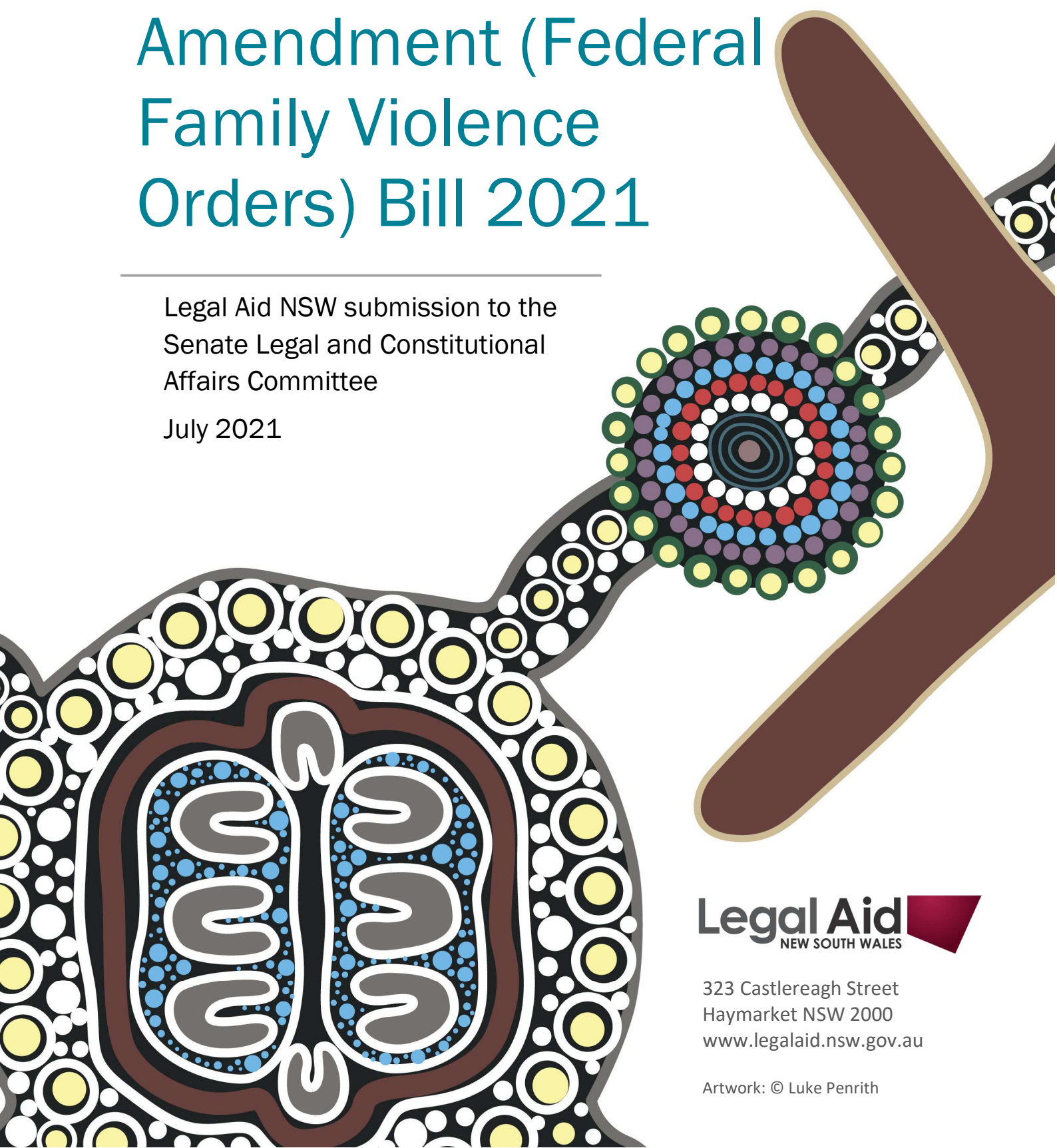


Inquiry into the Family Law Amendment (Federal Family Violence Orders) Bill 2021

Legal Aid NSW submission to the
Senate Legal and Constitutional
Affairs Committee

July 2021



Legal Aid
NEW SOUTH WALES

323 Castlereagh Street
Haymarket NSW 2000
www.legalaid.nsw.gov.au

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Acknowledgement	4
1. About Legal Aid NSW	5
2. Executive Summary	6
Recommendations:	7
3. Issues for further consideration	9
3.1 Effects of overlapping state and federal family violence orders	9
Recommendation 1	12
Recommendation 2	12
3.2 Concurrent state and federal breach proceedings.....	12
Recommendation 3	13
3.3 Double punishment.....	13
Recommendation 4	13
3.4 Reliance on cross-jurisdictional information sharing	13
Recommendation 5	14
3.5 Ensuring that the Family Law System remains safe and accessible for Aboriginal and Torres Strait Islander families.....	14
Recommendation 6	15
4. Differences between state and federal family violence orders and the impact on compliance and enforcement	16
4.1 Threshold and considerations for making federal family violence orders and ADVOs.....	16
Recommendation 7	17
4.2 Nature of federal and state family violence orders.....	18
Recommendation 8	18
4.3 Terms of federal family violence orders and ADVOs	19
4.3.1 Intent	19
Recommendation 9	19
4.3.2 Duration of orders	19
4.4 Making concurrent family violence orders clear and consistent.....	20

Recommendation 10	20
5. Training	21
Recommendation 11	21
6. Financial impact of the scheme	22
Recommendation 12	22

Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

Legal Aid NSW's Women's Domestic Violence Court Advocacy Program Unit administers NSW Government funding for a network of 27 Women's Domestic Violence Court Advocacy Services (WDVCASs) across the state. WDVCASs are locally-based, incorporated, not-for-profit, non-government service providers. WDVCASs provide information, advocacy and referrals to assist women and their children who are or have been experiencing domestic and family violence, with their legal, social and welfare needs. WDVCASs assist women to obtain effective legal protection through applications for Apprehended Domestic Violence Orders (ADVOs) at all 136 local court locations across NSW.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. The Family Law Division also provides targeted services through specialist Units such as the Domestic Violence Unit and the Family Law Early Intervention Unit.

The Domestic Violence Unit is a service made up of lawyers, social workers and financial counsellors dedicated to assist victims of domestic and family violence. The Domestic Violence Unit provides casework litigation, social work assistance and financial counselling services to victims of domestic and family violence who are at serious threat and/or have complex legal and social needs.

The Family Law Early Intervention Unit is a specialist state-wide family and care law service located at the Parramatta Justice Precinct Office. The unit consists of a large group of dedicated solicitors with the focus on helping people resolve legal issues before they get serious. Each month we visit over 35 separate outreach locations across NSW to provide confidential legal advice to women, men and young people who need legal assistance about a family or care law problem. The EIU was established to be separate from Legal Aid's Family Law practice, in order to provide assistance to someone who is in dispute with another who is receiving help from Legal Aid NSW.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court as well as the State Parole Authority and Drug Court. The Criminal Law Division also provides advice and representation to eligible defendants to civil proceedings for Apprehended Domestic and Personal Violence orders under the Crimes (Domestic and Personal Violence) Act (NSW).

Should you require any further information, please contact:

Tijana Jovanovic
Senior Law Reform Officer
Strategic Law Reform Unit



2. Executive Summary

Legal Aid NSW strongly supports victims of violence being effectively protected from further incidents of violence and other harm. Legal Aid NSW also acknowledges that by addressing the victims' needs through one forum, avoiding the need for victims to tell their story twice and being retraumatised by that experience, the proposed reforms adopt a trauma informed approach to better assist and protect victims of violence.

Legal Aid NSW recognises that in some situations, the commencement of family law proceedings may coincide with the victim disclosing a history of domestic violence for the first time. Therefore, while incidents of domestic violence disclosed in family law proceedings may not be recent, they may nevertheless be relevant, and indicative of a real risk of violence in the context of acrimonious family law proceedings.¹

Legal Aid NSW acknowledges that in some instances the existing state family violence order regimes may not be adequate to protect victims and their children from future violence. For example, despite past incidents of family violence, NSW Magistrates may not be satisfied on the balance of probabilities that there is a reasonable likelihood that the defendant may commit a personal violence offence against the person and that the making of the order is necessary, or that the person has reasonable grounds to fear the commission of a domestic violence offence against the person.² Accordingly, the court may decline to grant an apprehended domestic violence order (**ADVO**) under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (**NSW Act**).

There are several other reasons why a victim may find that they are unable to protect themselves by way of an ADVO in the state system. It could be that the police have refused to apply for an ADVO, or the victim is not believed. In some cases, police have alleged that a report of domestic and family violence is being made to obtain an advantage in the Family Court proceedings.³ As such, the Family Court is often uniquely placed to make these decisions because of the breadth of evidence they have before them that may not have all been available to the Police.

Currently, in these situations, the only option for the Family Court and the Federal Circuit Court is to issue injunctions for personal protection. However, personal protection injunctions have certain limitations. Although sections 68C and 114AA of the *Family Law Act 1975* (**Family Law Act**) provide an automatic power of arrest where a person

¹ Dr Lesley Laing, *No way to live: Women's experiences of negotiating the family law system in the context of domestic violence*, Faculty of Education and Social Work, University of Sydney (2010).

² *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16.

³ See *Inquest into the deaths of John, Jack and Jennifer Edwards*, Coroners Court of New South Wales, (7 April 2021), Recommendations 1 and 4.

breaches an injunction for personal protection, unlike breaches of state ADVOs which constitute an offence and trigger a police and often criminal justice response, the breach of a personal protection injunction must be followed up by the person protected as a private matter pursuant to the Family Law Act. The onus is therefore on victim to file an application to seek an order from the court regarding the contravention and to pay the legal costs for that application. In addition, unlike in matters concerning breach of state ADVOs, police are reluctant to exercise their power of arrest under the Family Law Act, not fully appreciating their role in these matters.⁴ For these reasons, family law injunctions for personal protection were seen as less effective, and more complex and costly to pursue than state family violence orders. Giving courts dealing with family law proceedings involving issues of family violence the ability to make orders minimising the risk of future violence has clear benefits for the victims.

As mentioned above, Legal Aid NSW strongly supports measures aimed at strengthening protections for victims of domestic violence. We believe the best way to achieve this is by ensuring that any concurrent state and federal family violence orders are clear and consistent, thereby eliminating any possible confusion for defendants or enforcement agencies regarding the conditions of those order. In our view, this approach would facilitate better compliance, enhancing victim safety, and avoid criminal proceedings for unintentional breaches of the orders. To that end, we suggest a number of changes to the Family Law Amendment (Federal Family Violence Orders) Bill 2021 (**Bill**) below.

Recommendations:

Recommendation 1: To facilitate greater compliance with concurrent family violence orders and stronger enforcement, defendants to concurrent state and federal family violence orders should have access to free legal advice and as far as possible legal representation.

Recommendation 2: A court making a federal family violence order should explain (or arrange for someone else to explain), not only when the federal family violence order commences, but the actual conditions of the order itself.

Recommendation 3: The Bill should be amended to clarify that only one prosecuting authority can act on the breach of concurrent state or territory and federal family violence orders.

Recommendation 4: The Bill should be amended to include a double jeopardy provision to expressly exclude the possibility of double punishment.

⁴ Australian Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report 114, (2010) at [17.118].

Recommendation 5: Processes should be put in place to ensure that the National Police Reference System is updated contemporaneously with any grant, variation, suspension or revocation of a state or territory or federal family violence order to ensure that the information contained therein is at all times accurate.

Recommendation 6: That consideration be given to expanding the current Indigenous List at the Sydney Registry of the Federal Circuit Court of Australia, and that where Aboriginal and Torres Strait Islander people are parties to proceedings for federal family violence orders, allow for such matters to be heard as part of the dedicated Indigenous List.

Recommendation 7: The Bill should be amended to introduce a test of proportionality and necessity regarding the conditions of a federal family violence order.

Recommendation 8: If federal family violence orders are to be made on a final basis only, clarification is needed around what interim protection will be afforded to the person in need of protection pending the making of the final federal family violence order and how the proceedings regarding the federal family violence order will be conducted so as not to delay parenting or property proceedings.

Recommendation 9: The Bill should be amended to require that the requisite fault element for the offence of breach of federal family violence order is actual intent rather than recklessness.

Recommendation 10: As far as possible, there should be greater consistency between federal and state or territory family violence orders to ensure that orders are clear and capable of compliance and enforcement.

Recommendation 11: To ensure that reforms are properly implemented and used to effectively address victim safety, training on the proposed reforms should be provided not only to the judiciary, the legal profession, and police but community and domestic and family violence specialist workers as well as community workers who work with defendants in family violence proceedings.

Recommendation 12: The financial impact of the reforms should be re-evaluated taking into consideration the likely impact on state and federal court systems, legal service providers as well as victim support services.

3. Issues for further consideration

3.1 Effects of overlapping state and federal family violence orders

The Bill envisions that federal family violence orders would only be available to a discrete group of people who are already before the family law courts seeking protection, and who are not otherwise protected by an existing state or territory family violence order.

In the experience of our solicitors in the family law jurisdiction, the Family and Federal Circuit Courts are reluctant to make orders under sections 68B or 114 of the Family Law Act, if there is a state/territory ADVO in place. Currently, there are multiple ways the Family and Federal Circuit Court ensure that there are no state ADVOs already in existence. The issuing of a Police subpoena is one way to confirm the existence of an ADVO, as is an Order under section 69ZW of the Family Law Act. The Family Law Rules provide that parties have obligations of full and frank disclosure and there are provisions for ADVOs to be filed in Court at the time they are made, or along with applications commencing proceedings. Further, where children are involved, Independent Children's Lawyers have a memorandum of understanding with the NSW Department of Justice (**DCJ**) that allows information to be shared. There are also co-located NSW DCJ case workers at Court, and this will also soon be expanded to Police being co-located at the Court as well. We also note that further information sharing mechanisms will be put in place before the commencement of this legislation to ensure that family law courts have access to information about the existence or otherwise of state and territory family violence orders.

Nevertheless despite the intention of the Bill to limit the making of federal family violence orders to those circumstances where there are no existing state or territory family violence orders in place to protect the individual concerned, the drafting of the Bill makes it clear that federal family violence orders may coexist with state and territory family violence orders.

To reduce potential inconsistencies, the Bill provides that the court must not make a federal family violence order unless satisfied that there is no family violence order in force for the protection of the protected person and directed against the person against whom the federal family violence order is directed.⁵ However, a failure to comply with that requirement does not affect the validity of the order⁶ and where capable, the federal and state orders can operate concurrently.⁷ Where the orders are not capable of

⁵ Family Law Amendment (Federal Family Violence Orders) Bill 2021 (Cth) cl 68AC(6)(c) and 113AC(4)(c)

⁶ Ibid. cl 68AC(14) and 113AC(12).

⁷ Ibid. cl 68NA and cl 114AB.

operating concurrently, and the federal family violence order is deemed to be inadequate or inappropriate, the state or territory court may suspend or revoke the federal family violence order (depending on whether the proceedings concern interim or final orders).⁸ We note however that Local Court Magistrates rarely use powers under section 68R of the Family Law Act to amend parenting orders to make them consistent with ADVOs, so there may be a similar reluctance to exercise the power in the new scheme to suspend or revoke the federal family violence order. A NSW family violence order that is not amended under s68R but which is inconsistent with a federal family violence order will be invalid to the extent of the inconsistency.⁹

Whilst Legal Aid NSW supports the Bill in principle, we note that NSW defendants can already be subject to concurrent ADVOs under the NSW Act, in the form of final court orders and provisional police orders, as well as interstate orders which are recognised and enforced in NSW pursuant to the National Domestic Violence Order scheme (**NDVOS**).¹⁰ In addition, they may be subject to bail conditions which regulate their conduct in relation to the alleged victim of domestic violence where there are concurrent criminal proceedings on foot. We are concerned that with each subsequent order the level of complexity for the defendant increases, and with it their chances of breaching the order. For defendants this could mean facing serious penalties including up to two years imprisonment. From a victim perspective, there may also be confusion about which set of protective orders are enforceable. It could also mean that victim's safety is compromised rather than enhanced, particularly where defendants rely on inconsistencies between different orders as an explanation for their behaviour.

These risks will be compounded if defendants to federal family violence orders do not have legal representation. Although there are currently duty services available at family courts, and individuals may be entitled to funding under the family violence cross examination scheme, it is not clear whether these services will cover all defendants to federal family violence orders. In the NSW jurisdiction, ADVO defendants are often not legally represented in both contested and uncontested ADVO proceedings due to strict eligibility policies for legal aid.¹¹ In 2016 the NSW Bureau of Crime Statistics and Research found that 20 per cent of all final ADVOs were breached.¹² Latest data provided to Legal Aid NSW by BOCSAR also shows that in about a quarter of finalised

⁸ Ibid. cl 68NB and cl 114AC.

⁹ Ibid. cl 68ND and 114AE.

¹⁰ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) Pt 13B.

¹¹ See Legal Aid NSW Policies, Criminal Law Matters – when legal aid is available, 4.4 Apprehended Domestic Violence Orders, <https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/4.-criminal-law-matters-when-legal-aid-is-available/4.4.-apprehended-domestic-violence-orders>

¹² NSW Bureau of Crime Statistics and Research, *Breach rate of Apprehended Domestic Violence Orders in NSW* Issue paper no.119 September 2016.

court appearances which involve at least one finalised charge/offence of breach ADVO, no further domestic violence assault or domestic violence offence was committed.¹³ Instead they appear to be “technical breaches”, rather than ones capturing further incidents of violence. Such “technical breaches” can arise due to a misunderstanding of orders or agreeing to orders which are not actually workable. The risk of technical breaches will increase with another layer of orders, as will the risk of imprisonment for affected defendants. This includes the likelihood of remand, regardless of whether the breach is ultimately proven, or no sentence of imprisonment imposed. These challenges are exacerbated for young, vulnerable and Aboriginal and Torres Strait Islander defendants who may consequently be disproportionately affected. In particular, we are concerned about the impact of overlapping state and federal family violence orders on Aboriginal and Torres Strait Islander communities, who are already over-policed and who experience layers of intergenerational disadvantage and trauma.¹⁴

In NSW, the Aboriginal prison population has increased 37 per cent in the 6 years to February 2020. This is despite First Nations people accounting for only 3.4 percent of the population in NSW.¹⁵ A recent NSW Parliament Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody also highlighted the significant increases in the rate of First Nations women in custody, that domestic, family and sexual violence is a key link with women and incarceration, and that women may be misidentified as perpetrators in domestic violence incidents.¹⁶ In this context, we are particularly concerned about the potential negative impact of overlapping state and federal family violence orders on victims who are misidentified as perpetrators.

Accordingly, Legal Aid NSW supports all defendants to concurrent state and federal family violence order proceedings being provided with legal representation. These issues could also be ameliorated to some extent by consequent amendments to the NSW Act limiting the Local Court’s power to make ADVOs under the NSW scheme where a federal family violence order already exists which adequately protects the person/s in need of protection.

¹³ NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics January 2016 to December 2020*, Number of finalised court appearances which involve at least one finalised charge/offence of breach ADVO by type of charges/offences in the court appearance and finalisation month & year, reference 21-20202, May 2021.

¹⁴ See for example: Don Weatherburn and Stephanie Ramsey, What’s causing the growth in Indigenous Imprisonment in NSW?, *NSW Bureau of Crime Statistics and Research Bureau Brief*, (August 2016). 2; Australian Law Reform Commission, *Pathways to Justice – an inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, (December 2017), 92.

¹⁵ NSW Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, *Report on the high level of First Nations people in custody and oversight and review of deaths in custody*, (April 2021), 21.

¹⁶ *Ibid*, 36-37.

Recommendation 1: To facilitate greater compliance with concurrent family violence orders and stronger enforcement, defendants to concurrent state and federal family violence orders should have access to free legal advice and as far as possible legal representation.

Further, the Bill should be amended to require the court under section 68AD to not only explain, or arrange for someone else to explain, when the federal family violence order commences, but the actual conditions of the order, similar to the requirements under section 76 of the NSW Act.¹⁷ In circumstances where the defendant is not before the court when the order is made, the obligation should pass onto the authorities serving the order.

We note that service provisions will be contained in the Regulations which will be consulted on in the future and we welcome those consultations. We note however that whilst service of orders in the family law jurisdiction is often the responsibility of the parties, we do not support this practice with respect to federal family violence orders and instead suggest that orders be served by police.

Recommendation 2: A court making a federal family violence order should explain (or arrange for someone else to explain), not only when the federal family violence order commences, but the actual conditions of the order itself.

3.2 Concurrent state and federal breach proceedings

Legal Aid NSW submits that there will likely be greater confusion as to which federal or state agency is meant to investigate and prosecute a breach of federal family violence orders. While the intention may be for these orders to be enforced by state and territory police employing existing practices under NDVOs, there is nothing in the Bill that expressly prohibits more than one prosecuting agency acting on the breach, or preferencing state or territory prosecuting authorities to those of the Commonwealth.

For example, the NSW Director of Public Prosecutions (**NSW DPP**) and Commonwealth Director of Public Prosecutions (**CDPP**) respectively require the approval of the other agency before taking carriage of the other's offences. In our experience, this process can take some time, and involve confusion and dispute over which prosecuting agency has carriage of the proceedings, often contributing to delays. Proceedings may be further

¹⁷ See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 76.

complicated if they encompass a charge for an indictable offence alongside the prosecution for a breach of a federal family violence order. This is because the CDPD may want the proceedings dealt with on indictment, whereas NSW proceedings could otherwise remain in the Local Court.

Further, a breach of a federal family violence order may also constitute a breach of a state order. These breaches should be prosecuted by one agency, and not subject to double punishment. We would welcome further consultation with state and territory Legal Aid Commissions with respect to the enforceability of the offence provisions in the Bill.

Recommendation 3: The Bill should be amended to clarify that only one prosecuting authority can act on the breach of concurrent state or territory and federal family violence orders.

3.3 Double punishment

Legal Aid NSW is also concerned about the potential for individuals to be punished twice, under state or territory schemes as well as the federal scheme with respect to the same set of circumstances. In fact, Note 1 under sections 68AG(1) and 113AG (1) of the Bill expressly state that “Conduct that breaches a federal family violence order may also constitute an offence against the relevant State or Territory law”. Legal Aid NSW does not support duplication of offences and penalties. In our view, this is contrary to fundamental notions of proportionality and fairness. We submit that the Bill should be amended to include a clear double jeopardy provision.

Recommendation 4: The Bill should be amended to include a double jeopardy provision to expressly exclude the possibility of double punishment.

3.4 Reliance on cross-jurisdictional information sharing

We note that the federal family violence orders scheme relies heavily on accurate and timely information sharing between Commonwealth and state and territory police to ensure that victims are afforded appropriate protection while minimising the possibility of concurrent and inconsistent family violence orders being made. Accordingly, it is vital that the National Police Reference System (**NPRS**) is updated contemporaneously with orders being made, and that information about all types of family violence orders, whether provisional, interim or final, is reflected on the NPRS. Legal Aid NSW therefore welcomes the delay of up to 12 months on the commencement of the federal family violence order measures following Royal Assent, to allow for the implementation of information sharing and other mechanisms to support enforcement of the new orders.

Legal Aid NSW also supports the federal and state courts being provided with read only access to the NPRS.

Recommendation 5: Processes should be put in place to ensure that the National Police Reference System is updated contemporaneously with any grant, variation, suspension or revocation of a state or territory or federal family violence order to ensure that the information contained therein is at all times accurate.

3.5 Ensuring that the Family Law System remains safe and accessible for Aboriginal and Torres Strait Islander families

Recent research and reports have found that Aboriginal and Torres Strait Islander families are disproportionately affected by family violence. For example, in comparison with other Australian women, Aboriginal and Torres Strait Islander women are 34 times more likely to be hospitalised as a result of family violence and 10 times more likely to be killed.¹⁸ In particular, inquiries have found that while Aboriginal and Torres Strait Islander families are overrepresented in the child protection, criminal and civil law systems, they are significantly underrepresented in the family law system, and experience multiple barriers in accessing the family law system.¹⁹

It is therefore critical that these reforms are implemented with particular consideration to the barriers faced by Aboriginal and Torres Strait Islander families in this jurisdiction, and whether any additional changes are needed to support the reforms, to mitigate these concerns.

For example, consideration should be given to how hearings for federal family violence orders can be conducted in a culturally appropriate and trauma-informed way. An example of this is the Specialised Indigenous List, which currently operates at the Sydney Registry of the Federal Circuit Court of Australia. The specialist list is supported by comprehensive, culturally safe wrap-around therapeutic support for Aboriginal and Torres Strait Islander families. It includes legal assistance provided to parties by the Legal Aid NSW Family Law Early Intervention Unit and the Family Advocacy and Support Services duty lawyers through the Domestic Violence Unit, and is supported by

¹⁸ Parliament of Australia House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence: Recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence*, (December 2017), 230-231.

¹⁹ Ibid.

Aboriginal and Torres Strait Islander community workers and services, which can facilitate referrals for assistance, including housing, drug and alcohol, mental health and other therapeutic assistance.²⁰ The hearing itself is also less formal, with the judge sitting at the same table as the litigants.

Legal Aid NSW strongly supports the expansion of the Specialised Indigenous List to other court locations, both within NSW and across Australia more broadly. The present Inquiry should give consideration to how hearings for federal family violence orders could be incorporated into the Indigenous List, to ensure that Aboriginal and Torres Strait Islander families can access the protection of federal family violence orders in a culturally appropriate and safe forum.

Recommendation 6: That consideration be given to expanding the current Indigenous List at the Sydney Registry of the Federal Circuit Court of Australia, and that where Aboriginal and Torres Strait Islander people are parties to proceedings for federal family violence orders, allow for such matters to be heard as part of the dedicated Indigenous List.

²⁰ Law Society of NSW, *Submission to the Australian Law Reform Commission – Review of the Family Law System – Issues Paper*, (25 May 2018), 14-15.

4. Differences between state and federal family violence orders and the impact on compliance and enforcement

We note that as presently drafted, the federal family violence orders differ from NSW apprehended domestic violence orders in a number of ways. We submit that these differences could contribute to the complexity and confusion when it comes to compliance and enforcement of state and federal orders, impacting on their overall effectiveness.

4.1 Threshold and considerations for making federal family violence orders and ADVOs

Under section 68AC(6) of the Bill, in deciding whether or not to make a federal family violence order the court is required to consider the welfare of the child as well as the likelihood that the child was, or is likely to be subjected or exposed to family violence.²¹ The safety and welfare of the child, including the need to protect the child from being subjected or exposed to family violence is in fact a primary consideration.²² Under the NSW Act a court can make an ADVO protecting a child where it finds there are reasonable grounds to believe that the defendant may commit a domestic violence offence against the protected person (not necessarily the child), or engage in conduct which otherwise warrants the making of the order.²³ Children can also be included on an apprehended violence order under section 38(2) of the NSW Act, but in the experience of our Women's Domestic Violence Court Advocacy Program Unit police rarely utilise this option against the background of a family law dispute.

Further, under section 20 of the NSW Act, the court must consider the following issues in deciding whether or not to make an apprehended personal violence order:

- (1) In deciding whether or not to make an apprehended domestic violence order, the court must consider the safety and protection of the protected person and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order.
- (2) Without limiting subsection (1), in deciding whether or not to make an apprehended domestic violence order, the court is to consider—

²¹ Family Law Amendment (Federal Family Violence Orders) Bill 2021 (Cth) cl 68AC (6)

²² Ibid. cl 68AC(9).

²³ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 19

- (a) in the case of an order that would prohibit or restrict access to the defendant's residence—the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made, and
- (b) any hardship that may be caused by making or not making the order, particularly to the protected person and any children, and
- (c) the accommodation needs of all relevant parties, in particular the protected person and any children, and
- (d) any other relevant matter.

(3) When making an apprehended domestic violence order, the court is to ensure that the order imposes only those prohibitions and restrictions on the defendant that, in the opinion of the court, are necessary for the safety and protection of the protected person, and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order, and the protected person's property.

(4) If an application is made for an apprehended domestic violence order that prohibits or restricts access by the defendant to any premises or place and the court hearing proceedings in respect of the application decides to make an order without the prohibition or restriction sought, the court is to give reasons for that decision.

These important considerations for both victims and defendants should be included in the Bill. In addition, we suggest that a test of proportionality and necessity as to the conditions sought be included.

Recommendation 7: The Bill should be amended to introduce a test of proportionality and necessity regarding conditions to be placed on a federal family violence order.

In the absence of making federal and state legislation more consistent, appropriate training will be required to highlight and reinforce these key differences between state and federal family violence orders to avoid confusion on the part of all parties concerned and ensure that orders are utilised as intended (see Recommendation 10 below).

4.2 Nature of federal and state family violence orders

In NSW family violence orders can be provisional, interim or final. Provisional ADVOs can be granted by a court or senior police officer.²⁴ On the other hand, interim and final ADVOs are granted only by courts.²⁵ Provisional and interim ADVOs are temporary orders the purpose of which is to ensure that the alleged victim is protected until a court decides whether to make a final ADVO. Legal Aid NSW understands that federal family violence orders will only be made on a final basis. It is not clear from the Bill what protection, if any, will be afforded to a person seeking a federal family violence order when they first make the application until the court is satisfied that a final order is warranted, a process which in our experience in the state jurisdiction can take some time.

Research is clear that victims are at a heightened risk of family and domestic violence during the course of family law proceedings. Even if it were possible to hold a separate hearing to determine the matter of a federal family violence order, this would lead to considerable additional costs and stress for the victim. To that extent, we agree with Victoria Legal Aid's submission that more clarification in the legislation is required regarding at what stage in the proceedings determinations of fact will be made, and how determinations of fact regarding family violence will impact on other family law matters, such as financial orders.²⁶ We are also concerned about the potential delays on parenting proceedings pending the determination of the federal family violence order application. Legal Aid NSW welcomes further clarification around what processes will be put in place to ensure that victims of domestic violence are properly and promptly protected, and their matters not delayed by the federal family violence order proceedings.

Recommendation 8: If federal family violence orders are to be made on a final basis only, clarification is needed around what interim protection will be afforded to the person in need of protection pending the making of the final federal family violence order and how the proceedings regarding the federal

²⁴ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss28 and 28A.

²⁵ *Ibid* s22.

²⁶ Victoria Legal Aid, Submission No 31 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into the Family Law Amendment (Federal Family Violence Orders) Bill 2021*, 5.

family violence order will be conducted so as not to delay parenting or property proceedings.

4.3 Terms of federal family violence orders and ADVOs

Whilst there is some commonality between the prohibitions and restrictions imposed under the NSW Act and those under sections 68AC(8) and 113AC(6) again there are differences which affect the scope of each order. Even the wording of similar conditions is different, opening up the possibility of further inconsistencies which, as discussed above, could pose difficulties in terms of compliance and enforcement. Victims may also be dismayed to discover that minor differences between state or territory and federal orders can lead to completely different outcomes.

4.3.1 Intent

The NSW Act provides that a person is guilty of an offence of contravening an ADVO if the person knowingly contravenes a prohibition or restriction specified in an order made against the person. Sections 68AG and 113AG of Bill on the other hand state that

- (1) A person commits an offence if:
 - (a) a federal family violence order made under this Division is in force; and
 - (b) the order is directed against the person; and
 - (c) the person engages in conduct; and
 - (d) the conduct breaches a term of the order.

The new offence provision (ss 68AG(1) and 113AG(1)) provide that the default fault elements under the *Criminal Code Act 1995* apply. This includes recklessness. We submit that having regard to the heavy penalties for breach and the need for proportionality the appropriate fault element should be one of actual intention rather than recklessness.

Recommendation 9: The Bill should be amended to require that the requisite fault element for the offence of breach of federal family violence order is actual intent rather than recklessness.

4.3.2 Duration of orders

Under the NSW Act, where the defendant to the order is over the age of 18, the court may determine that the ADVO should remain in force for an indefinite period. On the other hand, under section 68AF of the Bill if the order relates to only one child when the child turns 18 or if the order relates to 2 or more children, when the youngest of those children turns 18.

4.4 Making concurrent family violence orders clear and consistent

Given the significance of family violence orders for both victims and defendants, we submit that as far as possible, the inconsistencies between state and federal family violence orders should be addressed in this Bill. This would mean the orders would be clearer, making them easier to follow and enforce, creating a truly cohesive framework to protect and support victims of violence. Victims will also not be forced to choose a forum that can issue orders which they deem better suited to their needs. Valuable court resources will also be spared on potentially protracted proceedings identifying which federal family violence orders (or terms thereof) are suspended or revoked upon commencement of the state family violence order, or which parts of the state or territory orders are invalid on account of inconsistency with the federal orders, or correcting errors with respect to those findings.

Recommendation 10: As far as possible, there should be greater consistency between federal and state or territory family violence orders to ensure that orders are clear and capable of compliance and enforcement.

5. Training

Legal Aid NSW supports training being developed for judicial officers and legal profession to assist all parties to familiarise themselves with the proposed changes. Training of Australian Federal Police and in particular state and territory Police will be especially important given the scheme's proposed heavy reliance on state and territory police to enforce and prosecute breaches under federal family violence orders. The effectiveness of the federal family violence orders scheme will therefore depend on police being well trained and willing to act on the powers they will be conferred.

Education and training should also be provided nationally for community and domestic and family violence specialist workers working with victims, to understand the impact of the introduction of federal family violence orders and the intersection of the orders with state/territory-based orders.

We also recommend funding for the development of community legal education resources, for those who work with defendants in these matters.

Recommendation 11: To ensure that reforms are properly implemented and used to effectively address victim safety, training on the proposed reforms should be provided not only to the judiciary, the legal profession, and police but community and domestic and family violence specialist workers as well as community workers who work with defendants in family violence proceedings.

6. Financial impact of the scheme

Legal Aid NSW notes that the Financial Impact Statement in the Explanatory Memorandum to the Bill provides that:

“There are no direct financial implications from implementing these amendments. As part of the 2020-21 Budget, the Australian Government has committed funding to ensure that key stakeholders and members of the public are aware of the commencement of the federal family violence order measures, develop training resources for police and judicial officers and ensure that information sharing and service arrangements are in place to enable the effective enforcement of federal family violence orders.”

Legal Aid NSW submits that the Financial Impact Statement fails to acknowledge the significant financial impacts of the Bill on legal service providers as well as victim support services. We anticipate that with an introduction of federal family violence orders there will be an increase in demand for legal advice and representation and increased pressure on Legal Aid NSW crime and family law services. Victims of family violence will also require additional information and support. The overall impact on Legal Aid Commissions’ service delivery and administration of limited grants of legal representation will take some time to be determined.

Legal Aid NSW strongly supports further discussion with Legal Aid Commissions and other sector stakeholders to determine the potential cost implications before the federal family violence order scheme comes into effect.

Recommendation 12: The financial impact of the reforms should be re evaluated taking into consideration the likely impact on state and federal court systems, legal service providers as well as victim support services.



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