family law order contradict the conditions of the FVIO. This is an appropriate, and necessary, provision that can provide safety for children in response to family violence that was not considered in the making of the family law order. This is demonstrated in the case story of a VLA client below.

### **Case Study**

An interim family law order provided for the children to live with the mother and spend time with the father. There was a pending Federal Circuit Court hearing to determine the father's application that the children live with him.

The mother then fled from interstate to Victoria after the equivalent of a FVIO was obtained by the police against the father of the children. The children were protected by the order, as there were significant concerns of violence towards the mother and the children arising from threats to kill. The father was facing criminal charges arising from the family violence incidents.

Now in Victoria, the mother sought a FVIO. The interim family law orders permitted the father contact with the children. VLA assisted the mother, arguing that it was necessary to suspend the father's time with the children, provided under the family law order, in recognition of the seriousness of the threat to kill. The Magistrate made a FVIO which suspended the time under the family law order.

Under section 68T of the Family Law Act, the variation or suspension to time made under section 68R ends at the end of the interim order period or twenty-one days after the interim order was made, whichever takes effect earlier. If, at the end of the twenty-one-day time limit, the matter has not yet returned to the family law courts, the variation or suspension of the family law order lapses.

Our practice experience has found that that the legislation incorrectly assumes that a twenty-one-day period is sufficient for the family law courts to consider the allegation and vary the family law



order if required. This is an issue in both metropolitan and regional areas. There are particular challenges in regional areas, where wait times are significant and this may prevent a matter from returning to court within twenty-one days. This leaves families with inconsistent and contradictory orders, creating confusion and uncertainty about care arrangements for children and increasing the safety risk for children and families on FVIOs. VLA has previously raised concerns about the twenty-one-day time limit.<sup>12</sup> The case study of a VLA client below illustrates the confusion and uncertainty that can arise when there are contradictory or inconsistent orders.

### **Case Study**

The eldest of three children lived with the father. The mother, who had the two other children in her care, was seeking to have the third child returned to her care. A Family Report indicated that there was an insecure attachment between that child and the mother and it would be detrimental to the child's emotional development to return the child to the mother's care.

However, on two occasions the child ran away to the mother's house. On the first occasion, the mother returned the child to the father's care. On the second occasion, the mother refused to return the child. The mother sought a FVIO, which was granted *ex parte*. The FVIO included all three children as affected family members. The order also suspended the time provided under the family law orders so the eldest child could not be returned to the father and the time arrangements for the two younger children were also suspended. The suspension stood for 21 days.

The father contested the FVIO.

The father also applied for a Recovery Order in the Federal Circuit Court. He was not able to get the matter listed within twenty-one days and the matter did not return to the Federal Circuit Court for a further four weeks. Once back in court, the judge found that there was no risk to any of the children when in the father's care.

VLA supports the amendment in the Bill that will remove the twenty-one-day time limit which applies to a family law order that is revived, varied or suspended by a state or territory court when making an interim FVIO. This amendment would allow the state or territory court to specify in the order a specific expiration, or that the revival, variation or suspension will expire when the interim FVIO expires, or when a court makes an alternative order. It would help to avoid inconsistencies between FVIOs and family law orders.

In VLA's experience, it is essential that the ability to suspend time is available to magistrates as a means of keeping children safe. However, it is also important to ensure that the Magistrates' Court does not unwittingly alter appropriate family law orders. Family law orders are made on the basis of family and expert reports and are made by judicial officers with specialist knowledge and experience in decision-making about complex family law issues. It is important, therefore, for state and territory magistrates to have sufficient family law training, knowledge, and case information before them when considering complex family law issues. Like in the discussion above on the one court principle, there would be benefit in providing training on the family law system to state and territory judicial officers and lawyers working in the local family violence jurisdiction so those working in the jurisdiction have the confidence to read family law orders and understand the consideration given to family violence by the family law courts when making family law orders.

### **Recommendations:**

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<sup>12</sup> VLA, above n 3.

- The Committee support the amendment to remove the twenty-one-day time limit which applies to a family law order that is revived, varied or suspended by a state or territory court when making an interim FVIO.
- The Committee recommend that the Commonwealth Government resource the provision of training on the family law system to judicial officers and lawyers working in the state and territory family violence jurisdiction, and that these training needs are identified and delivered in collaboration with state and territory governments.