

Related family law proceedings - Key Literature

Australia

Attorney-General's Department (Cth), 'Interim report to the Attorney-General in response to the first two terms of reference on families with complex needs and the intersection of the family law and child protection systems' (2015) Family Law Council.

See especially chapter 5 which considers 'integrated multi-jurisdiction family violence courts'. It provides an overview of the protection order system as well as the application process for obtaining a protection order in each state and territory. Appendix C contains a table of relevant legislation and terminology in each jurisdiction.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response (ALRC Report 114)* 2010.

Many aspects of this report contain material relevant to domestic violence protection orders. Chapter 5 discusses the need for a 'common interpretative framework', in relation to definitions in family violence legislation with a view to increasing victim safety. Chapter 9 entitled 'Police and Family Violence' discusses police-issued protection orders (pp 368-371). Concerns with police-issued orders are discussed. Police duties to investigate/apply for a protection order are considered from pp 381-386. At p 420 consideration of 'bail conditions and protection order conditions'. The Report notes that bail conditions and protection order conditions should be consistent because inconsistency increases confusion which increases the likelihood of breach. Chapter 11 considers protection orders and the criminal law. The Report notes that conditions prohibiting a respondent from locating or attempting to locate the victim are particularly important where victims are fleeing family violence, will not be appropriate in all cases (p 470-471) and notes that 'no contact' conditions ought to be minimised unless absolutely necessary, particularly in remote communities, so as to reduce the risk of unintentional breaches (p 471). Exclusion orders are considered from p 472. It was noted that exclusion orders are likely to be more effective and victims' safety would also be increased if reasonable steps are taken to secure temporary accommodation for perpetrators (p 479-480). Issues relating to the method and quality of evidence given in protection order proceedings are considered from p 843-864. The use of undertakings is considered from p 864-869. Protection orders made by consent are considered from p 869.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Alan Hayes and Daryl Higgins *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 207.

This essay discusses (among other things) the interaction between state and territory-based civil protection orders and the *Family Law Act 1975* (Cth), particularly in relation to children and child protection issues. See especially from p 209.

Douglas, Heather and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This article gives extensive consideration to the issue of cross-applications for domestic violence protection orders. It firstly considers feminist jurisprudence in the context of the development of the civil protection order system, particularly focusing on the issue of cross-applications. The complexities around the use of cross-orders are noted – 'a cross-order means much more than that the parties simply have a protective order. It has implications for the residence of children, engagement with the criminal justice system and most importantly victim safety' (p 86).

Douglas, Heather, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30(3) *Sydney Law Review* 439.

This article draws on a study of breaches of domestic violence protection orders in Queensland. It observes that, "[p]rotection orders aim to stop the violence but also provide a public statement to the respondent that certain behaviour will not be tolerated. They also put the perpetrator 'on notice' to the police. However, the effectiveness of a protection order in stopping the unwanted behaviour often relies, at least in part, on the threat of the consequences for breach" (p 444).

Gelb, Karen, 'Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates' Court of Victoria' (2016) Karen Gelb Consulting.

This report prepared for the [Victorian Royal Commission into Family Violence](#) contains data from family violence matters arising out of a study conducted in various Magistrates' Courts in Victoria. See especially from p 38, which summarises and discusses the data. Gelb notes that while the most common outcome is that the court issues an intervention order, many adjournments are still made. Gelb identifies that adjournments are often made to synchronise the civil matter with an associated criminal matter or, 'to allow police to undertake further discussions with the affected family member, to find out about related custody matters, or to provide more information on the precise circumstances of the incident' (p 40). Gelb notes that, 'The use of adjournments for either purpose may be problematic, both for the court (in terms of

requiring additional court resources when matters are relisted) and for the parties (especially the affected family member, who must return to court time and again)' (p 40). Gelb observed that most orders where respondents were present in court were finalised by consent (p 38).

Gibb, Melissa and Patricia Easteal, 'Defining Domestic Violence in Protection Order Legislation: A pilot observational study in the ACT' (2015) 40:2 *Alternative Law Journal* 113.

This article evaluates relevant ACT legislation through a court observation study. It concludes – 'A definition of domestic violence that does not explicitly recognise the non-physical manifestations may reinforce stereotypical notions of domestic violence as discrete physical events with emotional and economic abuses secondary and not as harmful' (p 117). However, notwithstanding this definition, judicial officers observed were nevertheless recognising the various types of domestic violence (including emotional or economic abuse).

Hunter, R., *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings*. (2008) Cambria Press. New York.

This study investigates the ways in which women's experiences of domestic violence are heard and understood in civil court settings, and examines women's experiences of telling their stories (or at least attempting to do so) in those settings. The two areas on which the study focuses are intervention order proceedings in State Magistrates' Courts, and residence, contact, and property matters in the federal Family Court in Australia. See chapters 3 & 4, in particular.

Hetzel-Bone, Jack 'Navigating The Laws Of Domestic Violence Intervention Orders' (2013) 35(4) *Bulletin (Law Society of S.A.)* 16.

The article is written by a community lawyer to aid in explaining how new legislation operates in South Australia, including what the grounds are for issuing an order; procedures around service, variation and revocation of orders; changes to trial proceedings and terms of orders. It also explores 'current issues', including Legal Aid/access to justice issues for the defendant; inconsistency with bail and intervention orders; and listing of substantive charges and intervention orders. In explaining the legislation, the article recognises that '[the] broad definition of abuse is an attempt to recognise difficulties faced by changing technology and that abuse between two people can take place in many forms' (p16).

Jeffries, Samantha et al, 'Protecting Australia's Children: A Cross Jurisdictional Review of Domestic Violence Protection Order Legislation' (2015) 22(6) *Psychiatry, Psychology and Law*, 800-813.

This article argues that domestic violence protection order legislation may offer an important legal option for the protection of children affected by domestic violence. The article reviews the provisions of State and Territory domestic violence protection order legislation to consider the focus on the protection of children and concludes that 'protection depends on the jurisdiction in which the child lives' (p 812).

See in particular at p 804 – 'Domestic violence protection orders offer a critical civil legal remedy for the protection of children at risk due to domestic violence. Protection orders have the potential to impact positively on the safety and welfare of children by providing non-violent caregivers and in some instances, other concerned parties (such as police and child protection workers), as well as the children themselves, a means of seeking legally enforceable protection'.

Jeffries, Samantha et al., 'Australian Domestic Violence Protection Order Legislation: A Comparative Quantitative Content Analysis of Victim Safety Provisions' (2013) 25(2) *Current Issues in Criminal Justice* 627.

This article uses comparative quantitative content analysis to assess the victim safety focus of domestic violence protection order legislation in each Australian state and territory. The authors consider four 'dimensions' of victim safety: protective scope of the legislation; specified matters to be considered by the court; procedural mechanisms and order options. The authors note that emergency orders of short duration with a limited range of conditions provides victims with less protection than orders in force for extended periods with unrestricted conditions that can be better suited to the individual circumstances of the case (p 634). The findings of the study are discussed at pp 637-638.

Jillard, Alicia and Julia Mansour, 'Women Victims of Violence Defending Intervention Orders – The latest developments in practice and policy in NSW' (2014) 39:4 *Alternative Law Journal* 235.

This article considers the issue of women defending intervention order proceedings who instruct that they are the victims of violence in the relationship and the applicant for the protection order is the perpetrator of the violence. It discusses data obtained from a study conducted by the Women's Legal Service (NSW) of their own clients. One of the key findings of the study was that two-thirds of clients defending protection order proceedings instructed that they were the primary victim of violence in their relationship.

Katzen, Hayley, 'It's a Family Matter, Not a Police Matter: The Enforcement of Protection Orders' (2000) 14 (2) *Australian Journal of Family Law* 119-141.

This article considers police responses to breaches of protection orders that occur in the context of contact hand-overs. The study, upon which the article is based, found that officers rarely prosecute offenders for a violation of an order when it occurs during contact hand-overs. The article draws on data collected in the

late 1990s: police reports of breaches of protection orders (n186); interviews with women (n32), focus groups with police (n33 police).

Mackay, Erin, Althea Gibson, Huetta Lam, David Beecham, *Perpetrator interventions in Australia: Part one – Literature review* (ANROWS, 2015).

This paper provides detailed discussion on perpetrator pathways in every state and territory in Australia. Civil protection orders are discussed at pp 3-4. A table which contains an overview of civil and criminal perpetrator pathways for family and domestic violence in Australia is provided.

New South Wales Legislative Council Standing Committee on Social Issues, *Domestic Violence Trends and Issues in NSW* (Report 46, 2012).

Chapter 9 extensively considers protection orders (known as apprehended domestic violence orders (ADVOs)). ADVO conditions are considered from pp 250-260. It was noted that some ADVO conditions are unworkable and exclusion orders are often problematic. Moreover, where an ADVO is accompanied by an associated criminal charge there are often delays before the order is finalised, in which time the parties may have reconciled and it may not be appropriate to make the conditions of the final order the same as the interim order. Exclusion orders are considered from pp 254-256. Strategies to improve the effectiveness of ADVO conditions are considered at p256-257. These strategies include tailoring conditions to suit individual circumstances. The report notes that the response to domestic violence should be victim-centric, while at the same time ensuring that ADVO conditions are workable (p 258). It notes that impracticable ADVO conditions could be avoided using greater consultation with the respondent. Even a short conversation with the respondent may be sufficient (p 259).

Queensland Government, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Information sharing is a critical part of an integrated response to domestic and family violence. The report notes that '[t]he ability for different agencies to discuss cases and share relevant details on an ongoing basis is at the core of coordinating a tailored response to a person's individual circumstances. Effective and efficient information sharing ensures that victims of domestic and family violence do not have to re-tell their stories repeatedly to different service providers and enables service providers to provide timely responses, particularly in high-risk cases' (p 230). While there are clear benefits to information sharing, there is a need to ensure sufficient safeguards are in place to protect confidentiality (p 231). Unnecessary or inappropriate sharing of information could have negative consequences including: 'destroying relationships of trust between a service provider and a client, leading to disengagement of a client, becoming a barrier to victims' willingness to seek help (p 231). Similarly, "information can be untested or based on service provider

opinion and could be highly prejudicial to one or both of the parties if used inappropriately in legal proceedings (p 231).

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Various tables summarising the position in each jurisdiction in relation to weapons, enforcement and information sharing, penalties and aiding and abetting are provided. See at pp 9, 11, 12, 15, 17 & 18. Cross-border enforcement of protection orders is considered from pp20-23. Information sharing is considered from pp 40-43.

Victorian Royal Commission into Family Violence, (Volume 3, 2016).

This report contains extensive discussion of protection orders. See in particular from p 120 which discusses the 'applicant experience'. Relevantly, delays in the protection order application process, particularly for interim orders, are considered from p 122. It was noted that initial delays in applications for interim orders can have detrimental effects on applicants such as an immediate and serious risk to the applicant's safety – 'To the extent that applying for an FVIO might signify a victim's recognition that they are in danger and be a definitive step towards ending or altering a violent relationship, the application period will be a time of heightened risk for the applicant. During this period the victim does not have the protection of an intervention order and might not have had contact with police or specialist services' (p 123). Delays caused by respondents are discussed at p 124. Often, there are legitimate reasons for delays caused by respondents to protection order applications – 'Delays can be caused by the perpetrators lawful assertion of procedural rights; for example, it is not uncommon for the respondent to seek "further and better particulars" about the application and to be given the opportunity to consider those particulars. There may need to be an adjournment to allow the applicant to respond to that request' (p 124). However, sometimes respondents abuse processes and cause delays without legitimate reasons. For example, respondents could make a cross-application without legitimate reasons (p 124). Other tactics include failing to appear at hearings, evading service of orders and seeking adjournments at short notice. The report observed that these tactics 'are part of the violence perpetrated against the victim and are calculated to terrorise, disempower, humiliate and undermine the victim's attempts to protect herself (or himself) and other family members' (p 125). Furthermore, delays associated with parallel criminal proceedings are discussed from pp 126-127. Police applications for intervention orders are discussed at pp 128-129.

Wangmann, Jane, 'Incidents v Context: How does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34(4) *Sydney Law Review* 695.

This article explores whether the New South Wales (NSW) civil protection order system (Apprehended Domestic Violence Orders or 'ADVOs'), and identifies limitations in the understanding of intimate partner violence (IPV). The article draws on a case study on cross-applications in NSW ADVO proceedings.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *University of New South Wales Law Journal* 945.

This article considers the issue of gender and its importance in understanding intimate partner violence (IPV) through an examination of the differences in men's and women's complaints for civil protection orders in New South Wales (known as Apprehended Domestic Violence Orders or ADVOs). This research focused on cross applications, that is, cases where the male and the female partner to a relationship are both making allegations that the other has used violence or abuse against them' (p 947). The case study of cross-applications in New South Wales at the problems with seeing domestic violence as discrete incidents, rather than the context of such acts of violence or abuse' (p 947).

Wilcox, Karen, 'Recent Innovations in Australian Protection Order Law – A Comparative Discussion: Topic Paper 19' (Australian Domestic and Family Violence Clearinghouse, Sydney, 2010).

This paper provides an overview of the state of domestic violence legislation in Australia at 2010, focusing particularly on the law relating to protection orders. See from p 18, where 'key features' in protection order law from each state/territory which promote 'good practice' are summarised. Inconsistency between family law orders and protection orders are also considered (p 20).

Wilcox, Karen and Ludo McFerran, 'Staying Home, Staying Safe: the Value of Domestic Violence Protection Order Provisions in Homelessness Strategies' (2009) 294 *Australian Law Reform Commission Journal* 24.

This article considers the legal framework and broader relationship between homelessness and domestic violence. In doing so, it considers two provisions in protection order legislation which impact on homelessness – exclusion/ouster orders and court-ordered changes to residential tenancy agreements. Notes the concern about the property rights and accommodation needs of the defendant as well as 'deferral of occupancy issues to property settlements under family law, or a belief that exclusion is only warranted when the violence was physical...Community beliefs about 'rights' to real property has complicated the issue further' (p 25). The authors note that if exclusion orders are to be effective in safeguarding victims' safety and preventing homelessness, there is a need for a supportive service system, including funding for practical security measures in houses (p 26).

Conner, Dana Harrington, 'Civil Protection Order Duration: Proof, Procedural Issues and Policy Considerations' (2015) 24:2 *Temple Political and Civil Rights Law Review* 343.

This article gives extensive consideration to the debate around the duration of civil protection orders in the American context. See also from p 369, where the author discusses the appropriate duration of orders in relation to specific types of domestic and family violence behaviours. The article concludes – ‘A "one size fits all" solution to duration is enticing because it avoids many complicated issues related to enacting laws that both define duration and provide guidelines that judges will follow when fixing order length. (pp 373-374).

Goldfarb, Sally F, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?' (2008) 29 *Cardozo Law Review* 1487.

This American article extensively considers the nature and efficacy of civil protection orders in preventing domestic violence. It contains an overview and critique of civil protection orders. It then considers expanding the role of civil protection orders by offering protection orders that do not terminate the parties' relationship. The article considers the use of protection orders in ongoing relationships (p 1551).

Jordan, Carol et al, 'The Denial of Emergency Protection: Factors Associated with Court Decision Making' (2008) 23 *Violence and Victims* 603.

This American study examines cases where victims of intimate partner violence are denied access to temporary orders of protection. The study sample included a review of 2,205 petitions that had been denied by a Kentucky court during the 2003 fiscal year. The study offers important insights into the characteristics of petitioners and respondents to denied orders and outlines individual, contextual, structural, qualitative/perceptual, and procedural factors associated with the denial of temporary or emergency protective orders.

Murphy, Jane C, 'Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women' (2003) 11(2) *American University Journal of Gender, Social Policy and Law* 499-521.

Part II (p 503) of this article discusses battered women's use of civil protection orders, drawing on a prior American study into the use of protection orders. The authors found that having an attorney substantially increased the rate of success in obtaining a protection order' (p 511). Also, it was noted that a substantial sample of women surveyed considered filing for a civil protection order a 'helpful strategy' (p 509).

Roberts, James C, Loreen Wolfer and Marie Mele, 'Why Victims of Intimate Partner Violence Withdraw Protection Orders' (2008) *Journal of Family Violence* 23(5) 369-375.

In this American study fifty-five women who were in the process of withdrawing a protection order against a male intimate partner were surveyed. Recognizing that reasons given for withdrawing a protection order often follow common themes, individual responses were organized into several “domains,” or groupings of such reasons. The most commonly cited domain involved a “concrete change” on behalf of the victim or defendant, which made the protection order less necessary in the victim’s view. This was closely followed by the domain addressing emotional attachment to the abuser. Implications for future research and policy are discussed. See in particular at p 373 – ‘Taken together, these findings suggest that, among this sample of women, concrete change (especially the defendant actually attending counseling or rehabilitation) and emotional attachment (especially no longer fearing the defendant) interacted to create a push/pull relationship between the offender and victim where the victim’s faith in programs aimed at helping batterers overcome their abusive behavior and the victim’s emotional attachment to the offender lead the victim to no longer feel that the (protection order) was necessary.’

Topliffe, Elizabeth, 'Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders Are Not' (1991-1992) 67 *Indiana Law Journal* 1039.

This American article firstly considers the advantages and disadvantages of civil protection orders. It then discusses mutual orders (orders made against both the perpetrator and the victim of domestic violence). It concludes that mutual orders harm women, in contrast to ordinary protection orders which are effective. Concerns about mutual protection orders include due process issues, in particular where mutual orders are issued without hearing any evidence or only hearing evidence about the violent behaviour of one party (p 1056-1060). There are also concerns about the accountability of the perpetrator – ‘The issuance of a mutual order can reinforce the batterer's belief that the problem is not his but is the result of external factors. He could easily understand a mutual protection order to mean that the court blames the victim as much as the batterer. The implication is that there is no accountability by the batterer’ (p 1060-1061). The victim could also recognise this message and blame themselves for the abuse. Other concerns with mutual orders are discussed at pp 1061-1064.

Zoellner, Lori et al, 'Factors Associated With the Completion of the Restraining order Process in Female Victims of Partner Violence' (2000) 15(10) *Journal of Interpersonal Violence* 1081.

This American study examined factors associated with completion of this process. Sixty-five women who initiated the process of securing a restraining order against a male partner participated in the study. Participants completed an interview, self-report measures, and were followed up to determine final restraining order status. Less than half of the women who initiated the process obtained final orders. Women who indicated an attachment to the abusive partner were less likely to complete the process. “Perceived threat to the women facilitated persistence with the process; however, when the threat involved

her children, women were less likely to persist. Understanding factors influencing persistence in help seeking, especially attachment and threat, is a crucial step toward enhancing interventions to facilitate efforts toward violence-free lives” (p 1081).