LEADERSHIP IN FAMILY LAW

2 November 2022

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
BRISBANE
BY EMAIL: LASC@parliament.qld.gov.au

**RE. Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022**

Dear Secretary,

Thank you for the opportunity to make submissions in relation to the *Domestic & Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022*.

The matters raised by the Family Law Practitioners' Association of Queensland (FLPA) for consideration (the author of this correspondence being the President of that organisation at the time of writing) are as follows, in connection with Parts 4 and 5 of the Bill.

Section 41G(2), if introduced in its existing form, would require that in the setting of cross applications (whether both are applications for a protection order, or whether one is a variation application and the other an application for a protection order) the court ***must***:-

1. firstly, decide which of the parties to the relevant relationship is the person most in need of protection in the relationship;
2. secondly, decide the application that makes, or varies, the protection order that is necessary or desirable to protect the person most in need of protection from domestic violence; and
3. then:
    a. if the other application is an application for a protection order – ***decide to dismiss the other application***; and



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*b.* if the other application is an application for the variation of a protection order ***– decide to vary the order by reducing its duration so that the order ends.***

While there is a proposed exception to this approach, in that subsection 41G(3) provides that the court may ***make***, or vary, a protection order under both applications - it is limited to the following situation:

1. if the court is satisfied that**, in exceptional circumstances:**

   a. there is a clear evidence that each of the parties to the relevant relationship is in need of protection from the other party; **and**

   b. it is not possible to decide whether one party's need for protection is greater than the other party's need for protection.

The section will remove much of the broad discretion available to a court when determining cross applications noting that the principles under section 4 are already a mandatory consideration under s37(2) of the Act when determining whether an order is necessary or desirable in any given case. In FLPA's submission, the retention of the existing (and more nuanced) approach is appropriate.

It is submitted that the preferable approach to any determination of competing applications remains (consistent with the Domestic and Family Violence Protection Act 2012, without the introduction of a new s41G as contemplated by the Bill), as expressed neatly in *SRV v Commissioner of the Queensland Police Service & Anor* [2020] QDC 208 at [46], [47], [54] and [55] that:

1. "*each application is required to be considered separately and on its own merits*"; and

2. "*[i]n deciding whether a protection order is necessary or desirable to protect [an] aggrieved from domestic violence, the court must consider the principles mentioned in s 4*"

3. "*[i]ncluded in the principles mentioned is the statement in s 4(2)(e) that:*

   > "*in circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, the person who is most in need of protection should be identified.*"

4. "*[i]f both applications satisfy the requirements of s 37 then plainly orders should be made under both applications, even if the effect is to protect both parties to the relationship*".

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A number of the potential mischiefs could arise from the introduction of section 41G as contemplated by the Bill, which could not be intended by the legislature:-

- a person most in need of protection hesitates or refuses to apply for a protection order on the basis that they doubt their ability to prove (in addition to the matters set out in section 37 of the Act), on the balance of probabilities, that either:
    - they are the person most in need of protection; or
    - there are exceptional circumstances, that each of the parties are in need of protection and it is not possible for the court to decide whether one party's need for protection is greater than the other's;
- police officers hesitate or refuse to apply for a protection order on behalf of an aggrieved in circumstances where they are unable to, or disinclined to, make an assessment that the aggrieved is the party most in need of protection within the relationship – despite being aware of acts of domestic violence perpetrated against the aggrieved;
- litigants put forward arguments, and case law develops around, which of the various kinds of domestic and family violence found to exist in a particular case might render a party as being considered the most in need of protection – for example, an aggrieved who has been subjected to behaviour that is not physically abusive but is considered threatening, coercive, emotionally or psychologically abusive; but also acted in a way themselves that is considered physically abusive, threatening, emotionally or psychologically abusive on a number of occasions.

Further, in connection with Police applications, the following is also observed in terms of practical matters requiring consideration in the review of the proposed Section 41G (where the actions of Police will usually determine whether, and how, cross-applications envisaged by this Section ultimately come before the Court):

- The risk that if a victim of domestic violence has, for example, protected themselves, and in so doing has caused an injury to the perpetrator, the Police may not, at that time, have the opportunity to properly investigate who is most in need of protection and may bring an application against the person who is in fact the one most in need of protection;
- The risk of potential misidentification of perpetrator and victim, which can also be based on other biases. To illustrate, the victim-survivor might appear agitated at the time of Police attendance, and the perpetrator calmer, more cooperative and more convincing. (It is noted that this risk is referred at page 27, first paragraph, of the Draft National Principles to Address Coercive Control.)

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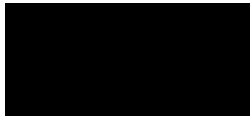
These practical risks are, it is noted, traversed in the draft National Principles to Address Coercive Control, in that in the information below Draft National Principle 8 (pages 26 and 27) there is specific reference to unintended consequences of criminalisation of coercive control, and risks which must be taken into account when reviewing the matters isolated above in respect of Section 41G. The information in explanation of that particular principle includes that *"State and territory governments agree that misidentification of the perpetrator of family and domestic violence is a significant potential issue that must be addressed in the design and implementation of any criminal justice response, including any new laws. Situations where misidentification can happen include when police first respond to a matter, when people go to court, or when non-specialist service providers become involved."*

The Draft National Principles (page 10) go on to reinforce this dynamic by warning that *"If developing a specific coercive control offence, state and territory governments recognise the need to consider how police and other law and justice professionals could be supported to apply the legislation. This includes training on how to recognise coercive control and accurately identify the person most in need of protection. Police, frontline services, the justice sector and other relevant professionals need to be equipped to recognise patterns of coercive control and respond effectively"*.

Yours faithfully



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