QUADRANT

November 01st 2016

AUGUSTO ZIMMERMANN

The Menace of Family 'Violence' Order

I have a personal concern—not as a Law Reform Commissioner, but as a citizen—regarding the proposed Restraining Orders and Related Legislation Amendment (Family Violence) Bill 2016 in Western Australia.

The West Australian parliament is introducing new laws regarding domestic violence which pose an insidious threat to fundamental rights of citizens. The proposed laws could see an accused lose access to their children or be forced from their home without any evidence of violence occurring.

The family violence bill, aimed at preventing harm, updates the definition of domestic violence to "promote a contemporary understanding of the nature and seriousness of family violence" and extends the relaxation of evidence rules already available for interim orders to final decisions. This erodes the very idea of natural justice and the right to remain innocent until proven guilty.

Under these proposed laws respondents can be forced out of their homes, lose access to their children and other rights, without the requirement for evidence to be provided. In its final report on the subject, the Law Reform Commission of Western Australia explicitly rejected such moves, noting they were likely to exacerbate the existing problem of overuse and abuse of violence restraining orders, which are known to be used for tactical purposes in family law litigation.

In August 2013, the West Australian 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, the Commission published its Discussion Paper presenting fifty-three specific proposals for reform and raising twenty-nine questions for discussion. The Paper was followed by consultation with more than 150 individuals expressing their concerns about family and domestic violence. The Commission ultimately received forty-three written submissions, and we conducted additional consultations to resolve matters arising from the submissions.

The West Australian Attorney-General has been described by the local media as having stated that a new Family Violence Restraining Order (FVRO) is designed to reduce the onus on the victim to provide evidence of intimidating or controlling behaviour.

Further, the media says that the West Australian Police Minister has declared:

We're sending a message to the courts that we would prefer them to err on the side of the victim and err on the side of granting one of the violence restraining orders in these scenarios because they do protect women.

Of course it is extremely important to protect women who are at risk of violence and it is commendable that strenuous efforts are finally being made to ensure victims are given every possible legal support to ensure their safety. But many in the legal profession and elsewhere take issue with the notion that laws should be tilted to favour victims without any consideration for traditional legal protections to ensure fair treatment for the alleged perpetrators.

And yet, those problematic statements by the Police Minister provide the rationale for the following amendment proposal:

Section 44A amended:

(2A) Except as otherwise provided in this Act, at a final order hearing for an FVRO, the court may refuse to admit, or may limit the use of, evidence if—

the court is satisfied it is just and equitable to do so; or the probative value of the evidence is substantially outweighed by the danger that the evidence may be unfairly prejudicial to a party or misleading or confusing.

In our Final Report, titled "Enhancing Family and Domestic Violence Laws", the Law Reform Commission rejected such an approach. It recommended that legislation should provide a fair and just legal response to family and domestic violence. Above all, it expressly stated:

… as 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 …

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 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.

In order to justify the need for legislative reform, Police Minister Liza Harvey reportedly stated: "Family violence starts usually with the partner controlling every aspect of a woman's life, the banking, who they speak to, where they go." This is reflected in the following amendment, which creates the concept of financial abuse as a form of domestic violence that allows for the application of restraining order:

5A. Term used: family violence

(g) unreasonably denying the family member the financial autonomy that the member would otherwise have had

Our Commission spent numerous hours discussing the concept of "banking or financial control" as a form of domestic violence. The Commission finally decided to reject any such idea, since there might exist a proper reason why someone may be prevented from accessing the family's financial or banking resources. Instead, in our

report the Commission reminds the West Australian government that "the inclusion of emotional and psychological abuse within the definition of family and domestic violence is contentious".

Although the Police Minister's statement reflects her own view about "economic abuse"—as a form of violence that possibly justifies an AVO application—the Commission's Final Report rejects such a proposal by explicitly referring to Sydney law professor Patrick Parkinson's statement that adding any such a concept "has very little potential to be helpful and much potential for the opposite". Above all, our Final Report expresses the view that "it is preferable not to expressly refer to concepts such as economic (and emotional) abuse in this new proposed category of the definition".

Ms Harvey's comments provide the rationale for the following proposed amendment:

> *5A. Term used: family violence*
>
> *A Reference in this Act to family violence is a reference to—*
>
> …
>
> *any other behaviour by the person that coerces or controls the family member or causes the member to be fearful*
>
> *(2) Examples of behaviour that may constitute family violence include (but are not limited to) the following—*
>
> …
>
> *(d) repeated derogatory remarks against the family member*

These actions are deemed to be a form of emotional or psychological abuse. However, our Commission decided that "psychological abuse should not be expressly included within the definition of family and domestic violence".

Likewise, the Commission does not support any mandatory sentencing to breaches of VROs. The Commission received a considerable number of submissions of which only *one* submission advocated mandatory sentencing.

As our Final Report clearly indicates, the government's proposal is radical and it violates the Law Reform Commission's recommendations. Above all, our Final

Report reminds the government that:

> *the 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.*

For these reasons, we concluded 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.*

The Police Minister posted in her website that reforming domestic violence restraining orders is needed because the number of reported incidents of family violence in Western Australia has "risen dramatically in recent years". Apparently there were 44,947 incidents (including mere allegations) of domestic violence reported to police in 2012, which is two and a half times the number reported in 2004.

First of all, not every claim of domestic violence can be substantiated. Second, there is a real concern in the community that unethical lawyers instruct their clients to find *any* reason to apply for such violence restraining orders. Such orders are relatively easily accessible and they can occasionally be sought for purely collateral reasons. The problem lies in how these orders are issued and the grounds for which they are made.

Ms Harvey said: "To be able to intervene at that point, before that control, coercion and intimidation escalates to violence is a step in the right direction and a huge step for these women who are trapped in those relationship." The word *before* is important.

She is asking for the state to intervene even before domestic violence takes place. This is a totalitarian concept, more likely to exist in countries like the former Soviet Union. It has no place in a democratic society under the rule of law.

And yet, the statement appears to provide the rationale for the following amendment proposal:

Part 1B—Family Violence Restraining Order

10A. Objects

The objects of this Part are as follows

to maximise the safety of persons who have experienced, or are at risk of, family violence

…

10D. When FVROs may be made

…

a person seeking to be protected, or a person who has applied for the order on behalf of that person, has reasonable grounds to apprehend that the respondent will commit family violence against the person seeking to be protected.

The Attorney-General, Michael Mischin, said, "We will be moving away from the need for establishing evidence of an act of abuse, as is currently the case, towards one of behaviour to intimidate, coerce and control a member of the family." Here the Attorney-General is openly stating his intention to undermine one of the foundations of the rule of law—that one is innocent until proven guilty. These orders will be issued without the presentation of any evidence of legal wrongdoing.

Contrary to his remarks, the Law Reform Commission was very clear in its recommendation that "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".

The following amendment proposal states:

10A. Objects

The objects of this Part are as follows …

(e) to make perpetrators of family violence accountable to the court for contraventions of court-imposed restrictions designed to prevent them from committing further family violence.

The provision leads to the misleading assumption that everyone who is served a restraining order has necessarily committed an act of domestic violence. However, restraining orders are usually granted with no evidence.

Section 62A of the Restraining Orders Act creates an obligation to investigate family and domestic violence in specified circumstances. If so, the police officer should investigate whether family and domestic violence is being or has been committed or whether family and domestic violence is likely to be committed. However, I was told of numerous instances where individuals attend a police station simply claiming "family violence" by their domestic partner and have been instructed by police to apply for a domestic violence restraining order.

The current definition of "an act of family violence" currently includes conduct that may not constitute a criminal offence—behaviour that "intimidates", "controls" or "adversely affects" a person's "wellbeing"—and conduct that may not even put a person's safety at risk. Perhaps this is why the number of recorded claims of family and domestic violence incidents, classified as Domestic Violence Incidents (DVIs), has risen significantly over the past years in Western Australia. In 2004 there were 16,607 DVIs, and 44,947 incidents in 2012. The broad definition is found in Section 6 of the Restraining Orders Act, which was inserted in 2004—precisely when the number of alleged incidents increased!

The fact that "verbal abuse" can be a ground for successfully obtaining a family restraining order is a dangerous development, as this excerpt from an e-mail sent to me by a victim clearly indicates:

I think the one area you missed in your article is the wonders of the ADVO [apprehended domestic violence order] where a woman can simply decide she doesn't want the guy anymore (in my case she wasn't getting to the gym enough, the GFC had affected my salary and she didn't fancy renovating), duck down the local police station

> *and (per the quote from my ex's father) "the truth doesn't matter all she has to do is say she's scared". In my case she had seen a lawyer and within an hour ducked down to local police where a 23 year old constable simply took her word for everything ("verbal abuse") raised an interim order and went on holiday for 6 weeks. She even managed to lose the paperwork on her return! During this time (with no evidence, having not spoken to me or witnesses) I was hospitalised, treated like a criminal and locked out of my house and (to a large extent) kids' lives. This gave her in effect the house (which she refuses to pay the loan on) and a "default" interim custody arrangement.*

"Emotional abuse" and "financial abuse" are extraordinarily subjective standards that can be very difficult to combat. Arguably, even a raised voice or an extemporaneous gesture may be regarded as "emotionally abusive" and, therefore, constitute 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 "victim" claims it to be. This is why family violence orders are so popular and have become a major weapon in the war between divorced or separated couples.

Indeed, a comprehensive study about post-separation conflict reveals that the participants who had sought and obtained 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. (See the article by 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.) One participant commented:

> *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.*

The Police State Family Violence Coordination Unit explained to the Law Reform Commission that the definition of a family and domestic relationship has been amended to ensure that the police policy reflects national and state policies that focus

on preventing violence against women and children (regarded as highest risk category for family and domestic violence).

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". 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. "Domestic violence" is now used in a broader sense to cover all sorts of behaviour.

The Western Australia Police internal policy requires police to formally record all allegations of family and domestic violence. Accordingly, the 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).

To make it worse, the police have a deeply problematic pro-arrest policy for family and domestic violence. In other words, arrest is expressed to be the "preferred option". The Western Australia Police informed the 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 stated to the Law Reform Commission that such a presumption of arrest "will almost inevitably produce injustice and hardship in some cases".

People have been arbitrarily removed from their homes through "*ex parte*" restraining orders. These orders, separating parents from their children for years and even life, are issued without the presentation of any evidence of legal wrongdoing.

A parent receiving such an order must immediately vacate their home and make no further contact with their children. If that parent does try to contact their children, then the alleged victim may contact the police and under the pro-arrest policy the parent is summarily arrested.

Finally, under section 62B the Restraining Orders Act sets out the powers of police to search and enter 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 premises because, under the current provision, police may enter a person's premises following a false report of family and domestic violence.

Given the further relaxation of rules of evidence that the amendment proposes, and the potentially dramatic consequences for a person who is served a family restraining order, I am deeply concerned that nothing in the proposed amendments is mentioned about possible penalties for filing a false complaint. I would expect even the possibility of criminal charges for those who file such false accusations.

These are some of my concerns. I believe the proposed changes cannot be supported by the Law Reform Commission's Final Report.

I feel that I have the moral duty to make the information available before these decisions are implemented. Professor Patrick Parkinson has written an interesting academic article that provides full evidence that some family lawyers have instructed their clients to seek such family violence orders even when they are clearly unjustified.

Since restraining orders are granted *ex parte* and no rules of evidence are properly applied, thousands of innocent people have been caught in police proceedings and evicted from their homes by orders that seriously violate the most fundamental elements of due process, including advance notice of the proposed action, the right of facing the accuser and the opportunity to refute the allegation.

Above all, I believe these legislative changes pose an insidious threat to the fundamental rights of every citizen in Western Australia. They grossly violate the recommendations of the West Australian Law Reform Commission. These reforms also undermine the most elementary principles of the rule of law. They will inevitably lead to the further undermining of basic rights to natural justice, property rights and parental rights in Western Australia.

Dr Augusto Zimmermann is Postgraduate Research Director and Senior Lecturer in Constitutional Law and Legal Theory at Murdoch University School of Law. The opinions expressed in this article are personal and do not reflect the opinion of the Law Reform Commission of Western Australia, of which Dr Zimmermann is a member