

Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth): Exposure Draft

Response to the December 2016
Public Consultation Paper Children's
Court of Victoria

17 February 2017



Introduction

The Children's Court of Victoria (**the Children's Court**) welcomes the opportunity afforded by the Commonwealth Government to respond to the proposals outlined in its Public Consultation Paper dated December 2016 and the accompanying exposure draft provisions of the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* (Cth) (**the exposure Bill**).

The Children's Court notes that the exposure Bill seeks to incorporate the Commonwealth's response to the issues and recommendations raised as part of the Family Law Council's Inquiry into *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* and is also informed by the report and recommendation of Victoria's Royal Commission into Family Violence (**RCFV**).

Subject to the caveats and resource implications outlined in this response, the Children's Court supports legislative amendment to clarify its status as a court of summary jurisdiction for the purposes of Part VII of the *Family Law Act 1975* (Cth) (**the FLA**) and for the Children's Court to be able to make parenting orders, either by consent or on an interim basis, where to do so would bring about the effective and appropriate conclusion of matters that were first instituted in the Children's Court as child protection proceedings under the *Children, Youth and Families Act 2005* (Vic) (**CYFA**).

The Children's Court of Victoria

The Children's Court is a specialist jurisdiction constituted under the CYFA. The Children's Court has exclusive jurisdiction to hear and determine child protection matters, and criminal charges against child accused. It has been established to provide specialised and constructive responses for children in Victoria and has operated on a public law model since its inception.

The office of the President of the Children's Court is constituted by a Judge of the County Court. The other judicial officers of the Children's Court are magistrates of the Magistrates' Court of Victoria (**MCV**). When assigning magistrates to the Children's Court, the President has regard to the experience of the magistrate in matters relating to child welfare: s507 of the CYFA.

Jurisdiction and Divisions of the Children's Court

The two main divisions of the Children's Court are its Family Division and Criminal Division. Under s504(3) of the CYFA, the Children's Court is comprised of:

- The **Family Division**, which determines applications relating to the care and protection of children (from birth to 17 years of age) who are at risk of harm. The Family Division deals with emergency care applications, and applications for the care and protection of children and young persons across the State. The Family Division also has jurisdiction to hear and determine intervention order applications under the *Family Violence Prevention Act 2008* and the *Personal Safety Intervention Orders Act 2010*. The Family Division sits at the Melbourne, Moorabbin and Broadmeadows venues of the Children's Court. In regional Victoria, the Family Division sits at MCV venues.
- The **Criminal Division** of the CCV has exclusive jurisdiction to hear all summary and indictable offences charged against a child (aged 10 or more, and under the age of 18 years at the time of the alleged offending), except for six death-related offences. The Criminal Division sits at the Melbourne Children's Court, and at metropolitan and regional MCV court venues.
- The **Children's Koori Court (Criminal Division)** was established in 2005 in response to the overrepresentation of young Koori people in the juvenile justice system. The Children's Koori Court may deal with a proceeding for an offence if the child is Aboriginal and facing an offence that falls within the jurisdiction of the Criminal Division (other than sexual

offences), in certain circumstances (where the child pleads guilty or is found guilty, and consents to participating in the Koori Court). The Koori Court aims to provide improved opportunities for engagement between indigenous young people and their families. The Children’s Koori Court has expanded from Melbourne to eight other court venues.

- The **Neighbourhood Justice Division** has jurisdiction to hear certain types of criminal proceedings and intervention order proceedings if the child lives in the City of Yarra, or if the child is a homeless or Aboriginal person with a relevant connection to that municipal district. In practice, this Division comprises of certain parts of the CCV jurisdiction as exercised in the Neighbourhood Justice Centre in Collingwood.

The Children’s Court has concurrent jurisdiction with the MCV to hear and determine applications under the *Family Violence Protection Act 2008 (Vic)* and *Personal Safety Intervention Orders Act 2010 (Vic)*, where an affected family member or affected person, protected person or the respondent is a child. Children affected by family violence in various ways appear before the Children’s Court as victims, witnesses or as alleged perpetrators of family violence. Children may also appear in the Criminal Division as accused charged with family violence-related offences. Most significantly however, family violence is a predominant feature of many of the child protection applications dealt with in the Family Division of the Court.

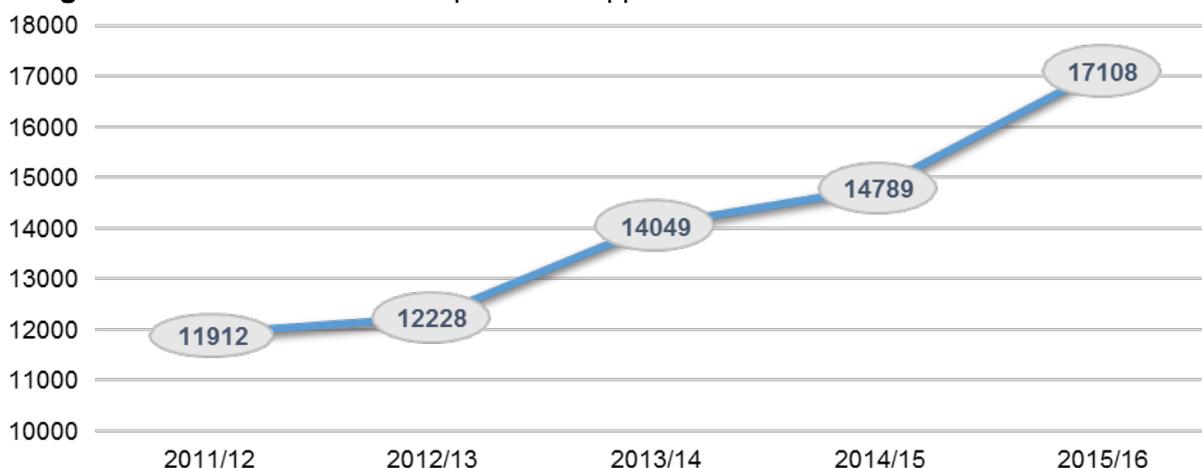
The Children’s Court deals with children and families presenting with often multiple and complex problems such as poverty, social isolation, mental health issues, disability, alcohol and substance abuse, and disengagement or a lack of access to education. The Children’s Court’s processes are focused on meeting the needs of vulnerable children and families. Given the complex and sensitive nature of the proceedings in this Court, an intensive and specialised response is required.

Moreover, to facilitate access to justice for vulnerable children, young people and their families, the legislation directs that proceedings in the Children’s Court be conducted in an informal manner, without regard to legal forms and the Court may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary: s215 of the CYFA. Accordingly, the Children’s Court and those who practice in its specialist jurisdiction operate in an environment focused on non-adversarial processes and non-legalistic procedures consistent with the legislative intention. This may be contrasted with the conduct of legal proceedings under the FLA.

Increasing initiations and demands on the Family Division

Over the past decade, the Children’s Court has been shaped by exponentially increasing demand in respect of child protection applications heard in its Family Division. In the past five years, there has been an increase of approximately 44% in the total numbers of child protection applications (primary and secondary) initiated under the CYFA.

Diagram 1: Total number of child protection applications initiated in the CCV since 2011/13



Since 2006, there have been significant increases in the workload of the Children's Court on an annual basis. In 2015/16, a total of 17,108 child protection applications issued in the CCV increased by 16% on the number of initiations in 2014/15. This has placed considerable strain on the existing judicial and non-judicial resources of the Children's Court. It has been estimated that about 85% of the Court's resources are dedicated to Family Division cases.

In order to improve the management of this demand, the Children's Court has introduced a number of initiatives, including intensive case management of every Family Division matter through a 'docket' system whereby the one judicial officer is allocated to each child protection case from initiation to finalization, where it is appropriate to do so.

Extending the jurisdiction of the Children's Court to determine matters under the FLA in the current environment has the potential to impact on the timely resolution of child protection matters without additional resources, both judicial and administrative. The existing infrastructure of the Court is also under existing strain, with insufficient court rooms, conference areas and safe waiting areas impacting on the effective operation of the Family Division of the Court at critical times.

Proposed legislative changes impacting on the Criminal Division

The Children's Court, in addition to the significant increase in its Family Division workload, is currently experiencing increasing demands in its Criminal Division. The recent focus on juvenile offending in Victoria has resulted in multiple Victorian Government policy proposals to introduce legislative amendments that will significantly impact on the CCV's Criminal Division. In December 2016, the Victorian Government proposed the establishment of:

- a new Youth Control Order (**YCO**), giving the Children's Court the power to issue an intensive and targeted type of sentencing order for young offenders; and
- an Intensive Monitoring and Control Bail Supervision Scheme, which will require children and young people to regularly report to the Department of Health and Human Services and Victoria Police, and undertake education, employment or training requirements.

As the Court understands it, the new YCOs and intensive bail supervision scheme will involve intensive judicial monitoring and supervision of children and youth on such orders. These initiatives will similarly impact on the judicial and other resources of the Children's Court, and highlights the very real limitations in the Court's existing infrastructure.

In order to perform the legislative function that the Victorian Government is proposing for the Criminal Division, the Children's Court requires additional courtrooms, judicial officers and chambers, court and registry staff, funding and resources to implement changes in its processes. These additional resources are necessary to manage the anticipated future expansion in its workload and increased demand on its resources.

It is in context of this increasing jurisdiction and demands on the Children's Court resources that the Court provides its comments on the Commonwealth's proposed amendments to the FLA.

Proposed amendments to the Family Law Act 1975 (Cth) to respond to family violence – Commonwealth exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (draft Bill)

The exposure Bill proposes to give clarity to the ability of the Children's Court to exercise jurisdiction under Part VII of the FLA 'in the same circumstances currently applicable to state and territory courts of summary jurisdiction'.

While the Children's Court supports giving clarity to its status as a court of summary jurisdiction for the purposes of the Part VII of the FLA, it does not support an expansion of its jurisdiction beyond the circumstances envisaged by Family Law Council.

In its earlier submission to the Family Law Council dated May 2015 (a copy of which is **attached**) the Children's Court outlined its broad support for clarification of the Court as a court of summary jurisdiction for the purposes of the FLA with a measured and considered assessment of the intersection between the child protection jurisdiction and the family law jurisdiction to improve outcomes for complex families and vulnerable children. The Children's Court emphasised that, given the specialist nature of the CCV jurisdiction with a focus on child protection matters, the vesting of any family law jurisdiction needed to be carefully considered and resourced.

Parenting orders

Consistent with the observations of the Family Law Council in its interim report, the Children's Court considers any extension of jurisdiction most appropriately relate to parenting orders. As the FLC interim report stated:

"...there are a number of potential benefits of enabling state and territory children's courts to exercise jurisdiction under the *Family Law Act* to make parenting orders in certain circumstances. In particular, there are significant potential benefits for children where the matter is already before the children's court and a parent or kinship carer needs orders for (sole) parental responsibility to support their care of the children. Enabling children's court judicial officers to exercise *Family Law Act* powers in this situation would mean that the parent or carer could obtain parenting orders in the court with which they are familiar."

The CCV supports this observation. In particular, that the Children's Court have the ability to make parenting orders:

- where a matter originated in the Court's Family Division;
- the parties consent to the orders (not merely the jurisdiction of the Court to make orders); or
- an interim order is necessary to promote the best interests of the child; and
- in doing so, the Court is able to determine matters involving families with which it is already familiar.

This support is subject to the provision of the appropriate resourcing and training to implement the proposed increase to the Court's jurisdiction. At present, the workload of the Court would preclude an ability to hear contested interim parenting matters. The complexity of the decision-making criteria governing parenting orders under the FLA is also a barrier to incorporating this work given the Court's existing workload and resources.

In its submission to the Family Law Council dated April 2015, Victoria Legal Aid (**VLA**) analysed data in relation to VLA clients who had received family, youth and children (**FYC**) legal aid services between 2009/10 and 2013/14. This data is informative in considering the impact of any legislative amendments in this area.

During this five year period, VLA assisted 99,294 clients with parenting, family violence and child protection issues. Of these clients, the majority (approximately 87%) received help for only one type of FYC problem (eg, either for a parenting dispute, family violence or child protection issue).

A smaller proportion (11,969 clients or approximately 12%) of clients received help for at least two types of FYC matters. 915 clients (less than 1%) saw VLA for all three types of problems (being clients with complex needs). In examining this client base with complex needs, VLA considered whether the family violence or child protection issues occurred at the same time as parenting dispute matters. VLA reported that:

- the most common 'cluster' was for the combination of a parenting dispute and a family violence matter (with clients receiving help for both matters within a two year period);

Children's Court of Victoria

- about 30% of clients who received assistance with a parenting dispute in 2012/13 also received assistance with a child protection or family violence issue (either one year before or after receiving assistance for the parenting matter);
- about 20% of adult clients who received assistance with a child protection matter in 2012/13 also experienced a parenting dispute or family violence issue (either one year before or after the child protection matter).

It is this latter category that an expanded jurisdiction for the Children's Court is desirable, particularly where by making a consent parenting order, or an interim order, the Children's Court is able to efficiently and effectively determine issues in the best interests of a child. However, these figures reflect the resource implications already raised in this submission.

Contested family law proceedings

Section 69J of the FLA vests state and territory courts with federal jurisdiction to make orders under Part VII of the FLA, and s69N limits this power to (a) circumstances where the parties consent to the orders being sought; or (b) where the parties consent to the court of summary jurisdiction hearing and determining the matter. The Children's Court does not support any proposal to extend its jurisdiction to the hearing and determination of contested FLA proceedings.

Child maintenance orders

The Children's Court considers there are good reasons to distinguish between parenting orders and any child maintenance jurisdiction being exercised under the FLA.

First, child support issues are usually dealt with under the statutory scheme provided by the *Child Support (Assessment) Act 1989* (Cth) and *Child Support (Registration and Collection) Act 1988* (Cth), and outside of the FLA.

Second, and importantly, the focus of the work of the CCV under the CYFA is for the protection of at risk children. The child's safety is the paramount consideration in matters before the CCV. There is a clear nexus between the issues that regularly arise with a family in a child protection matter and the issues that require determination in parenting cases governed by Part VII of the FLA. It is therefore relevant and appropriate that the Children's Court, where seized of all information in relation to a family and child/ren, be able to finalise orders by consent (or on an interim basis) about who a child will live with, how much time the child should spend with other people, and how often and in what ways a child and parent should communicate with each other in the child's best interests. This is commonly done in the context of the child protection proceedings.

In contrast, child maintenance and other financial matters never arise as issues to be determined in child protection proceedings. To extend the jurisdiction of the Children's Court to such matters would necessitate the Children's Court embarking on a separate and discrete area of enquiry and determination under complex provisions pertaining to the family law jurisdiction. There is a fundamental distinction to be drawn between the public law work of the Children's Court in its Family Division and the private law nature of child maintenance proceedings under the FLA. Accordingly, the Children's Court does not support extending its jurisdiction to do so.

The importance of information sharing and multi-jurisdictional education

The Children's Court is also concerned that the proposed amendments to the FLA not be implemented without other critical elements being clarified by the Commonwealth; namely:

- appropriate and effective information sharing mechanisms between courts (both as between the various State courts and between State courts and the Family Court/Federal Circuit Court), police agencies, child protection and other relevant agencies;

Children's Court of Victoria

- proper analysis of the impact on State courts of the proposed amendments and adequate funding to meet the forecast demand;
- funding for the provision of training/education to enable multi-jurisdictional advice, support and advocacy to be provided by legal practitioners and child protection practitioners;
- funding for critical judicial education.

Power of court making a family violence order to revive, vary, discharge or suspend an existing order, injunction or arrangement under this Act

In the making of a parenting order under the FLA, the Children's Court supports having the power to revive, vary, discharge or suspend a state intervention order where it is in the child's best interests.

The exercise of this power however, requires the establishment of appropriate information sharing mechanisms between the relevant courts and agencies.

Location and recovery orders

The Children's Court supports having the power to make a location or recovery order for the subject child/ren where it is in the child's best interests in the circumstances where it is exercising powers under the FLA.

Short form judgments

The exposure Bill does not convey precisely what is intended by 'short form judgements' when making interim parenting orders. Presently, s94(2A) of the FLA enables the Full Court, in dismissing an appeal, to give reasons for its decision in 'short form', and s94AAA(7) applies when the Family Court is dismissing an appeal from another court. If what is proposed is the ability for judicial officers in the Children's Court to give brief, *ex tempore* reasons for decisions under the FLA, that proposal would be supported by the Children's Court. The need to produce written reasons for decision, even in 'short form' would further impact on the workload of the Court.

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

Dispensing with explanations regarding orders or injunctions to children

The Children's Court supports the conferral of discretion to dispense with the requirements to explain orders to children in circumstances where that is determined to be in the best interests of the child. However, this support is subject to the child being represented in the proceedings on a best interests model.

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

The Children's Court supports the proposed removal of the 21 day time limit on variations, discharge or suspension of FLA orders.