

# QCOSS

Queensland Council  
of Social Service

## *Review of the family law system*

*QCOSS submission to the Australian Law  
Reform Commission*



*November 2018*

## About QCOSS

The Queensland Council of Social Service (QCOSS) is the state-wide peak body representing the interests of individuals experiencing or at risk of experiencing poverty and disadvantage, and organisations working in the social and community service sector.

For nearly 60 years, QCOSS has been a leading force for social change to build social and economic wellbeing for all. With members across the state, QCOSS supports a strong community service sector.

QCOSS, together with our members continues to play a crucial lobbying and advocacy role in a broad number of areas including:

- place-based approaches
- citizen-led policy development
- cost-of-living advocacy
- sector capacity and capability building.

QCOSS is part of the national network of Councils of Social Service lending support and gaining essential insight to national and other state issues.

QCOSS is supported by the vice-regal patronage of His Excellency the Honourable Paul de Jersey AC, Governor of Queensland.

Lend your voice and your organisation's voice to this vision by joining QCOSS. To join visit [the QCOSS website](http://www.QCOSS.org.au) (www.QCOSS.org.au).

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## Introduction

Thank you for the opportunity to make a submission to the Australian Law Reform Commission (ALRC) review of the Family Law System.

The Queensland Council of Social Service (QCOSS) is the peak body for social services in Queensland and a voice for people experiencing disadvantage. For more than 50 years, QCOSS has been a leading force for social change to build social and economic wellbeing for all. With around 600 members from throughout Queensland, QCOSS undertakes informed advocacy and supports a strong community service sector. QCOSS is also part of the national network of Councils of Social Service lending support and gaining essential insight to national and other state issues.

While not actively engaged in the family law system from a legal perspective, we understand the impact that it can have on the wellbeing of families as they transition through what can be a very traumatic period of life. Our key interests in this review are two-fold. Firstly, we are interested in the interaction between fragmented systems – it is here that individuals and families can fall through the cracks or be further marginalised as they seek to navigate the complexity of these fragmented systems. Secondly, we are committed to ensuring that we tell the stories of both workers and individuals in the system, to share the lived experience with the worlds of law, policy and program design.

With these factors in mind, our focus in making this submission is the intersect between the family law and domestic and family violence systems, and the stories of lived experience across these two systems from both workers and individuals. We know that women who experience domestic and family violence are more vulnerable to poor outcomes under the family law system.

Our submission focuses in particular on the proposals in relation to parenting arrangements, property and financial matters, getting advice and support and reducing harm as these have the most relevance to the stories we heard.

We know that domestic and family violence is an urgent and growing concern and that the family law system cannot ignore the prevalence of domestic and family violence. To illustrate:

- In the 2017-18 year<sup>1</sup>, Queensland's state-wide telephone support service, DVConnect fielded 101,050 calls from women and 7,448 calls from men; assisted 8,444 women and children into emergency accommodation; and placed 5,040 women and children into refuge or shelters.
- In the decade from 2006–07 to 2016–17, 150 intimate partner homicides and 110 family homicides occurred within Queensland, with 17 taking place in the 2016-17 year<sup>2</sup>.
- Since its commencement under the Criminal Code in May 2016, over 800 individuals in Queensland have been charged with choking, suffocation or strangulation in a domestic setting<sup>3</sup>.
- There were 32,074 originating applications for domestic violence protection orders made in Queensland in the 2016–2017 financial year<sup>4</sup>.

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<sup>1</sup> University of Queensland, Criminal Justice Responses to Domestic and Family Violence: A Rapid Review of the Evaluation Literature: Final Report (6 September 2018)  
[https://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0006/586185/systematic-review-of-criminal-justice-responses-to-domestic-and-family-violence.pdf](https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/586185/systematic-review-of-criminal-justice-responses-to-domestic-and-family-violence.pdf)

<sup>2</sup> Domestic and Family Violence Death Review and Advisory Board, 2017

<sup>3</sup> (s. 315A) Queensland Police Service, 2017, p. 57

<sup>4</sup> Queensland Courts, 2017, p. 21

- The research shows that ‘the overwhelming majority of violence and abuse is perpetrated by men against women’.<sup>5</sup>
- Whatever the form domestic and family violence takes, ‘it has serious and often devastating consequences for victims, their extended families and the community’, and ‘comes at an enormous economic cost’.<sup>6</sup>
- Exposure to all types of family violence has a harmful effect on children.<sup>7</sup>

## Our position

QCOSS commends the ALRC on the many proposals aimed at reducing harm and strengthening protections for women who are affected by domestic and family violence. QCOSS is concerned however that the Family Law System may continue to make women who separate from their partners vulnerable to domestic and family violence, and this will continue to have devastating impacts on their own, and their children’s, wellbeing.

The Family Law System creates safety and wellbeing risks for women and children. This includes: the time taken to resolve family law matters; the inability of the system to adequately value children’s views and experiences; and the imbalance of power that results from domestic and family violence or financial capacity.

We have spoken to people that work in domestic and family violence support services to better understand how the family law system affects people that have experienced or are experiencing domestic and family violence. We heard stories about how the family law system can exacerbate domestic and family violence as men use parenting, property and financial arrangements to continue controlling behaviours towards their ex partners.

As you draft your final recommendations, we ask that you test them against these stories. Will your recommendations assist in resolving the challenges and problems experienced by these individuals, mostly women and children? Do they support a family law system that puts the safety of victims of domestic and family violence front and centre? Do they support and protect women and children through and across the various parts of the system? Do they work to support individuals to move through trauma into a place of wellbeing?

We ask that you use these stories to analyse and test your final recommendations through a domestic and family violence lens.

## Parenting arrangements

A survey of separated parents in 2016<sup>8</sup> found that issues relating to violence and child safety were apparent in 14 per cent of responses, demonstrating the need for the family law system to consider domestic and family violence issues when making parenting arrangements.

Our conversations with workers show that perpetrators of domestic and family violence can use the family law system to carry out violent behaviours towards their partner.

We spoke to a group of workers in a service for women and children affected by domestic and family violence, as well as male perpetrators. They said they saw many parenting orders that

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<sup>5</sup> National Council to Reduce Violence against Women and their Children, Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021 (2009), 25.

<sup>6</sup> Australian Government, The National Plan to Reduce Violence against Women: Immediate Government Actions (2009), 2.

<sup>7</sup> Family Court of Australia Fact Sheet “Exposure to family violence and its effect on children”

<sup>8</sup> <https://aifs.gov.au/publications/understanding-parenting-disputes-after-separation/2-analysis-caring-children-after-parental-separation-study>

allowed men to continue to spend time with their children despite a history of domestic and family violence. They felt that many parenting orders did not give adequate weight to the history of domestic and family violence despite the evidence that this type of behaviour has a harmful effect on children. This included a reluctance by the courts to grant full custody to the mother in situations where there is a history of domestic and family violence.

Ongoing intimidation and controlling behaviour can be exacerbated by parenting orders. The types of behaviours that the domestic and family violence support workers mentioned in the context of parenting arrangements included:

- Isolating women (and children) from support services including domestic and family violence services, health professionals and legal advice.
- Taking advantage of the weaknesses in the system to make women fearful of raising any history of domestic and family violence in family law proceedings. This includes the father making counter claims about violence, threats of taking the children away from their mother, increased costs to fight it out in court, the stress of drawn out processes, mistrust of the system (and the players within it), the fear of not being believed and fear of the court siding with the violent partner.
- Making women feel guilty for trying to limit a child's contact with a violent father such as by arguing that "children need their father" or "I have a right to see my children" and forcing women to agree to parenting orders that put themselves and their children at risk of harm.
- Failure to comply with parenting orders such as unscheduled visits or not taking children when they are meant to and using threats (eg. accusations about not being a good mother and threats of legal action to take children away) to prevent mother from trying to enforce the orders.
- Disregarding the needs of the children including not paying child support, not supporting children to attend or participate in after school activities, sport or not helping children with homework and developmental needs.
- Disregarding the safety and wellbeing of the children including failure to recognise the damaging impact of ongoing violence towards their mother, and an unwillingness to allow children to access professional mental health services for fear that it may expose their violent behaviour

A peak organisation for men's behaviour change found that men who use family violence are very adept at making use of whatever gaps or inconsistencies are present in the service system to extend their control over family members. They can threaten to involve the child protection system to 'out' her as a bad mother, draw workers into colluding with their violence-supporting narratives (such as by making them believe that the victim is the one who is being unreasonable), and use evidence of inconsistent responses by organisations to convince her that it is all her fault.<sup>9</sup> The research paper examines the accountability web for men who are violent towards women. This web may comprise attempts to hold him accountable through formal criminal, civil or child protection systems; the actions of non-mandated service systems that may attempt to engage him in services or programs; or the women or broader community may take their own informal attempts to hold the man accountable for his behaviour. The Family Law System could play an important role in this web of accountability.

These issues are demonstrated through the story below as told to us in our research.

### **Case Study 1: Parenting arrangement not advancing child's safety and best interests**

Kat\* was in a relationship with John\* for 10 years, married for 7 years and they had two daughters. John had a history of controlling behaviour. At the time of separation, their oldest daughter was two and Kat was still pregnant with their youngest child.

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<sup>9</sup> <https://www.ntv.org.au/wp-content/uploads/2016/12/Strengthening-perpetrator-accountability.pdf>

The initial parenting order took three years to finalise as John and his legal team continually undermined any attempts to come to an agreement outside of court. The parenting order provided for shared care (five days a fortnight with their father) and shared parental decisions. John often said he couldn't or wouldn't take the girls, so Kat would just keep them with her when this happened. As the girls got older (13 years and 11 years) they started to get much more involved in after school activities such as sport. John refused to take them to any after school activities forcing the girls to give some of them up altogether.

The youngest daughter began to experience stress and anxiety when she had to stay with her Dad and the tension between Kat and John grew. John constantly had his solicitors write letters and emails. When John did not comply with the orders, he used threats of legal action to manipulate Kat to stay quiet, with the constant fear of going back to court if John didn't get his way. Kat sought assistance from Relationships Australia and completed the induction course in Family dispute resolution, but John refused to attend.

At the height of the tension John physically assaulted the children and Kat, and they ran to Kat's car in fear. The youngest girl talked about suicide and was obviously traumatised. John took out a DVO on Kat and then so did Kat on John. Then, Kat put forward the intention to allow John to spend short amounts of time with the children with the idea of building it back up once the children felt ready. Just weeks after the physical assault incident, John lodged a new application for full custody of the two girls.

Around this time Kat took her youngest daughter to the GP who worked out a mental health plan which included her seeing a psychologist. On seeing a report that the psychologist prepared, John lodged an application with the court to stop both daughters from seeing any mental health professional in the future without his consent. The court upheld this application effectively preventing his daughters from accessing mental health professionals and making it impossible for Kat to follow the advice of the GP as set out in her daughter's mental health plan.

Following this new application for full custody, a comprehensive family report was prepared and another court hearing was scheduled. Kat instructed her Legal Aid solicitor to draft Orders in line with the Family Report recommendations. However, at mediation it was clear John and his solicitor had no intention of reaching agreement. At the following hearing John's solicitor had not prepared any suggested court orders or alternative orders and they did not provide any dialogue about why he wouldn't agree to the orders that were prepared in line with the Family Report - so no agreement could be reached at the court hearing. This has again forced Kat to participate in formal court proceedings to resolve the dispute. Kat could not get Legal Aid as, just before the hearing, John paid six months of outstanding child support payments.

Relationships Australia have provided Kat much needed support, but Kat has still had to pay for her own legal advice. Kat has since attended three hearings in which the judge made the decision to set a trial date for some time next year, having not even read the family report. In the meantime, the girls continue to feel stress and anxiety about spending time with their father, with the additional fear of having to live with him full time should he succeed in his application for full custody. They are now all in limbo until the court decision.

### **Consideration of ALRC proposals in the context of parenting arrangements**

QCOSS supports the ALRC proposals that emphasise the safety of children and their carers as a primary consideration in the development of parenting arrangements. In particular we support:

Proposal 3–4 to amend the objects and principles underlying part VII of the *Family Law Act 1975* set out in section 60B to assist the interpretation of the provisions governing parenting arrangements as follows:

- arrangements for children should be designed to advance the child's safety and best interests;
- arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;
- children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;
- decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities; and
- decisions about the care of an Aboriginal or Torres Strait Islander child should support the child's right to maintain and develop the child's cultural identity, including the right to: (a) maintain a connection with family, community, culture and country; and (b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child's age and developmental level and the child's views, and to develop a positive appreciation of that culture.

Proposal 3–8 to amend the *Family Law Act 1975* to explicitly state that, where there is already a final parenting order in force, parties must seek leave to apply for a new parenting order, and that in considering whether to allow a new application, consideration should be given to whether: there has been a change of circumstances that, in the opinion of the court, is significant; and it is safe and in the best interests of the child for the order to be reconsidered.

In the context of Case Study 1, we believe that these proposals could have provided a stronger basis for Kat to seek amended parenting orders as soon as her children started experiencing stress and anxiety when spending time with their father (Proposal 3–8); that the basis of the decision to prevent the children from accessing mental health services would have instead prioritised the safety and best interests of the children over the father's parental rights (Proposal 3–4); and that the father would not have obtained leave to lodge his application for full custody of the children (Proposal 3–8).

QCOSS believes however that more needs to be done to address the imbalance of power experienced by many women in reaching the initial parenting agreement. In Case Study 1 it took three years to resolve the dispute about parenting arrangements. An unwilling party can extend processes as a way to continue abuse and control over their former partner. A person or their legal representative should be held to account for their behaviour towards their partner during family law processes such as refusing to agree to reasonable parenting orders at mediation or using threats to coerce their former spouse to agreeing to parenting orders that put the father's interests over the children's safety and best interests. The family law system has a duty to ensure that they are not complicit in allowing abusive and controlling behaviours by men towards women, and that the system plays a part in holding men to account for such behaviours.

## Property and financial matters

### Financial Abuse

The *Not Now, Not Ever Report* (2015) uses the following definition of financial abuse, "Controlling or withholding the family assets and income which denies the victim economic or financial autonomy or the ability to pay the reasonable living expenses for the family". The types of behaviours that we heard about from financial counsellors and domestic and family



violence support workers in the context of the settlement of property and financial matters in family separation included:

- Withholding financial support for children;
- Using the court system to put women in financial stress, including refusing to agree to orders coming out of mediation, making numerous applications to the court, delaying tactics to drive up costs, and property orders that disregard history of domestic and family violence;
- Hiding income and assets from their partner;
- Forcing women to take out personal loans;
- Accumulating debt in their partners name (including tolls and utilities);
- Destroying assets;
- Not taking responsibility for shared financial commitments; and
- Forcing women to lie to Centrelink or other government authorities so that the father can access financial benefits.

This type of behaviour can further increase the imbalance of power in favour of the perpetrator. Even though the definition of domestic and family violence generally includes economic abuse<sup>10</sup>, state and territory legislation and service systems seem to fall short of protecting women and children from this type of behaviour. The Taskforce on Domestic and Family Violence in Queensland acknowledged that family violence and poverty are interwoven. By the time victims access legal services they may have lost their home, job, child care, health care, transportation and access to income.<sup>11</sup>

There is still no specific criminal offence in Queensland for committing an act of domestic and family violence. There are domestic and family violence behaviours which constitute a criminal offence, such as use of physical violence which amounts to an assault. However, where abuse is emotional, psychological or financial it will often not currently amount to a crime under the Queensland Criminal Code.

The language used in Queensland's application for a protection order<sup>12</sup> is largely focused on physical violence and is likely to make people feel that other forms of domestic and family violence will not be taken seriously. The application asks applicants to describe isolated incidents of domestic violence, which is likely to diminish the devastating impact of ongoing and persistent abuse such as economic control and abuse, even if there is also physical violence. Likewise, the stated conditions in the application form do not specifically mention any protection from economic abuse.

This view of domestic and family violence, and the culture of the legal system to downplay the impact of all forms of domestic and family violence, is likely to make it even harder for women to raise economic abuse during family court processes. A men's behaviour change expert said that "Lots of women are advised not to raise it because they're going to be hauled over the coals, told they're lying, it's too difficult, too traumatic, just go for an easier option."<sup>13</sup> The Family Violence Best Practice Principles<sup>14</sup> have been developed by the Family Court of Australia and the Federal Circuit Court of Australia and contributes to furthering the courts' commitment to protecting litigants and children from harm resulting from family violence and abuse. However, this document does not adequately address non-physical forms of family violence.

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<sup>10</sup> Section 12 of the Domestic and Family Violence Protection Act 2012 See: <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2012-005#sec.12>

<sup>11</sup> Taskforce on Domestic and Family Violence in Queensland, (2015) Not Now, Not Ever Report

<sup>12</sup> Form DV1, Domestic and Family Violence Protection Act 2012 (s.32), Application for a Protection Order See: [https://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0006/162168/dva-f-1.pdf](https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/162168/dva-f-1.pdf)

<sup>13</sup> Danny Blay is a qualified Men's Behaviour Change Program facilitator and counsellor.

<sup>14</sup> <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/family-violence-best-practice-principles/>

## Financial Barriers to Separation

One of the main barriers to leaving a violent relationship is financial control or dependence on their abusive partner. The Family Law System does not effectively support women that want to leave domestic and family violent relationships. In particular, there is a lack of fast, practical solutions to separate finances (including debt) and obtain access to their share of income and assets.

This case study was provided by a financial counsellor and demonstrates that women need more timely resolution of financial matters when leaving violent relationships.

### Case Study 2: Financial position to leave violent relationship

Alice\* lives in private rental accommodation with her partner and her two girls from previous a relationship aged 12 and 14. Her partner has mental health issues, is extremely violent, and is not good with money. Alice has another daughter aged 17 who is living interstate with her father because of the ongoing domestic violence.

Alice wants to leave the relationship and is currently looking for a new rental with her two children, without her partner's knowledge. The couple has accumulated debts totalling \$31,519 which includes a joint personal loan, credit card, school expenses and dental costs.

Alice asked her bank if the joint personal loan could be split into two separate loans, but they refused her request. Alice is concerned that any changes to bank accounts, such as removing her name from the account or opening a new one, will be noticed by her partner and will impact on her safety, especially given the bank had told her that her partner had recently opened a new account. She was scared that the bank may also breach her privacy which could put her at risk of violence.

The financial counsellor examined Alice's weekly income and expenses as follows:

Income	\$1,000.00	
Living Expenses		\$485.61
Accommodation		\$565.00
Credit card / Loans		\$346.75
Committed Expenses		\$155.77
Deficit	-\$553.13 PW	

The client worked with the counsellor to review her income and expenses and found that, even after getting a 3-month moratorium on her bank debt while she finds new accommodation, she will still be about \$15 in the red. Alice will not be able to get bond assistance as her income is considered too high which puts pressure on her to stay in the relationship while she saves for a bond.

Alice will need a range of supports in relation to her finances in order to leave her violent relationship and move to safety. This will include separating her finances from her partner to ensure she is not exposed to additional and ongoing financial risk. It also will help keep her and her children safe from her partner as he will not be able to see where she goes based on her transactions. The family law system is not currently able to do much to help someone like Alice. It takes too long to get enforceable orders to achieve separation of finances, and generally it relies on some level of cooperation between the parties. It could also leave the debt with Alice as her ex is not in a position to pay.

Alice will also need direct financial assistance and again the family law system is not able to support this. Some emergency assistance may be available from domestic and family

violence services but unfortunately, availability depends on demand, an assessment of risk compared to others in need, and the individual's overall financial situation.

The ALRC should give further consideration to how the family law system could respond to someone in a situation such as this. We suggest that the ALRC prioritise this issue and make a specific recommendation to provide a streamlined and quick response to initial separation of bank accounts.

The following case study is an extension of Kat's story from Case Study 1 and explains her experience of the family law system in relation to their property settlement and the financial impact of ongoing legal disputes. This case study demonstrates how the family law system failed to recognise both the imbalance of power in the relationship and John's use of the court system to continue to exert control over Kat. As a result, further harm is caused to both Kat, and the children.

### **Case Study 3: Using the court system to put women in financial stress**

This case study is also based on Kat\* from Case Study 1. At the time the relationship started, Kat only had \$60,000 remaining on her mortgage and was (and still is) working as an account manager. In her role, she occasionally received incentive payments, some of which she put towards the purchase of a business for John\*.

After the relationship ended, it took around three years for the property settlement and parenting orders to be finalised. John had financial support from family which helped him engage a family law specialist and a barrister. Kat was able to obtain assistance from Legal Aid.

John did not agree to the draft orders following mediation and Kat was forced to participate in formal court proceedings to resolve the dispute. Ultimately, the court ordered that the house be sold, and the proceeds split between Kat and John, while John kept the business that Kat had helped finance. Over half of Kat's share of the proceeds from the sale of the house went to Legal Aid (around \$130,000). John's family member bought the house and transferred it back to John so that he could continue to live there.

Kat had primary care of the children. Over the ten years or so since the relationship ended John would go for long periods of time without paying any child support. As he had forced Kat into a private agreement she was not able to use the Child Support Agency for collection and struggled to enforce the payment arrangements. In January 2018, Kat applied for the Agency to collect on her behalf. John then began to minimise his income from his business to reduce his liability but still did not pay.

Just after John lodged the application for full custody (see Case Study 1), he paid a lump sum of the child support in arrears. As a result Kat had too much money in her bank account at that point in time and was not eligible for Legal Aid for the new custody process placing her in an inferior position in the custody dispute.

### **Consideration of ALRC proposals in relation to property and financial matters**

QCOSS supports the ALRC proposals that aim to simplify processes used by the courts for determining the division of property. In particular we support Proposal 3–11 to provide that courts must: in determining the contributions of the parties, take into account the effect of family violence on a party's contributions; and in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.

Proposal 3–13 establishes protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence. We feel this proposal does not go far enough to protect women that have been forced to take on debt for the benefit

of their partner. Banks should also have protections in place for victims of financial abuse and should not be able to force compliance with a financial agreement in situations of domestic and family violence where it would not be fair to do so (eg. when a loan is in women's name, but the item purchased, or the benefit of the loan is in the possession of the male partner). This should apply even if the victim is in a financial position to repay the loan. The family law system should not allow financial institutions to be complicit in acts of economic abuse.

QCOSS supports the approach suggested in Question 3–3 of the Discussion Paper to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into.

We also support:

Proposal 5–3 to provide some limited exceptions to the requirement for parties to attempt family dispute resolution prior to lodging a court application for property and financial matters, including urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs; where there is an imbalance of power, including as a result of family violence; where there are reasonable grounds to believe non-disclosure may be occurring; where one party has attempted to delay or frustrate the resolution of the matter; and where there are allegations of fraud.

Proposal 5–4 to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a 'genuine steps' statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.

QCOSS believes that these proposals will go some way in addressing the issues identified in Case Study 3, but are unlikely to be helpful in addressing the more immediate needs of the women trying to escape a violent relationship as set out in Case Study 2. We have considered this further in the section on "Reducing harm".

We are concerned however that the proposals rely on the courts identifying and considering domestic and family violence in decisions about property and financial matters. It is possible that the outcome for Kat could be unchanged even with these proposed reforms. In the final recommendations the ALRC should make it clear that a failure to take domestic and family violence into account can result in the orders being set aside, and cost orders being made in favour of the victim.

## Getting advice and support

No to Violence, a peak body for men's behaviour change, emphasise that people experiencing domestic and family violence may have to engage with a number of different service systems. This includes child protection and family services, family dispute resolution and other family law services, child contact centres, post-separation parenting programs and other often Commonwealth-funded family and relationships services. Due to the very inconsistent linkages between these sectors, many perpetrators can exploit holes in these potential accountability webs, to the detriment of all members of their family.

Fragmentation in the family law system, domestic and family violence and child safety systems has been identified in numerous reports and publications. For example, the ALRC

Report<sup>15</sup> found that there is fragmentation of laws and practice in relation to family violence and the family law system resulting in the risk that victims of domestic and family violence may fall through the gaps in the system, and not obtain the legal solutions and the protection that they require.

Once domestic and family violence has been identified, service systems particularly central to coordinated community responses – police, Community Corrections Officers, Magistrates and Court Registrars, child protection workers – need to have a sufficient and shared understanding of domestic and family violence both to take effective steps towards the safety of women and children, and towards the accountability of men who use violence.<sup>16</sup> These service systems must prioritise the safety and wellbeing of women and children escaping domestic and family violence and should ensure that non-physical abuse is recognised in their assessment of risk and harm.

A number of domestic and family violence support workers that we spoke to in preparing this submission were exasperated by what they saw as the failure of the family law system to support women and children that are experiencing domestic and family violence, and the inconsistency between domestic violence orders and parenting orders. They felt that it was difficult to support women when the parenting order put restrictions on their ability to make decisions about safety. This includes parenting orders that require the mother to stay within a certain distance of the violent partner, that enforces access to the children by the violent parent, and the practical difficulties around seeking amended parenting orders.

In many of our conversations with domestic and family violence support workers, there was a common misconception that compliance with parenting orders takes priority over the safety of women and children. There is a lack of practical guidance about what to do if safety concerns have arisen, such as “what is a reasonable excuse” for not complying with parenting orders.

Below are some excerpts from family law products giving general information about compliance with parenting orders. As an example of how it plays out in practice, a victim of domestic and family violence is forced to breach a parenting order because of safety concerns. As a result, the perpetrator undertakes enforcement action in the courts to reinstate the arrangements. In this instance, the onus is on the victim to prove that they had a reasonable excuse for not complying with parenting orders – to prove that their safety, and that of their children, was at risk. This can allow the perpetrator to again use the system to carry out their ongoing control and abuse. It is easy to see how the process could be manipulated by the more powerful person to get the courts to condone the abuser’s behaviour and make the women feel that she was overreacting and that her safety concerns were not sufficient to justify her non-compliance.

The possibility for abuse is particularly evident where a custodial parent cannot be seen to prevent the other parent from spending time with their child. Ongoing non-compliance that cannot be explained to the satisfaction of the court could result in serious consequences, including jail. This may influence a women’s decision to act in accordance with the order even when her or her children’s safety is at risk. This is further exacerbated if a non-primary custodial parent chooses not to spend time with the children, and later manipulates this to imply non-compliance. In some cases there is little the primary custodial parent can do.

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<sup>15</sup> ALRC, (2010) Family Violence – A National Legal Response, p52

<sup>16</sup> <https://www.ntv.org.au/wp-content/uploads/2016/12/Strengthening-perpetrator-accountability.pdf>

### **Excerpt from Family Court of Australia Fact Sheet: Compliance with parenting orders**

What is a reasonable excuse?

If a court decides a person has failed to comply with an order, it will consider whether the person had a reasonable excuse for contravening the order. Some examples of reasonable excuses that may satisfy a court include:

1. the person did not understand the obligations imposed by the order, or
2. the person reasonably believed that the actions constituting the contravention were necessary to protect the health and safety of a person, including the person who contravened the order or the child, and
3. the contravention did not last longer than was necessary to protect the health and safety of the person who contravened the order or the child.

### **Excerpt from Legal Aid Queensland: Breaching family court orders**

#### **What if my children don't want to visit the other parent?**

There's no set age when children can decide where they live, who they spend time with, or communicate with. If the children refuse to visit, you still need to encourage them to spend time with the other parent or other people who are important to them unless there is a risk to them.

If there's a court order saying the children should spend time with the other parent and they don't want to go, you should get legal advice. If the dispute ends up in court, it will consider the children's age and their maturity when making a decision.

#### **What if a parent doesn't want to spend time with the children?**

Parents don't have to spend time with or communicate with to their children if they don't want to. You can't force the other parent to spend time with their children, even if there are court orders in place. The court will not force a parent to spend time with them. If you want the other parent to take more responsibility you can try family counselling or dispute resolution.

#### **What happens when a court order is broken?**

The court has wide powers to deal with people who breach parenting orders. If the court finds a person breached an order without a reasonable excuse, it can:

- order a person to participate in a parenting program run by an approved counselling service (helping them focus on their children's needs and to sort out conflict)
- change the existing order—for example to compensate the other parent for any time lost with the children or to change other arrangements.

If a parent disobeys an order multiple times, or if the court believes the parenting order is being ignored, there may be more severe penalties. These include:

- paying for any expenses incurred because of the breach (such as loss of airfares)
- paying some or all of the other person's legal costs
- community work
- entry into a bond for up to 2 years
- a fine
- a jail term of up to 12 months.

### **Consideration of ALRC proposals in relation to getting advice and support**

QCOSS supports the ALRC's Proposal 4–1 to 4–7 that the Australian Government should work with state and territory governments to establish community-based Families Hubs that will provide separating families and their children with a visible entry point for accessing a range of legal and support services. QCOSS believes that the Families Hubs cannot effectively advance the safety and wellbeing of separating families and their children while supporting them through separation, without complimentary changes to the Family Law System. This includes resolving the current tension between domestic violence orders and parenting orders through education and training for officers that work in the Family Law System. In Queensland we note the shift to an integrated service response including High Risk Teams and Common Risk Assessment Frameworks (CRAF) and the specialist court trials, all of which are creating new practice in responding to domestic and family violence. In particular, the CRAF is a critical reform in managing risk in the domestic and family violence service system.

This issue must be made a priority – see “Reducing harm” below. Any additional service infrastructure around the Family Law System should also be designed with a family violence risk assessment framework and solid referral pathways to existing specialist family violence services in mind.

## **Reducing harm**

Australia's National Research Organisation for Women's Safety (ANROWS) reported in 2016<sup>17</sup> that family violence was the highest preventable health risk factor for women aged 25-44, leading to a range of negative health outcomes, including poor mental health, problems during pregnancy and birth, alcohol and illicit drug use, suicide, injuries and homicide.

Another ANROWS report in 2017<sup>18</sup> found:

- Over one third of the 12-13 year olds included in the sample (34.9%) live in families where their parents had reported previous parental conflict. In one quarter of these cases, the conflict was reported to be persistent.
- Children in families with parental conflict have worse health, social and educational outcomes than children in families without parental conflict and children in families with persistent DFV have the worst health and social outcomes.
- There is a greater probability of impaired parenting (measured by high parent irritability and inconsistency and low parenting efficacy), in homes with DFV.
- Children are more likely to experience physical and verbal parental conflict after their parents have separated.
- Many children continue to be affected by parental conflict and DFV after their parents separate, through ongoing contact with both parents.
- A significant number of mothers reported concern that their children were copying the abusive attitudes and behaviours of their fathers.
- A number of mothers reported that their children's engagement with their father increased after parental separation, at times due to child protection or family court involvement. This meant that their children were at greater risk of being exposed to violence or abuse.

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<sup>17</sup> ANROWS (2016) “A preventable burden: Measuring and addressing the prevalence and health impacts of intimate partner violence in Australian women: Key findings and future directions”  
<https://www.anrows.org.au/publications/compass-0/preventable-burden-measuring-and-addressing-the-prevalence-and-health-impacts>

<sup>18</sup> ANROWS, (2017) Research Summary: The Impacts Of Domestic And Family Violence On Children  
[https://dh2wpaqogtxwe.cloudfront.net/ANROWS\\_Impacts-on-DFV-on-Children.2ed.pdf](https://dh2wpaqogtxwe.cloudfront.net/ANROWS_Impacts-on-DFV-on-Children.2ed.pdf)

In providing advice and support to people experiencing domestic and family violence, the family law system is a secondary consideration – the priority must be the right to feel safe – and domestic and family violence and its dynamics must be considered and prioritised before a father's "right" to access his children. Unfortunately, in many cases the Family Law System itself can get in the way.

A domestic and family violence helpline shared some common concerns about the relationship between the systems including that family court orders:

- Can undermine the safety and wellbeing of women and children.
- Can be in direct conflict with a domestic and family violence order.
- Are often disregarded by perpetrators of domestic and family violence (this includes DVOs).
- Can allow the perpetrator to continue acts of physical violence, and other forms of controlling or abusive behaviours against the mother.
- May force women to live within a certain radius of their violent ex-partner.
- Can lead to homelessness due to:
  - constantly having to move to safety; or
  - inability to access or sustain private rental accommodation due to ongoing instability in employment or income support arrangements
- May lead to children being taken away from their mother – as the evidence in child safety matters is stacked up against women who are experiencing domestic and family violence as she is the one being monitored by child safety services.
- Are very difficult for women to enforce, especially when they continue to experience domestic and family violence.

In the context of DVOs it is important to recognise that Research by Women's Legal Service Victoria<sup>19</sup> found that 57% of women named as perpetrators were actually victims. This misidentification by police can cloud subsequent family law processes. The services we spoke to felt that more needed to be done to ensure that the correct perpetrator is identified, otherwise DVOs become even more ineffective in keeping women and children safe. One person that we spoke to said that "It really shouldn't be that hard to see who has the power in the relationship".

The formal service system can let women and their children down – for example, through police not taking her reports of family violence seriously, or men's behaviour change programs being too under-funded to provide her sufficient and ongoing support. In these instances, No to Violence reports that women's attempts to hold her partner accountable are undermined, and that the perpetrator can feel vindicated and emboldened to continue his use of violence.

"Women and children, and the services which support them, therefore perform a central role in this web of accountability. While they are not responsible for holding men accountable, they are not passive victims, and accountability is strongest when their existing efforts to hold men accountable are supported, and not undermined, by formal accountability measures. It is vital for systems agencies to listen to, and understand, women's and children's needs and voices in our efforts so support their struggle against the violence, and their (or our collaborative struggle) towards their safety and perpetrator accountability."<sup>20</sup>

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<sup>19</sup> Women's Legal Services Australia, "Response to Family Law Council Discussion Paper: Families with Complex Needs and the Intersection of the Family Law and Child Protection <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Womens-Legal-Services-Australia.DOCX>

<sup>20</sup> From No to Violence Journal Article, Ending Men's Violence Against Women and Children, where Joanie Smith, Cathy Humphreys and Chris Laming introduce the concept of a web of accountability around men who perpetrate family violence. Referenced in: <https://www.ntv.org.au/wp-content/uploads/2016/12/Strengthening-perpetrator-accountability.pdf>



The domestic violence campaigner Rosie Batty<sup>21</sup> has said there should be no presumption of shared custody of children, arguing parents' sense of "entitlement" to custody is exposing children to violence and is leaving parents feeling powerless to protect their children. She said:

"All too often, survivors even with proof have their fears written off as anxiety or obsession. Minimised or dismissed. Accused of exaggerating or manipulating the system. Children who say they are afraid, or bravely disclose their own abuse, are routinely seen as having had their minds influenced and poisoned by their mother's animosity towards the father and are not believed. The court can then order these very same children to continue to spend time with, or even live with, the alleged abuser – a truly diabolical and unacceptable situation. As a parent, you shouldn't be entitled to have ongoing relations with your child if you are violent, abusive, neglectful - and that is proven over time."

The below case studies were shared with us by a domestic and family violence service and demonstrate that parenting orders can put women in violent or abusive situations, impact on their health and contribute to homelessness.

#### **Case Study 4: Jo\***

Jo is an Aboriginal woman living in Townsville and is originally from a regional community. She had two children with an Aboriginal man who was extremely violent towards her. Jo eventually lost custody of the children who went to live with their paternal grandmother. She is also experiencing homelessness.

The parenting orders provided for fortnightly supervised contact for both Jo and her ex, and the paternal grandmother insisted they be held on the same day at the same time. After each visit, the ex-partner would follow Jo and assault her.

Jo was reluctant to go to safe family violence accommodation because the crisis accommodation was usually in hostels that housed homeless men as well – including her ex. She did not want to access the secure family violence refuges in the area because she had family members working at those services. She sometimes drops off the radar of service providers. In addition to experiencing ongoing violence, trauma and homelessness, Jo is experiencing substance misuse and self-harm.

#### **Case Study 5: Sarah\***

Sarah is 24 years old and has three children under five years. She had to end her relationship due to extreme violence, including strangulation attempts and sexual assaults, some of which took place in front of the children. The violence continued post-separation. Sarah had a domestic and family violence order that limited her ex's visitation but he kept breaching it – showing up at her private rental at unscheduled times and putting her safety at risk. She contacted family violence services to request safe accommodation, however, Sarah's family court order said she could not be more than 30 kms from her ex. This made finding safe family violence accommodation extremely challenging as there were no vacancies within that radius. Family violence refuges also generally require women to move to a different area in order to keep the location of the refuge secure and protect the staff and other women and children. She was too afraid of her ex to report the DVO breaches to the police, and although she was on Centrelink, she was ineligible for Legal Aid. She was referred to homelessness and housing services in the region. During all of this, Sarah suffered an emotional breakdown. She had no trust or confidence in the system. She disengaged from the services that were trying to find accommodation. Because Sarah was unable to find safe accommodation, Child Safety believed Sarah was not acting to keep her children safe from the ongoing violence from her ex-partner, and within a few months her children were taken away.

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<sup>21</sup> Karp, P, "Rosie Batty: courts' aim for shared custody leaves children at risk" (15 June 2016) The Guardian: <https://www.theguardian.com/australia-news/2016/jun/15/rosie-batty-courts-aim-for-shared-custody-leaves-children-at-risk>

### **Consideration of ALRC proposals in relation to reducing harm**

QCOSS feels that the ALRC proposals fall short of addressing the above situations as the system will still rely on the identification of domestic and family violence (with the onus on the victim) and adequate responses including the courage to make an order for full custody for the mother in cases where there is a history of domestic and family violence.

In the context of some of the other issues identified in this submission, QCOSS strongly supports ALRC Proposal 8–3 to amend the definition of family violence in the *Family Law Act 1975* to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in subsection 4AB(2). This could be done by inserting a new subsection referring to the ‘use of systems or processes to cause harm, distress or financial loss’. This recommendation is consistent with the Deluth Wheel which identifies the ways in which men exert power and control over women post-separation.<sup>22</sup>

QCOSS also supports Proposal 8–5 to ensure that, in considering whether to deem proceedings as unmeritorious, a court may have regard to evidence of a history of family violence and in children’s cases must consider the safety and best interests of the child and the impact of the proceedings on the other party when they are the main caregiver for the child.

The services that we spoke to felt that the culture of the family law system needed to change and were concerned that the ALRC proposals would not address the failure of the system, particularly among the legal profession, to understand the harm caused by domestic and family violence, to keep women and children safe from perpetrators, and to hold perpetrators accountable for their violent behaviours. Some people we spoke to felt that lawyers should not be allowed to advise their clients to take action that would cause harm to their children, including by harming the primary care giver.

One way of providing some accountability may be to make changes to the courts’ powers to apportion costs in section 117 of the *Family Law Act 1975*, as considered by Question 8–4 in the ALRC discussion paper. However, like many of the other ALRC proposals around domestic and family violence, this relies on the culture and capability of the court to adequately respond to violent behaviours in a family law context.

## **Conclusion**

QCOSS suggests that in making its final recommendations, the ALRC consider ways to ensure the Family Law System does not get in the way of women and children’s safety and wellbeing. The above Case Studies all demonstrate family law system outcomes that are clearly not keeping women and children safe, and in some cases are contributing to children being removed from their mother’s care. There must be a safety net that ensures that women cannot be forced to comply with orders when this would put her and her children at risk, including when it would contradict child safety advice.

The Family Law Hubs may assist, but only when the underlying culture and legal framework of the family law system can effectively identify and respond to domestic and family violence and safety concerns.

In general, all parts of the family law system and associated service infrastructure should be designed with a family violence risk assessment framework and solid referral pathways to existing specialist family violence services in mind.

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<sup>22</sup> <https://www.theduluthmodel.org/wp-content/uploads/2017/03/Using-Children-Wheel.pdf>

There also needs to be some avenue for fast tracked or interim orders to ensure women are in a position to leave a violent relationship and be protected from the risk of escalated violence (including financial abuse) at this time.

The ALRC's final recommendations must acknowledge and address the power imbalance inherent in family law system. In cases of domestic and family violence, this imbalance of power is putting women and children at risk. All of the ALRC's final recommendations should be tested in the context of domestic and family violence such as the case studies included in this submission.

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