

# Family Law Amendment (Federal Family Violence Orders) Bill 2021

Submission to Senate Legal and Constitutional Affairs  
Legislation Committee

2 July 2021



## Introduction and summary

National Legal Aid (NLA), representing the directors of the eight Australian State and Territory legal aid commissions (LACs), thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to provide this submission about the Family Law Amendment (Federal Family Violence Orders) Bill 2021, (the Bill). The LACs are the main providers of family law, family violence and child protection legal assistance services across the country.

NLA supports the intent of the Bill being to strengthen protection for victims of family violence, and to reduce the need for interactions with multiple courts.

NLA has, however, some concerns in relation to the Bill and would seek that there be further consultation about it. Further consultation would support improved understanding of the potential impacts of the proposed legislation including in respective jurisdictions.

NLA's key concerns include:

- The complexity of the proposed amendments and existing legislation.
- That there are more people living in poverty than are eligible for a grant of Legal Aid for legal representation in Commonwealth family law proceedings.
- The potential for people to become confused about the most effective pathway to quick protection, noting limited funding to LACs means many people, including those experiencing multiple circumstances of disadvantage, may have to self-represent.
- The need for early triage of all applications at the family law courts, so that matters that need federal family violence orders can be responded to appropriately.
- The need for a system which allows for the making of urgent ex parte and interim orders with early return dates. Both protection and procedural fairness are essential.
- The readiness of triage systems and real time information sharing platforms.
- The likely costs and resourcing impacts, including to LACs.

## About National Legal Aid and legal aid commissions

LACs are independent, statutory bodies established under respective State or Territory legislation. They are funded by Commonwealth and respective State or Territory governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged. Around 2 million legal assistance services are provided to people each year. LACs are the largest providers in the country of family law, family violence and child protection legal services. LACs are also known as "Legal Aid".

LAC services include ongoing legal representation in court proceedings, duty lawyer, dispute resolution, legal advice and legal tasks, social support services, and information and warm/referrals to other organisations where appropriate. LACs provide a range of specialist programs such as the Commonwealth Government's Family Violence and Cross-examination

of Parties Scheme, Family Advocacy and Support Services based at the family law courts, Independent Children's Lawyers (ICLs), and Domestic Violence Units. LACs also deliver community legal education and training (activities and resources) to community service providers and to the community generally about family law, family violence and child protection.

Individual LACs may make their own submissions to this Inquiry about the particular impacts they apprehend in relation to their respective jurisdictions if the measures in the Bill were to be implemented.

### Complexity of legislation

- The *Family Law Act 1975* (Cth), (the Act) is considered complex.<sup>1</sup> The Bill seeks to amend the Act, and we consider it is also complex.
- Further consultation would enable people time to fully understand the Bill's constitutional law underpinnings, how the Commonwealth and State and Territory laws will interact in relation to family violence, child protection and the criminal law, and the impacts in respective jurisdictions. Further exposition about current arrangements and perceived issues would be likely to be helpful.
- There is considered to be a potential risk that people who are not legally represented may become confused about the best pathway to quick protection, to the detriment of their safety and/or that of their children.
- There is also considered to be a potential risk that the well-being of children may be adversely impacted if their meaningful relationships with other people are inappropriately affected by a combination of the making of orders based on untested allegations and the length of time it may take for family law applications to be heard.
- Legal Aid funding for family law court proceedings is limited. In 2014 the Australian Government Productivity Commission *Inquiry into Access to Justice Arrangements*,<sup>2</sup> found more people were living in poverty (14%) than were eligible for legal aid (8%).<sup>3</sup> The Productivity Commission recommended, inter alia, a funding increase to LACs of around \$57m per year (\$62.4 m with indexation) to relax the means tests for LACs. In 2021 the Joint Select Committee on Australia's Family Law System recommended that the "Australian Government increase funding to Legal Aid... to enable Legal Aid Commissions to relax their means tests so as to increase legal assistance to vulnerable families."<sup>4</sup>

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<sup>1</sup> Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System*, ALRC 135 (2019) Recommendation 55.

<sup>2</sup> Australian Government Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, 30.

<sup>3</sup> Ibid (Appendix H) 1021-2.

<sup>4</sup> Joint Select Committee on Australia's Family Law System, Parliament of Australia, *Improvements in family law proceedings*, Second interim report (March 2021) Recommendation 16.

- The LACs target funding to priority groups pursuant to the National Legal Assistance Partnership Agreement 2020-2025, however, there are many financially disadvantaged people who are not well placed to represent themselves, e.g. by reason of disability, poor health, poor literacy etc.

### Triage and ex parte and interim applications

- Parties may be encouraged by any change in the legislation to make an application for protective orders to a family law court rather than the state and territory court. It will therefore be important that the family law courts are able to immediately triage incoming applications to identify those which need urgent protective orders. The Lighthouse Project pilot operating at the family law court registries in Adelaide, Brisbane and Parramatta is noted in connection with triage of matters.
- Whilst the majority of people who might have federal family violence orders made against them could be expected to be the other party named in the proceedings, the Bill appears to have within contemplation that third parties (i.e. not parties to the proceedings) may have final orders made against them, without first having had notice of the proceedings.<sup>5</sup> It appears that these people would then need to bring their own application to the Court to revoke, suspend, or vary the final order.
- To provide for safety and to accord with procedural fairness, it is considered that the Bill should provide for the making of ex parte and/or interim orders where grounds for such orders are made out, the early return of such matters, and for a party against whom an order has been made to challenge the assertions against them. NLA does not consider it appropriate that final orders might be made against a person who has had no opportunity to contest the basis for the making of the orders. This is particularly so given the criminality that it is proposed be associated with breach, i.e. being sent to prison for a breach of an order that should not have been made in the first place presents as a real potential risk. The interaction of these proposed provisions with any provisions in jurisdictions with mandatory sentencing, such the Northern Territory, are of concern, noting that they may impact disproportionately on particular communities. E.g. there are concerns about the potential impacts on communities with low levels of literacy, limited English language skills, and/or understanding about family violence orders and consequences of breach, and/or the ability to interact with the family law courts.
- It is also a potential concern that a party not inappropriately cause the making of orders which prevent or reduce time spent with children by another party with whom the children would otherwise have spent more/time.
- Evidence about matters in dispute should ideally be dealt with in a timely way and be the subject of one hearing rather than more than one hearing. This would support fairness and reduce costs.

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<sup>5</sup> See 68AD(2)(c)

## Mechanisms to support the proposed legislation

Mechanisms required to support the proposed legislation include:

- As indicated above, triage of matters upon filing at the family law courts, and the ability for matters to be dealt with expeditiously by the family law courts.
- Real time access to “records, data bases, and registers” containing information about family violence orders. It is envisaged that there might be complications in connection with enforcement and breach if dates of births and deaths, and potentially also changes in parental responsibility, are not readily accessible.
- Funding to LACs to allow relaxation of means tests to increase the number of parties able to be legally represented.
- Immunity for ICLs given the potential for the ICL to be the applicant for the federal family violence order, that orders can be made in a person’s absence, the criminality attaching to any breach, the potential for imprisonment and mandatory sentencing regimes.
- An appropriately funded and targeted community legal education campaign to help inform people of any changes.
- All professional stakeholders trained in understanding of all relevant legislation and jurisdictional practices.

## Likely costs impacts

The Explanatory Memorandum states that “There are no direct financial implications from implementing these amendments.” NLA anticipates, however, that there will likely be significant financial implications for stakeholders.

Victims can currently seek the assistance of the State/Territory police to achieve the making of protective orders, at no cost to the victim. Where Police Family Violence Orders, or Court Family Violence Orders on applications by police, are not made, LACs and other legal assistance services are available to help support victims to make applications to the State/Territory courts at low or no cost to the victim.

Financial implications for LACs are expected to include:

- LACs, and individuals paying private lawyers, will potentially need to pay more for the work involved in federal family law proceedings, than they would for the work for State/Territory court proceedings. It is acknowledged that there might potentially be efficiencies achieved as a result of only one set of proceedings at a family law court rather than two, e.g. one for family violence orders at the State/Territory court and one for orders about who a child should live/spend time with, however whether safety will be sufficiently supported by one filing at a family law court will depend on the practical implementation of the legislation, e.g. the implementation of early triage etc.
- LACs administer the Family Violence and Cross-examination of Parties Scheme for the Commonwealth Government. Pursuant to s.102NC of the Act, the Ban on direct cross-examination which is implemented when the circumstances of s.102NA are established,

is currently being reviewed. If the Family Violence and Cross-examination provisions in the Act are to be maintained, then s.102NA of the Act may require amendment, as matters in which federal family violence orders have been made may be considered to be matters in which direct cross-examination should be prohibited. The number of matters likely to be within Scheme would also be likely to increase. Additional funding would be required to support representation of the parties in these matters.

- LACs operate successful legally assisted family dispute resolution (FDR) programs. The national settlement rate is in the order of 77% annually. These programs screen for family violence and where it exists determine whether a matter is inappropriate for FDR or whether power imbalance can be addressed by the legally assisted model and other measures, such as shuttle or remote conferencing. NLA would be concerned if federal family violence orders did not provide for the parties to participate in legally assisted FDR where this would be appropriate, as this could be expected to protract matters for the parties, and have adverse costs impacts for the LACs and the family law system more broadly.
- If there are increased numbers of applications and/or breaches of orders then there will be impacts on LACs including because LACs have responsibility for providing the necessary criminal law representation, whether for a plea of guilty or defended hearing.

## Conclusion

Thank you for the opportunity to provide a submission to this Inquiry.

Should you require any further information from us please be in touch with the NLA Secretariat on 03 6236 3813 or [nla@legalaid.tas.gov.au](mailto:nla@legalaid.tas.gov.au)

Yours sincerely,



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