

Submission :

Inquiry into the *Family Law*

Amendment (Family Violence and

Other Measures) Bill 2017

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Introduction

safe steps welcomes the opportunity to provide comments on the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* and commends the Government's intention to provide better outcomes within the legal system for people experiencing family violence. In particular, **safe steps** is pleased to see that the changes proposed in this Bill aim to address fragmentation in the current system, as this has been consistently noted by previous inquiries into the family law system.

About safe steps

safe steps Family Violence Response Centre is Victoria's 24 hour, 7 day per week statewide first response service for women (including women who identify as female or transfeminine), young people and children experiencing family violence. **safe steps** provides a critical service intervention, including support, accommodation, advocacy and referral throughout Victoria and nationally.

Our work includes referring women who have experienced family violence and are involved in current Magistrates or Family Court proceedings with legal and social support services via the Family Advocacy and Support Service (FASS). We connect women with a specialist **safe steps** social worker who can accompany them and ensure they are safe while at court, and offer emotional support.

safe steps is committed to ensuring all women and children are able to live free from abuse - our ultimate goal is the elimination of family violence. We acknowledge that family violence is inherently gendered in nature, with the overwhelming majority of family violence perpetrated by men, against women. As a result, in this submission we refer to the victim-survivor as female and to the perpetrator as male.

Our contributions to policy and legislative reform are evidenced-based, informed by a feminist framework and prioritise the safety and wellbeing of women, young people and children.

Summary of recommendations

safe steps works with many women, young people and children who come into contact with the family law system and is committed through its strategic objectives to ensuring that their voices are heard, informing the community about their experiences of family violence.

Our work includes referring women who have experienced family violence and are involved in current Magistrates or Family Court proceedings with legal and social support services via the Family Advocacy and Support Service (FASS). We connect women with a specialist **safe steps** social worker who can accompany them and ensure they are safe while at court, and offer emotional support. In preparing this submission, we have drawn upon feedback received from our clients and staff about their experiences with the family law system.

safe steps views the current Bill as an important step: we look forward to the forthcoming review of the entire family law system by the Australian Law Reform Commission (ALRC) to prompt the introduction of further crucial reforms to ensure the safety of women and children who come into contact with the family law system. We acknowledge, too, the many partial reviews of the family law system which have taken place in recent years, including the recently released *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*. We are eager that the recommendations contained within these

reviews should draw from, and complement one another, acknowledging that each has sought the contribution of family violence specialists and victim-survivors.

A comprehensive review will hopefully address other systemic issues that these amendments do not, such as: judicial vacancies in the Family Court and the Federal Circuit Court contributing to long delays in matters being resolved; and the courts' ability to deal with an ever increasing number of cases involving family violence.¹

- **Recommendation 1:** That the Federal Government commit to additional funding and resourcing of state and territory courts to meet their increased family law caseload.
- **Recommendation 2:** That the Federal Government make additional funding available to legal assistance services, comprised of: community legal centres, including specialist women's legal services and programs; Family Violence Prevention Legal Services, and Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions, to enable them to better respond to anticipated increased demand for family law legal assistance flowing from the proposed jurisdictional amendments.
- **Recommendation 3:** That the Federal Government implement Recommendation 27 of the *Parliamentary inquiry into a better family law system to support and protect those affected by family violence* final report regarding the development a national and comprehensive professional development program for judicial officers from the family courts, and from state and territory courts that preside over matters involving family violence. The Committee recommends that this program includes content on:
 - the nature and dynamics of family violence;
 - working with vulnerable clients;
 - cultural competency;
 - trauma informed practice;
 - family law; and
 - 'The Safe and Together Model' for understanding the patterns of abuse and impact of family violence on children.
- **Recommendation 4:** That the Federal Government implement Recommendation 28 of the *Parliamentary inquiry into a better family law system to support and protect those affected by family violence* final report regarding the development of a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children's Lawyers, and family dispute resolution practitioners. The Committee recommends that this program includes content on:
 - the nature and dynamics of family violence;
 - working with vulnerable clients;
 - cultural competency;
 - trauma informed practice;
 - the intersection of family law, child protection and family violence; and
 - 'The Safe and Together Model' for understanding the patterns of abuse and impact of family violence on children.
- **Recommendation 5:** That the Federal Government implement Recommendation 19 of the Family Law Council final report (*Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*) regarding commissioning research on the intentional and unintentional misuse of legal processes in the family law context and how such abuse of the system may be prevented.

- **Recommendation 6:** That the Family Law Amendment (Family Violence and Cross-examination of the Parties) Bill 2017 is introduced into Parliament as soon as possible (with consideration given to recommendations made in **safe steps**' joint submission with SafeNET to that Amendment's consultation process), as per Recommendation 12 of the recent report of the *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*.

Expanding family law jurisdiction of state and territory courts, including children's courts

safe steps supports amending the Family Law Act 1975 (FLA) to clarify that state and territory children's courts can make family law orders under Part VII of the Family Law Act as a measure to reduce the number of litigants who will be required to navigate both state and federal court systems. This change would mean that children's courts could make orders under the Family Law Act where such orders are in the best interests of the child, and parties would not be forced to present to the Family Court to resolve matters pertaining to the FLA. Our court advocacy worker stated that this would allow families to have more continuity in their interactions with the courts, particularly with Child Protection.

We also support the amendment removing the existing monetary limit of \$20,000 for a state or territory court to hear and determine family law property proceedings.

We submit, however, that these amendments will not be successful unless the following crucial and complementary measures are also committed to by Government.

Increased funding for state and territory courts

safe steps endorses the position of the Law Council of Australia, Australian Women Against Violence Alliance (AWAVA) and Women's Legal Services Australia (WLSA) that the Federal Government commit to increase funding to state and territory courts of summary jurisdiction to facilitate their expanded role.

In its submission to the exposure draft of the Bill, the Law Council of Australia noted that 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".ⁱⁱ Both the Law Council of Australia and the WLSA raised concerns that, without additional resourcing, the proposed amendments will not be taken up by litigants or the courts, or will not operate as intended and result in further delays in hearing and resolving family law matters.

Recommendation 1

That the Federal Government commit to additional funding and resourcing of state and territory courts to meet their increased family law caseload.

Increased funding for community legal services

safe steps recommends that there is an increase in funding for community legal services at a state and territory level to support the increased role of state and territory courts of summary jurisdiction. As WLSA and AWAVA argued in their submissions, implementation of the proposed amendments is likely to increase demand for Legal Aid and community legal centres, particularly women’s legal services. Indeed, it is **safe steps**’ experience that many women who come into contact with the family law system are unable to afford independent legal representation and/or unable to obtain Legal Aid and are clearly disadvantaged in family law disputes as a result of this. As noted by AWAVA:

“Where there is increasing demand for a justice system response to domestic, family and sexual violence, the consequences of not meeting this demand can be profound, particularly for safety and protection of victims / survivors of this violence”ⁱⁱⁱ

We therefore support the recommendations made by other organisations in their submissions to the exposure draft of the Bill regarding injecting additional funds into the community legal sector and endorse WLSA’s recommendation:

Recommendation 2

That the Federal Government make additional funding available to legal assistance services, comprised of: community legal centres, including specialist women’s legal services and programs; Family Violence Prevention Legal Services, Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions, to enable them to better respond to anticipated increased demand for family law legal assistance flowing from the proposed jurisdictional amendments.

Family violence training for judges, lawyers and court staff

In large part, the success of the proposed amendments will depend upon the skills of state and territory judicial officers. We note the Law Council of Australia’s view that state and territory courts currently lack experience and knowledge of the family law jurisdiction.^{iv} The Law Institute of Victoria pointed to the complexity of family law and family violence in particular, and consequently the importance of training for judicial officers in exercising power under the FLA and in the dynamics of family violence.

Continuous patterns of abusive behaviour in the context of an intimate relationship can affect the physical, psychological and emotional wellbeing of women and their children. Although there is growing awareness of the lived reality of family violence and its impact on victim-survivors due to recent inquiries like the Royal Commission into Family Violence in Victoria, nuanced understandings about family violence are not yet embedded into our public institutions, such as the courts. We have received feedback that female litigants displaying mental health issues are often disadvantaged by family court processes, which often fail to deal sensitively or effectively with these issues, due to a lack of family violence literacy on the part of judges and other court staff. There is also a lack of understanding or recognition within the current system about some types of emotional and financial abuse; for example: perpetrators initiating court proceedings to re-assert power and control in their relationship and seeking access to children although they have not been positively involved in their care for a number of years.

safe steps would particularly like to see increased training for court-appointed reporters and child psychologists in recognising family violence dynamics and responding to them, as the reports produced by these individuals so often have significant influence on the findings of the Family Court. This is an area that was explored in

some detail in the report of the *Parliamentary Inquiry into a better family law system to support and protect those affected by family violence*. We also believe there is a need for training to develop skills in correctly identifying the predominant aggressor of violence.

As such, **safe steps** recommends:

Recommendation 3

That the Federal Government implement Recommendation 27 of the *Parliamentary inquiry into a better family law system to support and protect those affected by family violence* final report regarding the development a national and comprehensive professional development program for judicial officers from the family courts and from state and territory courts that preside over matters involving family violence. The Committee recommends that this program includes content on:

- the nature and dynamics of family violence;
- working with vulnerable clients;
- cultural competency;
- trauma informed practice;
- family law; and
- ‘The Safe and Together Model’ for understanding the patterns of abuse and impact of family violence on children.

Recommendation 4

That the Federal Government implement Recommendation 28 of the *Parliamentary inquiry into a better family law system to support and protect those affected by family violence* final report regarding the development of a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children’s Lawyers, and family dispute resolution practitioners. The Committee recommends that this program includes content on:

- the nature and dynamics of family violence;
- working with vulnerable clients;
- cultural competency;
- trauma informed practice;
- the intersection of family law, child protection and family violence; and
- ‘The Safe and Together Model’ for understanding the patterns of abuse and impact of family violence on children.

Criminalising breaches of family law injunctions made for personal protection

safe steps commends the Government’s proposed criminalisation of family law injunctions made for personal protection and its intention to send a strong message to the public that family violence is not a private matter, but a criminal offence.

We support this amendment, subject to:

- the passing of associated amendments proposed by the Government in the Bill preventing victim-survivors being charged for aiding and abetting an offence if their actions invite a breach;
- the development and implementation of clear processes for litigants and police officers (who will be prosecuting the offences); and
- WLSA’s suggestion that training is provided for police officers that includes a nationally consistent understanding of the proposed injunction amendments and their enforceability nationwide

We note the Law Institute of Victoria’s concerns^v regarding the need for police officers to be sufficiently resourced, trained or experienced to be able to determine whether breaches have occurred; and, for example, ensure personal protection injunction orders are not overturned via by fraudulent means^{vi}. While the legal technicalities are beyond the scope of our expertise, it is clear that the processes surrounding the implementation of this amendment need to be given further consideration to secure its success.

Dismissal of unmeritorious cases

safe steps praises the Government’s intention via the insertion of Section 45A into the FLA to “better protect victims of family violence from perpetrators who attempt to use the family law system as a tool of continued victimisation,” by giving clearer powers to family law courts to dismiss cases that are instigated by perpetrators and clearly have no merit. However, we agree with the view expressed previously by a number of different organisations that this amendment might have unintended consequences for victim-survivors.

As discussed above, many judicial officers are not adequately trained in the complex dynamics of family violence; added to which, many victim-survivors are often litigants in person, as they do not have the financial means to obtain legal representation and may be unable to arrange, or be ineligible for community legal services. Although the Government has stated that the family law courts have significant experience working with litigants with limited legal experience and can identify the difference between a self-represented litigant who is “underprepared due to inexperience or trauma, and a litigant whose case should be dismissed because it is an abuse of process or has no reasonable prospect of success”, feedback that we have received regarding the ability of the courts to recognise and deal effectively with litigants experiencing the effects of trauma indicates that there is a risk this amendment will harm victim-survivors, rather than protect them from systems abuse.

Given the above concerns, we endorse the following recommendation made by the WLSA and the Family Law Council in its final report (*Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*):

Recommendation 5

That the Federal Government implement Recommendation 19 of the Family Law Council final report (*Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*) regarding commissioning research on the intentional and unintentional misuse of legal processes in the family law context and how such abuse of the system may be prevented.

Recommendation 6

That the *Family Law Amendment (Family Violence and Cross-examination of the Parties) Bill 2017* is introduced into Parliament as soon as possible (with consideration given to recommendations made in **safe steps**’ joint submission with SafeNET to that Amendment’s consultation process), as per Recommendation 12 of the recent report of the *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*.

As a further measure to prevent systems abuse by perpetrators of family violence, **safe steps** recommends:

Other amendments

safe steps also supports the following proposed amendments, but makes some suggestions regarding their implementation.

Short form judgments

We support the insertion of 69ZL to provide for courts to give short form judgments in relation to interim parenting orders. **safe steps** commends the Government's intention to implement the Family Law Council's recommendation^{vii} and to clarify in the legislation that courts may give reasons for their decisions in short form when determining interim parenting orders. This is intended to encourage state and territory courts in particular to exercise their family law jurisdiction and prevent the writing of detailed judgments from being too onerous and contributing to hearing delays. We are pleased to see the inclusion of subsection 69ZL(2) in the proposed Bill, which is designed to make clear that courts are still obliged to ensure that any reasons provided in short form are adequate.

However, given the complexity of the interim parenting decision making process, and the importance of adequate reasons being provided to allow parties a basis to appeal decisions, we agree with the Law Institute of Victoria's suggestion that all courts exercising jurisdiction under the FLA collaborate to produce a clear template "to ensure the reasons supplied by the judicial officer are sufficient to constitute proper reasons and mitigate opportunities for appeals".^{viii}

Removal of 21 day time limit on family law orders

safe steps supports amendment of section 68T of the Act to remove the 21 day time limit the revival, variation or suspension of family law orders by state and territory courts in family violence order proceedings and allowing judges to set timeframes according to the particular circumstances of each case. As noted by the Government, this is intended to avoid inconsistencies between family violence orders and family law orders and should help to reduce confusion and risk to victim-survivors.

Remove requirement to explain matters to children where it is not in their best interests

safe steps supports the amendment removing the requirement that judges must explain certain matters to children where it would be in the child's best interests not to receive the explanation; for example, in cases where the child would be exposed to details of family violence in their parents' relationship. We would argue that, in exercising its discretion in relation to this requirement, the court's starting position should be that children should be provided with as much information as possible, rather than a position that assumes sheltering children from information is the preferred means to secure their best interests. In most cases, children are acutely aware of conflict and abuse within their family, and in the State of Victoria, under the Family Violence Protection Act the definition of family violence includes the witnessing of violence by children. Nonetheless, **safe steps** supports the amendment because it accepts that there may be some exceptions to this rule.

Repeal of provision in relation to orders relieving a party of the obligation to perform marital services

safe steps supports the repeal of subsection 114(2) as proposed, and agrees with the Government’s statement that conjugal rights and an obligation to perform marital services should be seen as redundant concepts which “do not reflect current law and their ongoing presence in the Family Law Act is unacceptable by any modern standard”.

Conclusion

We thank The Committee again for the opportunity to provide feedback, and would welcome the opportunity to elaborate on any of the issues we have raised herein. We can be reached as per the contact details provided at the first page of this submission.

ⁱ Berkovic, N, 19 December 2015, ‘Lives on hold: George Brandis blamed for family court delays’, *The Australian*, <https://www.theaustralian.com.au/news/inquirer/lives-on-hold-george-brandis-blamed-for-family-court-delays/news-story/b3c3a86e7e26e72d5e23e7bcd97a16bd> ; Laurence, E, 3 December 2015, ‘Failure to replace judges, surge in domestic violence cases straining Federal Circuit Court: lawyers’ *ABC News* <http://www.abc.net.au/news/2015-12-03/family-law-jurisdiction-at-breaking-point/6999576> ; Davidson, H, 12 May 2017, ‘Government accused of ‘outsourcing’ family law policy to Safe School critic, *The Guardian*, <https://www.theguardian.com/australia-news/2017/may/12/government-accused-of-outsourcing-family-law-policy-to-safe-school-critic>

ⁱⁱ Law Council of Australia, 17 February 2017, *Submission in response – Exposure Draft Family Law Amendment (Family violence and Other Measures) Bill 2017*: 4.

ⁱⁱⁱ Australian Women Against Violence Alliance (AWAVA), 3 February 2017, *Submission in response to the exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth) and corresponding Public Consultation Paper*: 5.

^{iv} Above n. ii: 4.

^v Law Institute of Victoria, 17 February 2017, *Submission - Family Law Amendment (Family Violence and Other Measures) Bill 2017*.

^{vi} Ibid. See section 4(e) of submission: “An important distinction between family law court orders and personal protection orders made by a state court (in Victoria, intervention orders) is that they can legally be overturned by the parties entering into a parenting agreement. This is designed to allow parties to change their care arrangement in a cost effective and easy manner without requiring them to return to Court or receive independent legal advice. A party accused of breaching a PPIO could, in theory, produce a paper with a handwritten care agreement signed by both parties which effectively overrides the PPIO. It would be a difficult evidentiary exercise to ascertain whether the other party consented to the parenting plan, was coerced into signing and/or whether the signature was forged”.

^{vii} Family Law Council, 2015, *Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*.

^{viii} Above n. v.