

COMMUNITY LEGAL CENTRES TASMANIA

26 November 2024

Members of the House of Assembly
Parliament House
Hobart Tasmania 7000

To all members of the House of Assembly
Re: *Family Violence Amendment Bill 2024*

The *Family Violence Amendment Bill 2024* (Tas) was tabled in the House of Assembly on 19 November 2024 and is likely to be debated this week. The Bill seeks to make two minor amendments to the *Family Violence Act 2004* (Tas).

- ***Extension of Family Violence Order***

The Bill seeks to amend section 20 of the *Family Violence Act 2004* (Tas) by making the following changes (in red):

20. Variation, extension and revocation of FVO

(1) A person who may make an application for an FVO or a person against whom an FVO has been made may at any time apply to a court for a variation, extension or revocation of the FVO.

(2) An application referred to in subsection (1) may only be made with the leave of the court.

(3) The court is not to grant leave under subsection (2), **in respect of the variation or revocation of an FVO**, unless satisfied that there has been a substantial change in the relevant circumstances since the order was made or last varied.

(3A) For the avoidance of doubt, an application referred to in subsection (1) for the extension of an FVO does not require a change in the relevant circumstances since the order was made or last varied.

(4) Section 18 applies to the variation, extension or revocation of an FVO in the same manner as it applies to the making of an FVO.

In the 2005 case of *McLean and Kemp*¹ the Supreme Court observed that section 20(1) of the Act requires a 'substantial change' before a Family Violence Order is varied, extended or revoked and went on to observe:²

The words "substantial change" and "relevant circumstances" are not defined in the Act. The ordinary meaning of those words would suggest that what was intended was that the Court be satisfied there had been a significant or obvious change in the circumstances involving the parties affected by the FVO since the date it was made.

¹ [2005] TASSC 100.

² [2005] TASSC 100 at para. 24.

In our experience, Family Violence Orders are usually in place for 12 months. In some cases, victims may be reluctant to seek an extension because the perpetrator has not breached the order and therefore be put off by the hurdle of needing to seek leave of the Court to bring such an application through needing to establish a “substantial change” in the relevant circumstances at first instance. By explicitly providing that extensions can be sought without needing to establish a substantial change in circumstances, more victims may avail themselves of the opportunity for increased protection through applying for an extension during the life of the Order, rather than making application for fresh orders after its expiry because of the need to seek leave to bring such an application during the life of the Order. This will result in less paperwork, a more streamlined process and one less hurdle for a party seeking ongoing protection to overcome

It is worth noting that in practical terms the change to s20 as proposed will not alter the evidentiary matters the Court will need to consider when determining an application to extend an existing Order. That is, whilst it avoids the need to seek leave by establishing a substantial change in the relevant circumstances, the Court will still need to assess the Application against the evidentiary considerations outlined in ss16,18 & 19 of the Act which allow the Court to extend such Orders and determine the duration of any such extension. This is important, as it maintains the necessary checks and balances and maintains appropriate levels of judicial discretion based on the necessary legislative considerations.

We strongly believe that victims of family violence should be able to request an extension of a FVO even where there has been no substantial change since the order was made as it simply takes away a barrier for those seeking ongoing protection without impacting the ultimate decision-making process for our Courts. The Bill will address this reform by clarifying that the test of ‘substantial change’ only applies to a variation or revocation and not an extension of an FVO.

- **Costs**

Section 34 of the *Family Violence Act 2004* (Tas) currently provides:

34. Costs

The court hearing an application under this Act made by a person other than a police officer may, if the court thinks fit, order either party to pay such costs as the court considers reasonable.

The second amendment in the Bill will replace section 34 of the Act with the following:

34. Costs

(1) Subject to subsection (2), each party to proceedings under this Act is to bear its own costs incurred in connection with the proceedings.

(2) Despite subsection (1), the court hearing an application under this Act may order that a party (the liable party) pay all, or a specified part, of the costs of another party to the proceedings if the court is satisfied that it is fair to do so, after taking into account each of the following:

(a) whether the liable party has made the application, objected to the application, or withdrawn the application –

(i) for the purpose of controlling or intimidating, or causing mental harm to, or apprehension or fear in, another party to the application; or

(ii) for a purpose, or in a manner, that is malicious, frivolous, vexatious or in bad faith; or

(iii) in a manner that has an unreasonable impact on another party to the application;

(b) whether the liable party has been responsible for prolonging unreasonably the time taken to complete the proceedings;

(c) whether exceptional circumstances exist;

(d) whether the order for costs falls within the objects of this Act.

(3) An order may not be made under subsection (2) against a police officer who is a party to proceedings by virtue of being such an officer.

(4) Before making an order under subsection (2), the court is to give the liable party a reasonable opportunity to be heard.

(5) For the purposes of making an order under this section, the court may fix an appropriate scale of costs.

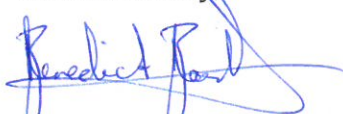
In our experience, it can have a chilling effect on parties to family violence proceedings that they may have to pay legal fees. Amending section 34 of the Act to make clear that as a general rule costs will not have to be paid, and go on to outline the particular circumstances which may attract costs considerations will reassure both victims and perpetrators that genuine and timely applications are safe from such costs even if the application is ultimately unsuccessful.

Another benefit that this amendment will have, is in clarifying the consequences that will arise from systems abuse and this applies to both perpetrators and parties protected by FVOs. The risk of having to pay costs is likely to have the effect of discouraging potential applications from individuals seeking reciprocal orders against protected parties in retaliation. Baseless applications should be discouraged as much as possible as they an unnecessary strain on the court's resources and can re-expose victims to further trauma. Similar provisions to the proposed section 34(1) are already in place in most Australian jurisdictions (Annexure A).

It is worth noting that much of what is proposed in the amendments to s34 is already what Courts consider when determining applications for costs under s34 of the Act.³ If anything, the changes sought clarify the existing general common law position, making it easier for Courts, lawyers and lay persons to provide advice and determine their position when considering costs matters.

We urge you to support the Bill.

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

³ *Smith v Broarder* [2022] TASSC 30 per Pearce J.

Annexure A

Jurisdiction	Act	Provision
Victoria	<i>Family Violence Protection Act 2008</i> (Vic)	<p>154 Costs</p> <p>(1) Each party to a proceeding for a family violence intervention order under this Act or a proceeding for the variation, extension or revocation of a recognised DVO must bear the party's own costs of the proceeding.</p> <p>(2) In a litigation restraint order proceeding—</p> <p>(a) if a person is made subject to an extended litigation restraint order or an acting in concert order, that person must bear the costs of the proceeding, other than the Attorney-General's costs if the Attorney-General is a party to the proceeding; and</p> <p>(b) if a person is not made subject to an extended litigation restraint order or an acting in concert order, each party must bear the party's own costs.</p> <p>(3) Despite subsections (1) and (2)—</p> <p>(a) the court may make an order about costs if the court decides that exceptional circumstances warrant otherwise in a particular case; or</p> <p>(b) if the court is satisfied in a particular case that the making of any application under this Act was vexatious, frivolous or in bad faith, the court may award costs against the applicant.</p> <p>(4) For the purposes of subsection (3), the mere fact that an application is made and then withdrawn is not exceptional and does not amount in itself to a vexatious or frivolous application or an application made in bad faith.</p> <p>(5) If the court decides there are grounds to award costs against a person but the person is not present in court, the court may—</p> <p>(a) adjourn the proceeding; and</p> <p>(b) give the parties to the proceeding notice that an order for costs will be made on the next mention date unless the party against whom the costs will be awarded contests the making of the order on the mention date.</p>
Australian Capital Territory	<i>Family Violence Act 2016</i> (ACT)	<p>73 Costs</p> <p>(1) Each party to a proceeding for a family violence order is responsible for the party's own costs of the proceeding.</p> <p>(2) However, a court may make an order about costs against—</p>

		<p>(a) the applicant for a family violence order only if the court is satisfied the application was vexatious, frivolous or in bad faith; or</p> <p>(b) the respondent if the court considers it appropriate to do so.</p> <p><i>Note</i> If the Magistrates Court orders that a proceeding be dismissed under s 54A (Neither party present at return of application), the court must not make an order about costs (see s54A (2)).</p> <p>(3) For subsection (2) (a), an application is not a vexatious or frivolous application or an application made in bad faith only because it is made then discontinued.</p> <p>(4) If the court orders costs against a party to a proceeding (the <i>payee</i>) for a family violence order, the amount must not be more than the costs reasonably incurred by the other party.</p> <p>(5) The amount stated in the order—</p> <p>(a) is a debt owed by the payee to the other party; and</p> <p>(b) is a judgment debt enforceable in accordance with the rules under the <i>Court Procedures Act 2004</i> applying in relation to the civil jurisdiction of the Magistrates Court.</p>
<p>Queensland</p>	<p><i>Domestic and Family Violence Protection Act 2012</i> (QLD)</p>	<p>157 Costs</p> <p>(1) Each party to a proceeding for an application under this Act must bear the party's own costs for the proceeding.</p> <p>(2) However, the court may award costs against the party who made the application if the court hears the application and decides—</p> <p>(a) to dismiss the application and, in doing so, also decides that the party, in making the application, intentionally engaged in behaviour, or continued a pattern of behaviour, towards the respondent to the application that is domestic violence; or</p> <p><i>Note</i>— This type of behaviour is known as systems abuse or legal abuse. It is behaviour in which a person intentionally misuses the legal system, including, for example, by starting court proceedings based on false allegations against another person, as a way to intentionally exert control or dominance over the other person or to torment, intimidate or harass the other person.</p> <p>(b) to dismiss the application on the grounds that it is malicious, deliberately false, frivolous or vexatious.</p> <p>(3) In this section— <i>party</i> includes an aggrieved.</p>

Northern Territory	<i>Domestic and Family Violence Act 2007 (NT)</i>	91 Costs If the Court refuses an application to make a DVO or an order varying a DVO, it must not award costs against the applicant unless it is satisfied the application for the DVO or variation was unreasonable and in bad faith.
Western Australia	<i>Restraining Orders Act 1997 (WA)</i>	69 Costs (1) Subject to subsections (2) and (3) and the regulations, a court may make such orders as to costs as it considers appropriate. (2) A court is not to order an applicant for a restraining order to pay costs to the respondent unless it considers the application was frivolous or vexatious. (3) A court is not to order costs to be paid by an applicant if the applicant is a police officer who — (a) makes an application under this Act for a restraining order, represents another officer at a hearing or acts under section 62G; and (b) acts in good faith and in the normal course of duty in making the application, or appearing at the hearing.