VICTORIAN WOMEN LAWYERS

SUBMISSION TO THE INQUIRY INTO THE *FAMILY LAW AMENDMENT (FEDERAL FAMILY VIOLENCE ORDERS) BILL 2021*

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About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 600 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community for female identifying lawyers.

Since 1996, VWL has advocated for the equal representation of women at all levels of the legal profession and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, to achieve justice and equality for all women.

Details of our publications and submissions are available at www.vwl.asn.au under the 'Publications' tab. In particular we draw attention to our recent Submission to the Standing Committee on Social Policy and Legal Affairs Inquiry into Family, Domestic and Sexual Violence (2020).

Background to the submission

The proposed amendment would amend the *Family Law Act 1975* to establish federal family violence orders (**FFVO**). It is intended that the FFVOs would operate concurrently with the existing state-based Intervention Order[1] (**IVO**) framework. In the event of any inconsistency, an FFVO would prevail and the state-based IVO will be invalid to the extent of that inconsistency.[2]

If charged with a breach of an FFVO, the penalty imposed would be imprisonment for 2 years or 120 penalty units (approximately $26,000), or both.[3] VWL notes that by comparison, the penalty for a breach of an IVO in each of the states' and territories varies in severity dependant on the state in which the order is obtained, as follows:

1. In Victoria, the penalty for breaching an IVO is up to a Level 6 imprisonment (5 years maximum) or a level 6 fine of $99,132 (600 penalty units maximum) or both, this is also the maximum penalty for persistent breaches. [4]

[1] An intervention order is a court order which prohibits a person from behaving in a particular manner towards a protected person or persons.
[2] Section 68NA of Subdivision B of the proposed Family Law Amendment (Federal Family Violence Orders) Bill 2021.
[3] S68AG of the proposed Family Law Amendment (Federal Family Violence Orders) Bill 2021.
[4] Section 123A of the Family Violence Protection Act 2008 (VIC).

2. In South Australia, the penalty for breaching an IVO is a maximum penalty of $10,000 or imprisonment for 2 years.[5]

3. In New South Wales, the penalty for breaching an IVO is imprisonment for two years or 50 penalty units ($5,500), or both.[6]

4. In Queensland, for a first breach that results in a conviction, the maximum penalty is 120 penalty units (approximately $16,000) or 5 years imprisonment. Otherwise, if a person that breaches an IVO has also breached the IVO at another time in the preceding 5 years, and the respondent has been previously convicted of a domestic violence, then the penalty for that second offence is 240 penalty units (approximately $32,000) or 5 years imprisonment.[7]

5. In Western Australia, the penalty is $6,000 or imprisonment for 2 years, or both.[8]

6. In Tasmania, a tiered penalty system applies. It involves imprisonment for one year or a fine of 20 penalty units (approximately $3,440) for first offences to imprisonment for five years for fourth or subsequent offence.[9]

7. In the Australian Capital Territory, the maximum penalty is 500 penalty units (approximately $80,000), imprisonment for 5 years, or both.[10]

8. In the Northern Territory, the penalty is 400 penalty units (approximately $62,000) or detention or imprisonment for 2 years, or both.[11]

The proposed Amendment intends to create consistency across jurisdictions. As the amendment will operate concurrently with the state-based IVO's,[12] it closes a loophole which allows for parties to 'forum shop' by selecting the form of the application depending on which jurisdiction will result in the most significant sentence.

[5] Section 31(2) of the Intervention Orders (Prevention of Abuse) Act 2009 (SA).
[6] Section 14 of the Crimes (Domestic and Personal Violence) Act 2007 (NSW).
[7] Section 177(2)(b) of the Domestic and Family Violence Protection Act 2012 (Qld).
[8] Section 61(1) of the Restraining Orders Act (WA).
[9] Section 35 Family Violence Act 2004 (Tas).
[10] Section 90 Domestic Violence and Protection Orders Act 2008 (ACT).
[11] Section 120, 121, 122 of the Domestic and Family Violence Act 2007 (NT).
[12] Section 68NA of Subdivision B of the proposed Family Law Amendment (Federal Family Violence Orders) Bill 2021.

Overview of submission

VWL welcomes the opportunity to make a submission to the Inquiry into *the Family Law Amendment (Federal Family Violence Orders) Bill 2021* (**the proposed Amendment**).

VWL recognises that the proposed Amendment has the potential to address the existing gap in proceedings for victim-survivors of family violence who run parenting matters in the relevant federal courts concurrently with state-based proceedings for protection.

It is critical that persons seeking protection, especially female identifying persons, can easily access enforceable protection orders without having to oversee multiple proceedings in separate courts.

Reducing court proceedings has the potential to lessen the risk of re-traumatising victim survivors by reducing the number of times they must relay the abuse they suffered from the perpetrator to in multiple hearings.

The proposed Amendment also aligns with Australia's continued obligations to protect women and children under the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

VWL's submission addresses three key areas:

(a) The effectiveness of the proposed criminally enforceable federal family violence orders in protecting victim-survivors of family violence;

(b) Whether broadening the immunity of Registrars in conducting conferences related to family law or child support proceedings will lead to better outcomes for victim-survivors; and

(c) Whether the proposed amendment effectively addresses Recommendation 131 of Victoria's 2016 Royal Commission into Family Violence and Recommendation 17-4 of the Australian and New South Wales Law Reform Commissions' 2010 report *Family Violence – A National Legal Response*.

The effectiveness of the proposed criminally enforceable federal family violence orders in protecting victim-survivors of family violence

Criminally enforceable Federal Family Violence Orders (**FFVOs**) would assist in protecting victim-survivors of family violence, particularly children who are the subject of parenting matters before a "Listed Court" (including the Family Court of Australia or Federal Circuit Court of Australia).[13] The proposed amendment empowers a Judge of a Listed Court[14] to order a FFVO to protect a child in the course of ordinary proceedings in relation to parenting orders for that child.[15] It further expands the role of Independent Children's Lawyers (**ICL**) in parenting proceedings, by allowing an ICL to obtain a FFVO, which could cover the children the subject of the proceeding.[16]

VWL recognises that empowering ICLs to seek a FFVO may assist in protecting children (and their caregivers) by removing the onus from the parent to seek an order, and allowing an ICL to do so instead within an application for parenting orders.[17]

VWL further notes that the introduction of FFVOs may further protect children who are victim-survivors of family violence by introducing new considerations when determining the best interests of the child under Section 60CC of the *Family Law Act 1975.* Under the current drafting of this section, the presence of an IVO is already a relevant consideration of the Court when making parenting orders. However, the seeking of an FFVO by an ICL on behalf of a child that is subject to parenting litigation is new. VWL submits this may carry more weight in relation to determining the best interests of a child than an IVO obtained by a party to the proceedings.

Capacity constraints

VWL further recognises that the application of the FFVO process in Listed Courts could cause further delays in the resolution of family law matters. The amendment proposes that FFVO are made by "*Listed Judges*", which is defined under Section 4(1) as "*Judges of the Family Court or the Federal Circuit Court of Australia, Family Court of Western Australia and the Magistrates'*

[13] Section 4(1) of the proposed Family Law Amendment (Federal Family Violence Orders) Bill 2021 defines a "Listed Court" as the Family Court, the Federal Circuit Court of Australia, the Family Court of Western Australia, the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia, sitting at any place in Western Australia.
[14] Section 4(1) of the proposed Family Law Amendment (Federal Family Violence Orders) Bill 2021 defines a "Listed Court" as the Family Court, the Federal Circuit Court of Australia, the Family Court of Western Australia, the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia, sitting at any place in Western Australia.
[15] Section 668AC of the proposed Family Law Amendment (Federal Family Violence Orders) Bill 2021.
[16] Section 68B of the proposed Family Law Amendment (Federal Family Violence Orders) Bill 2021
[17] Section 68AC of the proposed Family Law Amendment (Federal Family Violence Orders) Bill 2021.

Court of Western Australia constituted by a Family Law Magistrate of Western Australia, sitting at any place in Western Australia. "[18]

The Family Court and Federal Circuit Court already have limited capacity to manage their workloads,[19] which has been exacerbated by the challenges associated with the COVID-19 pandemic. VWL considers that strategies are needed to expedite the process of applying for FFVOs in Listed Courts, such as the creation of a unique list for FFVOs similar to the COVID-19 list.[20]

Other limitations

VWL notes that the provision does not assist victim-survivors of family violence who appear before the court solely for property proceedings. VWL recommends that FFVOs be applied in property proceedings as well to protect victim-survivors who have been the subject of family violence who do not have children and/or have been subjected to financial abuse.

It is also unclear whether the proposed amendment would expand an ICL's jurisdiction to allow them to apply for an FFVO on behalf of a parent who is also the subject of family violence. VWL considers that further opinion may need to be sought in this regard to ensure that such power does not encroach into the independent status an ICL is deigned to maintain in parenting proceedings.

VWL also supports adequate trauma-informed family violence training for all Judges dealing with FFVOs.

Will broadening the immunity of Registrars in conducting conferences related to family law or child support proceedings lead to better outcomes for victim-survivors?

The broadening of the immunity of Registrars in conducting conferences from property settlement proceedings to include family law or child support proceedings is intended to support increased and broadened use of alternative dispute resolution (**ADR**). The increased use of ADR must ensure fair and just outcomes for all parties, particularly victim-survivors, including children subject to family violence. It must not be treated as only an efficiency measure to "free up

[18] Section 4(1) of the proposed Family Law Amendment (Federal Family Violence Orders) Bill 2021.
[19] Federal Court of Australia Annual Report 2019-20
[20] The operation of the COVID-19 Lists is set out in Joint Practice Direction 1 of 2021.

judges"[21] as this underestimates the complexity of all cases before the courts and the challenges of achieving effective ADR which is not intended to be a tick-a-box exercise. To this end, VWL submits that the proposed amendment must be accompanied by:

a) adequate trauma-informed family violence training and support for Registrars;

b) empowering children to be heard and participate in the ADR process; and

c) support for the appropriate use of remote conferencing technology.

Adequate trauma-informed training for Registrars

The amendment must be accompanied by adequate training and support for Registrars in identifying and addressing family violence, and to prevent collusion with perpetrators. The explanatory memorandum contends that the 2020-21 Budget addresses training resources of judicial officers. More detail in respect of these measures is required. VWL notes that the Safe & Together Institute will be delivering court-wide training based on the Safe & Together Model.[22] This should be mandatory for all Registrars and Judicial Officers to ensure they are able to recognise and respond to family violence. VWL is encouraged by this training, in combination with the piloting of the Lighthouse Project in Adelaide, Brisbane and Parramatta. Women's Legal Services Victoria (**WLSV**) considers that Legally Assisted Family Dispute Resolution (**LAFDR**), when supported by trauma-informed mediators and lawyers, can be cost effective and efficient, whilst adequately protecting vulnerable parties.[23] Successful models of LAFDR should be considered to inform ADR conducted by Registrars and, in particular, the benefits of family violence victim-survivors having access to legal advice should be noted.[24] An evidence-based approach is desirable.

[21] Minister Dan Tehan, Second Reading Speech of the Family Law Amendment (Federal Family Violence Orders) Bill 2021, 24 March 2021
[22] Family Court of Australia and Federal Circuit Court of Australia, 'The Family Court of Australia and the Federal Circuit Court of Australia engage internationally recognised expert to undertake family violence focussed training', 21 April 2021.
[23] Women's Legal Service Victoria, 'Small Claims, Large Battles: Achieving Economic Equality in the Family Law System', 37.
[24] Women's Legal Service Victoria, Submission to the Standing Committee on Social Policy and Legal Affairs Inquiry into Family, Domestic and Sexual Violence, 24 July 2020, 22.

ADR run by appropriately-trained Registrars will also allow for family violence to be identified early in proceedings. WLSV recommends that Registrars conduct family violence risk assessments to better inform Judicial decision-making[25] and connect victim-survivors to support services.

Empowering children to be heard and participate in the ADR process

The Australian Institute of Family Studies (**AIFS**) has identified that children need to be empowered in the ADR process. The AIFS research found that children want to have their views taken into account by their parents when deciding parenting arrangements; to be given an opportunity to participate in decision about their care and living arrangements; to have their concerns about safety and abuse heard and acted on; to be given more information about the family law process; and to have access to counsellors, psychologists and support groups.[26] Where ADR involves children, they should be granted the right to be heard on matters affecting their lives in a way that is safe which takes into account any potential emotional or psychological abuse, fear of family violence, and the child's age and level of maturity.[27] VWL recommend that the courts look to the recently developed Child Safe Standards introduced in Victoria to consider how to ensure that children are empowered and able to participate in the family law proceedings impacting their lives.[28]

Supporting the use of remote conferencing technology

The use of technology should be explored for the purposes of ADR. Eighty percent of the family law courts' work was conducted remotely between March and May 2020.[29] This should be facilitated where appropriate, such as where parties are located regionally and/or would prefer to participate remotely. Courts should be mindful of considering when it is not appropriate, such as when there are allegations of coercive control or family violence generally to ensure that one party is not adversely influencing the other.

Whether the proposed amendment effectively addresses recommended amendments to the *Family Law Act 1975*

[25] Women's Legal Service Victoria, Submission to the Standing Committee on Social Policy and Legal Affairs Inquiry into Family, Domestic and Sexual Violence, 24 July 2020, 21.
[26] Australian Institute of Family Studies, 'Child wellbeing after parental separation - research summary' June 2020, 5.
[27] Commission for Children and Young People, 'Empowerment and participation - a guide for organisations working with children and young people', 3 March 2021.
[28] https://ccyp.vic.gov.au/child-safety/being-a-child-safe-organisation/the-child-safe-standards/
[29] Felicity Bell, 'Part of the Future': Family Law, Children's Interests and Remote Proceedings in Australia During Covid-19', University of Queensland Law Journal (2021) 40(1) University of Queensland Law Journal 1, 2.

The Victorian Royal Commission into Family Violence (2016) and the Family Violence Report of the Australian & New South Wales Law Reform Commissions (2010) recommended that the *Family Law Act 1975* (Cth) be amended *"to provide that a breach of an injunction for personal protection is a criminal offence."* [30]

The recommendation has been addressed within the proposed Bill, to the extent that injunctions for personal protection which may have otherwise been granted in the context of family law orders, can be applied within federal family violence orders. It follows that a breach of an FFVO constitutes a criminal offence.

Under the proposed amendment, injunctions will continue to attract a civil remedy only. This means that the onus is on the aggrieved party to bring a private action against the perpetrator for contravention of the injunction in the family law courts.

However, steps have been taken to close the gap to protect victim-survivors of violence. The new section 114(1)(1A)(c) provides that a court must not grant an injunction where it is possible to grant a federal family violence order. Further, previously-granted injunctions for personal protection can be replaced retrospectively with a FFVO under Part 2. This is an important step to ensure the protection of victim-survivors, especially when there is fear of making complaints.

Parties can apply for a federal family violence protection order under section 113AB of the proposed amendment. However, parties with a current family violence order, are excluded from making an application under section 113AB(2). Throughout family law proceedings, circumstances can arise that require specific protection orders or injunctions, to allow for the effective operation of orders relating to spending time with children. Presently, parties can seek to vary IVOs, or have parenting orders and IVOs operate concurrently pursuant to section 68R of the *Family Law Act (1975)* (Cth).

VWL submits the following:

1. To ensure that victim-survivors of violence can attend to all matters in the same Court, consideration be given to making final FFVOs in this context and upon making final parenting and property orders, including where State and Territory family violence orders exist; or

[30] Recommendation 17-4.

2. that families are informed of their rights under section 68R to vary, discharge or suspend a parenting order pursuant to section 68R.

As a final consideration, VWL notes that *'Protected Persons'* include children until the age of 18. However, even at this age they may still require protection. There may be a delay between when the child turns 18, and when they are able to obtain a new family violence order, during which time they are still vulnerable. VWL submits that the age of protected children be extended to 18 and six months.

Conclusion

VWL recognises the opportunity created by the proposed Amendment to increase the protections available to victim-survivors of family violence, especially women and children by expanding the scope and role of ICLs to apply for FFVOs and by broadening the use of ADR in parenting matters. However, VWL submits that in order to effectively increase these protections, the proposed amendment should be accompanied by further initiatives aimed at reducing capacity constraints in Listed Courts, ensuring that adequate trauma-informed family violence training is provided to Registrars, that children are empowered in the ADR process, and that remote conferencing technology is used where appropriate. VWL further submits that additional reform is needed to effectively address the recommendations arising from the 2016 Royal Commission into Family Violence and the Australian and New South Wales Law Reform Commissions' 2010 report *Family Violence – A National Legal Response*.