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

Dear Nathan,

The Law Institute of Victoria ('LIV') welcomes the opportunity to provide feedback to the Law Council of Australia ('LCA') in relation to the Senate Legal and Constitutional Affairs Legislation Committee's ('the Committee') Inquiry into the *Family Law Amendment (Federal Family Violence Orders) Bill 2021* ('the Bill'). This submission was informed by the LIV's Family Law Section, who are broadly supportive of the Bill and greater access to protection for victims of family violence ('FV'). However, the LIV is concerned about potential unintended consequences and the Bill's efficacy in achieving urgent protection for FV applicants.

### **1. Improved Communication between State and Federal Courts**

The Bill contemplates family violence orders being made in both the State and Federal Courts and addresses inconsistencies that may arise between a federal family violence order ('FFVO') and an Order that is issued in state courts. While it is clear that inconsistencies may be dealt with through proposed section 68ND, members are concerned about the potential for situations where parties may be mis-identified as a perpetrator in one Court and a victim in another.

Effective communication and information sharing between Courts to avoid this situation from arising is important, to avoid parties capitalising on instances where one Court may not be aware of an application made for protection in another. While the Family Court is empowered when requested by a party, to provide for the sharing of documents between the family law courts and a state or territory court,<sup>1</sup> timely information sharing would assist in more prompt risk assessments, rather than waiting for subpoenaed material to be returned. This is a key deficiency that the LCA has itself identified, that State or Territory

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<sup>1</sup> *Family Law Rules 2004* (Cth), r 15.34.

Courts exercising family violence ('**FV**') jurisdiction are not required to provide protection or FV orders to the family law courts.<sup>2</sup>

Contrary orders are likely to be made in current circumstances where state FV proceedings operate in tandem with a Federal parenting matter, with each having limited avenues to seek updates, documentation or the orders from the other, save for parties or lawyers bringing it to their attention. Many FV parenting cases begin with the protection or application for a State FV Order and it is beneficial for the application to be made directly to the federal court to ensure consistency in the protection response and avoid the potential for contrary orders to be made.

The availability of FFVOs is consistent with the paramount consideration given it is in the children's best interests to have more streamlined litigation and avoid the situation where, State and Federal Courts are making orders in a vacuum that could have contrary objectives, creating greater uncertainty. This may lead to more protracted litigation, escalation in FV risk indicators and at worst, risk for the children in the case.

While greater access to the protection afforded by a FFVO is to be welcomed, the LIV queries how it might benefit to apply for an FFVO in instances where matters or applications are not already filed in the federal jurisdiction. Applying for an FFVO in these circumstances is likely more onerous, complex, and costly than filing in a State Court for the protection of an Order; notwithstanding, the availability of interim orders at the state level and delays in the Court. The utility of FFVOs is more readily apparent in family law cases where there are other matters proceeding before the Federal Courts, such as parenting or property matters, which makes it easier to then seek the protection of a FFVO.

The Bill also contemplates that parties to a de facto financial cause are excluded from the same protections as parties with children and parties to a matrimonial cause. The LIV queries who may be the respondent, for example:

- Could an applicant wife apply for a FFVO against the respondent husband's new de facto partner, even if the respondent's partner is not a party to their financial proceedings?
- Could an applicant father apply for a FFVO against the respondent mother's father, even if the respondent's father is not a party to their parenting proceedings?

The LIV recommends clarity in the legislative intention regarding the scope of who may be a respondent to a FFVO application.

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<sup>2</sup> Law Council of Australia, Submission to the Commonwealth Attorney-General's Department – *National Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems* (27 November 2020) [42] <<https://www.lawcouncil.asn.au/publicassets/2b77a2ad-4e34-eb11-9437-005056be13b5/3929%20-%20Family%20violence%20info%20sharing.pdf>>.

### **Harmonisation**

There is an additional issue relating to the differences in definition in each state FV Act, and how this may impact upon protected persons seeking an order. It may be that one forum is preferable over another because of the definition and can lead to confusion. For example, the *Family Violence Protection Act 2008* (Vic) includes threats to pets as a form of FV,<sup>3</sup> while the definition of FV under the Act currently does not. This is one of the many examples where definitions of FV between jurisdictions vary. Uptake of the FFVO scheme may then be hampered by these inconsistencies. Members report situations currently where they are working with a state definition of FV in an Intervention Order Application while detailing incidents of FV during the drafting of an affidavit for a parenting matter, with the latter relating to a different definition of FV.

The LIV recommends harmonisation of FV definitions in Federal and State/ Territory jurisdictions to promote greater uptake of FFVOs and increased access to protection.

### **2. Interim Orders**

The LIV seeks clarification under the Bill regarding whether an interim order is contemplated as occurs in state courts pending the making of a final order. Delineation between interim and final FFVOs is needed, to clearly outline how the Court will prevent FV from occurring while it is determining whether a final FFVO should be made.

Members query the stage of proceedings in which determinations of fact regarding FV will be made and how it will impact on other family law matters such as financial orders. The *Family Violence Protection Act 2008* (Vic) provides for distinct tests in making interim and final orders, allowing for an urgent interim order where satisfied that it is necessary to ensure the safety of a protected person pending a final decision. It is currently unclear how FFVOs under the Bill will be conducted contemporaneously with parenting or matrimonial financial proceedings. Members query whether it is limited to a discrete hearing in which the Judge hears evidence for the making of a final FFVO, while other proceedings, such as parenting, are on foot.

The LIV recommends clear legislated pathways for interim protection applications under the Bill to prevent the risk of FV escalating.

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<sup>3</sup> *Family Violence Protection Act 2008* (Vic), s 5 (2)(e).

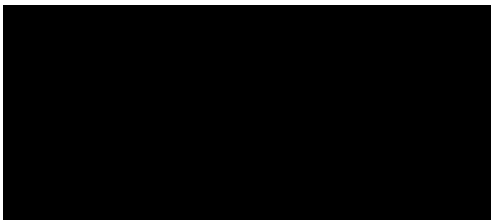
### **3. Resources and Funding**

The LIV contemplates that the need to facilitate urgent hearings for interim order applications would impact greatly on court resources. Moreover, there will be a greater volume associated with determination of FV applications and breach proceedings through discrete hearings, which will also impact on resourcing. The Court may need a separate list that deals with this growing volume of matters, similar to the contravention list, given FV cases will likely have other family law issues attached to them, particularly parenting matters; as well as the criminal consequences for breaching these orders and potential penalties for contraventions.

In the context of many State legal aid organisation currently having funding and resource issues, there would have to be more orders for self-represented parties requiring legally aided lawyers through the federal system as they cannot cross-examine under the ban on direct cross-examination scheme.<sup>4</sup> Orders for representation already takes place in the Victorian FV system, however, if FV orders are also being made in the Federal System then a greater allocation of funding for counsel or respondents at trials will need to be allocated.

Should you wish to discuss further, please contact Policy Officer Andy Kuoch or Paralegal Sarah Cooney at [FamilyLawSection@liv.asn.au](mailto:FamilyLawSection@liv.asn.au).

Yours Sincerely,



**Tania Wolff**  
President  
Law Institute of Victoria

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<sup>4</sup> *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* (Cth), s 102NA.