

## Chapter 9

### Domestic and family violence and the legal system

#### Australian domestic and family violence laws

9.1 Continuing with the crisis intervention services, this chapter discusses the legal frameworks that the Commonwealth and states and territories have to handle cases of domestic violence, issues raised with the committee and suggestions to improve outcomes for victims. In Australia, responsibility for the legal frameworks for addressing domestic and family violence is shared by the Commonwealth and the states and territories. The Commonwealth has some provision for handling cases of domestic and family violence under the *Family Law Act 1975* (Family Law Act). However, state and territory laws and court systems handle the vast majority of domestic and family violence cases.<sup>1</sup>

#### The Commonwealth legal framework

9.2 The Family Law Act covers some aspects of domestic violence, especially in its provisions for injunctions to protect partners or children who are suffering or at risk of suffering domestic violence.<sup>2</sup>

9.3 Injunctions are orders made by a court that require a party to refrain from performing certain actions. These can be made in the interests of protecting a partner or children, to restrict occupancy of a family home, or to restrain a party from entering a place of work or education.

9.4 Most injunctions relating to the protection of a partner or child suffering or at risk of suffering domestic and family violence are made through relevant state legislation, as Family Law injunction processes are costly, complex and difficult to enforce. Moreover, other advantages of injunctions issued under state and territory law have been noted, including:

- protection orders can protect a wider range of family members-such as siblings, extended family and other members of a household;
- a wider range of people can initiate proceedings for a protection order, including the police;
- state and territory family violence Acts specify a wide range of conditions or prohibitions that can be included in a protection order; and

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1 Renata Alexander, *Domestic Violence in Australia: The Legal Response* (2002), p. 55.

2 The Family Law Act can be found at [www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/) (accessed 9 July 2014); see also Australian Law Reform Commission (ALRC), *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117 (2011), p. 800.

- police are more familiar with procedures under state and territory family violence legislation.<sup>3</sup>

### **The legal framework of the states and territories**

9.5 All Australian states and territories have laws in place that empower courts to make orders to protect the victims of domestic and family violence, or those at risk of suffering domestic and family violence.<sup>4</sup> Terminology varies between jurisdictions, so this report will use domestic violence orders (DVOs).<sup>5</sup>

9.6 It should be noted that protection orders in general are civil, not criminal proceedings.<sup>6</sup> It is also worth noting every Australian jurisdiction has some provision to recognise and enforce New Zealand DVOs once registered in the local justice system by the victim.<sup>7</sup>

### **Issues raised with the committee**

9.7 Issues raised with the committee will be discussed in turn:

- existing work in this area;
- funding cuts to legal aid reducing access for victims of domestic violence;
- barriers to accessing legal aid;
- the lack of consistent training and evaluation for legal personnel working in the Family Court system;
- the need for harmonisation of DVOs across jurisdictions; and
- the tension between Family Court processes and cases heard in state and territory courts.

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3 ALRC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117 (2011), p. 800.

4 Australian Government Solicitor, *Domestic Violence Laws in Australia June 2009*, p. 13.

5 Following Australian Government Solicitor, *Domestic Violence Laws in Australia June 2009*, p. 10. Note the following terms are used in different jurisdictions: New South Wales – Apprehended Violence Orders; Victoria – Intervention Orders; Queensland – Protection Orders; Western Australia – Violence Restraining Orders; South Australia – Intervention Orders; Tasmania – Family Violence Orders; ACT – Protection Orders; Northern Territory – Domestic Violence Orders.

6 Australian Government Solicitor, *Domestic Violence Laws in Australia June 2009*, p. 25.

7 Renata Alexander, *Domestic Violence in Australia: The Legal Response* (2002), p. 97.

### *Existing work in this area*

9.8 The committee is aware of many reviews already conducted in this area.<sup>8</sup> In particular the committee acknowledges the comprehensive work undertaken by the Australian Law Reform Commission (ALRC) and the NSW Law Reform Commission (NSWLRC) examining the Australian legal response to family violence.<sup>9</sup>

9.9 The First Action Plan under the National Plan includes a commitment to consider the 186 recommendations of the ALRC/NSWLRC report<sup>10</sup> but there is no reference to this work in the Second Action Plan. Submissions urged that the recommendations be implemented.<sup>11</sup>

9.10 The progress report to COAG 2010-2012 notes:

The Commonwealth Government is currently considering the recommendations in the ALRC and New South Wales Law Reform Commission Report No 114, Family Violence—A National Legal Response, which was released on 11 November 2010.

The Report made 186 recommendations, which call for:

- a more seamless and integrated legal framework for people engaged in it;
- ensuring that victims have better access to legal and other responses to family violence;
- fair and just legal responses to family violence; and
- effective interventions and support in circumstances of family violence.

The recommendations can be split into two types: those that affect each jurisdiction individually and those that jointly affect the Commonwealth, states and territories.

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8 Australian Government, Attorney-General's Department and R Chisholm, *Family Courts Violence Review* (2009); Family Law Council of Australia, *Improving responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009); Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Final Report 19 (2010); Australian Institute of Family Studies, *Evaluation of the Family Law Amendment (Shared Parental responsibility) Act 2006 (Cth) Reforms* (2009); *Equal Before the Law: Towards Disability Justice Strategies* (2014). See also the National Association of Community Legal Centres and Women's Legal Services Australia *Submission 26*, pp1-2.

9 Note that the work done jointly by the ALRC with the NSW Law Reform Commission (NSWLRC) for their 2010 report was built upon by the ALRC's 2011 report the following year. See ALRC and NSWLRC, *Family Violence – a National Legal Response*, ALRC Report 114/NSWLRC Report 128 (2010); and ALRC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117 (2011).

10 Department of Social Services, *Submission 57*, Attachment 1 (National Plan), p. 27.

11 See National Association of Community Legal Centres and Women's Legal Services Australia, *Submission 26*, p. 10; Australian Women Against Violence Alliance, *Submission 62*, p. 6; Women's Legal Centre (ACT and Region), *Submission 67*, p. 2; ACT Domestic Violence Prevention Council, *Submission 100*, p. 15.

At the Standing Committee of Attorneys-General meeting on 22 July 2011, Ministers agreed to develop a national response to the Report for the recommendations that jointly affect the Commonwealth and states and territories. A working group has been formed under the Standing Council on Law and Justice to develop a national response

At the Standing Council on Law and Justice meeting in October 2012, Ministers agreed that further work should be done on a national response, with the item to return to Standing Council's first meeting in 2013 with proposed outcomes for addressing the recommendations made by the ALRC and the New South Wales Law Reform Commission.<sup>12</sup>

9.11 On 4 April 2013, the former Standing Council on Law and Justice (SCLJ) met and:

Ministers endorsed a national response [prepared by the Attorney-General] to the Australian and NSW Law Reform Commissions' report Family Violence – A National Legal Response. Ministers agreed to send the Attorney-General's response to the Australian and New South Wales Law Reform Commissions and to make the Attorney-General's response available in the SCLJ website.<sup>13</sup>

9.12 The national response notes how each recommendation will be responded to:

Of the 186 recommendations contained in the Report, there are 97 recommendations which affect only the States and Territories and will be considered by each of them individually. There are 22 recommendations which affect only the Australian Government, and a separate Australian Government response is being developed in relation to each of those items. In addition, there are 34 recommendations which will be addressed by the Australian Government in their response and also considered by States and Territories individually, as the recommendations note action for each jurisdiction but do not require a collaborative effort. There are 33 recommendations that have been identified by the Standing Council on Law and Justice as affecting jurisdictions jointly and are therefore considered in this national response. Of those 33 recommendations, 9 are being dealt with in a National Justice Chief Executive Officers' (NJCEO) project which is looking at collaboration between the family law and child

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12 *National Plan to Reduce Violence Against Women and their Children 2010-2022: Progress Report to the Council of Australian Governments 2010-2022* at [www.dss.gov.au/sites/default/files/documents/05\\_2013/final\\_edited\\_report\\_edit.pdf](http://www.dss.gov.au/sites/default/files/documents/05_2013/final_edited_report_edit.pdf) (accessed 20 April 2015), p. 117.

13 See SCLJ Communique 4 April 2013 at [www.lccsc.gov.au/agdbasev7/wr/sclj/documents/pdf/sclj%20communique%20april%202013%20final.pdf](http://www.lccsc.gov.au/agdbasev7/wr/sclj/documents/pdf/sclj%20communique%20april%202013%20final.pdf) (accessed 8 May 2015).

protection systems and will be responded to by jurisdictions through that project.<sup>14</sup>

9.13 The ACT Domestic Violence Prevention Council pointed out:

However, to date the 'national response' has only addressed 33 of the Commissions' recommendations. These were identified by the SCLJ as affecting jurisdictions jointly, with nine of those recommendations relating to collaboration between the family law and child protection systems referred to the National Justice Chief Executive Officers' project. Widespread consultation and extensive resources were engaged to develop the...recommendations for law reform across Australian jurisdictions. The DVPC believes more could be done to progress the Commissions['] recommendations. An opportunity now exists to bring to fruition a number of important reforms that have been recommended by the Commissions.<sup>15</sup>

9.14 The ACT Government submission notes that the ACT is currently considering the recommendations of the Australian and NSW Law Reform Commissions report.<sup>16</sup>

### ***Funding cuts to legal aid***

9.15 Discussed in the committee's interim report, most funding for legal aid centres is provided by the states and territories. However, the committee heard evidence about some aspects of legal aid the Commonwealth does fund, and how budget cuts to this funding would affect victims of domestic and family violence.

9.16 In particular, stakeholders commented on the 2013-14 Mid-Year Economic and Financial Outlook (MYEFO) measure 'Legal Policy Reform and Advocacy Funding — redirection', which cut \$43.1 million over the forward estimates to four legal assistance programs, including funding streams for community legal centres.<sup>17</sup> Stakeholders also criticised the withdrawal of \$15.0 million to the sector in the 2014-15 Commonwealth Budget.<sup>18</sup>

9.17 Dr Chris Atmore, Senior Policy Adviser, Federation of Community Legal Centres (FCLC), told the committee that Commonwealth budget cuts to funding for community legal centres' (CLC) advocacy work would actually impact on the assistance they could give to victims of domestic violence.

I just want to say a little bit [about] the impact of the recent federal funding cuts on family violence services and the changes to Commonwealth funding

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14 'National response to recommendations from the ALRC Report into family violence that jointly affect the Commonwealth, States and Territories' at [www.lccsc.gov.au/sclj/archive/former\\_sclj/standing\\_council\\_publications/2013\\_publications.html](http://www.lccsc.gov.au/sclj/archive/former_sclj/standing_council_publications/2013_publications.html) (accessed 8 April 2015).

15 *Submission 100*, p. 15. See also Federation of Community Legal Centres (Vic), *Submission 115*, p. 12; Redfern Legal Centre, *Submission 129*, pp 8-9, p. 13.

16 ACT Government, *Submission 121*, p. 40.

17 *Mid-Year Economic and Financial Outlook 2013-14* (December 2013), p. 119.

18 See the Budget measure 'Legal Aid — withdrawal of additional funding' in the Commonwealth Budget 2014-15, *Budget Paper 2: Expense Measures*, p. 60.

agreements meaning that systemic advocacy is ruled out for those centres who receive Commonwealth funding. The funding cuts are, to put it slightly bluntly, a partial rescinding of the previous federal Attorney-General's grant to CLCs. Effectively CLCs lost about half of what they had originally been promised, so the last two years of funding—which goes to, I think, 2018—is no longer there. Fourteen community legal centres in Victoria have been substantively affected by those cuts. For seven of those [Community Legal Centres] CLCs, the cuts apply directly to front-line family violence services, and those cuts amount to the order of roughly \$1 million. It is extremely unfortunate timing that those cuts have happened when they have.<sup>19</sup>

9.18 Ms Oberin, Chairperson, Australian Women Against Violence Alliance, suggested advocacy was an essential part of a healthy legal system, and so community legal centres should have their funding maintained for this work:

I think advocacy is critical to a healthy society and if we do not have NGOs or civil society being able to advocate on behalf of civil society there is a real risk of where governments may go with something. I think it is just the principle of how important it is. There has to be independence for NGOs and the not-for-profit sector to be able to do this. I think that [defunding the advocacy work of] community legal services, for example, are a very retrogressive step. They need to be advocating for their clients' issues and structural issues that they see—the systemic issues—walking through their doors and amongst each other. Rather than what is going on at individual levels they can pick up the systemic things and advise government. Advocacy is advice. I think it is wrong to think about it as some sort of negative lobbying. It is actual expert advice from the ground.<sup>20</sup>

9.19 Some witnesses drew the committee's attention to cuts to Aboriginal and Torres Strait Islander legal services. Of the \$43.1 million in cuts announced in the 2013-14 MYEFO, \$13.41 million has been taken away from the Indigenous Legal Aid and Policy Reform Program from 2013-14 to 2016-17.<sup>21</sup> The need for and value of specific legal services for Aboriginal and Torres Strait Islander people was reinforced in evidence to the committee.<sup>22</sup>

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19 *Committee Hansard*, 5 November 2014, p. 17.

20 *Committee Hansard*, 15 October 2014, p. 26.

21 National Aboriginal and Torres Strait Islander Legal Services, *Factsheet: Funding Cuts to Aboriginal and Torres Strait Islander Legal Services* (2013) at [www.natsils.org.au/portals/natsils/submission/Funding%20Cuts%20Factsheet%20%20April%202013.pdf](http://www.natsils.org.au/portals/natsils/submission/Funding%20Cuts%20Factsheet%20%20April%202013.pdf) (accessed 25 February 2015).

22 See for example the National Aboriginal and Torres Strait Islander Legal Services, *Submission 93*; Aboriginal Family Law Services (WA), *Submission 48*; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission 73*; Aboriginal Peak Organisations Northern Territory, *Submission 134*.

9.20 Dr Atmore, FCLC, outlined how these cuts would affect Aboriginal and Torres Strait Islander Australians:

I would also draw attention to the fact that one of our member centres, Aboriginal Family Violence Prevention and Legal Service, is currently struggling with the impact of cuts to the funding of those services and also because its funding future is currently uncertain. Given the high levels of violence that Aboriginal women and children, in particular, are subject to, and the extremely high death rates from family violence, quite frankly we are appalled. I just do not know how to put it more clearly than that.<sup>23</sup>

9.21 Ms Amanda Alford, Deputy Director, Policy and Advocacy, National Association of Community Legal Centres (NACLC), also highlighted that cuts to legal aid would impact negatively on Aboriginal and Torres Strait Islander victims of domestic violence.<sup>24</sup>

9.22 Ms Rhonda Payget, Principal Solicitor and Co-Convenor, Women's Legal Services Australia, noted that cuts to legal aid funding were leading to increased numbers of women self-representing in domestic and family violence cases taken to the Family Court. Ms Payget commented:

The issues that we are working with at the moment are the protection for vulnerable witnesses in the family law system. As you may know with many of the funding cuts in Legal Aid and in community legal centres there are many more women who are self-representing in the Family Court, so they are placed in the dreadful position of being cross-examined by their former partner who is the perpetrator of violence and at this point there is no systemic protection for those witnesses.<sup>25</sup>

9.23 This means victims are often forced to confront the alleged perpetrator of domestic and family violence directly, which can be a traumatic experience that leads to poor outcomes.<sup>26</sup> Ms Payget noted that, whereas some court systems provide victims with a lawyer in domestic and family violence cases to cross-examine alleged perpetrators, the Family Court had no such provision, where it is most needed.<sup>27</sup>

### ***Restoration of funding cuts***

9.24 In its interim report the committee noted its concern that funding cuts to legal services would affect already disadvantaged groups as well as affecting the ability of community legal centres to adequately plan, allocate resources and retain staff.

9.25 The committee notes the announcement by the Attorney-General on 26 March 2015 that funding cuts due to take effect on 1 July 2015 will not proceed. The

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23 *Committee Hansard*, 5 November 2014, p. 17.

24 *Committee Hansard*, 4 November 2014, p. 41.

25 *Committee Hansard*, 15 October 2014, p. 41.

26 See for example, Women's Council for Domestic and Family Violence Services WA, *Submission 89*, p. 17.

27 *Committee Hansard*, 15 October 2014, p. 42.

announcement restored \$25.5 million over two years to 30 June 2017 for Legal Aid Commissions, Community Legal Centres and Indigenous legal service providers. It restored funding of \$11.5 million for Indigenous legal assistance for two years.<sup>28</sup>

### ***Barriers to accessing the legal system***

9.26 Some submitters noted there were barriers to accessing legal aid, including financial, regional, and linguistic or cultural barriers.

9.27 It was noted that many victims who are unable to afford independent legal counsel are prevented from accessing legal services because they have modest assets, such as owning their own house or car. Ms Rosie Batty told the committee how financially and emotionally draining self-representation was for most victims, and how many asset-rich but cash-poor people were being denied legal aid:

Let us also consider the reality that true legal representation is out of reach for a lot of us. In my case I am asset rich and cash flow poor, so I do not qualify for legal aid representation. I felt forced to navigate the process on my own. As a single parent I had the opportunity to take out a caveat—with legal aid you take out something against your home that helps with the funding. But if I did that I would never be able to afford to go back into the housing market. So you are kind of assessing your future. I felt that I am an intelligent, articulate person—I should be able to navigate my way through. But it puts a huge, huge strain on you. The amount of money that it takes to go through the family law process to get advice—again, it is not always from lawyers that understand family violence, but they are professionals. If you are very poor you get legal aid representation and then there are the very rich and those in between.<sup>29</sup>

9.28 Ms Payget, Women's Legal Services Australia, also noted that the threshold for accessing legal aid was set too low:

Last week I had three women who were all representing themselves in Family Court. In one case Legal Aid had assisted to a point and then declined and the others were, for example, a woman had a car worth \$30,000 which meant she was refused Legal Aid because of the value of her car, but she had four kids who she had to take around in that car, so she was representing herself against a husband who was represented and there were various serious issues about abuse of the children in that matter.<sup>30</sup>

9.29 The Federation of Ethnic Communities' Councils of Australia, stressed the particular need for specialist translators in legal and court processes to assist culturally and linguistically diverse (CALD) women:

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28 The Attorney-General, Senator the Hon George Brandis QC, and the Minister Assisting the Prime Minister for Women, Senator the Hon Michaelia Cash, 'Legal aid funding assured to support the most vulnerable in our community', Media Release, 26 March 2015.

29 *Committee Hansard*, 12 September 2014. 13.

30 *Committee Hansard*, 15 October 2014, p. 43.

Many of the women eligible to access legal services might not be aware of, or fully understand, their rights, and fail to seek legal advice and support. Lack of effective use of interpreters and limited cultural competency of service provider staff also affect women's ability to confidently access services on the basis of the latter believing they will not be properly understood. Moreover, lack of understanding of the legal system in Australia combined with language barriers can be very intimidating for victims from immigrant or refugee backgrounds, as they might fail to understand how the legal proceedings taken against their husbands will impact them and their families.<sup>31</sup>

9.30 Some submitters also highlighted that women with a disability often face barriers to reporting domestic and family violence and receiving appropriate legal assistance. Mr John Chesterman, Policy and Education, Office of the Public Advocate, told the committee:

Women with disabilities experience many barriers to safety, including social isolation, difficulties reporting violence to police and lack of support through the court process. A lifetime combination of the experience of violence may mean that women do not identify what is happening as violence or that they're fearful of seeking help.<sup>32</sup>

9.31 Ms Keran Howe, Executive Director, Woman with Disabilities Victoria, highlighted how targeted programs could assist women with disabilities to get appropriate legal help:

We have identified examples of specialist work, such as a referral program from the Independent Third Person, where we do need additional resources. Making Rights Reality is another program in Victoria where there is a specialised sexual assault response to women with cognitive disabilities or women with communication difficulties. They have had more tailored case management from both legal advisers and counsellor advocates in the sexual assault services, and this has been found to be more effective in getting women to the court at all, let alone having successful prosecutions.<sup>33</sup>

### ***Training in family violence evaluation for legal personnel in the Family Law system***

9.32 Ms Rosie Batty indicated to the committee that the shortcomings of the family law system can be another form of systemic abuse for victims of domestic and family violence and their children. She indicated there is a need for workers in the legal system to receive more training in recognising and dealing with family violence and how to consider what is in the best interests of the child.<sup>34</sup>

9.33 Other witnesses also told the committee that there is a need to improve training in and resources about family violence for magistrates presiding over cases in

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31 *Submission 54*, p. 12. Other submissions also discussed the importance of interpreters, including the Thai Information and Welfare Association, *Submission 52*, p. 3.

32 *Committee Hansard*, 5 November 2014, p. 30.

33 *Committee Hansard*, 5 November 2014, p. 35.

34 *Proof Committee Hansard*, 11 June 2015, pp 3, 6.

the Family Courts. Others highlighted the need for family report writers to be given training in family violence and, moreover, be subject to a more rigorous evaluation process.

9.34 Dr Chris Atmore, FCLC, suggested to the committee that there were serious gaps in some magistrates' knowledge about the intersection of the Family Court and state and territory courts:

Even a lot of magistrates are still confused about their power to suspend family law orders, for example—let alone lawyers and clients. You have a family law system that is not thinking 'risk assessment'.<sup>35</sup>

9.35 Dr Atmore highlighted the recommendation made by the ALRC in their 2011 review of domestic and family violence laws, namely that the Commonwealth and jurisdictions should work together on 'the creation of a National Family Violence Bench book which provides guidance to judicial officers on family violence and sexual offences'.<sup>36</sup> Dr Atmore suggested this would be useful, citing Victorian experience:

We have a family violence bench book in Victoria now and it is a fabulous resource. It is available for anybody to have a look at. It is particularly used by our more excellent magistrates in family violence—everyone acknowledges that there is variability. It is used all the time. It has checklists of things they should think about when making decisions. Importantly, that checklist includes thinking about risk factors—what sort of order they should go through them.<sup>37</sup>

#### *Training and evaluation of report writers*

9.36 Some witnesses told the committee there is a particular need for consistency in the training and evaluation of writers of family reports. Domestic and family violence cases heard in the Family Court include the production of 'Family Reports', which provide an independent assessment of the issues of the case, particularly the effects upon children. The Family Law Courts describe these reports as follows:

A Family Report is a document written by a family consultant appointed by the Court. It provides an independent assessment of the issues in the case and can help the judge hearing the case to make decisions about arrangements for the child/ren. It may also help the parties reach an agreement.

In preparing the report, the family consultant considers the family's circumstances, explores issues relevant to the case and recommends arrangements that will best meet the child/ren's future care, welfare and

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35 *Committee Hansard*, 5 November 2014, p. 21.

36 ALRC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, ALRC Report 117 (2011), Recommendation 31-2, p. 47.

37 *Committee Hansard*, 5 November 2014, p. 21.

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developmental needs. The best interests of the child/ren are the main focus of the report.<sup>38</sup>

9.37 These reports are written by family consultants engaged and employed by the Family Court, who are 'psychologists and/or social workers who specialise in child and family issues after separation and divorce'.<sup>39</sup>

9.38 Some witnesses told the committee that family reports often glossed over or missed incidents of domestic violence. As a result, sometimes women who had experienced domestic and family violence were unable to access Legal Aid. Ms Rhonda Payget, Women's Legal Services Australia, outlined how this could happen:

Legal Aid do both a means and a merits test, so a woman may qualify on means but as part of the merits test the Legal Aid will look at the available evidence and try to make an assessment as to whether it is worthwhile spending public funding on going ahead to a hearing. One of the pieces of information that they are permitted to look at is that family report. If you have a family report writer who has not properly taken violence into account and make certain recommendations then Legal Aid almost can act as the judge and say, 'You won't be successful in your application, for example, to limit contact based on your own experience of violence', and then the Legal Aid will make a funding decision based on a report. That is a practical reality.<sup>40</sup>

9.39 This was supported by Ms Angela Lynch, Community Legal Education Lawyer, Women's Legal Service Inc:

A fairly typical example is that women going through violence do present in a particular way. They can look very disorganised; they can look very unsettled; they may not be looking like the best parent when they are talking to the family report writer....So [family reports] can miss the domestic violence. To give you an example of what we are talking about, we have had women in siege situations where they are in the house with him. He has a weapon. There are children in that house. Police have been called to that incident at the time of separation. Ultimately, the family report writer can say, 'That wasn't domestic violence; that was just separation violence because it happened at separation.' So the [Legal Aid] funding goes.<sup>41</sup>

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38 Family Law Courts, 'Family Reports' at [www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/FCOA\\_cds\\_family\\_reports](http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/FCOA_cds_family_reports) (accessed 13 January 2015).

39 Family Law Courts, 'Family Consultants' at [www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/Family+Consultants](http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/Family+Consultants) (accessed 13 January 2015).

40 *Committee Hansard*, 15 October 2014, p. 41.

41 *Committee Hansard*, 6 November 2014, p. 7.

9.40 Moreover, the committee heard that, once written, family reports were difficult to challenge for some victims, as contesting their findings often meant legal aid was withdrawn. As Ms Liz Snell, Law Reform and Policy Coordinator, Women's Legal Services New South Wales and Women's Legal Services Australia, told the committee:

We are really concerned...because it is quite easy for people not to realise the nature and dynamics of domestic and family violence, so a report may completely miss the issues and make a recommendation, for example, that the child should spend time with an abusive parent. If the woman wishes to challenge this, often what happens...if the woman has legal aid and wants to go against the recommendations made in that family report, is that her legal aid grant is finished at that point.<sup>42</sup>

9.41 Witnesses suggested the training and selection of these family consultants could be improved, to ensure they were aware of the nature, complexities and variety of cases of domestic violence. For instance, Ms Payget, Women's Legal Services Australia, told the committee:

One of the other issues is about accreditation and training of the family report writers. In the family law system family report writers review the family and the children. That is one of the main voices for the children to the court. We certainly observed an uneven level of expertise in family report writers recognising the impact of violence, both on the mother and on the children. Their critical recommendations then appear not to have taken into account the impact of violence, whereas in the social science world outside of the Family Court there is clear and growing evidence about the impact of violence, either as witnesses or being in a household of violence, the impact on children and particularly young children.<sup>43</sup>

9.42 A more rigorous training program for report writers focused on the effects of violence was also recommended by Ms Rosslyn Monro, Coordinator, Women's Legal Service Inc:

There are some good family report writers, but in our experience, generally, family report writing is not done through a lens of violence, so the capacity for the court to truly consider the risk through independent experts is quite limited. We would argue that there does need to be further training and enhancement of that family-reporting process in order to make sure that violence is front and centre for people who are providing expert views to the court.<sup>44</sup>

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42 *Committee Hansard*, 4 November 2014, pp 46-47.

43 *Committee Hansard*, 15 October 2014, p. 41.

44 *Committee Hansard*, 6 November 2014, p. 3.

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## ***Problems coming from differing legal systems***

### *Definitions and risk frameworks*

9.43 Ms Libby Eltringham, Community Legal Worker, Domestic Violence Resource Centre Victoria suggested major problems came from differing definitions across levels of government and legal systems:

Again I think it is a good example of where the gaps are, that we do not even use absolutely the same definition in family law and in family violence legislation across different states.<sup>45</sup>

9.44 Dr Chris Atmore, FCLC, suggested to the committee there was too little communication between the Family Court and state courts and this could exacerbate cases of domestic and family violence being heard in both systems:

You could have, for example, a highly volatile situation where a woman has just been in a Family Court with the perpetrator, possibly having been cross-examined by him, and then she could come back to state court and all hell could possibly break loose—and nobody would know. There does not seem to be any way for personnel to inform the state court of the risks. That is something we think needs to be consistent across the board—that they have the same understanding and the same approach.<sup>46</sup>

9.45 Ms Amanda Alford, NACLC, suggested there was a need for more coordination across differing systems:

...the Law Reform Commission of New South Wales and [the ALRC] really looked at the interaction of state and territory as well as Commonwealth legislative regimes, in the course of the inquiry I think about 27 different legislative regimes were examined. I think the key message really was that there is significant fragmentation and lack of coordination across those systems. It is really a siloed approach to family violence, and there is a need to address that in a holistic sense. I think some of the recommendations—for example, the need for a national domestic violence order register—and others that would bring together and coordinate family violence matters are quite significant.<sup>47</sup>

### ***The need to harmonise DVOs across jurisdictions***

9.46 There are some common features of DVOs across all jurisdictions. Most importantly, all states and territories have laws:

...to provide for a court order, obtained on the civil standard of proof (the balance of probabilities), protecting a victim against further attacks or harassment. Breach of this type of order is a criminal offence. Moreover,

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45 *Committee Hansard*, 5 November 2014, p. 5.

46 *Committee Hansard*, 5 November 2014, p. 21.

47 *Committee Hansard*, 4 November 2014, p. 45.

police may arrest without warrant a person who has contravened a protection order.<sup>48</sup>

9.47 The relevant laws of all jurisdictions have broadly similar approaches to:

- the types of conduct that may constitute domestic violence, and the grounds on which protection orders may be made;
- the types of orders that may be made in the domestic violence context and the kinds of prohibitions, restraints and conditions that an order may impose on the person against whom it is made;
- the capacity for temporary orders to be made or obtained quickly by police in emergency situations, without the need for an appearance before a court; and
- the (criminal) effect of contravening a domestic violence protection order.<sup>49</sup>

9.48 Applications for DVOs are made in one of two ways that are essentially consistent across all jurisdictions. The first involves the police applying on the victim's behalf; the second involves the victim applying themselves at their local court. In some jurisdictions, police are obliged to apply on the victim's behalf in some circumstances.<sup>50</sup>

#### *Differences between Commonwealth and state and territory legal frameworks*

9.49 There are some challenges that come from the differing and sometimes contested legal spaces between Commonwealth and the states and territories, including:

- until recently, victims were required to register DVOs in other states and territories for them to be effective beyond the jurisdiction they were originally issued. This made them a clumsy instrument in many cases where the victim or perpetrator moved; and
- tensions between the Commonwealth's Family Law Act and state or territory laws, particularly where parenting orders and a DVO are in force concurrently. These kind of tensions can create a situation where parental contact is mandated by the Family Law Act, whilst being prohibited by an active protection order issued by a jurisdiction.

#### *Differences across jurisdictions*

9.50 According to the report *Domestic Violence Laws in Australia June 2009*, prepared by the Australian Government Solicitor (AGS) for the then Department of families, Housing, Community Services and Indigenous Affairs (FAHCSIA), there are three major areas of difference in DVOs across jurisdictions:

- the maximum penalties for violations;

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48 Renata Alexander, *Domestic Violence in Australia: The Legal Response* (2002), p. 87.

49 Australian Government Solicitor, *Domestic Violence Laws in Australia June 2009*, p. 13.

50 Australian Government Solicitor, *Domestic Violence Laws in Australia June 2009*, pp 29-30.

- the obligations put on police officers to investigate suspected domestic violence; and
- varying approaches to the counselling and rehabilitation of perpetrators.<sup>51</sup>

9.51 Regarding maximum penalties, there is substantial variation across states and territories in the fines and imprisonment terms for violations. Beyond noting this variation, the AGS stated that 'it is not possible to make any straightforward comparison between these divergent systems' as lowest maximum fines for first offences can vary between \$2,400 and \$50,000 and minimum sentences range across jurisdictions from 1 year to 5 years.<sup>52</sup>

9.52 The Commonwealth has committed to making DVOs consistent across jurisdictions as recommended by the findings of the 2010 ALRC and NSWLRC report. In early 2015 the government announced plans to make this issue a priority for COAG in 2015 to ensure the harmonisation of DVOs across all jurisdictions was expedited.<sup>53</sup>

9.53 Commonwealth, state and territory governments are working together through the Law Crime and Community Safety Council to develop a legal framework to enable the automatic recognition and enforcement of domestic and family violence orders across jurisdictions.<sup>54</sup>

9.54 Once enacted, this legislation will remove the requirement for victims of domestic and family violence to register DVOs to make them apply in jurisdictions where they were not originally issued.

9.55 To complement this process CrimTrac have been funded to develop a prototype system to share information about active DVOs. From 2014 to 2017, CrimTrac has been given the responsibility:

...to design, develop and test a prototype information sharing system for domestic violence orders at the national level to be called the National Domestic Violence Order Information Sharing System (NDVOISS).

The NDVOISS aims to address the lack of national coordination and information sharing across systems, law enforcement agencies, justice stakeholders (such as courts, justice and corrections agencies) and between jurisdictions in Australia.<sup>55</sup>

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51 Australian Government Solicitor, *Domestic Violence Laws in Australia June 2009*, p. 14. For a full list of protection order provisions in every state and territory can be found in Renata Alexander, *Domestic Violence in Australia: The Legal Response* (2002), pp 91-184.

52 Australian Government Solicitor, *Domestic Violence Laws in Australia June 2009*, pp 14, 28.

53 The Hon Tony Abbott MP, Prime Minister of Australia, 'COAG agenda to address ending violence against women', Media Release, 28 January 2015.

54 Law, Crime and Community Safety Council, Communique 3 October 2014 at [www.lccsc.gov.au/agdbasev7/wr/sclj/lccsc%203%20october%202014%20communique.pdf](http://www.lccsc.gov.au/agdbasev7/wr/sclj/lccsc%203%20october%202014%20communique.pdf) (accessed 17 January 2014).

55 Crim Trac, 'News, 15 September 2014' at [www.crimtrac.gov.au/about\\_this\\_site/News.html](http://www.crimtrac.gov.au/about_this_site/News.html) (accessed 17 January 2014).

9.56 At a public hearing in October 2014, the Attorney-General's Department assured the committee that work was well underway on these initiatives.<sup>56</sup> Moreover, the April 2015 COAG meeting agreed that by the end of 2015:

a national domestic violence order (DVO) scheme will be agreed, where DVOs will be automatically recognised and enforceable in any state or territory of Australia;

progress will be reported on a national information system that will enable courts and police in different states and territories to share information on active DVOs – New South Wales, Queensland and Tasmania will trial the system;

COAG will consider national standards to ensure perpetrators of violence against women are held to account at the same standard across Australia, for implementation in 2016; and

COAG will consider strategies to tackle the increased use of technology to facilitate abuse against women, and to ensure women have adequate legal protections against this form of abuse.<sup>57</sup>

9.57 In June 2015, the Attorney-General's Department informed the committee that the work to put in place a national domestic violence order scheme remains on track:

The intention at the moment is to report to COAG through the ministerial council by the end of this year—whenever the last COAG meeting for this year is. Large parts of that work have been done already in terms of working up the model laws. We have the first couple of iterations of draft legislation being developed. The New South Wales Parliamentary Counsel's Office is providing that service for the LCCSC [Law, Crime and Community Safety Council] working group that is doing this work. That is led by Tasmania and chaired by the secretary of the Department of Justice in Tasmania. I would anticipate that it would get finalised well before the end of the financial calendar year, but it may take a bit of time to get that process through ministerial council and through to COAG, but we are well and truly on track.<sup>58</sup>

9.58 Mr Michael Pahlow, Assistant Secretary, AusCheck Branch, Attorney-General's Department outlined the legal and operational issues to be resolved:

There are a lot of issues that we have resolved already, or we have figured out how to get around those issues. Each jurisdiction's regime around

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56 Ms Tracy Ballantyne, Acting Assistant Secretary, Family Law Branch, Attorney-General's Department, *Committee Hansard*, 15 October 2014, p. 64. See also Ms Cate McKenzie, Principal Adviser, Department of Social Services, *Proof Committee Hansard*, 11 June 2015, pp 17-18.

57 COAG Communique, 17 April 2015, p. 1. See also Mrs Jenny Bloomfield, Acting First Assistant Secretary, Office for Women, Department of the Prime Minister and Cabinet, and Ms Cate McKenzie, Principal Adviser, Department of Social Services, *Proof Committee Hansard*, 11 June 2015, pp 17-18.

58 Mr Michael Pahlow, Assistant Secretary, AusCheck Branch, Attorney-General's Department, *Proof Committee Hansard*, 11 June 2015, p. 18.

domestic violence orders, or intervention orders or whatever term they use for them, has in some cases fundamental differences and in other cases minor differences. It might be around exemptions, or what conditions they put on things, or even how their IT systems internally between courts and law enforcement interact. There has been a range of more, I will describe them as, operational issues that have had to be resolved there to make sure that when any law is changed we do not wind up with another problem.

From a legal perspective, there has been a range of issues that have had to be resolved in terms of how we interact from a national system, including definitional language things, some of them around, for instance, how interim orders will be treated and how that would interact from a national perspective and how different legal arrangements in one jurisdiction would translate when you put that into a national context. The framework will, in effect, ensure that where a victim moves from one jurisdiction to another or requires their current domestic violence order to be enforced in another jurisdiction then that will be automatically done and there will not be all these issues they have at the moment where they have got to register them in a court in another jurisdiction.

There are three issues left at the moment, mainly around things like notification, the natural justice aspects—if there are changes made to a new jurisdiction to an order, how is that notified to the person against whom the order is taken out? And there are issues there around ensuring both natural justice and that we do not run the risk of inadvertently putting the victim at risk by notifying that they have changed locations. There are some issues around how we can retroactively include all current domestic violence orders under the new system, because some of those are paper based et cetera. There are a few of those sorts of issues that are to be resolved yet but well and truly down the track.<sup>59</sup>

9.59 At its July meeting, COAG considered the progress that has been made and the work that still needs to be done regarding reducing domestic and family violence.<sup>60</sup>

9.60 The committee notes that the ACT government recently announced reforms to its protection order system.<sup>61</sup> These reforms will make it easier for victims to renew an interim DVO, following recommendations made by a Victims of Crime ACT report that found victims can be unnecessarily re-victimised when making applications for DVOs.<sup>62</sup>

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59 *Proof Committee Hansard*, 11 June 2015, pp 18-19.

60 COAG, Special Meeting Communique, 23 July 2015.

61 Michael Inman, 'ACT government announces strengthened interim domestic violence orders' in *Canberra Times*, 11 May 2015.

62 Victims of Crime Commissioner ACT, 'Position Paper: Reforming the Framework for Applying for a Domestic Violence Order in the ACT' (March 2015) available at [http://cdn.justice.act.gov.au/resources/uploads/New\\_Victim\\_Support/Position\\_Paper\\_Protection\\_Orders\\_FINAL2.pdf](http://cdn.justice.act.gov.au/resources/uploads/New_Victim_Support/Position_Paper_Protection_Orders_FINAL2.pdf) (accessed 12 May 2015).

## **Committee view**

9.61 The committee understands that the multiple legal frameworks dealing with domestic and family violence are complex and, moreover, that domestic and family violence cases are mostly handled by state and territory legal systems.

9.62 However, there are some responsibilities that the Commonwealth does have including funding some aspects of legal aid, oversight of the Family Law Act and the Family Court system and leading work to coordinate legal systems across jurisdictions.

### ***Coordination***

9.63 Given comprehensive reviews undertaken in this area the committee was concerned by the apparent lack of progress reported by stakeholders.

9.64 The National Plan includes a commitment to consider the recommendations in the 2010 report by the ALRC and NSWLRC.<sup>63</sup> The status of this response is not currently clear, and reporting frameworks for this process have also not been made public. The committee believes that using the Evaluation Plan for the National Plan (Justice responses are effective) would be the most effective way of providing a coordinated response.

## **Recommendation 16**

**9.65 The committee recommends that the Evaluation Plan for the National Plan include a coordinated status report on the consideration of the recommendations in the 2010 report by the Australian and NSW Law Reform Commissions.**

### ***Training***

9.66 The committee heard how the training and resources on domestic and family violence that are available to legal professionals in the Family Court system could be improved.

9.67 Better knowledge across the Family Court system about the nature and extent of domestic and family violence would be a positive step towards helping victims get the assistance they need.

9.68 The committee understands the ALRC report recommended the development of a bench book by the Commonwealth and jurisdictions for use in the Family Court system. The committee notes that on 9 June 2015, the government announced that work has commenced on a National Family Violence Bench Book, which will be available in June 2017.<sup>64</sup>

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63 Department of Social Services, *Submission 57*, Attachment 1 (National Plan), p. 27.

64 Attorney-General, Senator the Hon George Brandis QC and the Minister Assisting the Prime Minister for Women, Senator the Hon Michaelia Cash, 'National Family Violence Bench Book', Media release, 9 June 2015.

9.69 The committee is also aware that the 2010 ALRC Report recommended the Attorney-General's Department coordinate the collaborative development and training relating to domestic and family violence for all professionals who encounter family violence in the legal sector, including Family Court report writers.<sup>65</sup> The government agreed to this in principle in its official response to the ALRC recommendations, highlighting that some training programs were already underway.<sup>66</sup>

9.70 The committee acknowledges information provided by the family law courts through the Attorney General's Department<sup>67</sup> regarding the training of report writers. While these efforts are welcome, evidence received by the committee suggests there is still work to be done with witnesses highlighting the importance of consistent training and evaluation of report writers.

### **Recommendation 17**

**9.71 The committee recommends the Commonwealth Government through the Attorney-General's Department, coordinate the development of consistent training for and evaluation of family consultants who write family reports for the Family Court alongside the development of a national family bench book by June 2017.**

### **Recommendation 18**

**9.72 The committee recommends the Commonwealth Government, through the Attorney-General's Department and COAG, facilitate the training of all judicial officers who preside over family violence matters, alongside the development of a national family bench book by June 2017.**

### *DVOs*

9.73 The committee heard evidence of how the DVO system should be harmonised across Australia, so that if a protection order is issued in one jurisdiction, it should be automatically recognised in all others.

9.74 The committee understands that work to harmonise DVOs across jurisdictions is underway, including work being done by CrimTrac. The committee notes that in early 2015, the government announced this work would be a priority for the COAG agenda for 2015. In its interim report the committee noted that this was re-announcement of this issue and urged the Commonwealth Government to expedite the work. Given the amount of time since the issue was first raised and the admission following the 17 April 2015 COAG meeting that it is likely to take at least another 12 months, the committee urges all jurisdictions to work through COAG to have this framework in place as soon as possible. The committee notes that at its meeting on

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65 Recommendation 22-5 of the ALRC and NSWLRC, *Family Violence – a National Legal Response*, ALRC Report 114/ NSWLRC Report 128 (2010).

66 'National response to recommendations from the ALRC Report into family violence that jointly affect the Commonwealth, States and Territories', pp 3-4.

67 See answers to questions on notice from 11 June 2015 hearing received from the Attorney-General's Department on 2 July 2015.

23 July 2015, COAG agreed to 'consider the Model Law Framework for Domestic Violence Orders and National Perpetrator Standards which are important next steps in addressing violence against women and their children'.<sup>68</sup>

### **Recommendation 19**

**9.75 The committee recommends that every effort is made by the Commonwealth Government to ensure that the critical work being undertaken by the COAG ministerial council to:**

- **agree a national domestic and family violence order scheme;**
- **report progress on a national information system to enable police and courts to share information on active DVOs;**
- **consider national standards to ensure perpetrators of violence against women are held to account at the same standard across Australia, for implementation in 2016; and**
- **consider strategies to tackle the increased use of technology to facilitate abuse against women and to ensure women have adequate legal protections**

**is completed in accordance with the timetable agreed by COAG in April 2015.**

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68 COAG, Special Meeting Communique, 23 July 2015.