



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair), Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into Sexual, Family and Personal Violence Legislation Amendment Bill 2023

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Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

By email: LACommitteeJCS@parliament.act.gov.au

Dear Committee,

Inquiry into the Sexual, Family and Personal Violence Amendment Bill 2023

The ACT Law Society (the Society) welcomes the opportunity to provide a submission to the Committee as part of the inquiry into the Sexual, Family and Personal Violence Amendment Bill 2023 (the Bill). The Society also thanks the Committee for the extension to make this submission.

The Society is the peak professional association that represents, advances, and defends the interests of an independent legal profession in the ACT, and lobbies for 'good law' in the ACT region through engagement in law reform processes. The Society has established a range of committees with relevant subject matter expertise and experience to support our purpose and strategic goals. In relation to this Bill, the Society has engaged with its Family Violence and Children's Committee and Criminal Law Committee. Further, the Society notes its appreciation for the ongoing consultation during the development of the Bill by the ACT Justice and Community Safety Directorate (JACS).

This submission focusses on the proposed amendments contained in Part 4 of the Bill, which amend provisions of the *Family Violence Act 2016* (the Act) to streamline proceedings related to protection orders and improve the experience and safety of persons seeking such orders. The Society's specific comments on the Bill are as follows.

- 1) Clause 9 of the Bill inserts new subsection 43(4) into the Act which provides that a person listed as a protected person on a protection order does not commit an offence by aiding, abetting, counselling or procuring or is party to conduct that contravenes a protection order. That is, a protected person cannot aid and abet a breach of a protection order that is designed to protect them.

The Society notes that its committees have different perspectives on this amendment. The Family Law Committee supports the amendment, recognising that in some circumstances, the current offence can be used to perpetrate further family violence and control the protected person by dissuading them from reporting breaches of a protection order. The Criminal Law Committee, however, considered that the offence should remain.

- 2) Clause 10 of the Bill inserts new section 44A into the Act which provides that a protection order continues to be in force (for the life of the original order), even after the protected person turns 18 years old. The Society supports this amendment but notes the following practical issue may arise:
 - a) Protection orders often contain an exception for contact between a protected person (child) and the respondent to a protection order under a parenting plan or order that has been made under the *Family Law Act 1975* (Cth). That is, there is no breach of a protection order where the contact is pursuant to a parenting plan/order. Under the proposed amendment, while the protection order will continue after the protected person turns 18, the parenting plan/order will not continue. This means that the respondent or protected person will need to make an application to amend the protection order, otherwise the continuation of contact may be a breach of the protection order.
 - b) A child protected person, who later becomes an adult, may wish to apply to extend a final protection order. Section 86 of the Act provides that the Magistrates Court must, on application, amend a final order by extending it, unless satisfied that a protection order is no longer necessary to protect the protected person from family violence by the respondent. The onus is on the respondent to establish that the protection order is no longer required (see *TS v DV* [2002] ACTSC 137). It is not currently clear whether a child protected person, who later turns 18 and wishes to seek an extension, has standing to make such an application. Further, it should be clear that the child (now adult) is entitled to the benefit of the reverse onus, which will require the respondent to satisfy the court that the order is 'no longer necessary'.
- 3) The Bill makes several amendments to the Act, allowing the Court to decline to hold a preliminary conference between the parties in relation to protection order proceedings (see for example, clauses 11, 12 and 15). Currently, holding a preliminary conference is mandatory, giving parties the opportunity to each meet with a Deputy Registrar to determine whether they can agree on an outcome. The proposed amendments will give the Court the discretion not to hold a preliminary conference in certain circumstances where either holding a preliminary conference: would create an unacceptable risk to a person's safety; or would be unlikely to achieve its objectives. While the Society supports the purpose of these amendments, it queries whether the legislation should give some guidance to what constitutes an 'unacceptable risk'. In addition, the Society submits that court officers who make these decisions should receive training in relation to family violence risk assessment/risk factors.
- 4) Clause 15 of the Bill inserts new section 82B into the Act, allowing the Court to make an urgent (provisional) amendment to interim and final protection orders where 'special or exceptional circumstances' apply, and may do so whether or not the respondent is present. If the provisional amendment is made, a copy is to be served on the respondent 'as soon as practicable'. The Society supports the purpose of the amendment but raises the following issues:

- a) Proposed section 82B only allows an applicant or a protected person to apply for an urgent (provisional) amendment. There are, however, legitimate circumstances where a respondent may need to seek an urgent amendment and they should be able to do so. Respondents to protection orders are not necessarily perpetrators of family violence. Perpetrators can seek protection orders against another person to perpetuate or further perpetuate family violence against that person. As such, the Society suggests that applicants, protected persons and respondents should be able to apply for urgent (provisional) amendments provided the circumstances in proposed paragraphs 82B(2)(a) and (b) are met. The Society appreciates that this would necessitate other changes to proposed section 82B, in relation to the court hearing such matters on an *ex parte* basis.
 - b) The Society considers that it is important that the issue of whether ‘special or exceptional circumstances’ exist should be determined when the matter is before the Court, rather than being approached as the threshold for the listing of a matter. This approach would enable the applicant, protected person and (as we propose, respondent) to put forward arguments in relation to that issue and will ensure that avenues of appeal apply. While the Society understands that this is how proposed section 82D is intended to operate, it queries whether the use of the words ‘hear and decide’ is appropriate as it creates an inconsistency with other provisions in the Act, which provide that the Court ‘may make an order/amendment. The Society suggests that replacing the ‘hear and decide’ with ‘ the language ‘may make’ such that the provision reads: The Magistrates’ Court may make the provisional amendment at any time...’
- 5) Clause 16 of the Bill inserts new section 91B into the Act, providing for appeals to the Court in relation to decisions made by Registrars. The Society supports the purpose of the amendment but raises the following issues:
- a) Proposed section 91B defines ‘relevant decision’ as either a decision to refuse to make an interim order, or where section 54 applies, a decision to adjourn proceedings (when the respondent does not attend court). The Society suggests the Committee give consideration to whether there should be an avenue for review where a Registrar decides to make an interim order but does not include all of the conditions sought by the applicant in the order.
 - b) The Society also queries, as a matter of practice, how the request for review is to be made. Given that proposed subsection 91B(3) requires the applicant to request a review by the end of the same day the relevant decision is made, it would seem prudent to ensure that information about how to do this is provided to the applicant in a timely manner. The Society notes that such guidance could be included as part of the obligation on the Registrar (at proposed subsection 91B(2)) to tell the applicant about their right of review at the time of making the relevant decision.

The issues outlined above have been framed in relation to amendments to the Family Violence Act. However, the Society notes that similar amendments, relating to appeals from Registrar decisions, and providing the Court with the discretion not to hold preliminary conferences, are also proposed to be made to the *Personal Violence Act 2016*. As such, the Committee may wish to consider whether these issues also require addressing in that context.

Yours sincerely,

Simone Carton
Chief Executive Officer