

**Senate Standing Committee on Legal and
Constitutional Affairs Inquiry into the Family Law
Amendment (Federal Family Violence Orders) Bill
2021**

**Submission of the Legal Services Commission of South
Australia (LSCSA).**

June 2021

Introduction

LSCSA supports the Bill in principle as an attempt to strengthen the protections offered by the family law system to victims of family violence.

It also supports the notion of mainstreaming family violence provisions in the family law courts.

In general terms, the more cohesion there is between the three arms of the family law system- child protection, family violence, and family law- the better.

LSCSA would like to make comment about some of the issues which specifically concern the operation of family violence orders in South Australia and potential impacts of the amendments.

The current position

While there is provision in the Family Law Act for injunctions for personal protection to be made, it is not the general practice for victims of violence to make applications in fresh or existing proceedings in the family law courts.

Practitioners have found that the most effective pathway is to seek assistance through the family law units of South Australia Police (SAPOL) for orders to be sought under the Intervention Orders (Prevention of Abuse) Act 2009.

The three main reasons for this practice are:

1. The speed with which a victim of violence can achieve the protection of a court order. Often, police patrols will be called to an incident involving family violence, and the referral for an intervention order will be made directly at that time. Intervention orders can then be made and confirmed by the courts within days, often the next day.
2. There is no financial cost to the victim. Police prosecutors initiate the proceedings and represent the victim in the local magistrates courts. Lawyers are not necessary and are not involved in almost all applications. The exception is where the police are unwilling to take out the necessary application and a private application has to be made. This number is small.
3. The speed with which a victim of family violence can have the intervention order enforced through the police system. The breach of an intervention order is a criminal offence and, again, this is a matter which does not require the involvement of lawyers or protracted hearings. Enforcement of injunctions under the Family Law Act is more involved.

LSCSA believes that it is important that any changes to the legislation which allow proceedings to be instituted in the family law court system do not derogate from the effectiveness of the current system to the detriment of victims.

Potential costs to legal aid commissions and to LSCSA in particular.

The Explanatory Memorandum states that “there are no direct financial implications” from implementing these amendments.

LSCSA believes that this ignores the cost which the mainstreaming of these provisions within the Family Law Act may bring to legal aid commissions, the litigants, and the court system itself.

An application to the family law court for an injunction is not currently within commissions’ legal aid guidelines as adequate and better assistance is available to a victim through the state process, described above. If applications in a case or initiating applications are to be made by a litigant in the family law courts, applications for funding or extensions of current funding are likely to be made to legal aid commissions. Apart from requests for legal representation is noted that personal service orders are to be made which will add another cost. Currently, service of any intervention orders are covered within the police court process.

There is also concern that the inclusion of these provisions as part of existing disputes, usually around parenting matters, will add another dimension to the complexity of those proceedings. There is concern that a perpetrator of family violence will take the opportunity of broadening the dispute thus exacerbating the issues, making them less likely to resolve, and adding to the delays and costs of both legal representation and to the court system.

A further concern is the procedures for varying, revoking, or suspending an order. If this is to require a fresh application to the courts, this has the potential to lead to another round of family law proceedings.

The family law courts currently order, in the most difficult of parenting cases, the appointment of an independent children’s lawyer (ICL) to represent the best interest of children, the subject of those proceedings. The appointments of lawyers to act as ICLs is made by legal aid commissions from specialist, accredited panels of lawyers and are totally funded by legal aid commissions. The increase in appointments or the increase in the amount of litigation that an ICL has to be involved in, will add a cost burden to legal aid commissions. Funding for these appointments is made from core funding to legal aid commissions for family law matters. Any increase in demand would have an impact on the ability of commissions to extend assistance to parties within the constraints of our total funding abilities.

The three risks outlined- protracted litigation, additional hearing dates, increase in ICL appointments- are all valid issues, as is the need to personally serve the respondents and these all have the potential to stretch legal aid resources in this area.

Impact on other family law processes

Legal aid commissions have vibrant legally assisted family dispute resolution programs which attempt to resolve family law disputes either before the issue of court proceedings or on referral from the family law courts during existing court proceedings.

In South Australia, 1,032 conferences were held during the 2020 financial year. The number of conferences held in the current financial year has increased from that figure. The rate of settlement of these matters in the last financial year was 85%.

Conferences are held in purpose built secure conference rooms which enables victims of violence an opportunity to resolve their parenting disputes without having to go through the court litigation process.

Legally assisted conferences are an intrinsic part of the family law system and it will be important to ensure that provision is made for conferences to continue to be held if family law court violence orders are made.

In 2018, the Commonwealth amended the Family Law Act (the Family Law Amendment (Family Violence and Cross-examination of Parties Act) to prohibit parties in trials in the family law courts from cross-examining each other except where they are represented by a legal practitioner. The Commonwealth created a scheme, which is administered nationally by legal aid commissions, to provide legal representation to parties who fit the criteria of that scheme.

LSCSA has concerns that an increase in the number of family violence orders, the additional costs to a party because of the proposed changes to the court, and the impact of extra demand on legal aid funding, may mean that more parties will apply for assistance under the cross examination scheme. This will have an additional financial cost to the commonwealth flowing from this amendment.

Recommendation

Because of the concerns expressed, we would urge that legal aid commissions and any other relevant stakeholders in the state system be consulted about the potential costs implications, and the operation of the amendment in general.