



Law Council
OF AUSTRALIA

Family Law Amendment (Family Violence and Other Measures) Bill 2017: Exposure draft provisions – Public Consultation Paper

Attorney-General's Department

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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.

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- Law Institute of Victoria
- Law Society of New South Wales
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- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

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 2400 it is committed to furthering the interests and objectives of family law for the benefit of the community.

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 (Items 1-5)

1. These proposed amendments respond to the Family Law Council's recommendation that s69J and s69N of the *Family Law Act 1975 (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 (Part 2 at pages 104 and 145).
2. The Family Law Section (FLS) cautions the Government, when considering the drafting of the regulations, to take account of the decision of the High Court in *Harris & Caladine (1991)172 CLR 84* regarding the limits on delegation of powers.
3. 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 (Part 2 page146). The Public Consultation Paper appears to make no mention of this.
4. 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 on the ground; may alienate stakeholders who could see it as cost-shifting by the Commonwealth; or 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.
5. On page 4 of the Consultation Paper the following statement is made: *Many state and territory courts already exercise family law jurisdiction on a regular basis*. That is not, respectfully, the experience of family lawyers. In fact, the experience of most family lawyers is that judicial officers in state and territory courts do not regularly exercise their *Family Law Act* jurisdiction. State and 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 the 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 or may be reluctant to exercise their powers as a result.

6. FLS is concerned about the training of state and territory judicial officers in family law. Whilst FLS is supportive of the initiative of commonwealth training, FLS strongly believes that 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 (Items 8-9)

7. 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 (Items 6-7)

8. Whilst 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 *Act*. FLS refers to the article by Judge Riethmuller of the Federal Circuit Court '*Deciding Parenting cases under Part VII: 42 easy steps*'.¹
9. FLS is concerned that the Family Law Council's report on this issue (as quoted in the Public Consultation Paper at page 10) 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*. 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 on balance 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 (Items 10-11)

10. 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. FLS proposes that a limit of \$100,000 be set by the *Act*, rather

¹ Australian Family Lawyer, July 2015
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than Regulations, to enable proper 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. FLS notes that funding is proposed for one module on family law, however we would advocate for a more 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 (Items 12-13)

11. The proposed new s45A will replace s118 which enables the court to dismiss proceedings which are frivolous or vexatious, and make such order as to costs as the court considers just.
12. 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 and 13.07 of the *Federal Circuit Court Rules* 2001.
13. FLS cannot discern how this section adds to, detracts from, or changes the powers currently vested in the court.
14. If section 118 is to be repealed then it would also make sense to omit reference to it in section 117(1).

Criminalisation of breaches of injunctions (Items 15-16 and 22-23)

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:

- (a) In some cases the victim has been able to secure their immediate safety and that of their child/ren (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) In some cases the family violence (or the need for an injunction) occurs after *Family Law Act* proceedings have commenced.
 - (c) In some cases, 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 police have referred the victim to make an application directly to the state/territory court themselves and the delays in the state and territory courts to hear their own application are too long and discourage a victim from taking that course of action.
17. FLS encourages reform in this area. To this end, injunctions for personal protection under the *Family Law Act* need to be as effective as state/territory family violence orders. Victims and named persons in need of protection must be able to rely upon state and territory police treating *Family Law Act* injunctions in the same manner 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. FLS notes that both the *Family Violence – A National Legal Response – Final Report* ('ALRC Report') and the *Royal Commission into Family Violence (Victoria)* ('RCFV') Reports 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 s68C and s114AA of the *Act*.
19. Subject to the issues raised below, 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. FLS is concerned about the proposed amendments in terms of the interaction of state/territory courts and police officers and Commonwealth laws, the effect of the amendments on court users, and their application by judicial officers, legal practitioners and state and territory police:
- (a) The criminalisation of a breach creates potential for victims to be prosecuted under the aiding and abetting (complicity and common purpose) provisions contained in Chapter 2, Division 11 s11(2) of the *Criminal Code Act, 1995 (Cth)*. The ALRC Report considered the aid and abet provisions of state and territory

family violence legislation and the charging of victims who were found to have consented to the breach.² After significant consultation, it was recommended in the ALRC Report that state and territory legislation should provide that a person protected by a protection order under family violence legislation should not be charged with or found guilty of an offence of aiding, abetting, counselling or procuring the breach of a protection order.

- (b) 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'*³ 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.
- (c) The location of the two types of personal protection injunctions in different Parts of the *Family Law Act* (s114 and s68B) 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 s68B / s114(1) / s114(2A) / s114(3) the respondent be restrained etc ...*").
- (d) How will the criminalising of *Family Law Act* personal protection injunction breaches 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 draft Bill makes no provision for this (cf: the *Customs and Excise Acts* which specially provides that Commonwealth offences are prosecuted in state courts using the practice and procedure of the state⁴).
- (e) 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?
- (f) Have the resource needs of such a change been considered? 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?

² 12.3-12.46 (pages 509-519)

³ 17.204 (page 805)

⁴ See also Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd [2003] 216 CLR 161
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21. 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 orders between states and territories. 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 a such a proposal is that state and territory courts are already equipped to handle criminal prosecutions, and that 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.
22. FLS would welcome the opportunity to discuss this further with the Attorney-General's department if such a proposal has attraction.

Dispensing with explanations regarding orders or injunctions to children (Items 14 and 17)

23. FLS recognises that s68P creates compliance issues where a child is too young to understand an explanation.
24. FLS recommends however the inclusion of the words "*or of insufficient maturity*" to the proposed subsections (2A) and (2C). Age is not necessarily the sole determinant of whether a child can understand an explanation of an order or injunction. Some older children may not have sufficient maturity or ability to grasp the concept of orders, injunctions and the reasons for them.
25. 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.
26. In relation to the proposed subsection (2C), FLS understands the relatively confined scope of the decision to be made by the court and the desirability of

limiting the consideration and articulation of the s60CC factors in the decision. However, FLS does not support the discretion to disregard entirely consideration of these provisions.

27. FLS recommends that ss(2C) be amended to:

“In determining whether it is satisfied as described in paragraph (2A)(b) or (2B)(b) of this section, the court may have regard to any of the matters set out in subsection 60CC(2) or (3).”

Removal of 21 day time limit on state or territory courts’ power to vary, discharge or suspend an order (Items 18-20)

28. 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.

29. If the 21 day time limit is removed entirely, 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.

30. 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.

31. 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 (s60 CC (3(d) of the *Family Law Act 1975*).

32. 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.
33. 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 (Item 15)

34. This item purports to repeal s114(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 subsection 114(1) (*In the Marriage Of: Brian Hayne Applicant/Husband and Sharon Leslie Hayne Applicant/Wife* [1994] FamCA 53).
35. The power to order the restitution of conjugal rights was abolished by the enactment of s8(2) of the *Family Law Act*. FLS contends that it is not the case that s114(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 the Law Reform Commission's Report, 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.*"
36. It is important to note that neither s114 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 (*Ibid.*, per Dawson J at 80). If there was any inference that s114 does that, then in the view of FLS, that inference is wrong.
37. Nevertheless the section is otiose, historical, not used in practice, and confusing. FLS agrees with the Government that it ought to be repealed.