

SOUTH AUSTRALIAN
LAW REFORM
INSTITUTE



Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

7 June 2021

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

Dear Ms Dunstone

We are writing on behalf of the South Australian Law Reform Institute (SALRI) in relation to the current reference of the Legal and Constitutional Affairs Legislation Committee into the provisions of the Family Law Amendment (Federal Family Violence Orders) Bill 2021. SALRI would like to offer the following observations on the current reference.

SALRI is an independent, non-partisan law reform body based at the Adelaide University Law School. It was formed under an agreement between the University of Adelaide, the Law Society of South Australia and the South Australian Attorney-General. SALRI has a role similar to the ALRC. SALRI is based on the model used in Alberta and Tasmania and has a well-established output and impact over its ten years of operation. Dr David Plater is the Deputy Director of SALRI and Professor John Williams is the Director. Ms Anita Brunacci is an experienced researcher with SALRI and a Family Lawyer with over 12 years experience of legal practice in both Tasmania and South Australia. Dr Plater has many years of prosecuting offences of family violence in both the UK and Australia.

Dr Plater and Ms Brunacci would be happy to meet you and/or your colleagues by zoom to share our thoughts on this important reference or if you have any queries in relation to SALRI's observations.

Schedule 1 – Main Amendments

SALRI notes with the intended merger of the Family Court of Australia and Federal Circuit Court of Australia that the definition of 'listed Courts' for Subsection 4(1) may require amendment. Noting that proceedings under the *Family Law Act 1975* can also be commenced in State Courts using accrued jurisdiction, which is particularly relevant in rural areas without a federal registry,¹ SALRI suggests that the definition of 'listed Courts' could also be expanded to any Court exercising jurisdiction under the *Family Law Act 1975*.

Division 9A – Federal Family Violence Orders (“FFVO”) in relation to Children

SALRI notes that given the discrepancies between States and Territories as to:

- a) The definition of Family Violence; and
- b) The conditions available under a “Family Violence Order”

The restriction that prevents parties applying for a FFVO where an existing State or Territory Order already exists may not account for circumstances where:

¹ This theme has often arisen in SALRI's consultation with regional and rural communities.

- a) The State or Territory Order is due to lapse and by not allowing application for a FFVO parties must either have a period without protection or must have proceedings in both the Federal Court (for parenting) and the State Court (for Family Violence);
- b) A State Order was implemented with (or without) exemptions which are deemed inappropriate after the hearing of the parenting application parties must return to the State Courts for an amendment rather than have the Federal Court implement an appropriate Order as part of their final Orders adding additional cost, delay and uncertainty for families; and
- c) The existing Order is made in a State or Territory where the protected person will no longer reside IE as the result of a successful relocation application, which would require them to then apply for protection, either by registration of an existing Order or application for a new Order, upon their relocation.

During SALRI's consultation on a number of recent references including LGBTIQ discrimination, abortion and the current SALRI reference in to the role and operation of Communication Partners (also called Intermediaries) to help parties with complex communication needs, family violence has proved a significant theme which has arisen, including the use of the Court process to further exacerbate the control and emotional violence being experienced by the protected person. For this reason, SALRI encourages consideration which would allow the making of Protection Orders efficiently and cost effectively without the need to engage multiple Courts therefore increasing the uncertainty for protected persons and the opportunity for perpetrators to attempt to exercise further control of the process.

In regard to the proposed restrictions on the Court from making a FFVO where a State or Territory Order already operates, SALRI acknowledges that it is in the interests of protected persons to have clarity and certainty as to their protections and that a person who is to be restrained is aware of the restrictions upon them to prevent inadvertent breaches. SALRI therefore supports a legislative provision to only allow one Order, whether it be State or Federal to be active at any time. However, SALRI suggests that Courts be permitted to make FFVO in contemplation of the expiry or revocation of a State or Territory Order, or where such Order fails to have effect.

Service

SALRI suggests that Service of a FFVO be, wherever possible, undertaken by State or Territory Police. SALRI notes that local police are experienced in the Service of protection orders and in the obligations to explain the meaning of the Orders to those being served.

By utilising the Police for this purpose a number of benefits could be expected such as:

1. The person being served understanding the gravity of the Order which has been provided to them;
2. Not putting other persons, such as process servers or family members, at risk from the person who could be considered to have a propensity toward violence;
3. Not placing the protected person to the costs of service when they are already bearing the costs of proceedings; and
4. The Police being aware at the earliest opportunity of the existence of an Order.

Revocation, Suspension or Variations

As noted about SALRI's consultation on various references has heard stories of system abuse by perpetrators of family violence. Noting this, and that a FFVO may be in place over a period up to 18 years, SALRI suggests that conditions on applications to vary, suspend or revoke an Order be made clear in the relevant Act.

The Courts will presently not consider applications to amend Parenting Orders without evidence of a substantial change to circumstances. While it is not known if this test would be too high for an application related solely to a FFVO, consideration should be given to when an application to revoke, vary or suspend will be considered. Consideration may also wish to be given on how often applications can be made by the restrained person, and if there should be a different test or restrictions on applications made by the protected person.

Division 9 – Orders and Injunctions in relation to Children

Please see above as to SALRI's concerns on the restriction of applying for a FFVO for which SALRI expresses the same concerns in restricting application for an injunction.

This is further raised by SALRI in that injunctions may relate to matters not covered by the State or Territory protective Order because:

- a) At the time the Order was made the issue for the injunction had not arisen; and/or
- b) The injunction relates to matters which are not covered by available conditions in the State or Territory Order, noting the varied definitions of Family Violence throughout Australia.

Division 11 – Relationship with Family Violence Orders made under State and Territory Laws

SALRI sees the benefit and supports the ability of State and Territory Courts to make Orders impacting FFVO's.

However, SALRI queries the enforcement of FFVO's and prosecution of breaches for the same. State and Territory police will presently not enforce Orders made by the Family Court of Australia or Federal Circuit Court of Australia (the situation in Western Australia is outside of SALRI's knowledge).

State and Territory police will only act on specific direction and delegated authority from the Australian Federal Police (AFP) who only take action on an Order after enforcement Orders are made by the relevant Court. While such delays are already problematic for families in parenting matters, in regard to protective orders such as the proposed FFVO's such delays could well make the FFVO's effectively useless and potentially result in serious, even lethal, consequences as action could not be taken on the abuse in a manner timely enough to provide adequate protection.

SALRI simply raises this issue for consideration as to:

1. Will State and Territory Police respond to calls notifying of a breach of a FFVO in the same manner they do with their local Orders; and
2. Will prosecution of FFVO breaches be a State or Federal action.

Division 2 – Federal Family Violence Orders (“FFVO”) in relation to parties to a marriage

SALRI's comments as they relate to children above should be read to also include circumstances where the protected person is a party to a marriage.

SALRI also raises the need to ensure protections are extended to de facto couples.

Division 3 - Orders and Injunctions in relation to parties to a marriage

SALRI's comments as they relate to children above should be read to also include circumstances where the injunction relates to a party to a marriage.

SALRI also notes the need to ensure protections are extended to de facto couples.

Thank you for the opportunity to share our observations on this important amendment to the *Family Law Act 1975*. Dr Plater and Ms Brunacci would be happy to meet you and/or your colleagues by zoom, or in person, should you wish to discuss any issue further.

Yours faithfully

Yours faithfully

Dr David Plater
Deputy Director
South Australian Law Reform Institute

re/ **Anita Brunacci**
Researcher
South Australian Law Reform Institute