Women's Legal Services Australia

Women's Legal Services Australia
PO Box 3496, Alice Springs NT 0871 (08) 8952 4055
www.wlsa.org.au

Submission to the Family Law Amendment (Federal Family Violence Orders) Bill 2021

Prepared by
Women's Legal Services Australia
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Contact: Tania Clarke
tania@womenslegal.org.au

Table of Contents

About WLSA

Women's Legal Services Australia (WLSA) is a national network of specialist, women-led accredited community legal centres, specifically developed to improve women's lives through specialist legal representation, support, and advocacy.

WLSA's members provide high quality free legal services, including representation and law reform activities, to support women's safety, access to rights and entitlements, and gender equality.

WLSA members seek to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women. Some of our centres have operated for almost 40 years.

WLSA members have specialist expertise in safety and risk management, maintaining a holistic and trauma-informed legal practice, providing women additional multidisciplinary supports, including social workers, financial counsellors, and trauma counsellors, for long-term safety outcomes.

WLSA members approach the legal issues facing women and their experience of the legal system within a broader analysis of systemic gender inequality. They are committed to providing individual services whilst also working towards deeper legal and cultural change to redress power imbalances and address violence and gender inequality.

Executive Summary

A long term systemic approach to reform needs to be adopted to guarantee the safety and financial recovery of victim-survivors.

WLSA works to promote a whole of government approach to family violence that is safe, just, supportive, non-discriminatory and responsive to the needs of children, women and intersex, trans and gender diverse people in accessing justice. A holistic and integrated service system and justice system response can provide meaningful support for individual victim-survivors, to protect their safety and financial and emotional security. It can also contribute to broader social and cultural shifts to transform community attitudes about family and domestic violence.

In 2019, WLSA, with Rosie Batty AO, former Australian of the year, re-launched WLSA's Safety First in Family Law Plan[1]. The plan sets out the five steps that need to be followed to keep women and children safe in the family law system:

- Step 1 Strengthen family violence response in the family law system
- Step 2 Provide effective legal help for the most disadvantaged
- Step 3 Ensure family law professionals have real understanding of family violence
- Step 4 Increase access to safe dispute resolution models
- Step 5 Overcome the gaps between the family law, family violence and child protection systems

WLSA members have been working closely with the family law courts over the past few years to improve the safety of women and children in the the family law system in Australia. We welcome the family violence reform initiatives that are being introduced in the family law courts. These reforms are highlighted below and are a step in the right direction.

It is important, when considering the reforms outlined in the Family Law Amendment (Federal Family Violence Orders) Bill 2021 (**the Bill**), that they are a able to seamlessly line up with a whole of system approach, to prevent women and children falling through gaps.

WLSA acknowledges the good intention of the Bill, which is to "offer stronger protections in relation to family violence than current family law personal protection injunctions that can be made by the family law courts" as well as criminal enforcement.[2] We also note that the intention of the new scheme, outlined in the Bill, is not to replace or override existing state and territory family and domestic violence order and safety responses.

However, WLSA is concerned by possible unintended consequences of the proposed Bill and that the effective enforcement of federal family violence orders (**FFVO**) is dependent upon the passing of amendments to state and territory legislation. Unintended consequences may lead to unsafe outcomes for women and children.

[1] Safety First in Family Law | Women's Legal Services Australia (wlsa.org.au)

[2] Family Law Amendment (Federal Family Violence Orders) Bill 2021, Second Reading Speech, 24 March 2021

The safety of children and adult survivors must be the framework through which any reform in the family law system proceeds. With this safety framework in mind, we ask the following questions in reviewing the Bill:

- How will the FFVO scheme interact with the national information sharing scheme to avoid women and children falling through the gaps?
- What steps will be taken to ensure that victim-survivors of family violence are not misidentified as perpetrators or subjected to systems abuse?[3]
- How will costs and safety issues be addressed in the service of the FFVOs?
- Will the funding of the Family Violence and Cross-Examination Scheme be extended to include hearings in relation to FFVO applications?
- Has the resource allocation allowed for resourcing the family law courts to implement family violence training and to determine allegations of family violence?
- Noting that in some states/territories police apply for protection/intervention orders and police prosecutors litigate such matters, will filing fees be waived and parties receive legal representation in FFVO applications?

1. Legislative and policy reform centred on safety of children and adult survivors

In needing to have a strong legislative and policy framework centred on the safety of children and adult survivors, WLSA submits that it is not enough just to consider how to ensure children and adult survivors, who are predominantly women, can be protected through stronger protection orders in the family courts which can be criminally enforced.

The *Family Law Act* as it currently stands works to enable violent men to litigate. It does this through the presumption of equal shared parental responsibility and its links to equal time and substantial and significant time. Until the incentives for violent men to litigate are removed and the safety of children and adult survivors are at the centre of legislative and policy reform, children, adult survivors and society will be forced to carry unnecessary social and economic costs.

The presumption of equal shared parental responsibility is not meant to apply in cases of family violence and abuse because it is recognised that it would not be in the best interest of the children for an abuser to be involved in long-term decision-making about someone they have abused or exposed to family violence. However, the family law system has difficulty identifying and assessing the risk of family violence early.[4] It also struggles to judicially determine allegations of family violence early on in proceedings (see further submissions below). Many victims-survivors can be unrepresented in court because of limited legal aid and many matters are settled in family dispute resolution, often without legal assistance.

It is WLSA members' experience that women whose partners have exerted coercive controlling violence and abuse feel pressure to and do agree to consent orders for equal shared parental responsibility and then

[3] See Heather Nancarrow, Kate Thomas, Valerie Ringland, & Tanya Modini, *Accurately identifying the "person most in need of protection" in domestic and family violence law* (Research report, 23/2020) ANROWS, Sydney, 2020

[4] For example, in 2015 the AIFS found that almost 3 in 10 separated parents interviewed said they had "*never been asked*" about family violence or safety concerns when using dispute resolution, lawyers and courts to resolve parenting matters. Only three in five parents said that the family legal service they engaged with asked them about their experiences of family violence: Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J. et al. (2015). *Evaluation of the 2012 family violence amendments: Synthesis report* (Evaluation of the 2012 Family Violence Amendments). Melbourne: Australian Institute of Family Studies, p 33 (47) We acknowledge and welcome the recent development of the Lighthouse Project and specialist high risk list – the Evatt List, but note this is currently only being piloted in 3 locations: Parramatta, Brisbane and Adelaide.

continue to have to manage a continuing relationship characterised by coercive controlling behaviour over shared decision making.

Even in litigated outcomes where coercive controlling violence and abuse is present in a case, a sole parental responsibility order can be difficult to obtain.

Women who consent to an order for equal shared parental responsibility in the context of family violence and abuse often present to WLSA members with continuing parenting issues. In some cases they are responding to contravention orders, in other cases they are responding to ongoing issues relating to the exercise of shared parental responsibility, such as decisions about school enrolment; or travel overseas for school or sporting excursions or for short family holidays. Children have also been prevented from accessing specialist counselling due to the presumption of equal shared parental responsibility and a violent father refusing to consent to the child receiving counselling. Children continue to be distressed by impasses in decision making such as about disagreement in enrolment in high school. Where such issues require further litigation to resolve, and the consequent stress caused by delay and uncertainty in school enrolment, the presumption of equal shared parental responsibility has operated to impede a proper focus on the best interests of the child.

The Australian Government laments the economic burden on the family law system and has repeatedly expressed concern about the impact of costs and delays in the family court system on families and particularly children.

It is within the Government's power to address this by removing mechanisms that incentivise violent men to litigate such as the presumption of equal shared parental responsibility. This has been recommended by the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry ('**SPLA Inquiry**') [5]and the Australian Law Reform Commission.[6]

2. Systems abuse

One of the main concerns that WLSA members have is the lack of safeguards in the Bill to prevent perpetrators of family and domestic violence from applying for an order as a way of further abusing the victim. Based on our experiences:

- the risk of legal system abuse is greater where there is a power imbalance e.g. the perpetrator controls all of the finances or cultural issues that dictate gender norms.
- where the perpetrator is exercising coercive control, at the state/territory family violence system level, the perpetrator is highly likely to either vexatiously apply for a FFVO or cross apply. The potential for costs of an application may operate as a disincentive but entrenched cases of coercive control may be unaffected by this, with perpetrators preferring to bankrupt themselves rather than withdraw an application.
- Where perpetrators are self-represented, they are often able to successfully call on the judge or magistrate to afford leniency in seeking multiple adjournments, often claiming to be seeking legal advice or to claim ignorance and avoid accountability for their actions.

[5] House of Representatives Standing Committee on Social Policy and Legal Affairs *A better family law system to support and protect those affected by violence* (December 2017) Recommendation 19

[6] Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System*, 2019 Recommendation 8

- In the case of Aboriginal and Torres Strait Islander women, coercive control is common where there exists a cultural / racial difference. In these cases we have observed that in these situations the perpetrator can hold a sense of entitlement that is offended by the victim daring to leave the relationship.

3. National expansion of the Lighthouse project- strengthening the family violence response

Nearly 80 percent of matters lodged in the family courts involve allegations of family violence. The system is not set up to deal with this – and neither are many of the professionals who work within the system.

Other than in the Federal Circuit Court Lighthouse Project pilot sites, family courts do not have case management processes specifically designed for family violence cases (other than for some child abuse cases). Safety risks are therefore not being managed across all of the court registries.

The House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into family law and family violence (**SPLA Inquiry**) recommended that a risk assessment for family violence be undertaken upon a matter being filed at a registry of the Family Court of Australia or the Federal Circuit Court of Australia[7]. The report also recommended that case management of family law matters involving family violence issues be improved through the adoption of a single point of entry to the federal family law courts so that applications, depending on the type of application and its complexity, are appropriately triaged, and actively case managed to their resolution in an expedited time-frame.

In December 2019 the Federal Government announced that the Family Law Courts would receive $13.5 million over 3 years to trial risk screening, triage and high risk list at Brisbane, Parramatta and Adelaide. The Lighthouse Pilot commenced in the Federal Circuit Court of Australia on 7 December 2020 in Adelaide, and in Brisbane and Parramatta on 11 January 2021.

The Family Court of Australia and the Federal Circuit Court of Australia (the Courts) are now leading the way in assisting families that have experienced family violence or other safety concerns to navigate the family law system. WLSA has been calling on the Federal Government to fund the national rollout of the Lighthouse project, which is outlined in step 1 of WLSA's safety first in family law plan.

4. Early judicial determination of family violence allegations

In addition to granting FFVO, courts should also have timely access to evidence of family violence so as to make an early determination of family violence.

Our experience shows that family violence can still be a contested issue when the Judge is making a final decision in a family law case. Final decisions can take up to three years to make. We acknowledge that reforms are currently being implemented in the family law courts that are aimed at improving the courts' family violence response. Without the early determination of family violence, women are bearing the unreasonable burden of managing safety risks for themselves and their children.

This is happening despite the fact that the court has the power to test the evidence to determine family violence early. In our experience this power is rarely exercised.

[7] Ibid 5, recommendation 3

An early decision to determine the facts of family violence, may help to resolve disputes quickly which will in turn reduce safety risks and the experience of trauma for victim-survivors of family violence navigating the family law system.

If perpetrators are not held accountable for their abusive behaviour early on, they can use court processes to continue to exert control and coercion over their victims. This is otherwise known as "system abuse".

An early determination of family violence may help to limit systems abuse. The SPLA inquiry recommended early determination of family violence.8

The likelihood of systems abuse will decline as perpetrator behaviour is detected early and perpetrators will be held to account for their actions.

Based on our experiences, Judges, Registrars and liaison officers need to be provided with adequate information, training, tools and, where appropriate, oversight to ensure that their decision making both protects the woman and her children and reflects the best interests and welfare of the child.

Step 3 of WLSA's safety first in family law plan calls upon the Australian Government fund options to ensure regular and consistent training on family violence, cultural competency, LGBTQ awareness and disability awareness for all professionals in the system, including for family law judicial officers, lawyers and interpreters. It is recommended that this training be developed so that it is comprehensive, ongoing and tailored. It also must address unconscious bias and the unique needs and experiences of diverse communities

Operational issues

5. National information sharing scheme and FFVO applications

WLSA notes that state and territory courts will, appropriately, **continue to be the primary avenue for victims to seek family violence protection orders**. However, this Bill is intended to reduce the need for vulnerable families to navigate multiple courts when they are already before a family law court and allow victim-survivors to access protection when they require.

This includes restricting a court from making a federal family violence order where there is a state family violence order in force between the same parties, and from making a personal protection injunction that is inconsistent with a state family violence order. Access to orders on the National Police Reference System will be available to the family law courts for this purpose

It is unclear, however, if orders will be available to the courts in real time. This is important to ensure an application for a FFVO cannot be made when a state/territory based order is in place. We understand that a permanent information-sharing mechanism is under development and that it is hoped orders will be available in real time. The timeframe for completion of this is not clear.

6. Processes

It would be helpful to better understand the process envisaged for making an application for a FFVO.

- How quickly will these matters be listed? WLSA members note the current delays in listing urgent matters, such as recovery orders which may take up to two weeks in some jurisdictions.
- Will there be a separated and dedicated list?

[8] Ibid 5, recommendation 7

- Will filing fees be waived? We note this was recommended by ALRC/NSWLRC in their 2010 report in relation to personal protection injunctions[9]
- What support will be provided to help people apply for these orders noting that, for example, in NSW most protection order applications are police initiated with a police prosecutor seeking the order?

7. FFVO v state/territory protection/intervention order

We note the FFVO is being presented as a supplement to the state/territory protection/intervention orders and the latter are intended to be the primary avenue to seek protection. We support this approach. What safeguards will be in place to ensure this happens in practice. For example, in state/territory jurisdictions which require police to apply for a protection order in certain circumstances "unless there is good reason not to make the application" what state/territory legislative and policy changes and education will be undertaken to ensure the existence of a FFVO of itself is not seen as a "good reason"?

What safeguards will be in place to limit cross-applications and ensure the person most in need of protection is protected?[10]

WLSA recommends that the committee consider recommendations that would work to clarify communications about the coexistence of the schemes and that information be made available to police and others.

8. Amendments required to state/territory legislation

We understand that amendments will be required to state/territory legislation to enable state and territory police to enforce FFVOs. Similarly, amendments will need to be made to state/territory *Weapons Protection Act*. This will take time. We question if a 12 month implementation plan as outlined below is sufficient.

9. Resourcing the new scheme

The 2020-21 budget included $1.8 million over four years to support the implementation and enforcement of federal family violence orders (including a federal DVO information sharing scheme). Once the Bill is passed, up to 12 months is allowed for implementation of outstanding issues before the main provisions commence. Outstanding issues include allowing time for states and territories to enact the legislative amendments needed for state/territory police enforcement of FFVOs.

$1.8m budget over 4 years includes money to "support the implementation and enforcement of FFVO. This funding will stand up effective information-sharing arrangements between the courts and police, support service of the new orders and enable important training and awareness raising." We understand funding is based on modelling that concluded only 100 FFVOs will be issued each year by the courts (This figure is said to factor in that FFVO would be more desirable than personal protection injunction).

It is understood that FFVOs will primarily be enforced by state and territory police. Given that state and territory police do not routinely enforce federal orders, it is crucial that funding is allocated to resource comprehensive training on how the enforcement of FFVOs is to be carried out. Such training should include emphasis that state and territory orders are to continue to be the primary avenue for victim-survivors to seek family violence protection orders.

[9] ALRC and NSWLRC Family Violence — *A National Legal Response*, 2010, paragraph 17.228

[10] Heather Nancarrow, Kate Thomas, Valerie Ringland, & Tanya Modini, *Accurately identifying the "person most in need of protection" in domestic and family violence law* (Research report, 23/2020) ANROWS, Sydney, 2020

Additional funding will also be required for Registrars/Judicial officers to undertake this additional work. Similarly, there would need to be funding for legal advice and representation, noting that in some state/territory jurisdictions police make applications for protection/intervention orders and police prosecutors litigate these matters.

Given the Family Violence and Cross-Examination Scheme will apply to FFVO applications it is important there is adequate funding for this.

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