Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary

FAMILY LAW AMENDMENT (FEDERAL FAMILY VIOLENCE ORDERS) BILL 2021

We write as two legal researchers and individual members of the Rights Resource Network SA and thank you for the opportunity to provide feedback on the Family Law Amendment (Federal Family Violence Orders) Bill 2021 . The Rights Resource Network is a volunteer-run network designed to share information and research among academics, community organisations and individuals who share an interest in protecting the human rights of South Australians. This submission reflects only the views of the authors, but our Network includes a range of experts in family law and women's rights who are also interested in these reforms.

We congratulate the Federal Government on its commitment to address family violence and look forward to working with experts and community members to learn more about the complex, intersecting causes of family violence and effective prevention strategies. In this submission we offer our views on how the Bill could be further improved to ensure that it achieves its stated aims.

Positive features of the Bill

In our view, the Family Law Amendment (Federal Family Violence Orders) Bill 2021 (the Bill) has a range of positive features that have the potential to advance the human rights and dignity of survivors of family violence. The Bill proposes to introduce new criminally enforceable federal family violence orders and is intended to alleviate the need for victims of family violence to seek enforceable protection in their respective state or territory court. It would allow for a 'listed court' (including the Family Court or the Federal Circuit Court) to make a federal family violence order where the court is satisfied that family violence has already taken place or there are reasonable grounds to suspect that it is likely that family violence will take place, or that a child may be exposed to family violence. The court would also be required to take into account other matters in making an order, including as the primary consideration, the safety and welfare of the child or protected person, as well as any additional considerations the court considers relevant, such as the criminal history of the person against whom the order is directed. The order may provide for the personal protection of a child or a person related to a child, such as their parent or a person who has parental responsibility for the child, or a party to a marriage. The Second Reading speech suggests that the Bill offers particularly benefit victims who are already before a family law court, as the measure will allow victims and survivors to access protection when they require it most, rather than having to navigate separate State and Territory level court processes to obtain protection orders.

The definition of family violence in proposed section 4AB of the Bill is broad, including 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful', and would include assault, sexual assault, stalking and unreasonably denying the family member financial autonomy.

These features of the Bill could, if refined in line with our suggestions below, help advance a rights-based approach to addressing the devastating consequences of family violence.

Human rights concerns with the Bill

If enacted, this federal reform aims to sit alongside pre-existing state and territory laws relating to intervention and protection orders sought in circumstances involving family violence. The Bill specifically

provides that the proposed provisions establishing federal family violence orders are not intended to exclude or limit the operation of state or territory laws which are capable of operating concurrently. However, a state or territory family violence order that is inconsistent with a federal family violence order would be invalid to the extent of that inconsistency.[1] This interaction of the two levels of laws in this area has some potential benefits – as noted above, it could make the process of obtaining protection orders more straightforward for parties already before the Federal Court – however it also comes with some risks. This is because the Bill provides that where a state or territory court is exercising powers to suspend or revoke a federal family violence order, specified provisions of the Family Law Act do not apply, including any provision that would otherwise make the best interests of the child the paramount consideration.[2] As the Senate Standing Committee on the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights have noted, this aspect of the Bill may engage and limit the rights of the child insofar as it would have the effect of not requiring the best interests of the child to be a paramount consideration in all actions concerning children.[3] It is not clear why this approach has been adopted in a Bill designed to protect and promote the rights and wellbeing of vulnerable children and their families. As the Human Rights Committee has observed (Report No 5 of 2021, p.11):

> The objective being pursued by this measure is unclear, as the statement of compatibility and the explanatory memorandum do not identify that the measure may limit the rights of the child nor address why it is necessary to downgrade the 'best interests of the child' from a paramount consideration to a relevant consideration. While the broader objectives of the bill are legitimate objectives for the purposes of international human rights law, further information is required to assess whether there is a pressing and substantial concern which gives rise to the need for this specific measure, and whether the measure is rationally connected to that objective.

This complex intersection between federal Family Court orders and state and territory intervention order regimes highlights the challenges associated with providing survivors of family violence with clear, accessible, and affordable pathways to obtain legal protection. There is an urgent need to set out very clearly how the proposed new federal regime will interact with state and territory intervention order regimes, and how the rights and interests of those seeking protection will be preserved in the event of potentially overlapping applications or orders being made.

In South Australia the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) governs the issue of intervention orders, which can be obtained from the South Australian Police on the grounds that 'it is reasonable to suspect that the defendant will, without intervention, commit an *act of abuse* against a person' (s6). These orders can be obtained with respect to a child who might be the victim of the act of abuse, or a witness to the act of abuse (s7). Such orders can then be confirmed by the Magistrates Court, which is also given powers to enforce compliance with the orders. When issuing an intervention order under this law, regard must be had to 'any orders made under the *Family Law Act 1975* (Cth)' (s10(2)(a)) along with a range of other principles. These principles currently do not include a 'best interest of the child' test, although the impact on any child in the family must be considered and the South Australian provision state that 'it is of primary importance to prevent abuse and to prevent children from being exposed to the effects of abuse' (s10(1)(c). It remains unclear how these provisions will interact with the new intervention order regime proposed in the Federal Family Violence Orders Bill. For example, if a mother was engaged in proceedings under the Family Law Act and sought a Federal Family Violence Order to protect her child from harm reasonably suspected to be perpetrated by her partner, how might such an order interact with a pre-existing South Australian intervention order obtained from the South Australian Police under the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) that is directly only at protected her personally? How would the issuing Federal Court go about determining whether there were any inconsistencies across

[1] Schedule 1, item 24, proposed sections 68NA and 68ND; item 44, proposed sections 114AB and 114AE; See also Parliamentary Joint Committee on Human Rights Report 5 of 2021 p. 8.
[2] Schedule 1, item 24, proposed section 68NC.
[3] Parliamentary Joint Committee on Human Rights Report 5 of 2021 p. 10; See also UN Committee on the Rights of the Child, General comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) [37]; see also IAM v Denmark, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8]

the two different tests for obtaining the relevant orders? Would different considerations around the impact of the order on the rights and wellbeing of the child apply?

It would appear from the way the Federal Family Violence Orders Bill is drafted that the South Australian issuing authority would not need to apply the 'best interests of the child' standard when considering whether to suspend or revoke a federal order when issuing or varying a South Australian order. However, it remains unclear whether or how the issuing Federal Court would deal with the pre-existing South Australian order when deciding whether to issue a Federal Family Violence Order with respect to the same family. Division 9A of the proposed Bill specifically states that 'it is not intended to exclude or limit the operation of a law of a State or Territory that is either capable of operating concurrently with Division 9A or prescribed by regulations'. However, the Explanatory Memorandum provides that a person would be prohibited from applying for a federal family violence order 'where there is a family violence order in force that is for the protection of the protected person and is directed against the person against whom the federal family violence order is directed' (proposed s68AB(2)). Navigating these nuances may be straight forward in many cases, but in other scenarios it may be difficult to identify whether the South Australian orders relate to the same protected person as the Federal Family Violence Order. Perhaps the answer to these questions is apparent when the detail of the Bill is carefully considered. However, these details may not be easily accessible to the vulnerable families seeking protection from these legal frameworks. We note that the South Australian Law Reform Institute's submission also raises questions about the interaction between the South Australian intervention orders regime and that proposed in this Bill.

In addition, there is the potential for delay in orders being made given that under the Federal legislation an application for a proposed federal family violence order will be conditional on current family law proceedings having commenced. This could result serious delays for victims in need of immediate assistance who may decide, for a range of carefully considered or misguided reasons, to seek orders under the proposed new Federal regime rather than seeking more immediate assistance from the South Australian Police.

Access to appropriate legal advice for women and families at risk in South Australia is already limited with specialist Women's Legal Services, Aboriginal Legal services and Family Violence services stretched to capacity. Consideration must be given to ensuring that those most at risk of family and domestic violence are able to understand the risks and benefits of applying to Federal Courts for the orders contemplated in this Bill, compared to seeking intervention orders directly from the South Australian Police. We note that the Australian Association of Social Workers' submission also documents the need to provide additional support services and tailored advice to communities who may be at particular risk of family and domestic violence to ensure that they can understand their legal rights and options under the proposed new regime.

Finally, there are provisions in the Bill that raise human rights concerns for the people against whom a protection order is made. The Bill allows the court to make a family violence order in "any term the court considers reasonably necessary to ensure the personal protection of the protected person", which may include prohibiting a person from being within a specified distance of a specified place or area where the protected person is, or is likely to be, located. While it is of paramount importance to protect victims, there is also need adopt proportionate responses that do not unreasonably affect the human rights of someone who has not yet been convicted of a crime. It is not clear from the Statement of Compatibility accompanying the Bill why it was necessary to adopt terms that extend beyond the already broad scope of pre-existing State regimes such as those in force in South Australia.

The legislative design of the Bill – and its relationship with pre-existing state and territory laws – highlight the complexities that plague this area of policy making in Australia and that pose real, practical barriers for survivors of family violence. To overcome these challenges, a more holistic approach to law-making in response to family violence may be needed. This could include the adoption of nationally consistent laws governing family violence and protection orders across Australian jurisdictions to support the existing reciprocal enforcement and recognition approach adopted in 2017 under the National Domestic Violence Order Scheme.

Due the challenges associated with implementing such holistic reforms, we consider this Bill to be an important positive step in response to family violence. We also wish offer to help facilitate further

community consultation on this important reform. In our view, the South Australian community is eager and well placed to assist in the development of effective family violence prevention plans and should be supported to contribute – particularly those with lived experience in this area. Please be in touch with on sarah.moulds@unisa.edu.au to arrange a meeting with the relevant members of the Rights Resource Network SA.

Yours sincerely

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