

3 February 2016

Your ref: Family Violence
Amendments

Our ref (ND/Familylaw)

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

By post and by email: familylawunit@ag.gov.au

Dear Family Law Branch

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

Thank you for the opportunity to provide comments on the proposed amendments to the Family Law Act. The Queensland Law Society appreciates the opportunity to provide feedback on this important legislative reform.

The Queensland Law Society welcomes efforts to reduce family violence and supports legislative reform that increases the capacity for the law to appropriately respond to family violence.

Overall, the Society supports the proposed amendments on the basis that the family law courts remain the primary forum for the resolution of family law matters. The Society is of the view that most aspects of the Bill are reasonable and are likely to reduce the need for some litigants to engage both state and territory and federal courts systems to have their dispute resolved.

However, we do not support any measures which seek to transfer responsibility for the current unacceptable backlog in the Federal Circuit Court and Family Court of Australia to state courts. Any measures that seek to do so are inappropriate. State courts are notoriously overloaded, particularly in the area of domestic violence. Often the parties are under enormous financial, emotional and legal pressure to reach resolutions which may not be in their best interests in the long term.

Current delays in the Federal Circuit Court and Family Court of Australia should more appropriately be addressed with increased funding and additional judicial resources. Further comments in this regard are included below.

Amendments to the *Family Law Act 1975* to respond to family violence

We make the following comments on specific clauses in the Draft Exposure of the Bill.

1. Broadening of state and territory courts' family law jurisdiction

The Society acknowledges the difficulty litigants may experience in navigating multiple courts and jurisdictions, particularly in matters involving family violence. In these circumstances, there are clear benefits in allowing state and territory courts to make orders under the *Family Law Act 1975*. This will undoubtedly contribute to greater consistency and, in some circumstances, will better protect families from family violence.

However, the Society has several concerns:

- Family law is a highly specialised jurisdiction and the determination of family law disputes requires considerable expertise. State and territory courts may not hold the expertise necessary to properly hear and determine family law matters. It is common, for example, that family law orders made in state courts omit necessary enforcement clauses. We acknowledge and welcome the development of the National Domestic and Family Violence Bench Book as well as the allocation of funding for judicial officer training. The Society is concerned, however, that this funding does not appear to be ongoing nor are allocations between states/territories specified. There is also limited detail in relation to the nature and extent of the training proposed.
- The support services currently provided in the family law courts, including family consultants who prepare family reports and conduct child dispute conferences and family law registrars with necessary expertise to conduct conciliation conferences, are essential to the resolution of family law matters and reflect the special nature of family law disputes. These services are not currently available in state and territory courts. It is not clear whether litigants will have access to these services where family law disputes are heard in state and territory courts. Additional funding will be required if these services are to be provided in state and territory courts.
- The Society anticipates that the proposed amendments will increase the demand for legal assistance services and, in particular, assistance from community legal centres and Legal Aid duty lawyers. Access to legal assistance in the early stages of a dispute can prevent or reduce the escalation of legal problems and reduce cost to the justice system overall. However, these amendments are proposed in a context where the legal assistance sector is already considerably under-resourced and is facing significant cuts in Commonwealth funding. The Society strongly recommends the Federal Government make additional funding available to the legal assistance sector to respond to the anticipated increase for family law assistance.
- Finally, appropriate resourcing for state and territory courts and judicial officer training will be critical to achieving the policy objectives of the amendments. There is already significant demand for state and territory court services such that the capacity for these courts to hear family law matters in a timely and effective manner may be limited. We note that it may be difficult for state courts to assess and plan for the impact of the amendments at this stage, particularly given the monetary limit for property matters has not yet been determined. There is also an apparent lack of available data in relation to matters filed in the

Amendments to the *Family Law Act 1975* to respond to family violence

Federal Circuit Court and Family Court involving family violence to assess potential workload transfers.

2. Removal of the \$20,000 monetary limit

The Society supports amendments to allow state and territory courts to determine family law property matters where the property pool exceeds \$20,000. In our view, the limit should continue to include only relatively modest property pools, given these are likely to be less complex cases and may require fewer trial days. In respect of any regulations, care should be taken in identifying how the asset pool is ascertained, for example, whether superannuation is to be included.

We reiterate that the capacity for state and territory courts to hear and determine a greater volume of family law property matters will depend on the proper allocation of funding and resources.

3. Summary dismissal of unmeritorious claims

The Society supports legislative amendment that prevents the abuse of court systems, particularly in circumstances of family violence. However, the Society does not support the proposed amendment to allow for the summary dismissal of 'unmeritorious claims'. In our view, there is a significant risk that this could be used to perpetuate systems abuse rather than to prevent it.

Self-represented victims of family violence often lack the capacity to properly gather evidence and draft affidavit material. A victim of family violence is also likely to find the experience of court stressful and traumatic. These factors will impede a victim's capacity to properly present their case and may contribute to a victim's claim appearing unmeritorious. While many judicial officers are experienced at hearing matters involving family violence, the adversarial culture of the family law system means that these litigants are nonetheless significantly disadvantaged.

The Society believes that a considerably more effective and direct measure to address the abuse of court systems would be the prevention of direct cross-examination of victims of family violence by their abusers. We note that, the Family Law Council recently addressed this issue in the 2016 Final Report – *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*. The Society agrees with the Family Law Council's view that cross-examination of unrepresented vulnerable witnesses not only perpetuates the abuse but results in the Court receiving incomplete or poor quality evidence. It also raises significant procedural fairness issues.

4. Time limits on orders issued by state and territory courts

The Society strongly supports the amendment to remove the need for parties to revert to the family law courts within 21 days to continue an order variation. It is not reasonable to expect a litigant to obtain legal advice, prepare all necessary legal documents and file a matter in the family law courts within 21 days and, in practice, is rarely achieved. In cases where assistance from Legal Aid is required, it is not unusual for Legal Aid applications to take 28 to 42 days to process, which exceeds the 21-day limit. Inconsistency between family violence and family law orders poses a significant risk to victims of family violence and their children.

5. Criminalising breaches of personal protection injunctions

The Society supports the policy objectives behind the proposal to make breaches of personal protection injunctions made under the Family Law Act a criminal offence. Family violence is a

Amendments to the *Family Law Act 1975* to respond to family violence

matter of public concern and it is appropriate that victims of family violence be relieved from the responsibility of initiating enforcement proceedings.

Victims of family violence may already have a state or territory court domestic violence order in place. The act or actions which breach a personal protection injunction under the Family Law Act may also constitute a breach of a domestic violence order or a criminal offence, for example, under the *Criminal Code 1889* (Qld). Given breaches of personal protection injunctions are to be prosecuted in state courts, these courts will need to monitor whether any issues arise under section 16 of the Criminal Code or corresponding provisions in other jurisdictions. We note that the practical effect of section 114AB of the Family Law Act may be that personal protection injunctions continue to operate in limited circumstances.

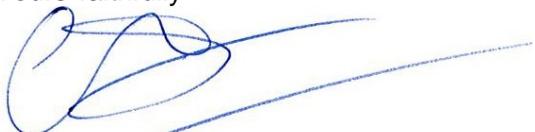
The effectiveness of the proposed amendment to strengthen family law personal protection injunctions will depend largely on implementation. The Society anticipates that access to legal advice and community legal education will be critical to support litigants in applying for a personal protection injunction, particularly given an affidavit is required in support of an application. As noted above, this will require the provision of additional funding for legal service providers.

Family Law injunctions will be most effective if coupled with sufficient training and resources for state and territory police to respond appropriately to reports of breaches. The Society recommends that the Federal Government allocate appropriate resourcing for police training in family law and family violence including in relation to the interoperability between relevant state and federal law.

At the moment, there is no clear statement from the Commonwealth about allocation of further resources. To support the proposed amendments, the Society would need to be advised of details of an ongoing financial commitment from the Commonwealth government to support the state and territory courts taking on additional family law matters.

The Queensland Law Society would be pleased to provide further comment or be consulted in the policy and legislative process. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Natalie De Campo on 07 3842 5889 or n.decampo@qls.com.au.

Yours faithfully



Christine Smyth
President