

**ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA
(INC.)**



**SUBMISSION IN RESPONSE TO THE COMMONWEALTH ATTORNEY
GENERAL'S DEPARTMENT CONSULTATION PAPER: AMENDMENTS TO THE
FAMILY LAW ACT 1975 TO RESPOND TO FAMILY VIOLENCE**

19 January 2017

About the Aboriginal Legal Service of Western Australia ('ALSWA')

ALSWA is a community-based organisation established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples¹ throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

ALSWA SUBMISSION

The aim of the Exposure Draft *Family Law Amendment (Family Violence and Other Measures) Bill 2017* ('Exposure Draft') is to 'improve the family law system's response to family violence'. The Consultation Paper prepared by the Commonwealth Attorney General's Department explains the proposed provisions under four broad headings. ALSWA adopts this structure for its submission.

¹ In this submission, ALSWA uses the term 'Aboriginal peoples' to refer to 'Aboriginal and Torres Strait Islander peoples.'

Family law matters to be resolved by state and territory courts as appropriate

The Exposure Draft proposes amendments to the *Family Law Act 1975* (Cth) (*'Family Law Act'*) to increase the number of state and territory courts vested with family law jurisdiction; to expand the current jurisdiction of the state and territory courts for family law property matters; and to encourage these courts to exercise their family law jurisdiction where appropriate. The purpose of these amendments is to reduce (although not remove) the requirement for parties to shift between different jurisdictions thus minimising delay and duplication.

Before discussing the proposed amendments, ALSWA highlights that in Western Australia, family law proceedings between persons who have not been married (for example, cases concerning ex-nuptial children) are carried out under the *Family Court Act 1997* (WA). Whenever the *Family Law Act* is amended, and it is considered necessary to adopt such amendments, the Western Australian Parliament must enact corresponding amendments to the *Family Court Act 1997* (WA) to ensure that unmarried parties to family law disputes are subject to the same system and procedures as married parties. In the past, there have been significant delays between the commencement of amendments to the *Family Law Act* and the 'mirror' amendments to the *Family Court Act* taking effect.

Specifically, the proposed amendments are:

1. To enable state and territory courts to be prescribed as courts of summary jurisdiction under the Family Law Act.

The Family Court of Western Australia has exclusive jurisdiction for family law matters in the Perth metropolitan area.² Family Court Judges and Family Law Magistrates exercise this jurisdiction. The Family Court also conducts circuit sittings in a number of regional Western Australian towns on several scheduled occasions during the year.

Magistrates of the general division of the Western Australian Magistrates Court sitting in regional areas have limited jurisdiction in family law cases; a regional magistrate can only make a parenting order if both parties consent to the making of the order or, if the application is contested, both parties consent to the magistrate determining the application.³ A regional general magistrate also has the power on his or her own initiative to transfer proceedings to the Family Court.

In practice, general magistrates in regional areas usually make interim consent orders only until such time as the matter can be transferred to the Family Court (either to Perth or to a

2 Governor General, *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation* (2006) cl 6).
3 *Family Law Act 1975* (Cth) s 69N.

regional location, for inclusion in a circuit). The benefit of this approach is that Family Court judicial officers are accompanied by family consultants who have social work or psychology qualifications and experience in child protection or family law disputes. Family consultants are an important tool in ensuring that family law cases are resolved in the best interests of the child. The Family Court of Western Australia also has the benefit of a co-located officer from the Department for Child Protection and Family Support (“Department”) and this officer works collaboratively with the Family Court to ensure efficient and expeditious exchange of relevant information. For circuit matters, the Family Court judicial officer and family consultant are in a far better position to seek and obtain relevant information from the Department than regional general magistrates.

The proposed amendments would enable the Western Australian Children’s Court (in both metropolitan and regional areas) to exercise family law jurisdiction in the same way that regional general magistrates are currently empowered to do. The current position is that the Children’s Court has jurisdiction in respect of the care and protection of children – where the Department seeks protection orders in respect of children – but no jurisdiction to make any orders under the *Family Law Act* or the *Family Court Act 1997 (WA)*.

ALSWA supports measures designed to reduce the burden for families in navigating two jurisdictions simultaneously; however, it also considers that complex family law cases should be heard in the specialist Family Court. With appropriate judicial training, Children’s Court magistrates would be better equipped to identify and transfer to the Family Court cases that are more complicated or are otherwise appropriate to transfer. The greatest benefit of the proposed amendment will be for families already involved in child protection proceedings in the Children’s Court, where the making of a parenting order in favour of one party would result in the discontinuance of the protection proceedings (in other words, where the Department and the other party both support the making of a parenting order instead of a protection order). Currently, in such a case, the party in whose favour the parenting order is sought must apply for a parenting order in the Family Court, and the protection proceedings are adjourned until the Family Court proceedings are finalised.

ALSWA also suggests that any proclamation that vests the Children’s Court with family law jurisdiction should be limited to cases where there are existing child protection proceedings in relation to the child or children. The objective in ALSWA’s view should be to put the Children’s Court into a position where, in hearing and determining child protection cases, it has the option to make parenting orders if that is the most appropriate solution.

2. To enable state and territory courts to hear more family law property matters. This jurisdiction is currently limited to \$20,000 and it is proposed to remove this monetary limit. The limit will be prescribed under regulations. The appropriate monetary limit has not yet been determined.

Currently, under s 46 of the *Family Law Act*, if proceedings are commenced in a court of summary jurisdiction in relation to property of a value over \$20,000.00 and the respondent does not consent to the orders sought, the court must transfer the proceedings to the Family Court unless the parties consent to the court hearing and determining the proceedings. The proposed amendment intends to remove the monetary limit of \$20,000.00 and provide for a new monetary limit via regulations.

ALSWA notes that the new monetary limit will be set after consultation with the states and territories and stakeholders. ALSWA has no objection to this proposed amendment in principle but considers that the monetary limit should not be set too high in order to ensure that the Family Court remains the forum to deal with complex property cases. In this regard, it is important to note that one party may be unrepresented and agree to a court of summary jurisdiction hearing a case without fully appreciating the complexity of the issues or the consequences of consenting to the summary jurisdiction. Moreover, appropriate judicial training will be needed to ensure that general magistrates are equipped to deal with more family law property cases, as they currently do not deal with these types of case in practice.

3. To enable judicial officers to give reasons for their decision in short form in family law matters in order to encourage state and territory courts to exercise their family law jurisdiction.

ALSWA notes that this proposed amendment is designed to encourage state and territory courts to consider giving short form judgements in order to ensure that the greater exercise of family law jurisdiction does not cause undue delays in these general courts. The Consultation Paper states that courts are currently empowered to give reasons for decision in short form so long as the reasons are adequate and hence this proposed amendment does not actually increase the courts' powers.⁴ ALSWA has no objection to this amendment.

Assisting the courts to exercise family law jurisdiction

The Consultation Paper states that the proposed legislative reforms will be 'accompanied by non-legislative measures to support state and territory courts to exercise jurisdiction under the Family Law Act'.⁵ These measures are the development of a National Domestic and Family Violence Bench Book and judicial training. ALSWA supports the continued development of the Bench Book and the accompanying judicial training package, especially given the intention that state and territory courts exercise their jurisdiction in family law cases more frequently. It is essential for judicial officers who

4 Commonwealth Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper (December 2016) 10.

5 Commonwealth Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper (December 2016) 5.

are not experienced with family law matters to be provided with sufficient and appropriate training concerning family law and family violence.

Strengthening the powers of the courts to protect victims of family violence

Criminalising breaches of personal protection injunctions

In order to provide greater protection for victims of family violence, the proposed amendment creates a new criminal offence for breaching a personal protection injunction issued under the *Family Law Act*. Currently, contravention of a personal protection injunction is a private matter between the parties and the victim must initiate enforcement proceedings. The creation of a criminal offence will enable the State to enforce a breach through police intervention and this means that the victim does not have to be a party to contravention proceedings. As stated in the Consultation Paper:

Once arrested, the police must bring the person before a family court by the close of business on the day following arrest, or the first day after a weekend or public holiday. The effect of the injunction is that once at court, the protected person can make an application to seek contravention of the injunction. This requires the aggrieved party (the victim) to bring a private (civil) action against the offender for breaching the injunction. If they do not, the person who is the subject of the injunction will be released and there will be no further consequences flowing from the breach.⁶

The proposed new ss 68C and 114AA provide that it is an offence to breach a personal protection injunction and the penalty is imprisonment for 2 years or 120 penalty units or both.

An additional benefit is that victims of family violence who are already involved in proceedings before the Family Court will not necessarily have to apply for a violence restraining order (“VRO”) in the Magistrates Court, if an injunction has been made for that victim’s personal protection. Under the amended model, such an injunction will provide a degree of protection similar to a VRO. This has the potential to eliminate the need for victims to apply for a VRO which currently involves a separate proceeding in the Magistrates Court. ALSWA supports this proposal.

Strengthening orders issued by state and territory courts

Under the proposed amendments, the current 21-day limit on a state or territory court’s variation, revival or suspension of a family law order in interim domestic violence order proceedings will be removed. Currently, if the victim is unable to have the matter listed in the Family Court within the 21-day period, the variation, revival or suspension of the family law order will expire. The proposed amendment will enable the variation, revival or suspension of a family order to continue to have effect until a specified time, a further order is made or the interim domestic violence order ceases to be in force.

⁶ Commonwealth Attorney-General’s Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper (December 2016) 14.

ALSWA supports this proposal because it will reduce the burden on victims of family violence by removing the necessity to initiate proceedings in the Family Court to ensure that the variation, revival or suspension of the family law order continues. Having said that, ALSWA considers that appropriate judicial training for general magistrates is crucial in order to ensure that family law orders are not inappropriately varied, revived or suspended (especially as general magistrates will have the power to make these orders for longer periods of time). Furthermore, all courts dealing with family violence orders and family law orders must be sufficiently resourced to ensure that all parties can seek variations or new orders when required. Delays due to lack of resources for these types of matters is unacceptable.

Increasing the power of the court to dismiss unmeritorious claims

The *Family Law Act* will be amended to strengthen the family law courts' powers to summarily dismiss unmeritorious applications (eg, if proceedings are unmeritorious and being prosecuted to inflict further trauma on a victim of family violence). The proposed new s 45A of the *Family Law Act* provides that the court may make a decree for one party against the other if satisfied that the other party has no reasonable prospect of successfully defending or successfully prosecuting the proceedings. It is further provided that a defence or prosecution of proceedings need not be 'hopeless' or 'bound to fail' to have 'no reasonable prospects of success'. Additionally, the court will be empowered to dismiss all or part of proceedings if it is satisfied that the proceedings or part of the proceedings is 'frivolous, vexatious or an abuse of process'. It is also stated that the court may make such orders as to costs as the court considers just.

This new provision would replace the existing s 118 of the *Family Law Act*, which provides that the court may dismiss proceedings at any stage if it is satisfied that the proceedings are frivolous or vexatious. The Consultation Paper noted that similar powers exist under the *Family Law Rules 2004*, Part 10.3. Under these rules, a party may apply for summary orders if the party claims that there is no reasonable likelihood of success.⁷

The Consultation Paper notes that some organisations have argued that this proposed amendment may be misused by the 'more powerful party' and 'litigants in person may make mistakes which make their cases appear unmeritorious'.⁸ In response, it is observed that the 'courts are well placed to identify the difference between a litigant in person who is underprepared due to inexperience or trauma, and a litigant whose case should be dismissed as an abuse of process of because it has no prospect of success'.⁹ This new provision would apply to all courts exercising family law jurisdiction.

7 Commonwealth Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper (December 2016) 12.

8 Commonwealth Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper (December 2016) 12–13.

9 Commonwealth Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper (December 2016) 12–13.

ALSWA acknowledges that there are similar existing powers under family law legislation. However, for cases where there is no reasonable prospect of success, the proposed new provision does not require a party to initiate an application – the court may summarily dismiss proceedings of its own initiative. The complexity of family violence coupled with the potential for differences in power between parties (including access to legal representation, which is an increasing problem) means that comprehensive and appropriate judicial training is crucial to ensure that victims of family violence are not disadvantaged by this amendment. This is especially relevant for courts of summary jurisdiction that are not as accustomed to dealing with family law cases as the specialist family courts.

Enabling the court to explain orders in a manner that supports the best interest of the child

It is proposed to amend the *Family Law Act* to enable the court to adjust its explanation of an order or injunction to a child, if to do so would be in the child's best interests. The Consultation Paper states that this amendment is designed to 'enable the court to communicate effectively with a child and in a manner that does not re-traumatise them'.¹⁰

Section 68P(2)(c)(iii) of the *Family Law Act* currently requires the court to provide an extensive explanation concerning an order or injunction that is inconsistent with a family violence order to a person who is protected by the family violence order even where the person protected is not a party to the proceedings. The proposed new s 68P(2A) provides that this will not apply to a child if the court is satisfied that the child is too young to understand an explanation of the order or injunction or if it is in the child's best interests not to receive an explanation of the order or injunction. ALSWA agrees with this proposed amendment on the basis that the best interests of a child must always be the paramount consideration.

Other amendments

It is proposed to repeal s 114(2) of the *Family Law Act 1975* (Cth) which currently provides that the Family Court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights. ALSWA supports this proposal.

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¹⁰ Commonwealth Attorney-General's Department, *Amendments to the Family Law Act 1975 to respond to family violence*, Public Consultation Paper (December 2016) 6.