



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
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By email: natalie.cooper@lawcouncil.au

Dear Dr Popple,

Inquiry into family violence orders

Thank you for the opportunity to provide input to inform a Law Council submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs in response to its Inquiry into family violence orders. The Law Society's Family Law and Indigenous Issues Committees contributed to this submission.

General comments

In principle, we support consideration of federal measures that improve access to the remedies available, at both federal and state and territory level, to people who are experiencing or at risk of family violence.

Our comments focus on opportunities at the federal level to strengthen the mechanisms for protecting family law litigants from family violence. We suggest:

- encouraging nationally consistent police responses to family violence, through police training aimed at operational and cultural improvement;
- expanding the capability of the Federal Circuit and Family Court of Australia (**FCFCOA**) to conduct risk screening, and to respond to identified risk through referrals to services and case management;
- positioning the FCFCOA to provide guidance, where possible, on the practical effect of parenting orders on any existing or future family violence orders (**FVOs**);
- prioritising the development of a national database of FVOs to support information sharing in regard to FVOs; and
- investing in legal assistance services, including wrap-around services, for parties involved in family violence.

Consideration could also be given to strengthening the effectiveness of injunctions made under sections 68B and 114 of the Family Law Act 1975 (**Family Law Act**), primarily by working with state and federal police to improve police responses under sections 68C and 114AA regarding the enforcement of these orders.

Our responses to the specific Terms of Reference are set out below.

1. The risk of an escalation in the aggressive and violent behaviour of the perpetrator and heightened risk to the partner and children during family court proceedings.

There is evidence to suggest that victim-survivors are at high risk of harm at the point of family separation.¹ Many subsequently end up in the family law system, with the trajectory of family violence continuing throughout the course of proceedings, and, frequently, beyond. At the point when proceedings are commenced, the presence of family violence may be an ongoing manifestation of conflict.

We note that the FCFCOA's current responses to this heightened risk at the commencement of proceedings include the FCFCOA's Lighthouse program, which provides opportunities at that point to identify and manage existing family violence risk to parties and their children. We also note, with approval, the FCFCOA's investment in the Safe and Together program for client-facing staff on assessing and responding to risk.

2. The current barriers for litigants in the family law system to obtain and enforce FVOs

During the course of family law proceedings, victim-survivors may be particularly reluctant to protect their safety by seeking or enforcing a FVO, for fear that doing so may escalate conflict in the proceedings and lead to a less favourable outcome for themselves or their children.

FVOs may also be used as a form of systems abuse in family law proceedings where family violence is present. Our members report instances where one parent (the perpetrator) obtains an FVO against the other parent (the victim-survivor) as a form of evidence against that other parent, and as a means of intimidating that parent and exerting pressure to agree to less favourable parenting orders. In that regard, we note a study conducted by the Women's Legal Service NSW which found that over two-thirds of clients defending FVOs were the victims of violence in their relationships. Less than 40% of these clients had a final Apprehended Domestic Violence Order made against them.² These circumstances can inhibit victim-survivors in the family law system from using the FVO system to report violence or the risk of violence against themselves or their children.

Victim-survivors, including family law litigants, also face barriers to enforcing FVOs across state and territory borders. Although the National Domestic Violence Order Scheme provides that all FVOs issued in an Australian state or territory after 25 November 2017 are automatically recognised and enforceable across Australia,³ our members report that victim-survivors do not always find it easy to obtain protection under the Scheme. This can be due to the local police being unfamiliar with FVO regimes in other jurisdictions. It may also suggest that the Scheme is not adequately supported by cross-border information sharing arrangements and systems.

¹ C Toivonen and C Backhouse, [National Risk Assessment Principles for domestic and family violence](#) (ANROWS Report, 2018) 12.

² Women's Legal Services, [Women Defendants to AVOs: What is their experience of the justice system?](#) (2014) 4.

³ <https://www.ag.gov.au/families-and-marriage/families/family-violence/national-domestic-violence-order-scheme>.

a. the additional difficulty for victims of violence in the family law system to attend multiple courts for their family law order proceedings and an FVO

Our members report that, for family law litigants who are experiencing or at risk of family violence, the “jurisdictional divide” which requires attending and navigating two separate court systems increases the burden on these parties. This includes the additional time, costs and stress of having to prepare two sets of evidence relating to the same circumstances.

We note that, since the introduction of Information Sharing Orders, the FCFCOA has a means of more easily informing itself about the parties’ family violence history, without the need for the parties to repeat their evidence. However, our members’ experience is that these orders are not yet widely sought, or made, and there may be opportunities to improve the operation of this mechanism.

b. the intersection between FVOs and parenting orders, including that a family court parenting order may override an FVO

Our members agree that family law litigants can be uncertain or confused as to the legal intersection of FVOs and parenting orders, particularly “spend time” orders and changeover arrangements. This can lead to misinterpretation of the effect of FVOs, which can heighten risk and intensify conflict between the parties.

Members report that the relationship between parenting orders and FVOs can also be misunderstood by police. This can result in police declining to enforce a (still active) FVO provision, or it can otherwise undermine parenting orders put in place to protect the safety of parties and their children.

c. the availability of wrap-around support services and security for victims of violence

Effective measures for reducing the barriers for family law litigants to seeking and enforcing FVOs, including barriers associated with the jurisdictional divide and/or the intersectionality of FVOs and parenting orders, include ensuring the availability of wrap-around, multi-jurisdictional support services.

Legal assistance services that offer advice and assistance in both the family law and the criminal / domestic violence jurisdiction have proven helpful. We note that the effectiveness of services such as the Family Advocacy and Support Service (**FASS**) has been recognised by the Australian Law Reform Commission:

4.120 The lawyers engaged in FASS (as the review of the pilot scheme showed), had the great advantage of being involved in both state and federal jurisdictions. They were shown in the review to be able to smooth the pathways, to reduce the confusion and to increase the provision of needed information to the litigants.⁴

There are also positive indications of the value of investing in wrap-around legal and non-legal assistance for defendants in family violence matters. The Inquiry may wish to consider the approach taken in 2011 of a pilot Apprehended Violence Order (**ADVO**) defendant pilot program at the Mt Druitt Local Court in NSW. The aim of the pilot was to “test the proposition that providing holistic minor assistance and duty representation to

⁴ Australian Law Reform Commission, [Family Law for the Future – An Inquiry into the Family Law System](#) (ALRC Report 135, March 2019), 142.

defendants in ADVO matters reduces future legal problems (in crime, civil and family law areas)".⁵

The pilot was evaluated after 12 months, and the Final Review Report noted positive early trends, including reductions in breach rates, no breaches for final orders that had been tailored in relation to children, and no breaches for matters that had been adjourned for legal advice through the pilot.⁶ Benefits of the pilot reported by stakeholders included that providing representation for defendants reduced problems with self-represented defendants denigrating victims in the courtroom.

We understand that the pilot was not continued at Mt Druitt Local Court, largely due to a "perceived imbalance of service provision between victim and defendant services, the conflict of interest issues associated with the ... provision of family law advice, and the perceived pressures applied to victims to address family law issues...".⁷ However, the concept of referring clients to defendants and/or providing family law advice was supported.

The Inquiry may also wish to consider the Specialist Family Violence List that currently operates in Sydney Downing Centre, Blacktown, Newcastle, the Gunnedah circuit (excluding Tamworth) and the Moree circuit. Among the aims of this specialist list is to ensure that ADVOs are consistent with other court orders such as bail conditions and Children's Court orders and consider consistency with any existing family law orders.⁸

3. How FVOs could be more accessible for victims of violence going through the family law system

a. making it easier to apply for and enforce an FVO

Police education

There may be opportunities at the federal level to encourage nationally consistent police responses to family violence, through assisting in the development of consistent police training aimed at operational and cultural improvement, with a focus on interaction with the family law system.

We note that the *National Plan to End Violence Against Women and Children 2022-2032 (National Plan)* commits to measures that "ensure people have positive experiences when reporting experiences of violence to police and specialist services"⁹ and "improve police responses to gender-based violence".¹⁰ This includes ensuring a survivor-centred approach for victim-survivors and strengthening police responses including training workforces.¹¹

Risk screening and case management

The reluctance of victim-survivors in the family law system to seek or enforce FVOs, and the potential for FVOs to be weaponised in the family law system, suggest there is a need for the FCFCOA to have greater visibility over family violence risk at all stages of proceedings, providing broader scope to identify risk, or heightened risk, and to respond through referrals and case management. As a minimum, we suggest that the Lighthouse

⁵ Legal Aid NSW, [ADVO Defendant Pilot: Mount Druitt Local Court Final Review Report](#), June 2013) 3.

⁶ *Ibid.*, 11.

⁷ *Ibid.*, 13.

⁸ Local Court of New South Wales, [Specialist Family Violence List Pilot Practice Note](#).

⁹ Australian Government, Department of Social Services, [National Plan to End Violence Against Women and Children 2022-2023](#), 27.

¹⁰ *Ibid.*, 28.

¹¹ *Ibid.*, 65, 71.

program should provide screening at the highest risk points throughout proceedings. This should be coupled with access at every stage to referral pathways to legal assistance services, and to therapeutic, social and multi-disciplinary support services.

Consideration could also be given to broadening the use of intensive case management approaches, similar to those used in the Magellan and Evatt Lists, for use in both property and parenting matters involving allegations of significant family violence against parties or their children. Features of this type of intensive case management could include the use of multi-disciplinary teams to minimise the risk of harm to vulnerable parties, as well as referrals to legal assistance.

Judicial guidance

We suggest the FCFCOA has a role in actively clarifying the practical effect of parenting orders where an FVO is in place, or likely to be sought. When making parenting orders, judicial officers should be encouraged to explain the matter to the parties as far as possible, in practical terms, and ideally, adopting the language of the relevant state or territory FVO orders. It may be appropriate in some cases to make orders which are clearly intended to “cover the field” and exclude the operation of any FVO made while they are in effect.

Information sharing

Effective information sharing between jurisdictions is crucial to ensuring that parties, police and the courts have visibility across all relevant orders.

The Law Society understands an inter-governmental project is underway to develop a national electronic database of FVOs.¹² In our view, completion of this initiative should be prioritised. A national database will improve the operation the National Domestic Violence Order Scheme in enabling victim-survivors to enforce FVOs nationally. It will also facilitate the use of Information Sharing Orders as a tool for assessing risk in family law matters, by providing a valuable resource to inform state and territory agency responses to these Orders. We suggest the national database should record provisional, interim and final domestic violence orders, any breaches, orders made under the *Family Law Act* and relevant child protection orders made under state or territory legislation.

Legal assistance services

We stress the importance of properly resourcing all legal assistance services that support victims of family violence. We note the National Plan commits to capacity building for legal services, including Women’s Legal Services and Aboriginal and Torres Strait Islander Women’s Legal Services.¹³

As discussed above, the availability of these services is key in ensuring that FVOs are accessible to victim-survivors, including as a component of multi-disciplinary support services. Legal assistance providers also have a role in ensuring that their clients understand the interplay between FVOs and parenting orders.

b. co-location arrangements that would allow an application or enforcement of an FVO to be heard in the same physical location as the FCFCOA; and

Despite the complexities of the jurisdictional divide, we would not support the introduction of further measures enabling the FCFCOA to hear or enforce FVOs. In our view, this

¹² See House of Representatives Standing Committee on Social Policy and Legal Affairs, [Parliamentary Inquiry into Family, Domestic and Sexual Violence](#) (March 2021) Recommendation 81; NSW Joint Select Committee on Coercive Control, [Coercive Control in Domestic Relationships](#) (Report 1/57, June 2021) Recommendation 7.

¹³ Australian Government, Department of Social Services, above n9, 62.

approach may risk further complicating the system overall, and may increase opportunities for systems abuse by differentiating the FVO pathway for victim-survivors in the family law system.

We note that the Family Law Amendment (Federal Family Violence Orders) Bill 2021 (Cth) proposed enabling the FCFCOA to make orders similar to FVOs under the *Family Law Act*. The Law Society raised significant concerns about the practical operation of the proposed Commonwealth family violence orders, about their potential as instruments of abuse of the family law system, and about the significant ongoing resources required to ensure their efficacy, in circumstances where such resources may be better directed to programs providing direct support to victims of family violence, or in improving the efficiency of the family law system generally.¹⁴ We maintain those concerns about that proposal.

Our preferred approach is to consider models which centre on the existing state and territory local court jurisdiction to hear certain proceedings under the *Family Law Act*. In the Final Report of the Australian Law Reform Commission's *Inquiry into the Family Law System*, Commissioner Faulks provided a dissenting view regarding the jurisdictional divide between the federal and state/territory jurisdictions, noting that "the problems are essentially continuity, support and the relieving of confusion".¹⁵ He suggested:

4.114 If the pathways from one court to another were to be simplified and supported for litigants, this would have the potential of preserving the existing institutions with their various strengths but ensuring that the litigants are relieved from much of the confusion and repetition they currently face.

4.115 This will involve a triage at the first-aid points (such as in the court hearings for apprehended domestic violence orders or in the courts hearing applications under the child protection jurisdiction of the various states and territories).

4.116 If as a result of the triage or with the intervention or assistance of FASS, the state court is asked by the parties to make orders, by consent, about other matters of family law, it should do so. Those courts have that power at present.

4.117 If on the other hand, the parties require more specialised assistance to resolve their disputes, it would be of great assistance if the magistrate were able to investigate with parties at the time of that magistrate's intervention, the issues of the parties requiring determination or resolution and to make such orders as would facilitate the parties' getting to where they can best obtain that assistance as straight-forwardly and as speedily as possible.¹⁶

Appropriate public information to help minimise confusion, and appropriate funding for FASS or other wrap-around support services, may help to overcome the jurisdictional divide, at least in matters involving consent orders or other simpler family law issues.

4. Any other reform that would make it safer and fairer for victims of violence in the family law system who need the protection of FVOs.

We note that the *Family Law Act* makes some provision for FCFCOA intervention in matters involving family violence through sections 68B, 68C, 114 and 114AA, which enable the FCFCOA to grant injunctions that provide protection to parties, children and carers who are at risk of family violence, breach of which may result in arrest and a short period of custody.

¹⁴ Law Society of NSW, Submission to Law Council of Australia, [Family Law Amendment \(Federal Family Violence Orders\) Bill 2021](#), 11 June 2021.

¹⁵ Australian Law Reform Commission, above n4, 141.

¹⁶ *Ibid.*

In 2019, the Australian Law Reform Commission's Final Report on its *Inquiry into the Family Law System* noted previous reports about the reluctance of state police to enforce these injunctions on the basis that they are federal court orders.¹⁷ This is consistent with the experience of our members, who report that, as a result, injunctions are rarely sought, and under-utilised as a protective mechanism available to the FCFCOA.

There may be opportunities for the Commonwealth Government to work with state and territory governments to support the improvement of police operational procedures and training on the use of these federal powers. In our view, participants in the family law system should have confidence that police will enforce injunctions as well as FVOs.

Our members also report that there can be concerns about delays in the FCFCOA in hearing applications for injunctions or for their enforcement. Consideration could be given to establishing a new list dedicated to these applications, with the capacity for urgent hearings where necessary.

Thank you once again for the opportunity to contribute to a Law Council submission to this Inquiry. If you have any further questions in relation to this letter, please contact Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brett McGrath', with a long horizontal flourish extending to the right.

Brett McGrath
President

¹⁷ Ibid., [4.30]-[4.31].