



THE LAW SOCIETY  
OF NEW SOUTH WALES

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11 June 2021

Mr Michael Tidball  
Chief Executive Officer  
Law Council of Australia  
GPO Box 1989  
Canberra ACT 2601

By email: [nathan.macdonald@lawcouncil.asn.au](mailto:nathan.macdonald@lawcouncil.asn.au)

Dear Mr Tidball,

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

Thank you for the opportunity to comment on this Bill.

In principle, we support measures that simplify the remedies available to people who are experiencing or at risk of family violence. We have previously stated that the divide between the family law jurisdiction for matrimonial, parenting and property matters in the federal courts and the family violence and child protection jurisdictions in the state and territory courts results in unacceptable complexity, costs and delays for many families and these jurisdictions should be better integrated.<sup>1</sup> We support measures that ensure that issues of family violence that have arisen either within those proceedings or in separate criminal proceedings are considered as soon as possible.

We note that currently the *Family Law Act 1975* makes some provision for court intervention in matters involving family violence, for example sections 68B, 68C, 114 and 114AA, which enable the family courts to grant injunctions that provide protection to parties, children and carers who are at risk of family violence, breach of which may result in arrest and a short period of custody.

We have significant concerns about the practical operation of the proposed federal family violence orders, about their potential as instruments of abuse of the family law system, and about the significant ongoing resources required to ensure their efficacy, in circumstances where such resources may be better directed to programs providing direct support to victims of family violence, or in improving the efficiency of the family law system generally.

#### **Relationship between federal and state/territory orders**

As drafted, the Bill provides that where a federal family violence order relates to the same circumstances as an existing state or territory domestic violence order, the federal order will prevail to the extent of any inconsistency. We are concerned that in such cases, the effect of the federal order may be unclear to the parties, and may lead to breaches and/or an escalation

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<sup>1</sup> Law Society of NSW, Submission to Law Council of Australia: Inquiry into family, domestic and sexual violence, 10 July 2020.

of conflict. To the greatest extent possible, the relationship between, and consistency of, federal and state or territory orders should be clear and simple. It may be that, as a matter of practice, any federal family violence orders should “cover the field” of any matters that were previously contained in an existing state or territory order, including matters where there was no inconsistency, so that there is only one order that the parties need to observe.

Another concern is the potential for a federal family violence application to be made by a party to family law proceedings for the purpose of nullifying an existing state or territory domestic violence order made against them, in relation to the same circumstances. Care will be required to minimise the ability of parties to make federal family violence applications as instruments of abuse or in ways that place their opponents at greater risk.

### **Resourcing of the family courts**

We are concerned that the passage of the Bill may result in an influx of new applications for orders, which would place further strain on the already over-burdened family courts. In our experience, in a significant number of Part VII and Part XIV proceedings, a party or a child is experiencing, or is at risk of, family violence and we envisage a federal family violence application would often be made in preference to a state or territory domestic violence order. By their nature, such applications would be urgent and would need to be triaged to an urgent interim hearing. A new list dedicated to hearing these matters, if created, would require significant resourcing. Resources would also be required to hear contested final hearings for federal family violence orders, which could run for up to several days.

A further resourcing consideration would be the need to provide specialist training in dealing with federal family violence applications. While the family courts have expertise in working with parties experiencing family violence, and in hearing applications for injunctions under sections 68B and 114, further expertise in applying criminal penalties would need to be acquired.

### **Delay in property or parenting proceedings**

We would anticipate that in many cases the outcome of a federal family violence application would be a factor in determining any related parenting and/or property proceedings. However, consideration should be given to avoiding, where possible, unnecessary delay to the related parenting and/or property proceedings while a federal family violence application is being determined. Delays in matters involving a federal family violence application may have safety implications for parties, may impact the best interests of children, or may increase costs.

### **Information sharing**

The Bill requires the court, when hearing a federal family violence application, to inspect any federal, state or territory record, database or register containing information about a relevant domestic violence order. This may cause difficulties in urgent applications, given that currently, obtaining state or territory records relating to domestic violence orders for the purpose of family law proceedings can cause significant delay in those proceedings.

A further concern is that the requirement to obtain and inspect existing records relevant to a federal family violence application may encourage one party to make an application as a strategy to prolong the property or parenting proceedings where it suits that party, for example, if that party resides in the matrimonial home or has primary care of the children.

We have previously suggested that a national electronic database of family violence orders would help reduce delays associated with obtaining records.<sup>2</sup> In our view, the development of a national database would be essential to the workability of the Bill. We understand an inter-governmental project is underway to develop such a facility which we note would have considerable ongoing resourcing implications. This project must be completed and an

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<sup>2</sup> Ibid.

information sharing database operating effectively before the proposed orders could be implemented.

### **Enforcement**

We understand the inter-governmental consultation on the Bill's policy development has included state police representatives. Where the enforcement of federal family violence orders is to be carried out by state police, this will require thorough ongoing training of state police, particularly in relation to recognising and enforcing these orders. This includes ensuring police have a full understanding of the relationship between federal and state orders and of the effect of an order on any existing state orders.

### **Implementation**

Given the significant concerns raised above, and the risks of introducing potentially significant change into a system already under pressure, we query whether, if the Commonwealth Government is minded to progress with this reform, consideration might be given to trialing the proposal in a particular state or territory, or for a limited time, and evaluating the impact before legislating to make these changes on a permanent basis.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: [sue.hunt@lawsociety.com.au](mailto:sue.hunt@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'JW', followed by a horizontal line extending to the right.

Juliana Warner  
**President**