

Labor Senator's Additional Comments (Dissenting Report)

1.1 Labor Senators support the purpose of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 to amend the *Family Law Act 1975* (FLA) to strengthen the powers of courts to protect victims of family violence and facilitate the resolution of family law matters by state and territory courts in certain situations.

1.2 Labor Senators make the following additional comments and/or dissent in relation to the provisions of the bill.

Family Law matters to be resolved by State and Territory Courts

1.3 Labor Senators acknowledge that navigating different jurisdictions can be confusing, time consuming and often expensive for families.

1.4 The Bill confirms that specialist children's courts have power to make parenting orders pursuant to the FLA.

1.5 The Bill proposes to extend the jurisdiction of state and territory courts to make orders in family law property matters to include disputes above the current monetary limit of \$20,000.

1.6 Labor Senators support the intent of these measures but are concerned that already overburdened state and territory courts will not have the capacity to undertake the consequential extended workload without a significant increase to their funding.

1.7 The Chief Magistrate of the Local Court of New South Wales said in his submission:

...if there is an increase in the Local Court's case load as a result of the increase in property value for the purposes of proceedings pursuant to section 46, it is essential that enough resources be made available to the Court to respond to the increase in matters before its magistrates. This would include an increase in the number of magistrates appointed to the Court.¹

1.8 Ms Liz Snell, Convenor, Women's Legal Services Australia (WLSA) said in her evidence to the Committee:

WLSA also supports the broadening of state and territory courts' family law jurisdiction contingent upon these courts receiving sufficient additional resources and training.²

1.9 Labor Senators are also concerned about the level of experience and training available to judicial officers in state and territory courts.

1 *Submission 19*, p. 2.

2 *Proof Committee Hansard*, 23 February 2018, p. 7.

1.10 The Law Council of Australia in their submission note:

The experience of most family lawyers is that judicial officers in state and territory courts do not regularly exercise their existing Family Law Act jurisdiction. State and territory courts are struggling to meet the demands of the caseload arising from their local jurisdiction and most do not have the resources (court time) available to hear and determine, for instance, interim parenting applications. Many judicial officers in state and territory local courts do not have experience or knowledge of the family law jurisdiction, or have only limited knowledge and experience, and are reluctant to exercise their powers as a result.³

1.11 Labor Senators consider that if these measures are to fulfil their purpose of 'reducing the need for families to interact with multiple courts across the federal family law and state or territory family violence and child protection systems' and not just be an exercise in cost shifting, then appropriate resources, including increased funding and ongoing judicial training, must accompany the amendments.

Summary Dismissal provisions

1.12 Labor Senators note the concerns expressed by Ms Liz Snell of the WLSA:

We are concerned about expanding the court's power to dismiss proceedings that are frivolous, vexatious or an abuse of power and express strong support for the Family Law Council recommendation on research about systems abuse prior to any changes to the courts' power to dismiss matters.⁴

1.13 Labor Senators also note the Family Law Council's submission where they say:

The proposed new section incorporates into the Act, the concept of 'no reasonable prospect of success' as is currently found in Rule 10.12 of the *Family Law Rules 2004* (Cth) and 13.07 of the *Federal Circuit Court Rules 2001* (Cth). [The Family Law Section of the Law Council] (FLS) cannot discern how this section adds to, detracts from, or changes the powers currently vested in the court.⁵

1.14 To ensure that there are no unintended consequences from this measure and that the amendment will 'better protect victims of family violence from perpetrators who attempt to use the family law system as a tool of continued victimisation', Labor Senators are of the view that this provision should be reviewed after a period of two years.

3 *Submission 13*, pp. 5–6.

4 *Proof Committee Hansard*, 23 February 2018, p. 7.

5 *Submission 13*, p.7.

Criminalisation of breaches of injunctions

1.15 Labor Senators strongly support the view that 'family violence is not a private matter, but a criminal offence of public concern'. Labor Senators also support the intent to criminalise breaches of family law injunctions for personal protection.

1.16 However, Labor Senators share the concerns raised by some submitters about the practical implementation of this measure as it is currently designed.

1.17 Senior Sergeant Luke Manhood, Legislation Development and Review Services, Tasmania Police, in his evidence to the Committee said:

So we are supportive of the principles proposed by the bill, we do see some practical issues with the proposal to criminalise breaches of personal protection orders, especially with the view that those offences be enforced by state and territory police. For your information, state and territory police—this may not be something of which the committee is aware—do not routinely enforce the Commonwealth criminal law. In fact, ensuring that the Commonwealth criminal law is routinely enforced is a primary reason for the existence of the Australian Federal Police. So although state and territory police are empowered to address the Commonwealth criminal law, there are substantial differences in criminal procedure between the Commonwealth jurisdiction and the state and territory jurisdictions. As a consequence, at least in this state, usually a small subset of police members have some knowledge of the relevant criminal procedure that applies to the Commonwealth. Conversely, responding to incidents of family violence or complaints that people's safety might be in jeopardy is done by general duties police. In this state at least, they would be the police members with the least understanding of the Commonwealth criminal procedure...

So in terms of PPI providing for the safety of victims, it's not clear that creating a criminal offence for the personal protection injunctions would substantially increase safety for those persons.⁶

1.18 Ms Esther Bogaart, Acting Assistant Secretary, Family Violence Taskforce, Attorney-General's Department, admitted that the Department was continuing to work through implementation issues with this measure:

We acknowledge that the practical implementation issues with the enforcement of criminalisation of personal protection injunctions need to be worked through. We don't think the issues are insurmountable. We have been working through a Council of Attorneys-General family violence working group with relevant states and territories, including a range of police and the senior sergeant who just spoke, to work out the implementation issues and how we can address them.⁷

6 *Proof Committee Hansard*, 23 February 2018, p. 40.

7 *Proof Committee Hansard*, 23 February 2018, p. 42.

1.19 The Law Council of Australia make the following points in their submission about FLA personal protection orders:

In the experience of family lawyers, they are most commonly made with the consent of both parties as part of a wider agreement, usually about parenting arrangements and/or the use and occupation of the family home...

The indefinite nature of injunctions made under the Family Law Act may also create unintentional consequences for parties who 'may, over time, make different, informal arrangements without applying to vary the orders and discharge the injunction' as noted in the joint submission of the Chief Justice of the Family Court and Chief Federal Magistrate (as he then was) to the [Australian Law Reform Commission] Report.⁸

1.20 Labor Senators are also concerned about the retrospectivity of this measure in real terms. Although this amendment will only apply to future breaches of a personal protection order, it will apply to orders made before the amendment is passed.

1.21 Labor Senators share the concerns of the Law Council of Australia in relation to the retrospective nature of this amendment:

The FLS submits that there will be many people who have consented to personal protection injunctions being made against them. They will have done so on the basis of advice that a breach of such an order is a private matter, capable only of enforcement in a civil court. Many people will have consented to these injunctions expressly because they are not capable of criminal enforcement. They may be employed in a job where a criminal charge or conviction could lead to dismissal. They may have been concerned about the other party making false allegations against them, but been reassured that such allegations could not lead to criminal charges. The FLS submits that it is contrary to the public interest for these amendments to apply retrospectively, and that, if pursued, the provisions should only apply to injunctions made after the commencement of operation of the amendments.⁹

1.22 The Department of Attorney-General's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states the principle that:

An offence should be given retrospective effect only in rare circumstances and with strong justification. If legislation is amended with retrospective effect, this should generally be accompanied by a caveat that no retrospective criminal liability is thereby created.¹⁰

1.23 Labor Senators are of the view that this amendment will create retrospective criminal liability in orders that are already in existence and that such an amendment would be an abrogation of the rights of parties to those orders.

8 *Submission 13*, p.9.

9 *Submission 13*, p.10.

10 As noted by the Law Council of Australia, *Submission 13*, p.8.

1.24 Labor Senators note that this measure will not come into effect until 12 months after royal assent. With that in mind, and with the Australian Law Reform Commission (ALRC) review of the family law system due to report to the Attorney-General within twelve months, Labor Senators are of the view that parliament should have the benefit of any relevant recommendations made by the ALRC before this measure is implemented.

Recommendation 1

1.25 That appropriate funding for increased resources and continuing training should accompany the measures to expand the jurisdiction of state and territory courts.

Recommendation 2

1.26 That a review be undertaken after the summary dismissal provision amendments have been in operation for a period of two years.

Recommendation 3

1.27 That the provisions criminalising breaches of personal protection injunctions be excised from the Bill and the intent of those provisions revisited as a matter of priority as soon as the Australian Law Reform Commission review of the family law system has released their report.

Senator Louise Pratt

Deputy Chair

