

# Victorian Government's Response to Consultation Paper on Amendments to the *Family Law Act 1975* (Cth)

February 2017



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# 1 Introduction

This submission responds to two documents: the exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill (Cth) (Exposure Draft) and the accompanying consultation paper, titled *Amendments to the Family Law Act 1975 to respond to family violence* (Consultation Paper). Both these documents are attached to this response (**Attachment 1**).

The Victorian Government welcomes the focus on improving the family law system and the experiences of family violence victims. The Victorian Government also welcomes the opportunity to provide comments on the proposed amendments to ensure their effective implementation.

The Victorian Government supports the purpose of the reforms, including to maximise victim safety, and to reduce further trauma for victims by allowing them to resolve as many legal matters as possible in a timely and cost effective manner, at the one court.

We note that these proposed amendments are being implemented during a time of unprecedented reform by the Victorian Government with significant investments and initiatives being implemented to reduce the incidence of family violence.

We also note that the Victorian Royal Commission into Family Violence (RCFV) emphasised that there are challenges for families who must navigate through the Commonwealth, state and territory family violence, child protection and family law systems. To reduce this burden on victims and their families, the RCFV recognised Australian governments must work in unison. The proposed amendments provide a basis for cooperation between federal, state and territory governments to align reform efforts with the objective to improve the experience of family violence victims in the family law system.

This submission represents the views of the Victorian Government, including Victoria Police. The Victorian courts and Victoria Legal Aid (VLA) are making separate submissions. The Victorian Government's response is informed by the findings of the:

- Victorian Royal Commission into Family Violence (RCFV);
- Coronial Inquest into the death of Luke Batty (Luke Batty Inquest);
- Family Law Council's *Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report* (FLC Interim Report); and
- Family Law Council's *Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report* (FLC Final Report).

This submission first outlines the resourcing and information sharing requirements to support the practical implementation of the proposed reforms, and the appropriate commencement of any legislative amendments contemplated, before commenting on the three primary objectives of the proposed reforms, being:

- state and territory courts resolving family law matters where appropriate;
- assisting state and territory courts to exercise family law jurisdiction; and
- strengthening the powers of the courts to protect victims of family violence.

This response considers each objective in turn, outlining the likely effectiveness of the amendments as currently proposed, risks to implementation, and broader impacts on the family law system and family violence system in Victoria.

There are four main issues that are not mentioned in the Consultation Paper, but which are crucial to the successful operation of the proposed amendments. These include:

- ensuring that federal, state and territory courts are able, effectively and efficiently, to share information between themselves as well as third parties, such as with police and child protection agencies to ensure effective decision making and safety planning;
- quantifying and funding the increased service demands resulting from the proposed amendments on state and territory courts and surrounding systems, including Victoria Police and child protection;
- broadening the proposed additional family violence and family law training to include child protection practitioners, relevant community service organisations legal services and non-judicial court staff; and

- establishing protections against self-represented perpetrators cross-examining victims of family violence, as raised by the Victorian Premier at the 9 December 2016 Council of Australian Governments (COAG) meeting.

It is essential that these issues are resolved for the proposed amendments to function as intended in the Victorian justice and child protection systems.

## 2 Summary of Victorian Government positions on *Family Law Amendment (Family Violence and Other Measures) Bill 2017*

Exposure Draft Item	Reform proposal	Victorian Government position
1-5, 8-9	Clarifying the jurisdiction of state and territory children's courts to make orders under Part VII of the <i>Family Law Act 1975</i> (Cth)	Support
6-7	Provision for courts to make short form judgements when making an interim parenting order	Support
10-11	Removal of the current monetary limit for state and territory courts of summary jurisdiction to determine family law property matters, for that limit to be prescribed in regulations	Support
15-16, 22-23	Criminalisation of breaches of personal protection injunctions	Support
12-13, 21, 24	Summary dismissal of unmeritorious claims	Support
14, 17	Conferral of discretion on family law courts to dispense with the requirement to explain orders or injunctions to children	Support
18-20	Removal of 21 day time limit on a state and territory courts' power to vary, discharge or suspend an order a family law order in family violence proceedings	Support
25	Repeal of obligation to provide marital services	Support

## 3 Preliminary issues

### 3.1 Information sharing

The Exposure Draft contemplates new (and variations to existing) powers for federal, state and territory courts and police, and creates a new offence. The Consultation Paper assumes that the federal, state and territory courts can, and already do, readily and easily share information between themselves, as well as with police and other family violence services. However, the Family Law Council found numerous obstacles to inter-jurisdictional collaboration, including information sharing, which it considered should be 'addressed as a matter of priority'.<sup>1</sup>

The Consultation Paper does not deal with the need for adequate information sharing arrangements to be put in place for several of the proposed amendments to operate effectively. Specifically, the Paper does not consider how:

- state, territory and federal courts will communicate with one another about judgements and orders made on a specific family law matter; or
- third parties, such as police and child protection agencies, will obtain information about family law orders or relevant risk information about family law proceedings held in relevant state or territory courts and federal family law courts.

<sup>1</sup> Family Law Council (2015) *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report*, 104-7; Family Law Council (2016) *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report*, 107-9

The Family Law Council, the RCFV, the Royal Commission into Institutional Responses to Child Sexual Abuse, and the findings in the Luke Batty Inquest have all highlighted examples of the limitations of the current rudimentary information sharing arrangements.<sup>2</sup>

For example, a simple request such as Victoria Police asking the federal family law courts what personal protection injunction orders are currently in place against one or more individuals in a designated area cannot be met without laborious and time-consuming manual entry and compilation of information by court staff. This example demonstrates challenges that will not be resolved by the current legislative proposals. If the information collection and sharing challenges are not resolved, the proposals contemplated will be less effective in meeting the needs of people experiencing family violence than otherwise envisioned. Further, if not remedied, insufficient information sharing arrangements could result in increased family violence risk to victims through insufficient visibility of perpetrators and delayed interventions from support services.

Indeed, the RCFV found that:

Despite the importance of information sharing, agencies in the family violence system do not share information routinely or systematically. A number of barriers impede organisations from sharing information, among them the complex legislation that governs privacy and information sharing, current information sharing practices, and outdated information technology systems.<sup>3</sup>

The Family Law Council has also recently highlighted concerns that state and federal courts are sometimes unaware of previous relevant orders made in other jurisdictions.<sup>4</sup> This needs to be addressed in order for state courts to effectively exercise family law jurisdiction.

The Victorian Government will be introducing legislation early this year to establish a family violence information sharing regime.<sup>5</sup> This regime will allow Victorian prescribed organisations to share information to establish, assess and manage family violence risk and collate information through a Central Information Point. This legislative regime will also allow Victorian prescribed organisations to share relevant information with Commonwealth bodies, including the family courts. However the regime will not be able to allow Commonwealth agencies to share with Victorian agencies.

The Victorian Government recommends that the Commonwealth:

- remove any legislative barriers that prevent appropriate information sharing between family courts and Victorian bodies (including courts, police, child protection and family violence support services). Legislative barriers may include privacy legislation, as well as legislative secrecy and confidentiality provisions.
- consult further with states and territories to ascertain what information sharing arrangements are required, and how they will be achieved. New arrangements should include both the capacity for family law courts to see what family law decisions are being made in state and territory courts and vice versa, and the ability for police agencies to have real-time access to information about personal protection injunctions.
- create a single database accessible by federal, state and territory courts, as well as police and child protection in all Australian jurisdictions.

As agreed by COAG, the Victorian Government is participating in the development by the Australian Criminal Intelligence Commission (ACIC) of a comprehensive national information sharing system data platform for domestic violence orders, also known as the National Order Reference System (NORS). The NORS will facilitate the operation of the National Domestic Violence Order (NDVO) Scheme. The work undertaken to implement the NORS highlights the need for a single access point relating to all forms of court orders relevant to family law and the protection of children. This would allow for a greater capacity to understand family violence risk, enable informed and timely decision-making by courts and prevent inconsistent orders being made. Consequently, the scope of the NORS should be expanded to include family law and child protection orders, and any information sharing between courts, child protection and police should be integrated into a single database.

<sup>2</sup> Coroners Court of Victoria, (28 September 2015), *Finding into Death with Inquest: Luke Geoffrey Batty*, State of Victoria, Royal Commission into Family Violence: Volume I Report and recommendations, Parl Paper No 132 (2014-16), Chapter 7; Family Law Council (Commonwealth), (2016) *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report*.

<sup>3</sup> State of Victoria, *Royal Commission into Family Violence: Summary and recommendations*, Parl Paper No 132 (2014-16), 20.

<sup>4</sup> Family Law Council (2015) *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report*, 105.

<sup>5</sup> State of Victoria (2016) *Ending Family Violence: Victoria's Plan for Change*, 59-60

## 3.2 Resourcing

Many of the proposed amendments have funding implications for various parts of the Victorian system, including the Magistrates' Court of Victoria (Magistrates' Court), the Children's Court of Victoria (Children's Court), Victoria Police, the Department of Health and Human Services (DHHS), community service organisations, VLA and community legal centres.

For example, the proposed reforms to expand the family law property jurisdiction of the Magistrates' Court, and to clarify the jurisdiction of the Children's Court to make family law orders regarding children, would increase demand for these courts and associated child protection staff, including the Child Protection Litigation Office. Given the range of parties and services involved in matters in these courts, the changes would also create downstream pressures on already stretched publicly funded legal assistance services.<sup>6</sup> This includes the need for duty lawyer services and grants of legal assistance, child protection and community service organisations who support families in court or are otherwise required to participate in court proceedings.

Training of judicial officers, court staff and child protection practitioners (and other related services where required) would be required to address the additional responsibilities of their roles and to ensure training can be provided to all professionals impacted by the transition. This includes the development of training materials for child protection staff and information materials for families regarding the expanded jurisdiction of the Children's Court.

In a further example, criminalising breaches of personal protection injunctions would have resourcing implications for Victoria Police, through both increased demand for police services and the need for appropriate training about new offences.

Expanding the family law jurisdiction and increasing the powers of state and territory courts will increase the workload on Victorian Courts, child protection, community service providers and Victoria Police. The Consultation Paper does not consider the quantum or source of required funding to meet this increased demand, including commensurate resourcing for state and territory courts from the Commonwealth.

Recommendation 15(3) of the FLC Final Report states that the Commonwealth should increase 'funding to state and territory courts of summary jurisdiction to enable them to take on more family law work'. The Royal Commission also noted that 'the exercise of federal jurisdiction by magistrates will have significant resource implications'.<sup>7</sup>

In October 2016, after noting the recommendation 69 of the RCFV, the Law, Crime and Community Safety Council agreed that additional resourcing is required from the Australian, state and territory governments for legal services to provide legal assistance (including duty lawyer services) in family violence matters.

The proposed expansion of the family law jurisdiction of state and territory courts amounts to a partial transfer of the administration of Commonwealth legislation. In other words, the proposed amendments will shift demand pressures away from federal family courts to state and territory courts. To meet this demand, commensurate funding must flow from the Commonwealth to the state and territories courts.

## 3.3 Commencement of legislative amendments

Victorian entities, as well as their counterparts in other states and territories, will require sufficient time to prepare for the commencement of the proposed amendments, including to train staff and to update technological systems, and practices and procedures. Information for community service organisations will also need to be prepared to ensure they are well placed to support families to understand and negotiate new arrangements.

The Victorian Government does not support commencing the proposed new offences for breach of a personal protection injunction on the day after Royal Assent, as proposed in the Exposure Draft. As discussed in this submission, establishing adequate resourcing and appropriate information sharing arrangements are essential prerequisites for these reforms to be effective.

The Victorian justice system is undergoing an extensive program of reform in relation to family violence as a result of the RCFV. Consequently, further consultation regarding the commencement of these

<sup>6</sup> In 2014 the Productivity Commission estimated that nationally, the legal assistance sector is under-resourced by a minimum of \$200 million for civil justice issues alone: Productivity Commission (2014) *Access to Justice Arrangements: Inquiry Report*, 30, 738-739.

<sup>7</sup> State of Victoria, *Royal Commission into Family Violence: Volume IV Report and recommendations*, Parl Paper No 132 (2014- 16), 211

proposed reforms is needed to ensure that they are aligned with Victoria's family violence reform agenda.

### 3.4 Cross-examination of a victim of family violence by the perpetrator

The RCFV noted the trauma that victims of family violence can experience as a result of being cross-examined by the perpetrator during family law hearings. Such questioning can have a devastating impact on victims and might also lead to some people choosing to settle their family law matters on less than satisfactory terms to avoid being cross-examined by a perpetrator.

The Victorian Government supports the objective of removing all possible avenues of re-traumatisation of victims in the court system, whether that be at a state and territory or federal level. Consistent with this objective, it is essential that victims of family violence are treated as protected witnesses during court hearings, similar to the status currently established in section 70 of the FVP Act and Division 3 of Part 8.2 of the *Criminal Procedure Act 2009* (Vic). Under those provisions, the court may order Victoria Legal Aid to offer unrepresented perpetrators legal representation for the purpose of cross-examining a protected witness.

The lack of a provision in the Family Law Act generally prohibiting cross-examination of victims of family violence by perpetrators is a significant gap in the family law system. This was identified as one of the five priorities for reform by participants in the family violence and the court system round table at the 2016 COAG National Summit on Reducing Violence against Women and their Children. The Victorian Government supports action by the Commonwealth to close this gap so that victims of family violence are better protected in family law hearings, and would urge the Commonwealth to do so as a matter of priority.

## 4 State and territory courts resolving family law matters

The Victorian Government welcomes the benefits for family violence victims of the proposal to expand the family law jurisdiction of state and territory. Such reforms would reduce the need for victims of family violence to attend more than one court jurisdiction to resolve their family law and family violence matters. They would also go some way to achieving the objective of resolving the cluster of legal issues a victim or a perpetrator presents with in as few court hearings as practicable, and as quickly as possible.

The Victorian Government also endorses the Commonwealth position, as articulated in the Consultation Paper, that '[s]tate and territory courts are not intended to become the primary fora for resolving family law disputes', and the recognition that the proposed amendments necessarily will not 'remove the need for parties to shift between systems in all cases, particularly in complex matters'.

The Victorian Government acknowledges that the Commonwealth's support for training of judicial officers, and proposed legislative amendments, such as short form judgements in relation to interim parenting orders and allowing greater flexibility for judges in explaining orders and injunctions to children, will contribute to supporting state and territory courts to exercise family law jurisdiction. However, the suite of proposed amendments will not be effective unless relevant state and territory courts are comprehensively resourced to exercise both their existing and any new family law jurisdiction.

Following on from the recommendations of the RCFV, the Victorian Government is taking steps to better support the Magistrates' Court in the exercise of its existing family law jurisdiction. These steps include:

- the Victorian Attorney-General considering, when recommending appointments to the magistracy, potential appointees' knowledge, experience, skills and aptitude for hearing cases involving family violence, including their knowledge of relevant aspects of family law;
- the Victorian Government funding the continued development of comprehensive training covering family violence, family law and child protection for judicial officers and court staff; and
- the Magistrates' Court considering revising its family violence intervention order application and other relevant documentation to ensure that victims and perpetrators are informed about the family law jurisdiction of the court.

## 4.1 Prescribing children's courts as courts of summary jurisdiction

The best interests of children are clearly served by being able to have all issues dealt with by one court. The Victorian Government welcomes the opportunity the proposed amendments present to minimise instances of families enduring repeated engagements with the legal system which can be contrary to the child's safety and wellbeing.

The Victorian Government supports the proposals to clarify:

- the jurisdiction of state and territory children's courts by prescribing them in regulations as courts to be treated as courts of summary jurisdiction for the purposes of making orders under Part VII of the Family Law Act 1975 (Cth); and
- the appeal pathway from state and territory children's court family law decisions, to either the Supreme Court of the relevant state or territory, or the Family Court of Australia. This includes whether the proposed amendments will overturn Proclamation (27/05/1976) by the then Governor-General John Kerr,<sup>8</sup> stating that family law matters held in lower Victorian courts cannot be appealed to the Supreme Court of Victoria;
- confining the exercise of any family law jurisdiction of the Children's Court to those matters which are already before the Court by virtue of its jurisdiction under the Children, Youth and Families Act 2005 (Vic), in which an order under Part VII of the Family Law Act is required; and
- ensuring that, if the Children's Court is prescribed, its family law jurisdiction may be exercised by all judicial members of the court, including the President, who is a County Court judge rather than a magistrate.

The Victorian Government reiterates that, to be effective, these amendments must be supported by commensurate resourcing from the Commonwealth to state and territory governments, in recognition of the shift in demand – and the administration of Commonwealth legislation – from federal family law courts to state and territory courts.

## 4.2 Victorian courts resolving property disputes

The Victorian Government supports the proposal to remove the \$20,000 monetary limit for family law property disputes in state and territory courts of summary jurisdiction, and to prescribe the relevant limit by regulations.

However, state and territory courts might still have a monetary limit on the property matters they can determine under state or territory legislation.<sup>9</sup> Consequently, it might be difficult to reach national agreement on an appropriate uniform monetary limit for state and territory courts making family property law orders. The Victorian Government would welcome further consultation to allow different monetary limits to be prescribed for state and territory courts, if necessary. This approach would provide the flexibility to cater for any differences of view regarding the appropriate limit, as well as for any differences in legislative provisions regarding the civil jurisdiction of relevant state and territory courts.

## 4.3 Short form judgements

The Victorian Government supports the proposal to allow short-form judgements for interim parenting orders in line with recommendation 3 of the FLC Interim Report. Short form judgements would reduce the time taken to make interim parenting orders in the Magistrates' and Children's Courts, without compromising procedural fairness.

<sup>8</sup> Governor-General of the Commonwealth of Australia, *Family Law Act 1975 s 96(3) - Proclamation (27/05/1976)*, F2005B01723, 27 May 1976.

<sup>9</sup> For instance, the Magistrates' Court of Victoria can currently only determine property disputes involving \$200,000 or less in cash and assets. Accordingly, regardless of any limit prescribed in Commonwealth regulations, the Magistrates' Court of Victoria would currently only be able to determine family law property matters of \$200,000 or less.

## 5 Assisting state and territory courts to exercise family law jurisdiction

As noted above, state and territory courts require appropriate support – by way of both additional funding and new training – to exercise family law jurisdiction. That training should not be limited to judicial officers.

### 5.1 Training needs

The Victorian Government welcomes the Commonwealth's commitment to funding training for judicial officers on family violence and family law, building upon the *National Domestic and Family Violence Bench Book*, the development of which is also being funded by the Commonwealth. These are important additional measures to support some of the amendments proposed in the Consultation Paper.

The Judicial College of Victoria has published, and periodically updates, the *Family Violence Bench Book* a publication dedicated to discussion of family violence related issues. The College is one of the Victorian entities represented on the advisory committee that is being consulted on the development of the proposed *National Domestic and Family Violence Bench Book*. A Family Law Manual has also been developed by the Judicial College of Victoria in partnership with the Magistrates' Court, for use by magistrates.

The Judicial College of Victoria is a national leader in judicial education and professional development and has conducted multiple family violence programs for judicial officers. As noted above, the Victorian Government has committed to provide funding to continue the development of comprehensive training covering family violence, family law and child protection for judicial officers and court staff. Court staff play a critical role in assisting people who are experiencing family violence to navigate the systems and services, whether by the advice those staff provide, the manner in which they provide it, or the decisions that they make.

As outlined in previous feedback provided to the Commonwealth Attorney-General's Department regarding potential family law reforms, any training to implement the proposed amendments needs to extend beyond judicial officers to encompass court registry staff, child protection workers, community support services including, family violence specialists, family violence intake workers and legal assistance providers. This recognises that extending the jurisdiction of state and territory courts, and in particular the Children's Court of Victoria, will have significant impacts on the roles and responsibilities of professionals who support families to access these services. Building the capability of these respective workforces is critical to the successful implementation of the proposals.

For example, a training package for the Victorian child protection workforce will need to be developed and delivered to ensure child protection practitioners understand these changes to family law and the intersections between these changes to family law and child protection law.

It is vital that the Commonwealth training package on family violence and family law is developed in close consultation with states and territories. This would ensure that the training package meets the needs of individual states and territories and builds on, or complements, the training already in place or that might be proposed or under development in states and territories.

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

### 6.1 Dismissal of unmeritorious proceedings

The Victorian Government supports the proposal to strengthen the power of courts to dismiss unmeritorious claims, subject to the inclusion of a legislative safeguard, similar to section 154(4) of the *Family Violence Protection Act 2008* (Vic) (FVP Act). As discussed below, such a safeguard would prevent unintended consequences for victims of family violence.

The RCFV found that perpetrators can use the family law system to continue emotional, psychological and financial abuse. The Victorian Government notes the RCFV finding that measures to strengthen

the power of courts 'may go some way to help courts dismiss applications where it is clear that parties are using proceedings merely as a means to further perpetrate violence'.<sup>10</sup>

The Women's Legal Service Queensland and the Australian Women Against Violence Alliance have raised concerns that the proposed dismissal powers could be misused by perpetrators, and that unrepresented litigants might make mistakes which make their case (incorrectly) appear unmeritorious. The latter risk is heightened due to the limitations on publicly funded legal representation in family law matters, and the increasing number of self-represented litigants.<sup>11</sup>

The Victorian Government is concerned to ensure that the proposed amendments do not have unintended consequences for victims of family violence. To guard against this, judicial officers in all courts empowered to exercise the new dismissal powers require comprehensive training in the nature and dynamics of family violence. Such training would ensure greater awareness of the risks outlined above. The Victorian Government recommends that the Commonwealth consider such training when developing its training package for judicial officers on family violence and family law and developing the next part of the *National Domestic and Family Violence Bench Book*.

The Victorian Government also recommends that the Commonwealth consider possible legislative safeguards. Section 154(4) of the FVP Act serves as a useful model in relation to the power to dismiss a proceeding on the basis that it is vexatious, frivolous or an abuse of process. That section provides that the mere fact that an application is made and then withdrawn does not, by itself, amount to a vexatious or frivolous application or an application made in bad faith. This provision is intended to ensure, for example, that victims of family violence who change their mind about applying for an intervention order are not penalised by the court making a costs order against them.

Where a court dismisses a family law proceeding using the proposed new powers, information about that decision should be made available to other relevant courts, so that those courts are adequately informed, should any further similar applications be made in their registries.

## 6.2 Criminalising a breach of a personal protection injunction

The Victorian Government supports the criminalisation of breaching a personal protection injunction. However, the full support of the Victorian Government is subject to the establishment of appropriate information sharing arrangements for personal protection injunctions, and the resolution of several other issues.

As the Consultation Paper indicates, criminalising a breach of a personal protection injunction would effectively create a Commonwealth system of family violence intervention orders. As such, police agencies would need to be able to enforce these orders, including to take immediate action to arrest perpetrators, where appropriate. This would require real-time access to accurate, up-to-date information about these orders. Without such access, there is a potential risk to the safety of victims of family violence and their children, who would rightly expect police to act on any breaches. State and territory courts that make family violence intervention orders would also require access to personal protection injunctions to ensure that any state or territory-based orders are consistent with existing orders.

While the NORS, which the ACIC is due to deliver in December 2019, will not include family law orders, that system offers the most logical technology-based solution to give police agencies and relevant state and territory courts access to information about personal protection injunctions as well as to other family law orders. The Victorian Government suggests that the Commonwealth consider the possible expansion of the scope of the NORS to include personal protection injunctions so that they can be effectively enforced, minimising the risks to victims and their children.

The other issues to be resolved relate to the interaction between personal protection injunctions and intervention orders, application of the proposed new offences, retention of civil enforcement action, categorisation of the proposed new offences, protection for certain aiders and abettors, police powers regarding firearms and weapons, and the consequences of being subject to a personal protection injunction. These issues are discussed in turn in the following sections.

The Victorian Government assumes that state and territory police agencies would investigate and prosecute these offences, in appropriate cases, in state and territory courts. However, it is unclear from the Consultation Paper whether, procedurally, a person charged with breaching a personal protection

<sup>10</sup> State of Victoria, *Royal Commission into Family Violence: Volume IV Report and recommendations*, Parl Paper No 132 (2014- 16), 202.

<sup>11</sup> The Victorian Government's recent *Access to Justice Review* found strong observations from courts and the legal profession that the number of self-represented litigants in the court system, including as both applicants and respondents in family violence matters, was growing: Department of Justice and Regulation (2016) *Access to Justice Review: Report and Recommendations (Volume 2)*, 472-3.

injunction would be required to be brought before the Magistrates' Court or a federal family law court. The Victorian Government seeks clarification on this issue.

### 6.2.1 Interaction between personal protection injunctions and intervention orders

The Family Law Act provides that injunctions available under sections 68B and 114 are 'not intended to exclude or limit the operation' of prescribed state or territory family violence legislation that is capable of operating concurrently with those sections. However, where these orders cannot operate concurrently, principles of constitutional law require that an order made under the Family Law Act, as Commonwealth legislation, prevails over an order made under state or territory legislation, to the extent that the orders are inconsistent.

The Family Law Act also makes express provision regarding the relationship between an injunction in relation to a child (made under section 68B) that is inconsistent with an existing family violence intervention order, including a requirement that a copy of the injunction is given to the relevant state or territory court, police and child protection agency. In certain circumstances, the Family Law Act also allows state and territory courts to revive, vary, discharge or suspend an injunction in a proceeding for a family violence intervention order. There are no similar provisions regarding injunctions made under section 114.

Given the proposed new offences, as well as the impending commencement of the National Domestic Violence Order (NDVO) Scheme, it is particularly important to ensure that any personal protection injunctions and family violence intervention orders are generally consistent. It is also important to ensure that there is clarity for the parties as well as for courts, police agencies and other relevant agencies, as to which order prevails, should there be a personal protection injunction and an intervention order in place.

The above changes would require appropriate information sharing arrangements, clear communication with the parties, and potentially, further legislative amendments.

In relation to information sharing, the Victorian Government would welcome the opportunity to further discuss the merits and implications of allowing state and territory courts to revive, vary, discharge or suspend an injunction made under section 114 in a proceeding for a family violence intervention order. This might provide an additional mechanism to deal with any potential inconsistency between these injunctions and a proposed intervention order.

### 6.2.2 Application of the proposed new offences

The offence of contravention of a Victorian family violence intervention order only applies if the respondent has been served with a copy of the order. This requirement is generally consistent with how contravention offences operate in other states and territories, although some allow intervention orders to be drawn to the respondent's attention by other means, such as by a telephone call or by the respondent being in court when the order is made. The FVP Act also contains provisions to facilitate proof of service – a certificate which, in the absence of evidence to the contrary, is proof of service.

It is not clear when a personal protection injunction is in force for the purpose of the proposed new offences. For example:

- Are both parties generally before the court when an injunction is made?
- Is an injunction served personally on the person against whom it is made? If so, who is responsible for serving these orders and is there a mechanism to facilitate proof of service?
- If an injunction is not personally served, what knowledge must a person have of the injunction and its terms for the proposed new offences to apply?

In other words, the point and circumstances of when an injunction is in force must be explained to enable certain and effective enforcement by police.

The Victorian Government is working to implement alternative forms of service to make family violence and family law orders enforceable more quickly if traditional service methods are not successful, as per recommendations 56 and 57 of the RCFV.

### 6.2.3 Retention of civil enforcement action

The Consultation Paper notes that civil enforcement action for breach of a personal protection injunction would also remain available to the victim after the new offences are enacted. This gives rise to the risk that a person subject to such an injunction might be sanctioned twice for the same conduct.

The Victorian Government suggests that the Commonwealth include a provision in the Bill to ensure that if the breach of a personal protection is alleged, it can be enforced either civilly or criminally, but not both.

More generally, it is not clear why it would be necessary to retain the civil enforcement action for breaches of personal protection injunctions if such conduct were criminalised. It is the Victorian Government's view that repeated perpetration of family violence is serious and warrants the gravity of criminal rather than civil action.

#### **6.2.4 Categorisation of proposed new offences**

The way the proposed new offences are categorised would determine which court may hear the matter, the level of penalty that may be imposed and the duties and powers of police officers. The Victorian Government understands that the proposed new offences would be indictable offences that are triable summarily, with the consent of the prosecutor and the defendant.

These new offences would contrast with the general position in Victoria, where contravention of a family violence intervention order is a summary offence punishable by a term of imprisonment of up to two years, which allows these matters to be dealt with more quickly. Victoria also has two indictable offences for more serious contraventions punishable by a term of imprisonment of up to five years: persistent contravention of an order, and contravention of an order intending to cause harm or fear for safety. These indictable offences are triable summarily.

Further consultation is required between the Commonwealth and state and territory governments about whether there is sufficient justification for the proposed new offences to be categorised as indictable offences. This consultation should directly consider any impact that a change in categorisation might have on the powers available to police officers to enforce these offences (e.g. powers of arrest and powers to search and enter premises).

#### **6.2.5 Protection for aiders and abettors**

The Family Law Act provides that a person is taken to have contravened an order affecting children if they aided or abetted contravention by a person who is bound by it. Consistent with the views of the Australian and NSW Law Reform Commissions, the Victorian Government suggests including additional amendments in the Bill to protect victims of family violence who aid or abet breaches of personal protection injunctions.

Such protection would ensure that the person who is subject to the injunction is held responsible for complying with the order, rather than the protected person, who might have been pressured to allow the contravention. It would also prevent the protected person from being exposed to further traumatisation and reduce any disincentive for them to report contravention of a personal protection injunction.

In Victoria, section 125 of the FVP Act provides such protection for a person protected by a family violence intervention order.

#### **6.2.6 Consequences of being subject to a personal protection injunction**

Victoria's firearms and weapons laws establish a prohibited person scheme, which restricts access to firearms, weapons and associated licences for respondents to final family violence intervention orders. Other states and territories also restrict respondents' access to these items and licences.

States and territories would need to consider whether being subject to a personal protection injunction should have the same consequences for a person's access to firearms and weapons and associated licences as being subject to an intervention order.

There might also be other consequences that require further consideration at the state and territory level. For example, in certain circumstances Victorian residential tenancies legislation makes provision for persons protected by a family violence intervention order to change a lease.

### **6.3 Dispensing with explanations regarding orders or injunctions to children**

The Victorian Government supports this proposal.

## 6.4 Removal of 21 day time limit on state and territory courts' powers to vary, discharge or suspend a federal order

The Victorian Government supports the removal of the 21 day time limit on variations and suspensions of family law orders in interim domestic violence order proceedings for the reasons set out in the Consultation Paper. This support is subject to appropriate information sharing arrangements being implemented between state, territory and federal courts, as well as adequate resourcing of state and territory courts to service the increased demand that is likely to result from greater certainty for parties seeking family law orders in those courts.

## 7 Other amendments

### 7.1 Repeal of obligation to perform marital services

The Victorian Government supports the repeal of this provision.

### 7.2 Misuse of legal processes by perpetrators of family violence

#### 7.2.2 Misuse of subpoena processes to obtain sensitive therapeutic records

The Victorian Government notes the concern raised in the Family Law Council's final report in relation to the misuse of the subpoena process by perpetrators of violence to obtain sensitive therapeutic treatment records of victims in family law matters.<sup>12</sup> The Victorian Government shares the concerns raised in this report, due to the potential for re-traumatisation of victims who are involved in family law proceedings. The Victorian Government seeks to work with the Commonwealth on a solution to this issue.

## 8 Conclusion

The Victorian Government wishes to see the amendments contemplated in the Commonwealth's Consultation Paper and Exposure Draft pursued as soon as practicable, and seeks to collaborate closely with the Commonwealth. The proposals under consideration are complex and have numerous consequences for Victorian entities.

There will be implementation issues including resourcing impacts that need to be worked through in the roll out of changes. Victoria would welcome further collaboration and engagement between Commonwealth and Victorian officials on these implications.

Three critical issues that are not mentioned in the Consultation Paper are crucial to the successful implementation and operation of the proposed amendments. These are:

- quantifying and funding the increased service demands on state and territory courts and surrounding systems, including Victoria Police, that would result from the proposed amendments;
- ensuring that federal, state and territory courts are able to effectively and efficiently share information with each other as well as with third parties, such as police agencies; and
- broadening the target audience for the proposed additional family violence and family law training to include child protection practitioners, legal services and non-judicial court staff.

Resolving these issues, together with the other issues raised in this submission, is essential for the proposed amendments to function as intended in the Victorian justice and child protection systems. Effective implementation will require sufficient time for the Victorian Government to work with the Commonwealth on the planning and execution of the proposed reforms. In the absence of adequately resourced state and territory agencies, supported by appropriate information sharing infrastructure, there is a risk that justice and child protection systems would be overwhelmed by increased demand, which might further compromise the ability of these systems to respond promptly and effectively to the needs of victims of family violence.

<sup>12</sup> Family Law Council (2016) *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report*, 154-155