



Law Council
OF AUSTRALIA

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

Senate Legal and Constitutional Affairs Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
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- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges that this submission has been prepared by the Family Law Section of the Law Council of Australia. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2600 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The Law Council is also grateful to the Law Society of South Australia, the Law Society of New South Wales, the Queensland Law Society, and the Bar Association of Queensland, for their assistance with the preparation of this submission.

Overview

1. The Family Law Section (**FLS**) supports legislative amendment to enhance the capacity of the family law system to provide effective outcomes for people who are experiencing family violence. However FLS notes with concern that the Bill is not accompanied by any confirmed increase in funding for the authorities which will be affected by the terms of the Bill, in particular the courts that exercise *Family Law Act 1975* (Cth) (**Family Law Act**) jurisdiction; state, territory and federal police forces who will be called upon to investigate and prosecute breaches of *Family Law Act* personal protection injunctions; and Legal Aid Commissions that provide advice to litigants.

Part 1 - Family law matters to be resolved by State and Territory courts

Exercise of family law jurisdiction by children's courts

Jurisdiction of courts

2. These proposed amendments properly respond to the Family Law Council's recommendation that s 69J and s 69N of the *Family Law Act*, which vest courts of summary jurisdiction with powers to make parenting orders, be amended to remove any doubt that children's courts, no matter how constituted, are able to make family law orders under Part VII of the *Family Law Act* in the same circumstances that are currently applicable to courts of summary jurisdiction.¹
3. The FLS cautions the Government, when considering the drafting of the regulations, to take proper account of the decision of the High Court in *Harris v Caladine* regarding the proper delegation of powers.²
4. It should be noted that the Family Law Council recommended an increase in Commonwealth funding to state and territory courts of summary jurisdiction to enable them to take on more family law work.³ The Explanatory Memorandum states that the Government is 'discussing' with the states and territories 'any' financial implications arising from the amendments. The FLS submits that it is clear that there will be financial implications for state and territory courts arising from any increase in the family law work consequent upon these amendments.
5. Unless the Government is prepared to couple these legislative amendments with a commitment to increase funding to state and territory courts of summary jurisdiction, as well as children's courts, then the proposed amendments are:
 - unlikely to have any practical effect;
 - may alienate stakeholders who could see it as cost-shifting by the Commonwealth; and,
 - may result in list blowouts in the children's court (the jurisdiction which has the most urgency for resolution of matters concerning the protection of children).
6. The experience of most family lawyers is that judicial officers in state and territory courts do not regularly exercise their existing *Family Law Act* jurisdiction. State and

¹ Family Law Council, *Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (June 2016) 104, 145 ('*Family Law Council Report*').

² *Harris v Caladine* (1991) 172 CLR 84.

³ *Family Law Council Report*, 146.

territory courts are struggling to meet the demands of the caseload arising from their local jurisdiction and most do not have the resources (court time) available to hear and determine, for instance, interim parenting applications. Many judicial officers in state and territory local courts do not have experience or knowledge of the family law jurisdiction, or have only limited knowledge and experience, and are reluctant to exercise their powers as a result.

7. The FLS is concerned about the training of state and territory judicial officers in family law. The Public Consultation Paper about an earlier iteration of the Bill, issued in December 2016 by the Attorney-General's Department, suggested that the Government has agreed to fund training on family law for state and territory judicial officers.⁴ There is no mention of that training in the Explanatory Memorandum to the Bill. The FLS submits that such training is essential for the proper administration of justice. The FLS strongly believes that any such training must be ongoing so that state and territory judicial officers are kept up to date about changes in the law, and so that any new judicial officers appointed to the state and territory local courts receive the base level training as part of their induction.

Appeals

8. The FLS supports these proposed amendments but records its view that appeals from decisions made under the *Family Law Act* by state and territory courts are most appropriately dealt with by the specialist family courts.

Short form judgments

9. Whilst the FLS generally supports these amendments, it is of the view that they are unlikely to have any impact without broader amendment and simplification of the interim parenting decision making process mandated in Part VII of the *Family Law Act*. The FLS refers to the article by Judge Riethmuller of the Federal Circuit Court entitled '*Deciding Parenting cases under Part VII: 42 easy steps*'.⁵
10. The FLS is concerned that the Family Law Council's report on this issue (as quoted in the Explanatory Memorandum at page 16) and these proposed amendments, focus on the need for written judgments. In fact, many judicial officers in the Family Court and the Federal Circuit Court deliver *ex tempore* judgments in interim parenting cases, particularly those heard in busy Duty Lists. The FLS considers that, absent any legislative change to simplify Part VII, encouraging state and territory judicial officers to deliver *ex tempore* judgments is likely to lead to less error than those judicial officers attempting to deliver short form reasons pursuant to a complex Act. The FLS notes that judicial officers in specialist family courts have rarely been able to deliver 'short form' judgments in interim parenting cases, and it is unlikely that less experienced judicial officers in the state and territory courts would be able to do so without falling into error.

Property jurisdiction of state and territory courts

11. The FLS supports an increase in the jurisdiction of state and territory courts in family law property matters to promote opportunities for resolution of multiple aspects of a case in the one court. The FLS proposes that a limit of \$100,000 be set by the *Family Law Act*, rather than by the *Family Law Regulations 1984* (Cth), to enable proper

⁴ Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence - Public Consultation Paper* (December 2016).

⁵ Judge Grant Riethmuller of the Federal Circuit Court '*Deciding Parenting cases under Part VII: 42 easy steps*' (2015) 24(3) *Australian Family Lawyer* 1.

consideration of future proposals (if any) to increase the amount. However, without appropriate and continuing family law education for judicial officers and funding for state and territory courts to meet the expanded jurisdiction, the change may have limited uptake and effect. The FLS recommends that the Government fund an extensive continuing joint professional development program in family law for judicial officers in accordance with recommendation 15-1 of the Family Law Council in its final report on *Families with Complex Needs and in the Intersection of the Family Law and Child Protection Systems*.

Part 2 – Strengthening the powers of the courts to protect victims of family violence

Summary dismissal

12. The proposed new s 45A will replace s 118 which enables the court to dismiss proceedings which are frivolous or vexatious, and to make such order as to costs as the court considers just.
13. The proposed new section incorporates into the *Act*, the concept of ‘no reasonable prospect of success’ as is currently found in Rule 10.12 of the *Family Law Rules 2004* (Cth) and 13.07 of the *Federal Circuit Court Rules 2001* (Cth).
14. The FLS cannot discern how this section adds to, detracts from, or changes the powers currently vested in the court.

Criminalisation of breaches of injunctions

15. FLS contends that state and territory courts should remain the primary jurisdiction for obtaining family violence orders. State and territory family violence legislation protects a wider range of persons and state and territory police play a significant role in obtaining and enforcing the orders. In most cases where there has been family violence, the state and territory courts are the first courts to be involved with a family. *Family Law Act* parenting proceedings in federal courts usually come later.
16. There are, however, some situations where a victim needs a personal protection order when *Family Law Act* proceedings are already on foot, or where the personal protection issues are not the primary concern of the victim. For instance, in some cases:
 - (a) the victim has been able to secure their immediate safety (and does not urgently require a state or territory order), but issues *Family Law Act* parenting proceedings to regulate the living arrangements of children, particularly if there is a risk that the other parent might attempt to remove a child from school or child care without their consent;
 - (b) the family violence (or the need for an injunction) occurs after *Family Law Act* proceedings have commenced; or
 - (c) particularly in states and territories where the majority of state/territory family violence proceedings are commenced by police, either the victim does not want initial police involvement, or has been unable to convince police to commence those proceedings and the delays in the state and territory courts to hear their own application are too long so as to discourage a victim from taking that course of action.

17. The FLS encourages reform in this area that currently means that a victim in such a situation must issue separate state/territory court action after *Family Law Act* proceedings have commenced. To this end, injunctions for personal protection under the *Family Law Act* need to be as effective as state/territory family violence orders. This means that victims must be able to rely upon state and territory police treating *Family Law Act* injunctions with the same seriousness as state and territory orders when they are called to an incident of an alleged breach, and that victims can rely on police to initiate breach proceedings.
18. The FLS notes that both the *Family Violence – A National Legal Response – Final Report (ALRC Report)* and the *Royal Commission into Family Violence (Victoria) Report (RCFV Report)* recorded the difficulties faced by victims in enforcing injunctions for personal protection made under the *Family Law Act*, as well as the reluctance of state and territory police to exercise their powers of arrest pursuant to s 68C and s 114AA of the *Family Law Act*.
19. The FLS supports legislative changes to criminalise breaches of injunctions for personal protection made under the *Family Law Act*, as a means of increasing their effectiveness to protect victims of family violence and to provide a clear direction to police to enforce injunctions. The amendments also reinforce that family violence is a crime rather than a private law matter.
20. However, the FLS has serious reservations about the terms of the proposed amendments and submits that:
 - (a) the proposed amendments could place some victims of family violence at serious risk of further family violence because of confusion about the level of protection the amendments will provide to them;
 - (b) despite the fact that the Attorney General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers notes that '[a]n offence should be given retrospective effect only in rare circumstances and with strong justification', the proposed amendments have retrospective effect;
 - (c) the proposed amendments may cause an increase in the number of contested *Family Law Act* proceedings and impede settlement opportunities; and
 - (d) the terms of the proposed amendments are confusing, and likely to lead to misinterpretation by litigants and police.

When are Family Law Act personal protection injunctions currently made?

21. The FLS respectfully disagrees with the inference in paragraphs 174 and 175 of the Explanatory Memorandum that personal protection injunctions under s 114 of the *Family Law Act* are made in relation to conduct that falls within the broad definition of family violence. The experience of family lawyers is that injunctions, both pursuant to the s 114 power and pursuant to s 68B, are made to remedy a broad range of behaviours, many of which could not be described as family violence.
22. It is worthwhile noting here the historical background to the use of the personal protection injunctions powers in the *Family Law Act* and the increased scope and sophistication of personal protection laws made by states and territories. Before the latter were introduced (or refined), victims of family violence had few options available to them to, for instance, have a violent partner removed from a joint property or to stop a perpetrator from coming into contact with them after a violent incident. Although

personal protection injunctions could be made under the *Family Law Act*, they were rarely sought because of the difficulty in enforcing such orders. Although the *Family Law Act* gave (and still does give) power to state and territory police officers the power to arrest people who might have breached such an injunction, state and territory police forces were (and remain) notorious for their failure to exercise that power.

23. Improvements in state and territory laws for the making of personal protection restraining orders and the enforcement of those orders by state and territory police officers means that victims of family violence will now, almost exclusively, seek state and territory-based orders for their personal protection. Whilst breaches of such orders are criminal offences and thus likely to be a deterrent to perpetrators committing further family violence, the main advantage of such orders to victims is the response of the police to enforcing the orders. If a perpetrator of family violence who is subject to a state or territory restraining order attends at a victim's home, the victim can usually rely on an immediate response from police to prevent further family violence. A victim of family violence could not expect or rely upon an immediate response from police to a breach of a *Family Law Act* injunction. A state or territory restraining order is more likely to keep a victim safe from further episodes of family violence.
24. Despite the increasing reliance on state and territory based restraining orders in situations of family violence, *Family Law Act* injunctions are still made. In the experience of family lawyers, they are most commonly made with the consent of both parties as part of a wider agreement, usually about parenting arrangements and/or the use and occupation of the family home. Such orders are commonly made in the following situations:
 - (a) Very often, if allegations of family violence are made in support of an application for an injunction, those allegations are contested and the alleged perpetrator's consent to the injunction is expressed to be on a 'without admission' basis – that is, they consent to the injunction, but without admission of the allegations of family violence.
 - (b) Although allegations of family violence are made, there is insufficient evidence to support the making of a state or territory based restraining order.
 - (c) The orders are sought, not in situations of family violence, but as part of a broader complex dynamic of the interpersonal relationship of the parties and sometimes the children. For instance, one person may have a psychological vulnerability arising from the separation which means that they do not want to be in presence of the other person. Or, a child may have anxiety arising from the breakdown of his or her parents' relationship which is exacerbated by the child being exposed to the parents at the same time.
 - (d) One person may be prepared to consent to an injunction in exchange for the other person agreeing to other orders, such as orders to spend time with children. Even though that person does not agree with the facts that are alleged in support of the injunction, if they have no intention of behaving in the manner described in the injunction (for instance, they have no intention of going to the other person's home), they are willing to consent.

Risk of further family violence as a result of the amendments

25. The FLS submits that the proposed amendments are quite likely to be interpreted by victims of family violence as meaning that state and territory police officers will respond immediately to situations where a personal protection injunction is being

breached. Lay people, particularly people who are vulnerable, are unlikely to understand the nuances of state and federal jurisdictions, and the difference between a breach of an injunction being capable of criminal prosecution and a breach of an injunction being immediately responded to by police. FLS is concerned that some victims of family violence may consent to, or seek, injunctions when in fact they would be best protected by a state or territory based restraining order.

26. FLS is concerned that the Bill is not accompanied by any commitment to the funding of training for state and territory police officers about their powers under the *Family Law Act*.
27. The indefinite nature of injunctions made under the *Family Law Act* may also create unintentional consequences for parties who *'may, over time, make different, informal arrangements without applying to vary the orders and discharge the injunction'* as noted in the joint submission of the Chief Justice of the Family Court and Chief Federal Magistrate (as he then was) to the ALRC Report.⁶

Retrospective operation of the amendments

28. The FLS submits that there will be many people who have consented to personal protection injunctions being made against them. They will have done so on the basis of advice that a breach of such an order is a private matter, capable only of enforcement in a civil court. Many people will have consented to these injunctions expressly because they are not capable of criminal enforcement. They may be employed in a job where a criminal charge or conviction could lead to dismissal. They may have been concerned about the other party making false allegations against them, but been reassured that such allegations could not lead to criminal charges. The FLS submits that it is contrary to the public interest for these amendments to apply retrospectively, and that, if pursued, the provisions should only apply to injunctions made after the commencement of operation of the amendments.

Impact on settlement of litigation

29. FLS submits that in their current form, the amendments are likely to impede settlement negotiations and lead to more contested applications. Given the already overburdened courts exercising family law jurisdiction, the amendments are likely to lead to further delays for litigants in the court system.

Complexity of the amendments

30. The location of the two types of personal protection injunctions in different Parts of the *Family Law Act* (s 114 and s 68B) already tends to obscure their accessibility and necessarily requires judicial officers, legal practitioners and police having to look at different parts of the Act in order to determine their source and enforceability. It is often also the case that Judicial Officers make injunctive orders, without identifying in the body of the order itself, the statutory basis for the order made (ie they often read *'That the respondent be restrained by injunction from ...'* rather than *'That pursuant to s 68B (or ss 114(1), 114(2A) or 114(3)) the respondent be restrained ...'*). The FLS submits that the complicated wording of the amendments only exacerbates this complexity.

⁶ Chief Justice Diana Bryant and Chief Federal Magistrate John Pascoe, Submission 168 to the Australian Law Reform Commission, *Family Violence - A National Legal Response*, 25 June 2010. Submission cited at 805 [17.204] of the Report.

31. The amendments leave open a number of questions about how the criminalising of *Family Law Act* personal protection injunction breaches will operate. Will the state and territory police be prosecuting in the Family Court or Federal Circuit Court? Would such a position be constitutional? If such prosecutions are to occur in state and territory courts, then the Bill makes no provision for this.⁷
32. Will there be a jury or a right to a jury trial? Will reference have to be made to the Attorney-General who will then decide whether to prosecute? If the police or Attorney-General determine not to prosecute, will there be any restriction on the victim's right to institute their own enforcement proceedings?
33. Finally, the FLS has serious concerns about the resourcing requirements of the amendments. On a very practical level, do existing federal courts have sufficient cells to hold alleged perpetrators? What would be the impact of such an amendment in single judge registries, where, once a judge hears a prosecution, they would be unable to hear the substantive proceedings between the parties? What would be the overall impact on court resources, including judicial time?
34. The FLS suggests consideration be given to an alternative approach, being the registration and enforcement of *Family Law Act* personal protection injunctions under state and territory family legislation. We note that work is already well advanced on a system of registration and recognition of state and territory personal protection/family violence orders between states and territories. The FLS suggests that consideration be given to adding *Family Law Act* orders to such a scheme. In simple terms, we suggest that consideration be given to amendments which would allow breaches of *Family Law Act* personal protection injunctions to be enforced as crimes under state and territory legislation. Whilst this would require negotiation with states and territories, the advantage of such a proposal is that state and territory courts are already equipped to handle criminal prosecutions. To the extent that the workload in those courts might be increased in relation to prosecutions, the workload of those courts in hearing and determining applications for personal protection injunctions where there are related family law matters would reduce if victims could access an equally enforceable order in the federal courts.

Dispensing with explanations regarding orders or injunctions to children

35. The FLS recognises that s 68P of the *Family Law Act* creates compliance issues where a child is too young to understand an explanation.
36. Whilst recognising Australia's obligations as a signatory to the United Nations Convention on the Rights of the Child (**UNCRC**) in relation to children's participation in decisions affecting them, discretion needs to be exercised as to whether the detail and extent of the explanations relating to family violence and consequential orders and injunctions, are in the child's best interests to know. Such explanation and/or detail may be distressing for children, may enmesh them in their parents' dispute and adversely affect their relationship with their parents or caregivers - which is not the intended purpose of the order.
37. The FLS supports the proposed amendment to s 68P which appropriately balances a child's right to be heard and protecting them from further harm.

⁷ Cf *Customs Act 2001* (Cth) and *Excise Act 1901* (Cth) which specially provide that Commonwealth offences are prosecuted in state courts using the practice and procedure of the state.

Removal of 21 day time limit on state or territory courts' power to vary, discharge or suspend an order

38. At present, if a state or territory court discharges, varies or suspends a parenting order, the 21 day time limit 'encourages' in theory a swift review of the case in the federal courts. Whilst critical funding issues have limited the capacity of the federal courts to review matters in this timeframe, the limitation gives these matters a notional priority.
39. If the 21 day time limit is removed entirely, the FLS considers that there might not be a sufficient impetus in the judicial system for these matters to be prioritised. At the present time, the fact that a parent might not be spending time with a child will not, of itself, mean that parent can obtain an urgent interim hearing in the federal courts. Therefore if a parenting order is suspended and a party applies for a review, it could be expected, based on current delays in the listing of interim hearings in the federal courts, that it would be four to eight months before such a review would be heard. That length of time, if a child does not spend any time with the other parent, might not be in their best interests and could have a significant detrimental impact on their welfare and development.
40. In addition, the longer the delay between the state variation/discharge/suspension and a hearing for review of the parenting orders, the greater the likelihood that a new unintended status quo will be created, which may (regardless of the statutory pathway under Part VII of the *Family Law Act*) then go on to be a factor given substantial weight in the ultimate determination.
41. In determining a parenting order, the child's best interests are the paramount consideration. Those interests are determined by consideration of a range of factors - one of which, is the likely effect of any changes in the child's circumstances (s 60CC(3)(d) of the *Family Law Act 1975*).
42. In practice, it would not be unexpected for children who, for example, have not spent time with a parent for an extended timeframe whilst awaiting a hearing, to have established a new routine with the then sole-carer parent and be averse to a change and re-introduction of time with the other parent. The court must then consider the effect of a change to that arrangement on the child. Whilst the 'status quo' is not determinative of future parenting orders, it is nonetheless a relevant factor in a judicial determination. In this example, it could be expected that the court would ultimately order less time between the other parent and child than would otherwise have been the outcome had the delay not occurred. The effect is that delay subverts the proper consideration of what is in the best interests of a child.
43. The FLS supports a variation to the present 21 day limit, but suggests there must be an appropriate temporal limit. FLS suggests a not longer than 60 day limit would be an appropriate period to allow an application to be made and heard.

Part 3 – Other Amendments

Repeal obligation to perform marital services

44. This item purports to repeal s 114(2), which empowers the court, only when exercising its injunctive powers, to relieve a party to a marriage from any obligation to

perform marital services or render conjugal rights. It is not an independent power but is incidental to the exercise of the power under s 114(1).⁸

45. The power to order the restitution of conjugal rights was abolished by the enactment of s8(2) of the *Family Law Act*. The FLS contends that it is not the case that s 114(2) preserves any common law inability of a wife to withhold her consent to sexual intercourse with her husband. As noted by the Government in its response to ALRC Report,⁹ in *R v L* (1991) 174 CLR 379 at 390, Mason CJ, Deane and Toohey JJ said that, *'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law'*.¹⁰
46. It is important to note that neither s 114 nor any other section of the *Family Law Act* has anything to say about the extent to which consent to sexual intercourse is to be implied from the marriage contract.¹¹ If there was any inference that s 114 does that, then in the view of the FLS, that inference is wrong.
47. Nevertheless the section is otiose, historical, not used in practice, and confusing. FLS agrees with the Government that it ought to be repealed.

⁸ *Re Hayne* [1994] FamCA 53.

⁹ Australian Government, Government Response to the Australian and NSW Law Reform Commissions': Family Violence – a national legal response (June 2013) 9.

¹⁰ *R v L* (1991) 174 CLR 379, 390 (Mason CJ, Deane and Toohey JJ).

¹¹ *Ibid* 404-5 (Dawson J).