Committee Secretary
Senate Legal and Constitutional Affairs Committee
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18 June 2021

Dear Committee Secretary

**FAMILY LAW AMENDMENT (FEDERAL FAMILY VIOLENCE ORDERS) BILL 2021**

On behalf of the [Rights Resource Network SA](https://www.rightsnetworksa.com/) we thank you for the opportunity to provide feedback on the Family Law Amendment (Federal Family Violence Orders) Bill 2021 . The Rights Resource Network is a volunteer-run network designed to share information and research among academics, community organisations and individuals who share an interest in protecting the human rights of South Australians.

We congratulate the Federal Government on its commitment to address family violence and to work with experts and community members to learn more about the complex, intersecting causes of family violence and effective prevention strategies. In this submission we offer our collective views on how the Bill could be further improved to ensure that it achieves its stated aims. These views are intended to supplement more detailed submissions provided by individual members of the Network, including those provided by TAKE IN IF RELEVANT.

**Positive features of the Bill**

In our view, the Family Law Amendment (Federal Family Violence Orders) Bill 2021 (the Bill) has a range of positive features that have the potential to advance the human rights and dignity of survivors of family violence. The Bill proposes to introduce new criminally enforceable federal family violence orders, and is intended to alleviate the need for victims of family violence to seek enforceable protection in their respective state or territory court. It would allow for a ‘listed court’ (including the Family Court or the Federal Circuit Court) to make a federal family violence order where the court is satisfied that family violence has already taken place or there are reasonable grounds to suspect that it is likely that family violence will take place, or that a child may be exposed to family violence. The court would also be required to take into account other matters in making an order, including as the primary consideration, the safety and welfare of the child or protected person, as well as any additional considerations the court considers relevant, such as the criminal history of the person against whom the order is directed. The order may provide for the personal protection of a child or a person related to a child, such as their parent or a person who has parental responsibility for the child, or a party to a marriage

The benefit of this is that victims who are on holiday, or who are fleeing their homes and travel across borders, can seek protection where-ever they are the time that protection is required. The Second Reading speech suggests that the Bill offers particularly benefit victims who are already before a family law court, as the measure will allow victims and survivors to access protection when they require it most, rather than having to navigate separate State and Territory level court processes to obtain protection orders. [[1]](#footnote-1) The reconsideration of the legislation comes at a time when the voices of victims of family violence are finally being heard, and there is the opportunity to change our long history of hidden abuse. Under the legislation, family violence is defined as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful', and would include assault, sexual assault, stalking and unreasonably denying the family member financial autonomy.[[2]](#footnote-2)

These features of the Bill could, if refined in line with our suggestions below, help advance a rights-based approach to addressing the devastating consequences of family violence.

**Human rights concerns with the Bill**

If enacted, this federal reform aims to sit alongside pre-existing state and territory laws relating to intervention and protection orders sought in circumstances involving family violence. The Bill specifically provides that the proposed provisions establishing federal family violence orders are not intended to exclude or limit the operation of state or territory laws which are capable of operating concurrently. However, a state or territory family violence order that is inconsistent with a federal family violence order would be invalid to the extent of that inconsistency.[[3]](#footnote-3) This interaction of the two levels of laws in this area has some potential benefits – as noted above, it could make the process of obtaining protection orders more straightforward for parties already before the Federal Court – however it also comes with some risks. This is because the Bill provides that where a state or territory court is exercising powers to suspend or revoke a federal family violence order, specified provisions of the Family Law Act do not apply, including any provision that would otherwise make the best interests of the child the paramount consideration.[[4]](#footnote-4) As the Senate Standing Committee on the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights have noted, this aspect of the bill may engage and limit the rights of the child insofar as it would have the effect of not requiring the best interests of the child to be a paramount consideration in all actions concerning children.[[5]](#footnote-5) It is not clear why this approach has been adopted in a Bill designed to protect and promote the rights and wellbeing of vulnerable children and their families. As the Scrutiny of Bills Committee observed:

The objective being pursued by this measure is unclear, as the statement of compatibility and the explanatory memorandum do not identify that the measure may limit the rights of the child nor address why it is necessary to downgrade the 'best interests of the child' from a paramount consideration to a relevant consideration. While the broader objectives of the bill are legitimate objectives for the purposes of international human rights law, further information is required to assess whether there is a pressing and substantial concern which gives rise to the need for this specific measure, and whether the measure is rationally connected to that objective.[[6]](#footnote-6)

This challenging intersection between federal Family Court orders and state and territory intervention order regimes highlights the challenges associated with providing survivors of family violence with clear, accessible, and affordable pathways to obtain legal protection. The differences between state, territory and federal laws may make it very difficult for an overarching bill, such as this one, to result in the breadth of protection needed to really make a difference to the lives of those currently suffering from family violence. At the best of times the law can be difficult for members of the general public to understand and access, and in moments of extreme stress may prove unmanageable if the process is not clear and consistent across the country.

In South Australia intervention orders under the Intervention Orders (Prevention of Abuse) Act 2009 (SA) fall under the remit of South Australia Police. The question arises, how will the issuing of intervention orders in SA in the future relate to the new Federal legislation? How will the differing definitions (e.g. abuse) in each piece of legislation fit together? Is there a danger that the broader definitions of the State Act may be diminished by the cross over with the new Federal legislation?

In addition, there is the potential for delay in orders being made given that under the Federal legislation an application for a proposed federal family violence order will be conditional on current family law proceedings having commenced. Will this result in serious delays for victims in need of immediate assistance? Does it in fact create a duplication of proceedings that may be lengthy and costly to people who are already seriously disadvantaged?

Division 9A of the proposed Bill specifically states that "it is not intended to exclude or limit the operation of a law of a State or Territory that is either capable of operating concurrently with Division 9A or prescribed by regulations", thereby acknowledging that there are differences that must be navigated in order to apply the provisions of the new Bill. Who will undertake this work, and what will the costs be? Is there a risk that decisions will be inconsistent, depending on where victims are located?

Finally, there are provisions in the Bill that raise human rights concerns for the people against whom a protection order is made. The Bill allows the court to make a family violence order in “any term the court considers reasonably necessary to ensure the personal protection of the protected person”, which may include prohibiting a person from being within a specified distance of a specified place or area where the protected person is, or is likely to be, located. Anticipating where a protected person "is likely to be" speaks to a level of omniscience not common in human beings, and potentially severely limits the movements of the person against whom the order is made, for example their place of work. While it is of paramount importance to protect victims, there need to be proportionate responses that do not unreasonably affect the human rights of someone who has not yet been convicted of a crime.

The policy motivations behind the Family Law Amendment (Federal Family Violence Orders) Bill 2021 are sound: to provide a streamlined legal pathway for parties before the Family Court to obtain protection orders to guard against family violence. However, the legislative design of the Bill – and its relationship with pre-existing state and territory laws – highlight the complexities that plague this area of policy making in Australia and that pose real, practical barriers for survivors of family violence. To overcome these challenges, a more holistic, radical approach to law-making in response to family violence is needed. This could include either one single Federal legislative instrument that covers the field (ideally supported by a referral of powers by the states and territories), or for all states and territories to adopt a nationally consistent approach to intervention orders and protection orders (to support the existing reciprocal enforcement and recognition approach adopted in 2019 CHECK). Without this type of more holistic reform, the Family Law Amendment (Federal Family Violence Orders) Bill 2021 will offer more of a bandaid that a lasting solution to this complex problem.

Should the improvements be made to the Bill, we consider this legislative framework to be an important positive step in response to family violence. We wish to again congratulate the Australian government on its leadership in this area.

We also wish offer to help facilitate further community consultation on this important reform. In our view, the South Australian community is eager and well placed to assist in the development of effective family violence prevention plans, and should be supported to contribute – particularly those with lived experience in this area. Please be in touch with Dr Sarah Moulds on sarah.moulds@unisa.edu.au to arrange a meeting with the relevant members of the Network.

Yours sincerely

1. Second reading speech, pp. 4–5. [↑](#footnote-ref-1)
2. Section 4AB of the Family Law Act 1975 [↑](#footnote-ref-2)
3. Schedule 1, item 24, proposed sections 68NA and 68ND; item 44, proposed sections 114AB and 114AE; See also Scrutiny of Bills Committee Report 5 of 2021 p. 8. [↑](#footnote-ref-3)
4. Schedule 1, item 24, proposed section 68NC. [↑](#footnote-ref-4)
5. Scrutiny of Bills Committee Report 5 of 2021 p. 10; See also UN Committee on the Rights of the Child, General comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) [37]; see also IAM v Denmark, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8] [↑](#footnote-ref-5)
6. Scrutiny of Bills Committee Report 5 of 2021 p. 11 [↑](#footnote-ref-6)