



LEADERSHIP IN FAMILY LAW

16 July 2024

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

By Email: spla.reps@aph.gov.au

Dear Committee Secretary,

Re: Inquiry into family violence orders

Thank you for the opportunity to respond to the Terms of Reference.

The Family Law Practitioners Association (**FLPA**) is Queensland's leading body representing those who work in family law including solicitors, barristers, social workers, psychologists, members of the judiciary and associated fields. FLPA has almost 1,000 members who are based throughout Queensland, Northern New South Wales and the Northern Territory.

Question 1. The risk of an escalation in the aggressive and violent behaviour of the perpetrator and heightened risk to the partner and children during family court proceedings.

Experience and research demonstrates that the risk of family violence and lethality is significantly increased at the time of and immediately post separation. It is also the time when victims need to engage with legal systems to achieve orders for their safety and for parenting and property orders, and at a time when they may not have the practical, financial or emotional resources to do so.

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Question 2. The current barriers for litigants in the family law system to obtain and enforce FVOs, including but not limited to:

- a) the additional difficulty for victims of violence in the family law system to attend multiple courts for their family law order proceedings and an FVO**
- b) the intersection between FVOs and parenting orders, including that a family court parenting order may override an FVO**
- c) the availability of wrap-around support services and security for victims of violence.**

Background

It is important to note the significant differences in the experience of obtaining an FVO compared with making an application to the Federal Circuit and Family Court of Australia (Division 2) (**FCFCOA**) in Queensland.

Applying for and enforcing an FVO

The Magistrates Court of Queensland has become extremely accessible to those seeking FVOs. A self represented aggrieved person can generally arrive at a courthouse, complete the application for a protection order with or without assistance from Court staff or Legal Aid, file it that day and, at least in Queensland, it is often heard immediately or in the days following to decide whether a temporary FVO should be made. There are more than 160 Magistrates Court registries in Queensland.

FVOs are further made easier for applicants to obtain noting:

- 1. Police can issue a Police Protection Notice (the Queensland version of an FVO issued by Police pending the matter being heard in Court), with the force of an FVO, effective immediately;
- 2. Police can be, and often are, the applicant for an FVO.

Breaches of an FVO are criminal matters, prosecuted by police. There is no cost to a victim to have them prosecuted. In the experience of FLPA members, Police in Queensland generally have good judgment as to when and whether to prosecute breaches of FVOs. The consequences of the breach, including potential prison time are, in the experience of FLPA members, treated seriously by defendants when they receive advice.



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Applying for orders in the FCFCOA

An applicant in the FCFCOA must complete a minimum of 3 forms, pay a filing fee of up to \$800, and wait up to 6 weeks for their first return date before the court. That date is procedural in nature, and ordinarily contested interim hearings do not occur until some weeks or months after the first return date. It should be said that even when represented it generally takes more than 5 hours to complete the application. The cost to prepare an application through a private solicitor is generally \$3,000 to \$10,000. There are 9 FCFCOA registries throughout Queensland, not all of which are staffed full time.

Enforcing a family law order requires filing an Application for Contravention (for parenting matters). Despite significant efforts post 2021, applications will generally take 6 to 12 months to be heard. The law and forms are complex and difficult for self represented litigants. The cost to pay a private lawyer to run the application would be in the range of \$10,000 to \$30,000. The consequences upon a finding of contravention are viewed as much less severe than a breach of an FVO, and rarely include prison time.

Subquestion 2.a: is it more difficult for victims of violence in the family law system to attend multiple courts for their family law order proceedings and an FVO.

It is trite to observe that a litigant engaged in proceedings before both the FCFCOA in the federal family law jurisdiction and the Magistrates Court in the state based domestic violence jurisdiction would encounter additional difficulties beyond that of a litigant engaged in proceedings before only one jurisdiction.

It would rarely be the case that it would be more convenient for an applicant for an FVO to attend an FCFCOA registry rather than a Magistrates Court registry in circumstances where:

1. there are many more Magistrates Court registries than FCFCOA registries (more than 160 Magistrates Court registries compared with 9 FCFCOA registries);
2. the complexity of making an application to the FCFCOA is much greater than making an application for an FVO in the Magistrates Court;
3. Magistrates Courts are often able to make temporary FVOs within 24 hours; and
4. FCFCOA Registries do not have that practical capacity.



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Rather, FLPA submits there would be a significant risk that:

1. victims may be deterred from making the FVO application if presented with that application at the same time as they are presented with the complex forms to apply for parenting orders in the FCFCOA; and
2. the lesser capacity of the FCFCOA is likely to result in FVO applications made within those registries being heard far more slowly than they would be in the Magistrates Court, with resulting risk in the intervening period. The comparative delay would not be apparent to potential applicants when considering where to file their FVO application.

We contend below that there is a need for the FCFCOA to have the power to make relevant injunctions where appropriate.

Subquestion 2.b: Does the intersection between FVOs and parenting orders, including that a parenting order may override an FVO, create barriers for litigants in the family law system to obtain and enforce FVOs.

The intersection between parenting orders and FVOs creates limited difficulties for victims of violence applying for an FVO for their own protection. Those presented by s114AB are discussed below.

The intersection between parenting orders and FVOs does however create significant difficulties for victims of violence applying for an FVO for the protection of *their children*. Those difficulties are, in some cases, appropriate hurdles, having regard to the benefits to children of having a relationship with both of their parents where it is safe to do so and the need to protect children from harm.

Relevant sections of the Family Law Act

The *Family Law Act 1975* (Cth) relevantly provides:

1. at s 68B, that a court exercising jurisdiction in a parenting matter can make injunctions for the protection of a person or children;
2. at s 68R, that a State or Territory court dealing with an application for an FVO may discharge, suspend, revive or vary a parenting order;



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3. at s 114AB, that a court exercising jurisdiction under ss 68B and 114 (sections providing power to make orders analogous to FVOs) must not do so where the same topic has been the subject of an application in a State or Territory court.

Police hesitance to prohibit contact with children in FVOs

The FCFCOA is clearly the preferable jurisdiction for orders to be made about children in the medium to long term including how children should live with and spend time with their parents. The FCFCOA, however, is not adequately equipped or set up to deal with urgent issues. Generally speaking, the FCFCOA labours under a significant burden of cases which limits its ability to respond to urgent matters within weeks or perhaps months, compared with the ability of the Magistrates Court to address temporary FVOs often within hours or days.

Despite that, it is common experience of FLPA members that police refuse to include children on DVOs, or are very hesitant to suspend existing spend time with arrangements, because of a view that those matters should be the subject of FCFCOA proceedings. This may occur even when parenting orders were made some time ago, and recent events the subject of the FVO application make them inappropriate.

Police should be given credit for their judgement in the many cases where it is appropriate that questions of spend time with arrangements be left to the FCFCOA.

There appears, however, a view amongst police that children's matters should be left for the FCFCOA as a matter of course. That should not be the case. The ability to seek urgent redress in the Magistrates Court is significantly different to the FCFCOA. There are many circumstances where it would be appropriate to protect children in the short term and there is no practical capacity to do so in the FCFCOA. This can be demonstrated as simply as noting that Police Protection Notices can be issued 24 hours a day, but the FCFCOA is only open business hours. In practice, the delay is much greater.

The result is often a lacuna where family violence orders prevent contact with the aggrieved but allow ongoing contact with the children.



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This must be balanced against, of course, overzealous suspension of time between children and (generally) fathers under FVOs. Such an outcome would potentially be a matter that brings FVOs into disrepute in the community.

The cost and complexity of commencing proceedings in the FCFCOA is, in the experience of members, prohibitive and may simply result in children not spending time with (generally) their father if the onus is on him to apply to the FCFCOA. The complete cessation of time is often not in the best interests of children, even if there is a basis for the FVO – if may be that supervised arrangements could be appropriate in the short to mid-term. Social science research shows the significant detriments to children of growing up without the benefit of a relationship with one of their parents. The recommencement of family law proceedings between parents can also have a serious impact on children.

It is FLPA's view that a more frequent suspension of time arrangements between respondents and children would be detrimental and productive of litigation in the FCFCOA in the majority of cases. There is however a significant risk involved in a small number of cases where children are left in the care of respondents until a family law application can be brought before the FCFCOA.

A potential compromise may be the ability for Police to temporarily suspend a child's time with a parent, for say up to 28 days, to allow the aggrieved time to make the required parenting application to the FCFCOA, rather than leaving the onus on the respondent to commence proceedings in the FCFCOA.

Education for Police about the limited ability for the FCFCOA (and child welfare dependants) to respond in the short term may assist.

Whilst s 68R of the *Family Law Act* provides a State or Territory court with the power to amend parenting orders, that rarely appears to occur at the time of a temporary FVO being made. It may assist to put an obligation on the State or Territory Court to "consider" whether an order needs to be made pursuant to s 68R whenever a temporary FVO is made. This would bring the question to front of mind for practitioners.



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Police hesitance to enforce breach of FVO involving contact with children

Concerningly, there is a view amongst police that when children are with a parent in breach of a family violence order, that is also a matter to be left for the FCFCOA. To clarify, police will take action where a respondent is in breach of a family violence order, but often refuse to do so where that breach is contact with children.

Members have spoken to police directly in Queensland, including in recent months, who have confirmed their view that even if an aggrieved is breaching an FVO by having contact with children, they would not collect the children or otherwise assist the aggrieved to collect the children and would leave that issue for them to deal with in the FCFCOA. That puts the victim in the position where they must commence proceedings in the FCFCOA to protect the children and sometimes to recover the children. The children may be at significant risk in the time it takes for the FCFCOA to hear the matter. Aggrieved victims are effectively blackmailed to resume at least their communications with the respondent, or return to their previous relationship with the respondent, so that they can see their children.

It may be useful to give a specific example, suitably anonymised, provided by a FLPA member:

The matter involved the mother of 3 daughters, the youngest was 2 years old. The father had an extensive criminal history for violence, and had served significant periods in gaol. There was a long history of the most significant domestic violence. He was returned to gaol for a period to serve out the balance of his parole. In that period the mother determined to leave him and made arrangements to move out. The father, on release, discovered these arrangements and took the children into his care before the mother could leave.

Police, appropriately, immediately issued a Police Protection Notice, including conditions preventing the father from having any contact with the mother or approaching her. A few weeks later the father consented to that order becoming a final Protection Order, which remains in place. Police however, did not include the children on the Protection Order, despite the obvious risk to the children. When questioned by the member, the officers advised that it was a "family law issue". It was put to the relevant officer whether they would take action to collect the children if an FVO was made preventing contact with the father, and the officer advised that they would



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not, and it was a matter for the FCFCOA. Several reports to Child Safety did not result in any action or investigation on their part.

Proceedings were commenced in the FCFCOA, and heard urgently (for that Court), being 11 days after filing. Fortunately, nothing happened to the children in the father's care in that example.

Impact of s114AB of the Family Law Act

Members of the bench of the FCFCOA are (appropriately) hesitant to make orders pursuant to s 68B where there has been an application for an FVO. That approach appears to be correct at law.¹

Section 114AB was introduced in 1983. The explanatory memorandum said that it was to enable the preservation of State and Territory Laws. No doubt there is benefit in limiting the ability of either party relitigating matters already the subject of an FVO application.

It is problematic however when combined with a preference by Police not to suspend time arrangements between children and parents. It is often the case that a victim of family violence applying to the FCFCOA would like to add s 68B injunctions for the protection of the child, or to extend the current FVO for their further protection, as a result of recent events. It may be that the Independent Children's Lawyer or the Court presses for the orders to be made, sometimes in circumstances where the victim has been unable or unwilling to seek an FVO.

FLPA has submitted above that it is far more convenient for an applicant for an FVO to apply in the Magistrates Court. That comment does not apply to the circumstances where a party is seeking orders which would prevent time between children and a parent. The Magistrates Court will be rightly circumspect about the application. The Magistrates Court does not have the information (such as a family report) or the legislation to appropriately make those decisions and will tend to defer to the FCFCOA.

¹ See for example, Spears & Caro [2020] FamCA 985; Genesalio & Genesalio [2020] FamCAFC 113



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The victim in the FCFCOA however is faced with the hurdle of s 114AB, and the FCFCOA may, depending on the scope of the original FVO application, be left without jurisdiction to make s 68B orders.

It is argued by FLPA that there should be no limit on the ability of the FCFCOA to make s 68B orders where, having seen the evidence in a matter, it views it as appropriate. The harm that s 114AB was designed to address (parties attempting to relitigate FVOs) can, in FLPA's view, be appropriately dealt with by the discretion of FCFCOA judicial officers who will be alive to that issue in any event.

This does raise the issue that enforcement of s 68B and s 114 injunctions is slow, expensive and uncommon. Compare that to enforcement of FVOs which is quick, free (to the aggrieved) and common. Criminalisation of breaches of s 68B and s 114 injunctions has been discussed in previous inquiries, and would need to be done with care, but it should be noted that injunctions made in the FCFCOA will inevitably be much less effective than FVOs whilst such significant differences in enforcement remain.

Question 3. How FVOs could be more accessible for victims of violence going through the family law system, including but not limited to:

- a. making it easier to apply for and enforce an FVO
- b. co-location arrangements that would allow an application or enforcement of an FVO to be heard in the same physical location as the Federal Circuit and Family Court of Australia
- c. the legal and non-legal support services required to promote early identification of and response to family violence.

Question 3.a: how could it be made easier to apply for and enforce an FVO for victims of violence going through the family law system.

In FLPA's experience, reforms over the past decade have successfully made it relatively easy to apply for an FVO, and attitudinal changes amongst Police have made enforcement of breaches of FVOs frequent and without cost to victims.

There is limited scope for reform in response to this question, at least in Queensland. The experience in other states may differ significantly.



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We note our comments above about the difficulties facing victims seeking to enforce injunctions made in the FCFCOA.

Question 3.b: could FVOs be made more accessible for victims of family violence by making it possible to apply for an FVO from the physical location of an FCFCOA registry?

There are 160 Magistrates Court registries in Queensland compared with 9 FCFCOA registries. It is difficult to see that it would be more convenient or accessible for a victim to attend an FCFCOA registry.

At Question 2.b. FLPA submits that there would be notable potential downsides to allowing FVO application to be made at FCFCOA registries.

Question 3.c. could FVOs be made more accessible for victims of family violence through legal and non-legal support services required to promote the early identification and response to family violence.

Early intervention, wrap around legal and social supports are a good model to provide assistance to victim-survivors. The Family Advocacy and Support Service (FASS) is one model that provides legal, social and mental health supports and referrals for litigants in parenting proceedings in the FCFCOA where family violence is an issue. Services like this provide early legal advice and referrals for practical support for litigants with family law and related domestic violence legal matters. These services can help victims to navigate their matters in the Federal and State jurisdictions.

Improved access to services such as FASS would be much more effective to assist victims of family violence to obtain and enforce an FVO. Secure, adequate and ongoing funding for Legal Aid and community legal centres to provide wrap around services such as FASS and domestic violence legal and social support is essential. There is significant expertise in the sector to provide multi-disciplinary early intervention responses for victim. These services can assist clients with their legal and support needs in the immediate post-separation period and facilitate application for legal aid funding or make referrals for private legal representation.



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FCFCOA has implemented the National Strategic Framework for Information Sharing which is well developed for some agencies, (child safety agencies particularly) but still developing in “court to court” information provision. Funding to support and consolidate information sharing processes, including co-location of officers from agencies and courts should be prioritised.

Question 4. Any other reform that would make it safer and fairer for victims of violence in the family law system who need the protection of FVOs.

National harmonisation and simplification of state-based legislation for Family Violence orders would improve accessibility as would national harmonisation of terminology, forms, and enforcement processes.

Police have far more of an influence over FVOs than any other aspect of the system. Massive positive change has been seen in Queensland over the past decade in Police responses to family violence, but reports from members are that experiences continue to vary. Further training and integration of victim-centred, trauma-informed practice amongst Police would have benefits for victims.

We note our comments in response to Question 2 regarding the difficulty for victims to enforce personal protection injunctions made in the FCFCOA, compared to FVOs.

If you would like to discuss any of the points raised in this submission, please contact FLPA President Shannon Daykin [REDACTED]

Yours faithfully

[REDACTED]

Shannon Daykin
FLPA President