LEADERSHIP IN FAMILY LAW

17 June 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By Email: legcon.sen@aph.gov.au

Dear Committee Secretary,

This submission is made by the Family Law Practitioners' Association of Queensland (**FLPA**), an organisation with approximately 900 members from the legal profession (solicitors and barristers) and allied professions (psychiatrists, psychologists, social workers and social scientists). FLPA was established to achieve the core objective of the continuing education of its members in relation to family law issues.

It is noted, that on 24 March 2021, the *Family Law Amendment (Federal Family Violence Orders) Bill* (**the Bill**) was introduced into the House of Representatives.

FLPA supports the idea of parties involved in family law proceedings being able to obtain a family violence order as part of those proceedings. However, as outlined below, FLPA has a number of concerns regarding the Bill as currently drafted, and recommends that changes be made to some proposed sections, and that consideration be given to some further provisions being included.

In this submission, references to:

- **the Qld Act**, means the *Domestic & Family Violence Protection Act 2012* (Qld);
- **the FLA**, means the *Family Law Act 1975* (Cth) as is currently in force; and
- sections - which are not accompanied by a reference to the Qld Act or the FLA - indicate the proposed new sections of *Family Law Act 1975* (Cth) as set out in the Bill.

FAMILY LAW PRACTITIONERS ASSOCIATION QLD

Suite 154, 4/16-18 Beenleigh Redland Bay Road,
Loganholme QLD 4129

E – membership@flpa.org.au
W– www.flpa.org.au
P – 07 3077 6650
F – 07 3112 6838

LEADERSHIP IN FAMILY LAW

Financial Implications & Delays

The Explanatory Memorandum[1] suggests that there are "*no direct financial implications from implementing these amendments*". Further, it is said that the Australian Government has committed funding as part of the 2020-2021 budget to ensure that "*key stakeholders and members of the public are aware of the commencement of the federal family violence order measures, develop training resources for police and judicial officers and ensure that information sharing and service arrangements are in place to enable the effective enforcement of federal family violence orders*".[2]

FLPA submits that there will be financial implications arising from the implementation of these amendments - to the court, to the relevant legal aid commissions and to any privately represented parties involved. There may also be additional costs of serving such applications.

Further, any increase to the workload of the federal courts operating in the family law jurisdiction will result in additional delays to the finalisation of proceedings in those courts.

The cost to the court

Introducing a requirement to determine whether or not to make a federal family violence order, deal with applications to vary, suspend or revoke such orders, and deal with breaches of the same, will require significant judicial time and administrative resources - all comes at a cost and has the potential to result in further delays within an already overburdened and under resourced system.

During the reporting year 2019-2020, there were 28,312 applications for protection orders lodged at Queensland Magistrates Courts (a decrease of 1,995 from the year prior) with an associated clearance rate of 92%.[3]

Section 102NB of the FLA requires the court to ensure appropriate protections for a party who is the alleged victim of family violence (for example, direct that cross-examination occur via video link or audio link) which will self-evidently have application in any proceedings for a federal family violence order.

If litigants are to obtain the full protection and benefit intended by these amendments, more resources are required to deal with the increased judicial and administrative workload.

[1] Page 4 of 138 under the heading "Financial Impact"
[2] Page 4 of 138 under the heading "Financial Impact"
[3] Magistrates Courts of Queensland Annual Report 2019-2020, p26.

LEADERSHIP IN FAMILY LAW

The cost to the relevant legal aid commissions

Section 102NA of the FLA may be applied by a court in hearings related to federal family violence orders to ban one party from personally cross-examining the other. It is likely therefore that there will be an increase to the current level of demand on funding available for litigants to be allocated representation under the Commonwealth Family Violence and Cross-Examination of Parties scheme. Previous estimates of the funding required following the introduction of section 102NA of the FLA (in the context of parenting and/or property settlement proceedings) have fallen well short.

Independent children's lawyers (**ICLs**) do not participate in hearings before State courts. Requiring ICLs to appear at and participate in the hearing of an application for a federal family violence order will incur further costs to be borne by legal aid commissions. It is inevitable that further and/or longer court appearances will be required in a parenting dispute if the court is also dealing with a federal family violence application. Again, this will necessitate further legal aid funding being made available.

The cost to privately represented parties

Parties – particularly those based in the regions – will need to allocate further financial resources to have legal representatives appear at hearings related to these issues.

The availability of 52 Magistrates Court registries state-wide in Queensland[4] allows for better access to justice, and an associated lower cost to parties, in protection order proceedings.

Comparatively, in Queensland, there are only:

- eleven locations serviced by a registry or circuit of the Federal Circuit Court;[5] and
- three locations (Townsville, Cairns and Brisbane) with access to a Family Court judge.

Costs of service

Subsection (3) of s68AE, s68AK, s113AE and s113AK provides that the regulations or the rules of court may provide for who is to bear the cost of service.

FLPA is concerned about costs for the personal service of such applications arising for parties. Currently service of state based applications, including variation applications, is arranged by the Queensland Police Service at no cost to the parties.

[4] Magistrates Courts of Queensland Annual Report 2019-2020, p6.
[5] Federal Circuit Court of Australia Annual Report 2019-2020, p21.

LEADERSHIP IN FAMILY LAW

Delays

Anecdotally, the usual timeframe from the commencement of proceedings to the finalisation of a contested application for a protection order under the Qld Act in the Magistrates Court of Queensland is somewhere in the range of six to twelve months. Comparatively, the timeframe from commencement to conclusion of contested proceedings in the Federal Circuit Court and Family Court in Queensland is far greater.

The need for additional hearing time to be allocated to a matter involving an application for a federal family violence order (over and above that which would otherwise be allocated to an application for parenting, property, spousal maintenance or child support orders) will only increase those delays.

Further Concerns

Forum shopping

Whilst the Bill intends to "*reduce the need for families to interact with multiple courts across the federal family law and State or Territory family violence systems*",[6] a party may nevertheless elect to seek a protection order in the Magistrates Court of Queensland rather than apply for a federal family violence order, if it is considered that:

- the prospects of their application are greater within the state jurisdiction;
- the remedies available to the applicant in the state jurisdiction are preferable to the federal jurisdiction (for example, the protection able to be afforded to children named on an order beyond the age of eighteen years in the state jurisdiction);
- the location of the state court's registry is more convenient;
- they are able to more readily access free legal advice or representation within the state jurisdiction (via services such as Legal Aid or Women's Legal Service).

Potential for replication of proceedings

It is noted that there is no restriction on a party bringing an application for a federal family violence order, after an unsuccessful application for a protection order in a state court, meaning that there may be a duplication of time and cost for the hearing of similar applications involving the same persons.

There is also the potential that an unsuccessful applicant for a federal family violence order, may file an application for a family violence order based on the relevant State or Territory legislation.

[6] Explanatory Memorandum, p3 [10].

LEADERSHIP IN FAMILY LAW

Exclusion of applicants with benefit of existing order from state jurisdiction

There is however a restriction on a party applying for a federal family violence order for the personal protection of the first person directed against a second person, if there is a family violence order (from the state jurisdiction) in force that applies for the protection of the first person directed against the second. The definition of 'family violence order' includes a temporary order.

Whilst the logic of avoiding two contemporaneous orders is apparent, FLPA raises for consideration a situation whereby a party with the benefit of a state based order nearing its expiry wishes to file an application for a federal family violence order without first being required to have the protection offered by the state based order lapse.

Duration of federal family violence order

Proposed section 113AF(2) provides that a federal family violence order in relation to parties to a marriage ceases to be in force at the earlier of the time specified in the order or when it is revoked. It appears therefore, that if a date is not included in the order, it could continue indefinitely until an application for revocation is made, which would necessitate further proceedings and thus more court time and further costs to the parties.

Pursuant to proposed section 68AC(4) a person stops being a protected person under a federal family violence order, in the case of a child when the child turns 18 (or, in the case of any of the other persons being a person with whom a child lives, spends time or communicates or a person who has parental responsibility for a child, when the youngest of the children turns 18). It is noted that there is a similar reference at s68AI(4). Given the provisions of s68AF(2) FLPA seeks that the 68AC(4) and 68AI(4) be expanded to include 'when the order ceases to be in force' so as to avoid any perceived inconsistency between the provisions.

FLPA notes that if parties commence proceedings early in a child's life that a federal family violence order could, under the currently drafted provisions, potentially remain in place for close to 18 years.

Generally speaking, FLPA is not supportive of orders being made for such lengthy periods of time. FLPA notes that parties' circumstances and children's circumstances often change significantly over the years – children's living arrangements may change, parents may engage in programs or therapy which renders a family violence order no longer appropriate.

FLPA proposes that a shorter 'standard period' be considered for inclusion.

Under the Qld Act, protection orders remain in place until the day stated by the court in the protection order or, if no date is stated, the day that is five (5) years after the day the protection order is made.[7] Previously, protection orders under the Qld Act were in place for two (2) years.

[7] See section 97 of the Qld Act.

LEADERSHIP IN FAMILY LAW

Similar provisions to those in the Qld Act could be put in place (i.e. a judicial officer can specify a date as to when an order will end or alternatively that the order be in place for the 'standard period').

FLPA submits that there should be factors prescribed in the FLA which the Court should consider when deciding whether to make a federal family violence order for a period longer or shorter than any 'standard period'. For example, in cases where findings have been made as to significant family violence or risks to a child or other person and/or a party has been convicted of violent criminal offences or breaches of a family violence order.

FLPA notes that s68AI enables an application to be made to vary, revoke or suspend an order. In the event that federal family violence orders were to expire after a 'standard period' or period stated in the order (rather than upon a child's 18th birthday), this may see a reduction in the need for further litigation.

FLPA would support the provisions around applications to vary - and s68AI(1) in particular - being augmented to ensure it is clear that orders may be extended. Reference could be had to the same factors proposed by FLPA to be prescribed in the FLA which the Court should consider if deciding whether to make a federal family violence order for a period longer or shorter than any 'standard period'.

Temporary Orders

The Bill does not make provision for a temporary order to be made pending a final hearing. The draft Bill arguably requires a full hearing of the issues (likely involving cross-examination) before an order can be made.

FLPA supports the Court being granted power to make an interim order on the basis of a lower threshold, see for example section 45 of the Qld Act, pending a final hearing.

It is not practical to conduct a final hearing of those issues in an abridged form on a first return date. Unless additional judicial resources are provided, the court simply will not have the capacity to deal with those matters in, what are already busy, duty lists.

Orders made 'without admissions' by consent

The Bill does not currently provide for the making of consent orders or orders "without admissions" such as provided for in section 51 of the Qld Act.

FLPA notes that applications are routinely able to be resolved in the state courts on this basis.

Of course, if findings are required to be made in relation to family violence allegations in the context of a determination of a parenting or property settlement matters which is also before the Court, there is no impediment to the Court making findings in that context regardless of whether a federal family violence has been made without admissions by consent.

LEADERSHIP IN FAMILY LAW

Competing applications

The Bill does not address how cross applications are to be dealt with or any requirement for the person most in need of protection to be identified. FLPA would support the inclusion of provisions such as those contained in Division 1A of the Qld Act.

Rules of evidence

It is noted that sections 69ZT, 69ZV, 69ZW and 69ZX of the FLA apply to '*child-related proceedings*' under Part VII of the FLA, meaning that certain provisions of the *Evidence Act 1995* (Cth) do not apply unless the Court so determines. The provisions in proposed Div 9A 'Federal family violence orders in relation to children' will fall under Part VII as 'child-related proceedings'.

Proposed Part XIV Div 2 'Federal family violence order in relation to parties to a marriage' are not child-related proceedings.

Whilst the proposed amendments require the court to be satisfied of certain matters on the balance of probabilities, there is no reference as to the application of the rules of evidence. FLPA submits that it ought be made abundantly clear that the rules of evidence are to apply to such applications, particularly for the benefit of self-represented litigants.

Appeals

Appeals are not specifically dealt with in the amendments so it is presumed the usual provisions will apply.

Determination by Registrars

It is unclear on the current drafting as to whether it is intended that Registrars will have the power to determine these applications. If so, the appeal and review processes are very different to the usual appeal process as the matter proceeds to a *hearing de novo*. This has to potential to result in parties being cross-examined on a second occasion about the same issues. FLPA does not support the delegation of the power to deal with these applications to Registrars.

Welfare of the child/protected person

The terms "*welfare of the child*" and "*welfare of the protected person*" are used in a number of sections of the Bill.[8] Whilst the Explanatory Memorandum at [122] offers a non-exhaustive indication of what "*the safety and welfare of the child*" would include, there is no indication of what is intended by either of those terms beyond the provisions of s68AC(9)(a) and 113AC(7)(a).

[8] See for example ss 68AC(6), 68AI(6), 68AI(8), 68AI(13) and 113AC(7)(a)

LEADERSHIP IN FAMILY LAW

FLPA submits that consideration be given to the inclusion of more fulsome list of factors which may be relevant to the Court's determination of what is appropriate for the welfare of a child or protected person.

ICL applications for federal family violence order

It is proposed that an independent children's lawyer (**ICL**) who represents the interests of a child in proceedings under that Part may apply to a listed court for a federal family violence order: s68AB(1)(c).

FLPA is concerned that the act of filing any such application by an ICL:

- may be contrary to the role of the ICL (as set out in s68LA of the FLA and relevant guidelines);
- may result in an application for the removal and/or discharge of that ICL on the basis of perceived bias;
- will necessitate further legal aid funding to be made available to prosecute such applications.

Section 68LA(4) makes it clear that an ICL is not the child's legal representative and is not obliged to act on the child's instructions. To have an ICL bring an application on behalf of the child for a federal family violence order runs contrary to that in FLPA's submission.

Section 68LA(5) of the FLA deals with "*Specific duties of independent children's lawyer*" which includes that they must:

(a) act impartially in dealings with the parties to the proceedings;

…

(d) endeavour to minimise trauma to the child associated with the proceedings; and
(e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child."

Further, the *Guidelines for Independent Children's Lawyers* (2013) as endorsed by the Chief Justice of the Family Court of Australia, the Family Court of Western Australia and also by the Federal Circuit Court of Australia, set out among other things that:

- an ICL is to act impartially and in a manner which is unfettered by considerations other than the best interests of the child; and
- an ICL must be truly independent of the court and the parties to the proceedings; and
- an ICL should assist the parties to reach a resolution, whether by negotiation or judicial determination, that is in the child's best interests.

Putting the ICL in a position where they are required to consider whether to bring an application for a federal family violence order is inconsistent with those provisions. It leaves ICLs open to pressure from parties to make an application, to allegations of bias or a lack of independence and/or claims of negligence. These all detract from their role to assist the court in determining what is in a child's best interests.

LEADERSHIP IN FAMILY LAW

FLPA is also concerned that any failure by an ICL to file an application for a federal family violence order in a particular matter (in circumstances where they are unable to produce direct evidence which would support such an application, without for example making themselves a witness or calling one of the parties as a witness in their case) may be criticised, particularly in hindsight if something were to tragically occur to a child.

Terms of order

Proposed subsections 68AC(8)(g) and s113AC(6)(g) may be open to abuse. For example, as currently drafted:

- a parent against whom a federal family violence order is directed may be attending a school or other venue to collect a child in accordance with an order of the Court;
- if the other 'protected' parent were to attend at the school or venue at that time (even though there was no basis for them to do so), the parent who is meant to be collecting the child would be required to leave if requested to do so.

FLPA submits this subsection should be deleted or modified to prevent misuse.

Provision of federal family violence orders to children

FLPA supports the concept that orders will not be made available to or explained to children unless it is in their best interests. However, FLPA has concerns about the way the proposed section is currently drafted where is says "*However, the court may instead:*

(b) cause a copy of the order to be made available to an independent children's lawyer representing the child's interest or to another person that the court considers appropriate; and

(c) cause an explanation to be given to a person that the court considers appropriate."

FLPA is concerned that the way the provision is currently drafted suggests that the best interests of the child do not need to be considered when this latter part applies.

The proposed section does not make clear whether parties are intended to be prohibited from causing a copy of the order to be made available, or an explanation of the order, to children.

It should also be clarified whether the intention is that if an ICL or other person is provided a copy of the order under s68AD(6), the ICL or that other person is at liberty to decide whether to explain the order to the child.

FLPA further submits it should be made clear that any order which is to be given to a child, shall not be given at or in the vicinity of the child's school unless there is no other place where this could occur so there is consistency with section 188(2)(b) of the Qld Act.

LEADERSHIP IN FAMILY LAW

Offence for breaching federal family violence order

Proposed sections 68AG and 113AG provide for the penalty for breach of a federal family violence order is two (2) years imprisonment or 120 penalty units or both.

Is it intended that this is the maximum penalty, with the Court to have discretion to order a lesser penalty if the circumstances warrant? If so, this ought be clarified. If not, consideration should be given to the range of matters which may constitute a breach of a federal family violence order – for example, contacting a protected person via text message may warrant a lesser penalty than physically assaulting a protected person.

Currently under the Qld Act, the maximum penalty for contravening a protection order is 3 years' imprisonment or 120 penalty units; or if the respondent has been convicted of a domestic violence offence within the five years prior to commission of the offence, 5 years' imprisonment or 240 penalty units.

Consistency in penalties would be preferable.

Considering impact of variation

FLPA proposes that provision be made within the Bill that prior to a court varying an order pursuant to s68AI that may adversely affect a protected person the court be required to consider certain factors, such as those set out in section 92 of the Qld Act.

Impact of federal family violence order on holding of weapons licence

It is unclear as to how the amendments will affect the holding of a weapons' licence. Weapons are specifically dealt with in Division 8 of the Qld Act and this should be addressed in the Bill as well.

Yours faithfully

Dan Bottrell
FLPA President