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Inquiry into the Family Law Amendment (Federal Family Violence Orders) Bill 2021

**Attorney-General's Department submission to the
Senate Legal and Constitutional Affairs Legislation
Committee**

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1. Introduction

The Attorney-General's Department (the department) welcomes the opportunity to provide the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) with this submission as part of the Committee's Inquiry into the Family Law Amendment (Federal Family Violence Orders) Bill 2021 (the Bill).

The Bill is a product of extensive collaborative efforts of the National Personal Protection Injunction Working Group (the Working Group), comprising senior officials from Commonwealth and state and territory police, justice and courts, over a significant period of time. The Bill has been designed to ensure that orders for personal protection from family violence made by family law courts are able to be enforced by police, in alignment with existing practices under the National Domestic Violence Order Scheme (NDVOS). The Bill before the Committee has been carefully developed to ensure these objectives are best achieved, and represents the outcome of significant negotiations with states and territories.

The purpose of this submission is to provide the Committee with information about:

- the background to and context for this legislative reform
- key aspects of the Bill and how they have been developed, and
- high-level operational matters outside of the Bill.

The issue

The family law courts routinely see matters in which people allege family violence. However, where these victims want criminally enforceable protection orders, they currently have to commence separate proceedings in a state or territory court.

The existing civil injunctions issuable under sections 68B and 114 of the *Family Law Act 1975* (the Family Law Act) for personal protection are not criminally enforceable. This means that the onus is on the aggrieved party to bring a private action against the perpetrator for contravention of the injunction in the family law courts. The dynamics of power and control in relationships involving family violence can make this difficult for the victim.

The Australian Government has invested heavily in improving safety within the family law system. Recent initiatives include:

- the co-location of child protection and policing officials within family law courts to improve information sharing
- a pilot of a significantly enhanced approach to identifying and managing family safety risk in the family law courts ('the Lighthouse Project')
- a ban on direct cross examination of victims of family violence by their alleged perpetrators and a legal assistance scheme to support this ban, and

- work underway with all states and territories to develop a National Information Sharing Framework on Family Safety.

This is in addition to a \$1.1 billion investment in women’s safety in the recent Federal Budget, as well as significant investments in legal and social support services for persons affected by family violence.

The Bill forms a critical part of this overall pursuit to better protect vulnerable persons traversing the family law system, and to address the ‘jurisdictional divide’ between Commonwealth, state and territory family violence systems.

The reform

The Bill would amend the Family Law Act to establish new federal family violence orders (FFVOs) which, if breached, can be criminally enforced. FFVOs would thereby offer stronger protections in relation to family violence than personal protection injunctions and have a deterrent effect against breaches.

Access to criminally enforceable FFVOs would mean that persons before a family law court would not be required to initiate separate proceedings in a state or territory court for a criminally enforceable protection order, but could instead seek the protections they need in the court where their existing matter is already being heard.

FFVOs are intended to be an additional protective measure for victims of family violence at the federal level, complementing the protections afforded by state and territory family violence order schemes. As a consequence, the orders are only available to a discrete sub-set of people who are already before the family law courts seeking protection.

This reform would align with Australia’s continued obligations to protect women and children under the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. Although family violence can be experienced by anyone, regardless of gender, women are overwhelmingly more likely to be subjected to family violence. Similarly, children are particularly vulnerable to family violence. FFVOs, though accessible to persons of any gender, would provide additional protections for women from family violence, and safeguard the wellbeing of children.

2. Development of the reforms

Criminalising breaches of family law orders for personal protection was recommended by the Victorian Royal Commission into Family Violence (recommendation 131) in 2016, and the Australian and New South Wales Law Reform Commissions’ 2010 report *Family Violence – A National Legal Response* (recommendation 17-4: ALRC Report 114 and NSWLRC Report 128). More recently, the Second Interim Report of the Joint Select Committee on Australia’s Family Law System (2021) recommended that the Commonwealth, states and territories consider how to ensure that breaches

of federal personal protection orders can be acted upon promptly by state and territory police (see recommendation 13).

Consultation and co-design process

The Bill is the culmination of significant stakeholder input over several years about improving family law protections for victims of family violence.

The Victorian Royal Commission into Family Violence and Australian and New South Wales Law Reform Commissions' recommendations were informed by consultation undertaken with the public and the family law profession. This included a Consultation Paper issued jointly by the Australian and New South Wales Law Reform Commissions entitled *Family Violence: Improving Legal Frameworks* in April 2010, which posed specific questions and proposals relating to the operation of the injunction provisions in the Family Law Act. The Victorian Royal Commission also accepted submissions in relation to the operation of sections 68B and 114 and proposals to make the orders criminally enforceable.

In December 2016, the then Council of Australian Governments (COAG) agreed to task the then Law, Crime and Community Safety Council with, *inter alia*:

considering options for ensuring that injunctions made by the Federal Court are enforced by state police - removing the onus from the victim to undertake costly family law proceedings.

The Working Group has been working together since 2018 in accordance with this tasking, to identify and report on necessary actions to ensure that family law orders made for personal protection from family violence can be criminally enforced. Preliminary work was undertaken by various working groups prior to the establishment of the Working Group. This included a sub-working group of COAG, the Family Violence Working Group, the National Domestic Violence Legislation Working Group, and Senior Police Officials.

The Working Group and its Legislative, Business and Technology advisory groups bring together expertise in police and court operations, information sharing technology, and the legal and business frameworks that currently support the enforcement of state and territory family violence orders.

The Bill is a product of extensive collaborative efforts of the Working Group and its sub-groups over a significant period of time. The department would like to record its thanks to state and territory officials for their expertise and collaboration in developing this Bill.

Initial legislative measures

Measures that would have criminalised breaches of personal protection injunctions were introduced into the Commonwealth Parliament in December 2017 in the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (the 2017 Bill). The measures would have made it a Commonwealth criminal offence to breach a family law personal protection injunction.

Draft measures for the 2017 Bill were put to the public as part of an exposure draft process from 9 December 2016 to 20 January 2017. The Government received 65 responses: 41 from organisations, recognised experts or judicial officers writing in their personal capacity, and 24 from members of the public.

The personal protection injunction provisions were ultimately removed from the 2017 Bill prior to its passage in August 2018 due to concerns raised about implementation matters associated with the measure, including the development of effective systems and information sharing mechanisms that would enable police to enforce the orders. The Government acknowledged the concerns and the benefits of additional time to enhance enforcement arrangements. The excision of the provisions from the 2017 Bill also reflected a recommendation made by Labor Senators on the Committee in their Dissenting Report of April 2018. Their recommendations included to excise the provisions of the Bill and ensure the intent of the provisions was revisited as a matter of priority as soon as the Australian Law Reform Commission's review of the family law system report was released. Over the past two and a half years, the Government has worked extensively with police, courts and justice agencies in all jurisdictions to address the practical implementation issues raised during early consultation on the 2017 Bill and the initial Committee process, to ensure the criminalised orders could be implemented successfully. The Government has carefully negotiated with states and territories to ensure the orders are able to be enforced by state and territory police, aligning with existing practices under the NDVOS, which provides for all state and territory family violence orders to be automatically recognised and enforceable across Australia.

The Bill currently before the Committee has been carefully designed to address the challenges previously identified with the enforcement of personal protection injunctions. Unlike the previous orders, FFVOs would:

- be issued as a stand-alone order, rather than as a part of a suite of family law orders
- have a direct nexus to family violence
- be issuable on a statutory test that is comparable with the tests for the issue of a final family violence order in the states and territories
- be issuable on conditions that are practically enforceable, and
- through recognition under the NDVOS, be treated as an order of the state or territory in which the breach occurs, such that local police would be able to use the enforcement powers and processes with which they are already familiar to handle breaches.

Establishment of FFVOs

After the 2017 Bill, the Working Group agreed that a newly-named order should be created in the Family Law Act – the FFVO – and should sit separately to the injunction provisions.

There are compelling reasons why FFVOs were created, rather than simply criminalising personal protection injunctions. Personal protection injunctions, in their current form, could not be criminally enforced in practice. They are issued as part of a suite of family law orders, with the court granted a

broad discretion to impose conditions that police may not be able to enforce in practice, or that prohibit behaviour that does not warrant police intervention, for example, rudeness or low level denigration. Police have advised that this would create significant challenges for police attempting to criminally enforce a personal protection injunction.

Personal protection injunctions are also not issued in a format that is compatible with police information sharing systems, which would create further challenges for police enforcement of the injunctions.

The Bill has been developed to ensure FFVOs do not present these enforcement challenges. Instead, the new criminally-enforceable FFVOs would provide targeted protections for family violence victims in the family law system, be issuable on conditions that are practically enforceable, and be made in a standard form template that can be shared with and used by police in the manner to which they are accustomed using the National Police Reference System (NPRS).

Personal protection injunctions would be retained to preserve a civil justice avenue for persons who would not be eligible for a FFVO.

Enforcement options

The department has worked extensively with police, courts and justice agencies in all jurisdictions to ensure that local police officers will be well equipped to take enforcement action if a FFVO is breached.

Following the 2017 Bill, alternative models for enforcement of FFVOs were explored that would allow for front-line state and territory police officers to use their local powers of arrest, detention and investigation, rather than Commonwealth powers, which are not as frequently exercised by state and territory police.

Preliminary work undertaken by the earlier working groups in 2018, and subsequently the Working Group in 2019, identified a number of potential options for enforcement aimed at ensuring state and territory police could confidently and effectively enforce breaches. The Working Group and its sub-groups comprehensively considered the legislative and operational issues associated with the options and proposed solutions. Ultimately, the Working Group determined that the option which would best achieve the policy imperatives of ensuring that persons in the family law system are able to be protected was through national recognition of FFVOs by states and territories under the NDVOS.

The NDVOS provides for all state and territory family violence orders issued in an Australian state or territory from 25 November 2017 to be automatically recognised and enforceable across Australia. Under this scheme, a FFVO would be treated as a local order in the state or territory in which the breach occurs for the purposes of enforcement and prosecution. Police would be able to enforce and prosecute FFVO breach offences using the state and territory laws and processes with which they

are familiar. This means that police in all states and territories will be able to hold perpetrators accountable for their actions if they breach an FFVO, regardless of where the breach occurs.

Ministerial agreement

In November 2019, on the recommendation of the Working Group, the then Council of Attorneys-General and Ministerial Council for Police and Emergency Management (MCPPEM) agreed in principle that the orders will be recognised on the NDVOS and enforced by state and territory police.

MCPPEM also agreed in principle that all jurisdictions would progress legislative amendments to firearms laws to ensure that the issuing of a FFVO against a person would result in their being prohibited from acquiring, possessing and using a firearm.

3. Key aspects of the reforms

The proposed measures in the Bill have been designed to ensure FFVOs will be issued in a format that is compatible with police information sharing systems, contain conditions that can be proven by police where a breach occurs, and minimise the potential for conflict between federal and state orders.

The legislation was developed with the following key objectives:

1. to improve the family law system's ability to protect victims of family violence and hold perpetrators accountable
2. to reduce the need for families to interact with multiple courts across the federal family law and state and territory family violence systems, and
3. to ensure that state and territory police can effectively and confidently enforce the applicable protection order.

Jurisdiction of the court to make a FFVO

FFVOs are able to be issued by a 'listed court'. This is proposed to include the federal family law courts, the Family Court of Western Australia, and the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia, sitting at any place in Western Australia.

Other state and territory courts already have comprehensive powers to make their own family violence orders.

Availability of FFVOs

The Bill would allow family law courts to make two new kinds of orders for personal protection from family violence:

1. FFVOs in relation to children, and
2. FFVOs in relation to parties to a marriage.

While separate orders, both categories of FFVOs are designed to protect vulnerable people from family violence, and breaches of each order would attract the same criminal penalty.

These types of FFVOs reflect the two categories of personal protection injunctions currently issuable under the Family Law Act, noting the Commonwealth's limited constitutional powers to legislate in respect of all de facto relationships. Importantly, however, FFVOs in relation to children (available in family law parenting matters) would apply equally to married and de facto persons.

FFVOs could be made for the personal protection of a child, a parent of a child, a person who is to spend time, communicate, or live with a child under a parenting order, a person who has parental responsibility for a child, or a party to a marriage in specified circumstances.

For those who are unable to obtain a FFVO, state and territory family violence orders will continue to be the key tool in their protection from family violence. State and territory family violence orders will remain the primary form of protection for de facto (and married) couples.

FFVOS are intended to be available to persons who are already before a listed court with a family law matter, are in need of protection, and do not have an existing state or territory family violence order. Where an applicant is a party to existing family law proceedings, they would be able to apply for a FFVO at any time during the course of the proceedings. In order to apply for a FFVO, a person must be either:

- a party to proceedings under Part VII of the Family Law Act (relating to children)
- an independent children's lawyer who represents the interests of a child in proceedings under Part VII
- a party to proceedings for an order or injunction in circumstances arising out of the marital relationship, or
- a person with a personal protection injunction in force to address family violence.

A FFVO could only be made as a final order. This would reduce the need for applicants to attend a family law court on multiple occasions in relation to interim orders to ultimately obtain a final order. This enhances the efficiency of the order-making process for the applicant and the courts, saving the applicant time and money, and allows victims and survivors to access protection when they require it most, noting the position that state and territory courts are expected to be the primary fora for the issue of family violence orders.

Obtaining a FFVO

Except in cases where a person seeks to have their existing personal protection injunction revoked or varied and replaced with a FFVO, a FFVO would be available only to persons who are already before a listed court. A person would apply to the court where their 'Part VII' family law proceeding (relating to children) or matrimonial cause proceeding is being heard, by way of filing an initiating

application. The Bill would also provide that, as an alternative to a person applying for a FFVO, a listed court could make such an order on its own motion. This is intended to benefit vulnerable classes of people, who may include:

- self-represented litigants, who may not be aware of the option to apply for a FFVO
- persons who may not self-identify as a victim or potential victim of family violence, due to a lack of understanding about the range of behaviours that constitute family violence
- litigants who may be unwilling or unable to apply for a FFVO as a result of the dynamics of power and control in their relationship with the other party or another person, and
- children who may not be independently represented in the proceedings and for whose protection neither party has applied for a FFVO.

Given the high rate of litigants in-person in the family law system, the family law courts have significant experience in working with litigants with limited legal backgrounds. The courts are well placed to identify persons who may be in need of a FFVO, but, due to inexperience or trauma, have not applied for one.

Matters relating to the administration of FFVO proceedings are being considered by the listed courts in advance of the Bill's commencement.

Test for issuing a FFVO

To make a FFVO, a listed court must consider that it is appropriate for the welfare of the child (for FFVOs in relation to children), or appropriate in the circumstances (for FFVOs in relation to parties to a marriage).

The court must also be satisfied of one of the following, on the balance of probabilities:

1. The protected person has been subjected to family violence, or if the protected person is the child, subjected or exposed to family violence, or
2. There are reasonable grounds to suspect that the protected person is likely to be subjected to family violence or, if the protected person is the child, is likely to be subjected or exposed to family violence.

The test for the issue of a FFVO is comparable to the tests for the issue of final family violence orders in state and territory courts. Many jurisdictions have multi-limbed tests, requiring a court to be satisfied of one or more matters.

The court would only make a FFVO if it is satisfied that there are no state or territory family violence orders in force that are for the protection of the protected person and are directed against the person against whom the FFVO would be directed.

In addition to the statutory test, the court would need to take into account, as the primary consideration, the safety and welfare of the child or the protected person, including the need to protect the child from being subjected or exposed to family violence, or the person from being

subjected to family violence. The court would also be required to take into account, as relevant, a number of other matters relevant to the protection needs.

Terms on which an order can be made

In a comparable manner to state and territory family violence orders, FFVOs would operate to restrict certain behaviours, communication and contact with protected persons. The Bill includes a number of order conditions, which have been developed in consultation with state and territory police to ensure that they can be enforced in practice and proven in breach proceedings in court.

In the case of a FFVO in relation to a child, the court may make the order on the terms it considers appropriate for the welfare of the child. In the case of a FFVO in relation to parties to a marriage, the court may make the order on terms it considers appropriate in the circumstances.

The court could prohibit the person against whom the order is directed from:

- subjecting the protected person to family violence, or, if the protected person is the child, subjecting or exposing the child to family violence
- contacting the protected person
- being within a specified distance of the protected person
- being within a specified distance of a specified place or area that the protected person is, or is likely to be, located
- attempting to locate the protected person, and
- causing, or attempting to cause, another person to engage in conduct in relation to the protected person that would, if the conduct was done by the person against whom the order is directed, breach the order.

The court could also impose a term requiring the person against whom the order is directed to leave a place or area in certain prescribed circumstances.

Importantly, the court could impose any other term or terms that the court considers reasonably necessary to ensure the personal protection of the protected person. This would allow the court to exercise their discretion and tailor the FFVO to individual circumstances.

Breaches of FFVOs

The Bill would provide that a breach of a FFVO would be a criminal offence, carrying a penalty of up to two years imprisonment, 120 penalty units or both. This is commensurate with a serious indictable offence, and comparable with the penalties available under state and territory legislation for breaches of family violence orders.

If the breach is prosecuted under Commonwealth powers, the penalty in the Bill will apply. Importantly, however, under the NDVOS model, the orders would be treated as a local order in the state or territory in which the breach occurs, making breach proceedings as straightforward as

possible for state and territory courts, and meaning that the penalty of the state or territory in which the breach occurs would apply.

Interaction between FFVOs and state and territory family violence orders

The Bill has been designed to manage interaction with state and territory family violence orders as appropriate. FFVOs are intended to operate alongside, and complement the protections afforded by, state and territory family violence order schemes.

The Bill contains measures that safeguard against persons having both a state and territory family violence order and a FFVO in force at the same time in relation to the same matter. The Bill provides that a listed court must not issue a FFVO where there is a state or territory family violence order in force for the protection of the protected person and directed against the person against whom the FFVO would be directed. The Bill also provides state and territory courts with a power to revoke or suspend a FFVO in proceedings for a family violence order, to avoid inconsistent orders.

The Bill clarifies that to the extent that a family violence order is not able to operate concurrently with a FFVO because the terms of those orders are directly inconsistent, section 109 of the Constitution would operate to invalidate the state order to the extent of that inconsistency. A FFVO would also invalidate conflicting territory orders. There would be a direct inconsistency if it would not be possible to comply with a condition of the family violence order without breaching a condition of the FFVO, or vice versa.

Where some of the terms of a family violence order are directly inconsistent with the terms of a FFVO, but other terms are not directly inconsistent, the family violence order would continue to be valid to the extent that it is not inconsistent. The conditions of the family violence order that are not inconsistent with the FFVO would remain enforceable. The creation of various aspects of the Bill recognises there may be cases where both parties in family law proceedings may genuinely require protection and have different orders in place, or where the orders prohibit different types of conduct.

4. Implementation

There would be a delay of up to 12 months on the commencement of the FFVO measures after Royal Assent, to allow for the amendment of state and territory legislation and the implementation of information sharing and other mechanisms to support enforcement of the new orders. The Working Group continues to work on draft amendments to the NDVOS model laws for adoption by states and territories, and to ensure that information sharing and other mechanisms to support enforcement will be in place ahead of commencement.

As part of 2020-21 Federal Budget, the Australian Government provided \$1.8 million funding over four years to support the implementation and enforcement of FFVOs. This funding will ensure that:

- information and service arrangements are in place to enable the effective enforcement of the orders
- police and judicial officers receive the training they need to manage these cases, and
- the community and key services have awareness of and information about this new protection tool.

Provisioning the FFVOs using the National Police Reference System

Funding has been allocated for the development of an automated system which would provision the FFVOs using the NPRS, and enable state and territory police to access the orders. This will enable state and territory police to effectively enforce FFVOs by providing them with real time access to information about the existence, enforceability and terms of a FFVO. State and territory police and courts currently share information concerning their family violence orders across jurisdictions through the NPRS. The Australian Federal Police (AFP) will develop the automated system, which is scheduled for completion before the commencement of the Bill.

Police services are the only agencies with the ability to place information onto the NPRS. As such, the AFP (as the only Commonwealth Police agency) has agreed to provision FFVO information on behalf of the family courts. Using the NPRS, state and territory firearms registries will also be notified when a FFVO is issued, to ensure they apply all relevant restrictions under their legislation.

Funding has also been allocated to the Australian Criminal Intelligence Commission, which administers the NPRS, to provide Court Portal read-only access to the NPRS to the family law courts. Before a family court can issue a FFVO, they must be satisfied that there are no state or territory family violence orders in force for the protection of the protected person and directed against the person against whom the FFVO would be directed. It is intended that the key method by which this obligation would be satisfied is by the courts checking the NPRS.

Legislative amendments to firearms laws

States and territories are responsible for legislation governing firearms licensing. In accordance with the agreement of MCPPEM in 2019, all jurisdictions will progress legislative amendments to firearms laws to ensure that the issuing of a FFVO against a person will result in the person being prohibited from acquiring, possessing and using a firearm. This would be consistent with the way that local family violence orders are treated under state and territory firearms laws.

Serving FFVOs

Unless the person against whom the FFVO is directed is before the court to receive the order at the time it is made, the order will have no effect and will not be enforceable unless and until it is served on them.

Service measures are being dealt with separately from the Bill. Subordinate legislation would prescribe the service arrangements which may include:

- permissible methods of serving FFVOs
- persons or bodies responsible for effecting service
- any timeframes within which service must be effected, and
- any reporting or record-keeping requirements in relation to service and who is to bear the cost of service.

The Working Group has agreed in principle a service protocol that will be prescribed in regulations, and will be supported by Commonwealth funding to ensure that the orders can be enforced. The Working Group is continuing to work through arrangements for the operationalisation of the service protocol. Under the protocol neither the applicant nor the respondent would be required to cover the costs of service.

Enforcing FFVOs

FFVOs will be enforced by state, territory and federal police as part of the NDVOS. Amendments to the NDVOS model legislation will be enacted by states and territories to allow the orders to be enforced under the NDVOS scheme.

Recognising FFVOs on the NDVOS means that the orders will be enforced by state and territory police and courts in the same way as other family violence orders issued under the laws of that state or territory.

To further support enforcement, information about FFVOs would be made readily available to state and territory police using the NPRS. The Bill would require the listed court to make FFVOs in a standard form template that will be compatible with this system and contain all critical information needed for enforcement purposes.

Training for state and territory police, state and territory courts and federal courts

Funding has been allocated for the development of on-line training modules for state and territory police, state and territory courts, and federal courts on the new FFVOs and their enforcement.

Family law judges will receive training on the new tests for issuing a FFVO, its interaction with other orders and injunctions under the Family Law Act, and the stand-alone template for recording FFVOs.

State and territory police, who will enforce FFVOs, will receive information on the nature and scope of the orders, how they are to be enforced, and how they interact with state and territory family violence orders.

State and territory magistrates, who will hear breach proceedings for FFVOs, will receive information on what law will apply to those criminal matters, and what scope they have to suspend or revoke FFVOs. Training on how FFVOs and state and territory family violence orders interact with other family law orders will also be provided.

Awareness raising

Funding has also been allocated for the development of an awareness raising campaign for the public and key stakeholders, such as domestic violence support groups, concerning the new FFVOs. An awareness raising package for the public and key stakeholders would be developed to ensure the community is aware of and understands this new tool.

5. Conclusion

The Bill responds to the clear need for reform to create a criminal offence for the breach of a federal protection order, which was first recommended over a decade ago by the Australian and New South Wales Law Reform Commissions.

The Bill is the culmination of significant consultation over many years and has been co-designed by experts, shaped by their advice and recommendations.

FFVOs will provide a new family safety tool in the family law system. Establishing FFVOs that are criminally enforceable would give protected persons assurance that if their order is breached, they can rely on the police to take appropriate enforcement action, enhancing their safety.

It is critical that persons seeking protection from family violence are able to access enforceable protection orders in whichever jurisdiction they are in. FFVOs will operate alongside, and complement the protections afforded by, state and territory family violence order schemes.

The department thanks the Committee for considering this submission. The department will be pleased to provide any further information to the Committee as required.