

Submission to Parliamentary Inquiry into

**A Better Family Law System to
Support and Protect Those Affected
by Family Violence**

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1. First Considerations

I am writing to make a submission to the parliamentary inquiry into a better family law system to support and protect those affected by family violence.

Before going further, perhaps I should state why I started my academic research on the topic of domestic violence and family law.

I am a Law Reform Commissioner in Western Australia. In August 2013, the WA Law Reform Commission received final terms of reference from the Attorney General to consider: (a) the benefits of separate family and domestic violence legislation; (b) the utility and consequences of legislation for family and domestic violence restraining orders separate to their current location in the Restraining Orders Act 1997; and (c) the provisions which should be included in such legislation were it to be developed (whether in separate legislation or otherwise).

In December 2013, our Commission published its Discussion Paper presenting 53 specific proposals for reform and raising 29 questions for discussion. This Paper was followed by consultation with more than 150 individuals expressing their concerns about family and domestic violence both outside and within government. Our Commission ultimately received 43 written submissions, and we also conducted a number of additional consultations to resolve matters arising from the submissions. Our final report was published in June 2014. ('Enhancing Family and Domestic Violence Laws', LRCWA, Project No.104, Final Report, June 2014, at http://www.lrc.justice.wa.gov.au/files/P104_FDV_FinalReport.pdf)

I should also note that I am an elected Fellow at the International Academy for the Study of the Jurisprudence of the Family (IASJF) and recipient of the Vice-Chancellor's Award for Excellence in Research, in 2012. I am also the author of numerous articles that examine family domestic violence, including in the context of violence restraining order (VRO) legislation. These works include:

- A Zimmermann, 'The Menace of Family 'Violence' Order', *Quadrant*, Volume LX, Number 10, November 2016, at <https://quadrant.org.au/magazine/2016/11/menace-family-violence-order/>

- A Zimmermann, 'WA Domestic Violence Laws Pose an Insidious Threat', *The Australian*, September 24, 2014, at <http://www.theaustralian.com.au/opinion/wa-domestic-violence-laws-pose-an-insidious-threat/news-story/959df15ff5103c723d19d349b070b380>
- A Zimmermann, 'West Australian Law: Domestic-Violence Laws Disregard Basic Rights', *Newsweekly*, March 25, 2017.
- A Zimmermann, 'Federal Guidelines Turn Shows of Displeasure into 'Violence'', *Newsweekly*, September 24, 2016, p 8.
- A Zimmermann, 'Without Restraint: The Abuse of Domestic Violence Orders', *Newsweekly*, March 14, 2015, pp. 9-10.

2. Expanding the Meaning of 'Domestic Violence'

Domestic violence is a serious problem that nobody should deny or pretend that it does not exist. And yet, one of the primary reasons as to why there is an apparent 'epidemic' of domestic violence it is simply because the concept of 'violence' has become so radically subjective that it practically means whatever the 'victim' claims it to be.

Released in 2011, the 'National Plan to Reduce Violence against Women and their Children' explains that a key component of family and domestic violence is an 'ongoing pattern of behaviour aimed at controlling a partner through fear' (*National Plan to Reduce Violence against Women and their Children 2010–2022*, p 2).

This has led to broad definitions of family and domestic violence to be adopted by state and federal governments. There has been a remarkable shift in terminology from domestic violence, which is now used in a broader sense to cover violence that involves all sorts of personal behaviours that are generally described for 'violence'.

Released by Attorney-General George Brandis on 18 August 2016, the Commonwealth funded 'National Domestic and Family Violence Bench Book' claims to provide a 'comprehensive guidance on issues relating to domestic and family violence for judicial officers in all jurisdictions'. This guideline effectively turns 'domestic violence' into anything that causes anyone displeasure. It gives as examples of 'violence' ongoing silence, staring, withdrawing affection, or threatening to divorce.

Under present statutory schemes one may seek a family violence order ('FVO') on grounds of such things as 'emotional abuse', 'banking abuse', and 'financial abuse'. These are extraordinarily subjective standards that can be remarkably difficult to combat. Arguably, even a raised voice or an extemporaneous gesture may be regarded as 'emotionally abusive', thus constituting sufficient grounds for a claim that 'domestic violence' has occurred. This may also encompass such things as 'refusing to let you have money', 'giving you negative looks', or 'ignoring your opinion'.

Since the understanding of 'domestic violence' has become so radically subjective, it basically means whatever the alleged 'victim' claims it to be. Indeed, a comprehensive study about post-separation conflict, reveals that the participants who had sought and obtained family violence orders referred to 'abusive behaviour' as something that was suggested by their lawyers and social assistants; this is true despite the fact that the applicants themselves did not in fact entertain this perception during the course of the relationship.¹ As one participant stated:

The lady at the court showed me this flow chart of domestic violence and it actually made me realise that that's what I've dealt with since I've been with him, but it's been verbal and emotional rather than physical.²

The WA Law Reform Commission spent numerous hours discussing the concept of "banking or financial control" as form of domestic violence. In our Final Report entitled 'Enhancing Family and Domestic Violence Laws', the Commission rejects any such idea since there might exist a proper reason as to why someone may be prevented from accessing the family's financial or banking resources. Instead, in our report the government is reminded that "*the inclusion of emotional and psychological abuse within the definition of family and domestic violence is contentious*" (p.45).

Also, the idea of 'economic abuse' as a form of 'violence' that possibly justifies an FVO application was explicitly rejected by the Commission's Final Report. We rejected such idea of 'economic violence' by explicitly referring to Sydney family law professor Patrick Parkinson's opinion that adding it '*has very little potential to be helpful and much potential for the opposite*' (p.47). Accordingly, our Final Report argues that '*it is preferable not to expressly refer to concepts such as economic (and emotional) abuse in this new proposed category of the definition [of domestic violence]*' (p. 47).

¹ Patrick Parkinson, Judy Cashmore and Judith Single, 'The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation' (2010) 24 *Australian Journal of Family Law* 313, at 314.

² Ibid

The number of reported incidents of family violence in Western Australia is said to have ‘risen dramatically in recent years’. Apparently there were 44,947 incidents of domestic violence reported to WA Police in 2012, which is two-and-a-half times the number reported in 2004.

However, not every claim of domestic violence can be substantiated. Not everyone who is served a VRO has necessarily committed any act of violence.

What is more, there is a real concern in the community that some unethical lawyers have instructed clients to find *any* reason to apply for restraining orders. Such orders are relatively easily accessible and they can be sought for purely collateral reasons. The problem lies in how these orders are issued and the grounds for which they are made.

In addition, the current definition of ‘an act of family violence’ currently includes **conduct that may not constitute a criminal offence** (i.e., behaviour that ‘intimidates’, ‘controls’ or ‘adversely affects’ a person’s ‘wellbeing’) as well as **conduct that may not even put a person’s safety at risk**.

Indeed, I have been told of numerous instances where individuals attend a police station simply claiming ‘family violence’ and have been instructed by police to apply for a restraining order.

This is why the number of claims of incidents classified as Domestic Violence Incidents (DVIs) has risen so significantly over the past years. In Western Australia, incidents of violence have substantially increased but this is largely due the definition of domestic violence being expanded in 2004 to include behaviour that is ‘emotionally abusive’, ‘could intimidate a person’, etc.

That year WA police recorded 16,607 incidents of violence, but by 2012 this had almost tripled (to 44,947). The broad definition is found in Section 6 of the *Restraining Orders Act WA*, which was inserted in 2004, precisely the year when the number of alleged incidents reportedly increased. And yet, to progress from a bad situation to one that is even worse, Simon Creek, a well-known family lawyer in Western Australia, explains:

[W]ithin the [new laws] passed through Parliament last [December] — all a person will need to show in order to be granted a violence restraining order (VRO) or a Family Violence Restraining Order (FVRO) is that they have a ‘reasonable apprehension’ of personal or family violence. No actual violence need have occurred. The new definition of family violence will mirror the Family Law definition of family violence, encompassing cyberstalking, denying a family member financial autonomy and support, preventing a family member from making or keeping connections with friends ‘or any other behaviour that coerces/controls/ causes a family member to be fearful.’³

Curiously, the WA Police internal policy requires police **to formally record any report of alleged family and domestic violence. Accordingly, the WA Police policy indicates that any alleged incident of family and domestic violence will be recorded (and whether or not the parties involved actually fit within the police definition of a family and domestic relationship or the legislative definition of a family and domestic relationship).**

3. How widespread are False Accusations of Domestic Violence

The public knows that false accusations of domestic violence are made, but virtually never punished when the claim is disproved. In a survey with over 12,500 respondents, more than half agreed with the statement that ‘women going through custody battles often make up or exaggerate claims of domestic violence in order to improve their case’, and only 28 per cent disagreed.⁴

Naturally, such laws cannot be written to the sole advantage women without being overtly sexist. They can and have been used also by male partners for malicious purposes. This operates as a double-edged sword so that women, too, can be exposed to the imminent risk of false allegations and defamation, without the possibility of natural justice applied.⁵

The overwhelming majority of magistrates in Australia share this popular perception that family violence orders (FVOs) are often sought for solely collateral reasons which are unrelated to authentic fear or real violence.

³ Simon Creek, ‘Pendulum Swings Over Restraining Orders Act, *The West Australian*, Perth, 7 December 2017.

⁴ Patrick Parkinson, ‘How Widespread are False Allegations of Abuse?’ *News Weekly*, Melbourne/Vic, June 25, 2011.

⁵ Adam Blanch, ‘Vigilante Justice: Feminism’s Latest Attack on Human Rights’, *On Line Opinion – Australia’s E-Journal of Social and Political Debate*, 22 August 2014, at <http://www.onlineopinion.com.au/view.asp?article=16613>

For instance, a survey of 38 magistrates in Queensland revealed that 74 per cent of them agreed with the assumption that FVOs are often used for tactical purposes.⁶

Similarly, a survey of 68 magistrates from New South Wales indicates that 90 per cent of them agreed with the statement that these orders are often sought as tactical devices to aid applicants with family law disputes, including depriving the former partners of any contact with their children.⁷

This is also confirmed by an analysis of 68 families with allegedly violent wives conducted by Dr Sotirious Sarantakos. He is an Associate Professor of Sociology at Charles Sturt University and his study reveals that a considerable number of ‘women’s allegations of DV were proven to be false’.

As noted by Dr Sarantakos, in such cases ‘the initial allegations [of domestic violence] were modified considerably by them during the course of the study, particularly when they were faced with the accounts of their children and mothers, admitting in the end that they were neither victims of violence nor acting in self-defence’.⁸

3.1. Lack of Due Process

One of the most insidious consequences of the politicisation of the debate on domestic violence relates the undermining of traditional procedural rules that are normally applied to govern our adversarial system of justice.⁹

At a minimum level due process requires sufficient evidence to convict.¹⁰ Further, due process requires that proceedings be designed to allow a person charged with a criminal

⁶ Belinda Carpenter, Susan Currie and Rachael Field, ‘Domestic Violence: Views of Queensland Magistrates’ (2001) 3 *Nuance* 17, 21. See also: Patrick Parkinson, Judy Cashmore and Judith Single, ‘The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation’ (2010) 24 *Australian Journal of Family Law* 313, at 317

⁷ J Hickey and S Cumines, ‘Apprehended Violence Orders: A Survey of Magistrates’ (Sydney/NSW: Judicial Commission of New South Wales, 1999), at 37.

⁸ Sotirios Sarantakos, ‘Deconstructing Self-Defense in Wife-to-Husband Violence’, (2004) 12 (3) *The Journal of Men’s Studies* 277, 287

⁹ Kenneth J Arenson, ‘When Some People Are More Equal Than Others: The Impact of Radical Feminism in our Adversarial System of Criminal Justice’ (2014) 5 *The Western Australian Jurist* 213, at 217

¹⁰ Christine Sypnowish, ‘Utopia and the Rule of Law’, in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford/UK: Hart Publishing, Oxford, 1999), at 180.

offence or accused of a civil wrong to be heard in a regular court and be fully informed in a timely fashion of the nature of the accusation(s).

Furthermore, due process entails, at least in criminal prosecutions, a presumption of innocence and the right to a fair and impartial adjudication. This necessitates, among other things, that the accused shall receive a fair and timely opportunity to respond to the allegations and prepare a defence.

Family violence orders (FVOs) lack the proper application of due process because the evidentiary standards are dramatically relaxed. In more extreme cases, the vast majority of such orders have no evidentiary foundation and are often granted on a ‘without admissions’ basis that have virtually no evidentiary value in themselves.¹¹

An analysis of court files in New South Wales reveals that the courts often deal with such cases in less than three minutes and are resolved by consent without admissions. The information provided in such complaints is typically brief and tends to focus on one single incident.¹² Further, references to ‘fear’ are included in a routine or habitual manner, ‘frequently as a bald statement to conclude a complaint without any reasoning or thematic connection to the victim’s experience’.¹³

Naturally, having only a few days to defend from an accusation of domestic violence is not nearly enough time. This is compounded by the undeniable stress caused by being evicted from the home by armed police officers at the behest of the domestic partner.

Far more often than not, the respondents will have lost access to their children and even their joint bank accounts too. This is because the applicant might have spent several months or even years with a lawyer planning to file such an order.

In sharp contrast, the accused is given only a couple of days to prepare a defence. Following a final hearing, those who are adjudicated guilty through such precarious process will have

¹¹ P Parkinson, J Cashmore and A Webster, ‘The Views of Family Lawyers on Apprehended Violence Orders After Parental Separation’ (2010) 24 *Australian Journal of Family Law* 313, at 317.

¹² *Ibid.*, at 318.

¹³ *Ibid.*

his life and reputation forever tarnished.¹⁴ And contact with his children may also be banned, particularly when the mere existence of the restraining order makes any contact impossible.

There is a widespread view that some lawyers have instructed clients to seek restraining orders even when they are palpably unjustified.¹⁵ Rather than being honestly motivated by legitimate concerns about feeling safe, a person may seek a FVO simply because he or she is legally advised to look for *any* reason to apply for such an order when facing a family law dispute.

As a result, law-abiding citizens have been caught in police proceedings and evicted from their homes by *ex parte* orders that seriously violate the most basic elements of due process – including advance notice of the proposed action, the right of facing the accuser, and the opportunity to refute the allegation.

In our Final Report, the WA Law Reform Commission recommended that legislation should provide a fair and just legal response to domestic violence. Above all, the Commission's Final Report stated that:

[A]s Legal Aid confirmed, this does 'not mean that fairness and the protection of individual rights are not important considerations.' In this context, it is vital to acknowledge that not every person who applies for a violence restraining order is a victim of family and domestic violence and not every respondent is a perpetrator.

As noted in the Discussion Paper, the current restraining order system is not without its critics in terms of its overuse or abuse. Although it is true that most applications for violence restraining orders are properly made, sometimes they are unmeritorious or otherwise used for tactical purposes in family law litigation. And yet, many lawyers consider that violence restraining orders, in particular those applied for after proceedings have been instituted in a family law dispute, may actually exacerbate conflict and decrease the prospects of the parties reaching agreement, with a consequent impact upon legal costs.

Because an interim violence restraining order can be made on the uncorroborated evidence of the applicant, the potential for abuse is very real. One example repeatedly mentioned to the Commission during its consultations is where the person protected by a violence restraining order is the perpetrator and the person bound is the victim. Further, it is important to acknowledge, from the respondent's perspective, the potential consequences of a violence restraining order: exclusion from the family home, prohibition of contact with children, inability to work, and general restrictions on day-to-day activities. Additionally, a respondent is liable to serious consequences

¹⁴ David N. Helleniak, 'The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act' (2005) 57 (3) *Rutgers Law Review* 1009, at 1014-16.

¹⁵ Parkinson, above n.11, at 324.

under the criminal law for failure to comply with the order (including an interim order).

For these reasons, the justice system must ensure that the legal rights of all parties are respected and, in particular, that respondents to violence restraining order applications have a right to be heard within a reasonable time. Additionally, the importance of ensuring that the legal system responds to family and domestic violence in a fair and just manner supports the provision of better and more reliable information to decision-makers at the outset, thus enabling more accurate and effective decisions to be made (pp.18-19).

3.2. Parental and Property Rights

Being deprived from one's home is always a traumatic experience. And yet, each year thousands of innocent Australians are issued with FVOs that evict them from their homes (and often alienates them from the lives of their children) without due process or any significant issue of physical safety or fear for safety involved.

Since these orders are often granted on an *ex parte* basis, armed police officers evict surprised owners from their properties without any evidentiary hearing or admissions. Since these orders nullify the legal right of homeowners to occupy their homes, it basically creates a crime out of the ordinarily innocent act of returning home.¹⁶ As noted by Simon Creek:

All a person will need to do is head off to court with their silver-tongued lawyer and tearfully explain that they have a reasonable fear of something bad happening. There will then be an automatic presumption in favour of granting a VRO or FVRO. And all of the above can take place without the alleged perpetrator even being informed. The first time he, or she, might know of what is being said about them is when they return home to find the locks changed and a police officer serving them with a copy of the order.¹⁷

Hence a property right is nullified and the family is transformed into a public space in which the state 'deliberately and coercively *reorders* and *controls* private rights and relationships in property and marriage – not as an incident of prosecution, but as its goal'.¹⁸ In this legal context, Jennie Suk of Harvard Law School concludes that '[t]he police presence is required in that space and the state gains a foothold for its supervisory presence and control in the home'.¹⁹

¹⁶ Jeannie Suk, 'Criminal Law Comes Home' (2006) 116 *Yale Law Journal* 1, at 31.

¹⁷ Creek, above n.3.

¹⁸ Suk, above n.16, at 7.

¹⁹ *Ibid.*, at 22.

Since FVOs require the respondent to immediately vacate the family house, such orders have profound implications to parental rights. They often restrict parental contact with children, which may result in supervised parenting time or no parenting time at all. Clearly, when an accusation is made the stakes are extremely high. This is contrasted by the incredibly low burden of proof that is often applied to these orders, which is then exacerbated by the abbreviated manner in which court hearings are held.

Remarkably, even if the accusation is based on trivial or uncorroborated allegations, an *ex parte* interim FVO still evicts the accused from the home. This makes the person who has been accused the only individual in the world who is specifically prevented by law from seeing his/her children without the accuser's permission.²⁰

These orders, separating parents from their children for years and even life, are sometimes issued without the presentation of any evidence of wrongdoing. A parent receiving the order must immediately vacate his home and make no further contact with his children. If he tries to contact with his children, then the alleged victim may contact the police and a pro-arrest policy for domestic violence will make sure the innocent person is **summarily arrested**.

3.3. Mandatory Sentences for Breach of FVO

I do not support mandatory sentencing to breaches of FVO. The WA Law Reform Commission's Final Report reminded that:

[T]he vast majority of submissions received in reply to this question did not support any changes to the current provision that would modify the presumptive sentence of imprisonment to a mandatory sentence of imprisonment. The Chief Justice of [the Supreme Court of] Western Australia indicated that he strongly opposed any reform to the current provision that would 'reduce or eliminate the limited discretion currently conferred on courts' and highlighted the importance of discretion to enable the individual circumstances of the offending to be taken into account. The joint submission from the Women's Council for Domestic and Family Violence Services and the Domestic Violence Legal Workers Network highlighted that full mandatory sentencing may in fact penalise victims of family and domestic violence because there are instances where victims may be inappropriately subject to violence restraining orders or police orders and they may be charged with breaching an order as a result of retaliation or defensive conduct (p.116).

²⁰ Warren Farrell, *Father and Child Reunion: How To Bring the Dads We Need to the Children We Love* (New York: Tarcher/Putnam, 2001), at 198.

For these reasons, we reached the following conclusion in our Final Report:

The Commission maintains its original view that the current limited discretion should be retained and is in agreement with the majority of submissions that full mandatory sentencing is inappropriate (p.116).

Regrettably, the WA Police have a **pro-arrest policy for family and domestic violence** whereby **arrest is expressed to be the ‘preferred option’** (*COPS Manual*, DV 1.1.4.1.). The WA Police expressly informed the WA Law Reform Commission that the accused are **usually arrested** for breaching a violence restraining order or a police order.

This is extremely serious since the Chief Justice of Western Australia, Wayne Martin, stated to the WA Law Reform Commission that such a presumption of arrest **‘will almost inevitably produce injustice and hardship in some cases’**. (Chief Justice of the Supreme Court of Western Australia, Submission No. 24, 27 February 2014. 2).

Under the current provisions, the police may enter a person’s premises following a false or unsubstantiated report of family violence. For instance, Section 62B the *Restraining Orders Act (WA)* sets out the powers of police to search and enter private premises in certain circumstances involving family and domestic violence. I am deeply concerned about the broad nature of the power of the police to enter and remain in such premises.

4. The Link between Child Support Payment and False Accusations

Three things should be taken into account when it comes to child custody.

First, no children should be denied their basic right to develop a meaningful relationship with both parents.

Second, no legal system has the legitimacy to prevent child-parent relationships to flourish, unless, of course, there are serious concerns about abuse and principles of natural justice are fully applied in the investigation of these matters.

Third, there is no excuse whatsoever for parents to neglect or abandon their children, or to alienate them from the other parent.

Contrary to popular belief, child support payments have nothing to do with fathers abandoning their children, or renegeing on their marital vows, or agreeing with a divorce. Since in a 'no-fault' system nobody can contest their divorce, such payments are awarded ostensibly and without any reference to 'fault' whatsoever. Hence, the payment of support is an entitlement to be automatically assessed on non-custodial parents, and even on those who are unwillingly separated or divorced against their personal will.

Accordingly, support payments can be a financial reward for divorced parents who make very difficult for non-custodial parents to develop a meaningful contact with their children. In view of the financial reward acquired from such support payments, the position of some custodial parents is that the non-custodial parent should not be allowed to spend any time with their children.

In this sense, a parent who holds temporary custody may decide to procrastinate as much as possible custody litigation, thus preventing the other (innocent) parent any right of access to their children. When this awful reality takes place, a parent will lose access to their children through no fault or agreement of his volition.

There have been many accounts of non-custodial parents who are falsely accused of child abuse and neglect, and even the sexual molestation of their children. Some non-custodial parents lose access to their children even after the Department of Child Protection (DCP) entirely clears them of any wrongdoing or 'unsubstantiated' allegation. When both DCP and the family court clear this parent of any wrongdoing, more often than not the court still keeps the custody of the child with the false accuser; i.e., the custodial parent who has maliciously made such false allegations.

To make a false accusation of violence has become a common strategy used to alienate a parent from his children. The strategy consists in the ability of the custodial parent to defame the non-custodial parent without the slightest need of proof.

Such accusations tear apart entire families, all on the word of a person and with no need of evidence to be provided.²¹ No proof is necessarily required and the damage to the other person's life and reputation is irremediably made. According to Dr Adam Blanch, a provisional psychologist and counsellor working in Melbourne;

The more a single parent can restrict the other parent's access to the children the more financial support they receive from the alienated parent and the government, and a [FVO] even when based on allegations that have been unsubstantiated is a great weapon in the fight for primary custody and restricted access.²²

Such malicious accusations should not be allowed to go unpunished. Perpetrators of false allegations should face the full force of the law. Once it is reasonably possible to testify beyond reasonable doubt that no actual violence has occurred, any such false accusation should automatically give rise to the loss of child custody.

5. Final Considerations

Domestic violence is obviously a grave issue and we should never go soft on the problem.

However, the sympathy which is due to those who live in fear of violence should be extended to those who are the victims of false accusations of domestic violence.

One of the most insidious consequences of the politicisation of the debate on domestic violence relates the undermining of traditional procedural rules that are normally applied to govern our adversarial system of justice.²³

Of course, this is not about violent people who terribly abuse their spouses and children. This involves law-abiding citizens who have lost parental and property rights without the most elementary requirements of natural justice and due process of law.

Unfortunately, it is deeply disheartening that one seldom hears about the plight of law-abiding citizens who have become the innocent victims of such accusations.

²¹ Blanch, above n.5.

²² Ibid.

²³ Arenson, above n.9, at 217.

Given the further relaxation of rules of evidence, and the potentially dramatic consequences for a person who is served a family restraining order, I am concerned that strong penalties are not applied against those filing a false complaint. I would expect even the possibility of criminal charges for filing a malicious accusation of domestic violence.

People who maliciously fabricate accusations in order to have an upper hand at family law disputes must face the full force of the law, including the loss of child custody. Such accusations should also have a more direct impact on property dispute settlements during family court disputes.

Dr Augusto Zimmermann
Perth, 20th April 2017