

14 February 2017

Public Consultation: Family violence amendments
Family Law Branch
Attorney-General's
Department 3-5 National
Circuit
Barton ACT 2600

familylawunit@ag.gov.au

Dear Sir/Madam,

Proposed amendments to the Family Law Act 1975 to respond to family violence

National Legal Aid (NLA) represents the directors of the eight state and territory legal aid commissions (LACs) in Australia. The LACs are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Introduction

NLA welcomes the opportunity to comment on the Amendments to the *Family Law Act 1975* to respond to family violence, Public Consultation Paper, December 2016 ('the Public Consultation Paper').

NLA generally supports the proposed amendments contained in the Family Law Amendment (Family Violence and Other Measures) Bill 2017: Exposure draft provisions.

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

NLA supports legislative amendment that clarifies that state and territory courts are able to exercise family law jurisdiction.

NLA supports the Public Consultation Paper's indication that the policy intent behind the proposed changes is not that state and territory courts become the primary fora for resolving family disputes, but that where a matter is already before a state or territory court for related legal issues, the judicial officer will have the jurisdiction to make family law orders.

NLA is mindful that the existing demanding caseloads of state and territory courts would be likely to impact on the judicial officers' capacity to exercise family law jurisdiction powers on a regular basis.

The Public Consultation Paper advises that the Government has agreed to fund training of judicial officers about family law and family violence. NLA understands that this is consistent with recommendations arising out of each the Australian and New South Wales Law Reform Commissions' report *Family Violence – A National Legal Response (ALRC Report 114), Final Report*, October 2010 ('the ALRC report'), and Family Law Council's report *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report - June 2016* ('the Family Law Council report'). NLA expects that training would need to encompass the aspects of domestic and family violence, parenting orders, property settlements, and child support, with child support often a factor silently at play in negotiations about where children will live, and having both a direct and indirect relationship to property settlements. The importance of cultural competence is also noted.

If these amendments were likely to be promulgated NLA asks that the Commonwealth consult with NLA about the likely funding impacts of such changes for LACs.

NLA supports amendments to increase the monetary limit of family law property matters that can be determined by state and territory courts. However, NLA seeks to be further consulted when the regulations are being considered as to the proposed financial limit that would currently be the appropriate level for such determinations.

NLA is supportive of the proposed changes about parenting arrangement orders, subject to the above caveats. In particular, NLA sees the benefit of state and territory courts exercising child protection jurisdiction being able to exercise family law jurisdiction in circumstances where the welfare authority indicated they will withdraw child protection proceedings if appropriate family law orders that are in the best interests of the child are in place.

NLA refers to the recommendations of the ALRC report and the Family Law Council report for a national register/database of court orders about families accessible by all courts exercising family law, domestic violence and child protection jurisdictions. If these amendments are enacted NLA suggests that such a national register is even more critical. Careful consideration will need to be given to which organisations can access the register and if so, on what basis. The implementation of such a register would also need to be accompanied by a training program for judicial officers, lawyers and other organisations operating in the family law sector about the legal effects of orders, in particular family and domestic violence protection orders and child protection orders in the different state and territory jurisdictions.

NLA supports the suggestion in the Public Consultation Paper that short form judgments be provided wherever appropriate.

Strengthening the powers of courts to protect victims of family violence

Criminalising breaches of personal protection injunctions

NLA understands, from considering the draft legislation and the Public Consultation Paper, that the state and territory police services will receive and prosecute potential offences for breach of personal protection orders, as for other charges under Commonwealth legislation, and that these will be heard in the state and territory courts.

If there is a proposal that the federal family law courts should hear and determine charges under these proposed amendments NLA would seek to be further consulted about the proposed amendments.

Whilst NLA envisages that the majority of protection orders will continue to be made in the state and territory courts, NLA suggests that consideration be given to including in sections 68B and 114 of the *Family Law Act* provisions that mandate any personal protection injunctions made under those sections to be time limited, in the same way that domestic and family violence protection orders made under state and territory legislation are. In saying this NLA does not exclude the possibility that a personal protection injunction expressed to be for life may be appropriate in certain circumstances. This will ensure a measure of consistency between orders made under federal and state and territory legislation. Further, it will allow for parents to make alternative parenting arrangements in the future, once the time period of the personal protection injunction has elapsed, without the need to apply under the *Family Law Act* for the personal protection injunction to be varied.

There are concerns about the possibility of double jeopardy situations arising, in particular where one act or action may lead to potential charges for a criminal breach of a state or territory domestic and family violence protection order and a criminal breach of a family law personal protection injunction.

NLA notes that the criminalisation of personal protection orders will also potentially benefit victims of intended forced marriages, and suggests that the particular issue of forced marriages and any legislative response be the subject of further consideration by AGD.

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

NLA supports the proposal to amend the current 21 day time limit imposed by section 68T. We agree with the various reports which have recommended this issue be addressed as, in our practice experience, a 21 day period is not sufficient for a matter to be listed in the family law courts and an existing family law order considered and varied if required.

Currently, if after an interim order is made, the matter does not return to the relevant family law court within 21 days, there is confusion and uncertainty about parenting arrangements for children, and this can elevate and escalate safety concerns. The proposed amendment would ensure that family violence and family law orders about the one family remain consistent and endure or lapse together, while still providing judicial officers with the flexibility to determine

time frames, vary orders and relist matters to manage cases according to their particular circumstances.

Increasing the powers of the court to dismiss unmeritorious claims

NLA supports the proposal to clarify the power of courts to dismiss unmeritorious claims. This proposal falls under the heading 'Strengthening the powers of the courts to protect victims of family violence'; however, NLA suggests the proposed provisions would appropriately have application beyond matters where the risk issue is family violence between the parties.

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

NLA supports the proposal to amend section 68P to dispense with the requirement that the court must explain (or arrange to explain) the making of injunctions which are inconsistent with family violence orders to children protected by those orders.

The proposed amendment relates to the explanation of orders and injunctions in a very limited context. Other mechanisms within the family law jurisdiction which enhance the participation of children and young people continue to be utilised, for example, through a child conferring with an Independent Children's Lawyer appointed in their case or through a child expressing their views to a family consultant, chapter 15 expert or other expert retained in the case.

Other amendments

Repeal obligation to perform marital services

NLA supports the proposal to repeal s. 114(2) on the basis of the rationale set out in the Public Consultation Paper.

Conclusion

Please do not hesitate to contact us if you require any further information.

Yours sincerely,

A handwritten signature in black ink that reads "Suzan Cox". The signature is written in a cursive, flowing style.

Suzan Cox QC
Chair