

40TH PARLIAMENT



Report 107

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

Domestic Violence Orders (National Recognition) Bill 2017

Presented by
Hon Michael Mischin MLC (Chairman)
October 2017

Standing Committee on Uniform Legislation and Statutes Review

Members as at the time of this inquiry:

Hon Michael Mischin MLC (Chairman)

Hon Pierre Yang MLC (Deputy Chairman)

Hon Laurie Graham MLC

Hon Robin Scott MLC

Staff as at the time of this inquiry:

Felicity Mackie (Advisory Officer (Legal))

Mark Warner (Committee Clerk)

Address:

Parliament House

4 Harvest Terrace, West Perth WA 6005

Telephone: 08 9222 7300

Email: lcco@parliament.wa.gov.au

Website: www.parliament.wa.gov.au

ISBN 978-1-925578-05-8



REPORT 107

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**DOMESTIC VIOLENCE ORDERS
(NATIONAL RECOGNITION) BILL 2017**

CONTENTS

EXECUTIVE SUMMARY	i
FINDINGS AND RECOMMENDATIONS	ii
1 INTRODUCTION	1
2 INQUIRY PROCEDURE	1
3 SUPPORTING DOCUMENTS	1
4 BACKGROUND TO THE BILL.....	3
National Domestic Violence Order Scheme.....	3
Commencement of the National Domestic Violence Order Scheme	3
5 THE INTERGOVERNMENTAL AGREEMENT	4
Commencement of the Bill.....	5
6 THE DOMESTIC VIOLENCE ORDERS (NATIONAL RECOGNITION) BILL 2017	5
Structure of the Bill.....	5
Departure from the model law framework.....	6
Overview of the Bill.....	7
Recognition of domestic violence orders	7
Consequences of recognition of domestic violence orders.....	8
Information sharing and support for the National Domestic Violence Order Scheme.....	8
Clauses that preserve Parliamentary sovereignty and law-making powers	8
Clauses that may impinge upon Parliamentary sovereignty and law-making powers	9
Clause 2	9
Committee comment	10
Clause 9(1)	10
Clause 9(4)	11
Clause 31	12
Absence of a review clause	13
7 CONCLUSIONS.....	15

**EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS FOR THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

DOMESTIC VIOLENCE ORDERS (NATIONAL RECOGNITION) BILL 2017

EXECUTIVE SUMMARY

- 1 On 17 August 2017 the Domestic Violence Orders (National Recognition) Bill 2017 (Bill) was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) for consideration and report. The reporting date is 10 October 2017, being the next sitting day after the 45 day period mandated by Standing Order 126.
- 2 In December 2015, the Council of Australian Governments (COAG) agreed to establish a national cross-recognition scheme for restraining orders that relate to family and domestic violence to be known as the National Domestic Violence Order Scheme (NDVOS).
- 3 Establishment of the NDVOS is subject to States and Territories introducing enabling legislation. The Bill is to facilitate Western Australia's participation in the NDVOS.
- 4 The Bill, in conjunction with corresponding laws in other jurisdictions:
 - defines which domestic violence orders (DVOs) are recognised under the NDVOS
 - sets out the consequences of national recognition, including in relation to enforcement, variation and cancellation
 - authorises information sharing and establishes other practical measures to support the scheme.
- 5 The Bill was modelled on the New South Wales Bill for the NDVOS, but is intended to allow for jurisdictional flexibility to suit local circumstances.
- 6 The Committee concludes that the Bill is materially consistent with the COAG Communique which outlines the agreement to introduce a national domestic violence order scheme.
- 7 Under its terms of reference, the Committee is confined to investigating whether the Bill has an impact on the parliamentary sovereignty and law-making powers of the Parliament of Western Australia.

- 8 The Committee has found that the Bill impacts upon parliamentary sovereignty to the extent that it:
- Requires the State to take certain action within a limited timeframe set by the Executive (see paragraphs 5.5 to 5.8 and Findings 1 and 2).
 - Provides that the Executive determines the commencement date, if any, of the Bill (see paragraphs 6.22 to 6.29 and Findings 3 and 4).
- 9 The Committee makes the following observations about the Bill:
- Clause 9(1) defines a term by reference to a repealed section of an Act (see paragraphs 6.30 to 6.36).
 - Clause 9(4) empowers the making of regulations that potentially could recognise any order made in a participating jurisdiction, regardless of whether or not it relates to an act of family and domestic violence (see paragraphs 6.37 to 6.39).
 - Clause 31 empowers the making of regulations that may permit prescribing persons or bodies among which information may be exchanged who may not have a sufficiently cogent nexus with the purposes sought to be achieved by the proposed Act (see paragraphs 6.40 to 6.45).
 - The Bill does not contain a review clause (see paragraphs 6.46 to 6.52).
- 10 The Committee is of the opinion that the matters identified by the Committee that affect parliamentary sovereignty have been adequately explained and justified.

FINDINGS AND RECOMMENDATIONS

- 11 The findings and recommendations are grouped as they appear in the text at the page numbers indicated:

Page 5

Finding 1: The Committee finds that agreements made by the Council of Australian Governments may impose upon parliamentary sovereignty by requiring the State to take certain action within a set timeframe. This may result in the Parliament being pressed to expedite consideration of legislation at the possible cost of adequate scrutiny.

Page 5

Finding 2: The Committee finds that it will be necessary for the Government to prioritise Parliamentary consideration of the Bill with a view to its passage, should the Parliament agree to it, as soon as practicable.

Page 10

Finding 3: The Committee finds that clause 2(b) of the Domestic Violence Orders (National Recognition) Bill 2017, in providing that the Executive determines commencement dates, erodes the Western Australian Parliament's sovereignty and law-making powers.

Page 10

Finding 4: The Committee finds that there are sound reasons for leaving the proclamation of the Bill to be determined by the Executive.

Page 15

Finding 5: The Committee finds that it is desirable that the operation and effectiveness of the proposed Domestic Violence Orders (National Recognition) Act 2017 be reviewed as soon as practicable after the end of three years of operation and reported to Parliament so that the benefits and consequences arising from Western Australia's participation in the NDVOS can be assessed.

Page 15

Recommendation 1: The Committee recommends that the *Domestic Violence Orders (National Recognition) Bill 2017* be amended as follows:

Page 28 – after line 25 – to insert as follows:

Part 8 – Review of Act

47. Review of Act

(1) The Minister —

- (a) must carry out a review of the operation and effectiveness of this Act as soon as is practicable after the end of the period of 3 years beginning on the day on which this section commences; and
- (b) may carry out a further review of the operation and effectiveness of this Act at any time after the period referred to in paragraph (a).

(2) The Minister must —

- (a) prepare a report based on the review; and
- (b) as soon as is practicable after the preparation of the report cause it to be laid before each House of Parliament.

Recommendation 2: The Committee recommends that the Legislative Council note the Committee's findings and comments during consideration of the Domestic Violence Orders (National Recognition) Bill 2017.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

DOMESTIC VIOLENCE ORDERS (NATIONAL RECOGNITION) BILL 2017

1 INTRODUCTION

- 1.1 On 17 August 2017 the Domestic Violence Orders (National Recognition) Bill 2017 (Bill) was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) for consideration and report. The reporting date is 10 October 2017, being the next sitting day after the 45 day period mandated by Standing Order 126.

2 INQUIRY PROCEDURE

- 2.1 The Committee posted the inquiry on its website at [Uniform Legislation Committee homepage](#). The general public was immediately notified of the referral via social media.¹ Given the Committee's terms of reference, the Committee considered that any broader advertising or invitation for submissions from the public was neither necessary nor warranted in relation to the Bill.

3 SUPPORTING DOCUMENTS

- 3.1 The Committee received copies of the Bill, the Second Reading Speech and the Explanatory Memorandum when the Bill was introduced into the Legislative Council.
- 3.2 The Attorney General, Hon John Quigley MLA, wrote to the Committee on 16 August 2017, the day before the Bill was referred. The Committee received the letter on 21 August 2017.
- 3.3 The Attorney General expressed his view regarding areas in which the Bill would not, if enacted, derogate from State parliamentary sovereignty or its law-making powers. The Attorney General submitted that '*...the Bill is not a uniform Bill of the kind that the Legislative Council's uniform legislation arrangements were designed to scrutinise.*'² He argued that the Western Australian legislature has capacity to adopt significant local adaptations without undermining the integrity of the National Domestic Violence Order Scheme (NDVOS) and that participation in the NDVOS will not be at the expense of Western Australia's legislative autonomy. He stated that the Bill '*does not warrant extra-ordinary Parliamentary scrutiny.*'³
- 3.4 The Committee's view is that the Bill is captured by Standing Order 126 and is one that is appropriate for the Committee to scrutinise so that it may properly and fully advise the Parliament in relation to matters within its terms of reference. The Committee notes

¹ Legislative Council, 17 August 2017, retrieved from <https://goo.gl/aXUUvy>.

² Hon John Quigley MLA, Attorney General, Letter, 16 August 2017, p 1.

³ *ibid*, p 2.

that clause 3 of the Bill which sets out the ‘*Object of Act*’ acknowledges that the proposed Act will establish ‘*in conjunction with the corresponding laws, a national recognition scheme for DVOs or domestic violence orders*’, an object also reflected by the long and short titles of the Bill. Furthermore, the Bill was referred without debate on the issue, given the Leader of the House’s concession at the conclusion of her second reading speech that it was one that fell within the ambit of Standing Order 126.⁴

3.5 In accordance with the Standing Orders, the Committee proceeded to consider the Bill as uniform legislation referred by the Legislative Council. It advised the Attorney General accordingly, and requested that he provide the information required by Ministerial Office Memorandum MM2007/01 as a matter of urgency in order to facilitate the Committee’s timely consideration of the Bill.

3.6 Standing Order 126(5) states:

The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral....

3.7 In response to the Committee’s request, the Attorney General provided the Committee with the following documents and information pursuant to Ministerial Office Memorandum MM2007/01:

- A copy of the Council of Australian Governments (COAG)⁵ Communique that outlines the agreement between the First Ministers in relation to the Bill.
- A statement as to the timetable for the implementation of the Bill.
- A copy of the Explanatory Memorandum for the Bill.
- A public statement of the Government’s policy on the Bill.
- A statement outlining the advantages and disadvantages to the State of Western Australia as a party to the NDVOS.
- An explanation of relevant constitutional issues.
- An explanation as to whether and by what mechanism the State of Western Australia can opt out of the NDVOS.
- The mechanisms by which the Bill, once enacted, can be amended.
- A copy of the New South Wales Bill for the NDVOS, on which the Bill was based.

3.8 The documents referred to above were provided to the Committee on 29 August 2017, eight working days after referral. The Committee has strict reporting timeframes and

⁴ Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 17 August 2017, p 2990.

⁵ The members of the Council of Australian Governments are the Prime Minister, state and territory First Ministers and the President of the Australian Local Government Association.

relies on Ministers and their agencies to provide the Committee with supporting documentation in a timely manner. Delay resulted in the Committee directing time and resources to gathering the information rather than focusing on any issues arising from that information.

- 3.9 Nevertheless, the Committee has discharged its responsibilities as expeditiously as possible, and has completed its function within the time limit prescribed by the Standing Orders.

4 BACKGROUND TO THE BILL

- 4.1 In December 2015, COAG agreed to establish a national cross-recognition scheme for restraining orders that relate to family and domestic violence to be known as the National Domestic Violence Order Scheme (NDVOS).

- 4.2 Establishment of the NDVOS is subject to States and Territories introducing enabling legislation. The Bill is to facilitate Western Australia's participation in the NDVOS.

National Domestic Violence Order Scheme

- 4.3 Once established, the NDVOS will eliminate the need to register restraining orders that relate to family and domestic violence in other participating jurisdictions; an order made in one State or Territory will automatically operate across Australia.⁶

- 4.4 According to the second reading speech, this national scheme is intended to enhance victim safety and perpetrator accountability by providing consistent, instantaneous legal protection across jurisdictional boundaries.⁷ It is also intended to spare victims the perceived time and effort associated with the existing cross-border registration process.⁸

Commencement of the National Domestic Violence Order Scheme

- 4.5 The NDVOS is due to commence nationally on 25 November 2017; that is, White Ribbon Day, the International Day for the Elimination of Violence Against Women.

- 4.6 In her second reading speech the Minister noted that Western Australia is now the only jurisdiction that is yet to enact enabling legislation.⁹ The Minister stated that:

*Failure to join the NDVOS in step with other jurisdictions on 25 November 2017 would create practical issues for the victims who will rely on the NDVOS in WA, and would certainly cause significant reputational damage to the state.*¹⁰

⁶ Hon Sue Ellery MLC, Leader of the House representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 17 August 2017, p 2988.

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

4.7 The Minister advised that ‘...the bill needs to be endorsed by the Legislative Council as a matter of priority.’¹¹

5 THE INTERGOVERNMENTAL AGREEMENT

5.1 The NDVOS was developed pursuant to a COAG agreement made on 11 December 2015. The COAG Communique issued on 11 December 2015 (COAG Communique) outlines the agreement made by First Ministers, namely to:

- *introduce a national Domestic Violence Order (DVO) scheme so DVOs issued in one state will be recognised in all others, with every jurisdiction committing to introduce laws to give effect to this in the first half of 2016;*
- *develop a comprehensive national DVO information sharing system that police and courts will be able to use for evidentiary purposes or to enforce DVAs, noting this will take several years to fully implement; and*
- *in the short-term, establish an interim information sharing system that will provide police and courts with information on all DVOs that have been issued, but will not have the same evidentiary or enforcement capacity as the permanent system.*¹²

5.2 The Attorney General has advised that the COAG agreement was a political agreement, with each State and Territory agreeing to introduce legislation into their respective Parliaments to give effect to the national scheme.¹³

5.3 He also advised that ‘*There are no other separate written agreements or memorandums of understanding relating to the NDVOS, however, the implementation of the COAG agreement has been overseen by the Law, Crime and Community Safety Council.*’¹⁴ The Law, Crime and Community Safety Council (LCCSC) is comprised of Attorneys General and Police Ministers from each State and Territory. The LCCSC has issued a series of communiqués outlining agreed decisions in relation to the NDVOS.

5.4 The LCCSC Communique of 19 May 2017 states that the ‘*Ministers agreed to working towards commencing the National DVO Scheme on 25 November 2017.*’¹⁵

¹¹ *ibid.*

¹² Council of Australian Governments Communique, 11 December 2015, p 3.

¹³ Hon John Quigley MLA, Attorney General, Letter, 28 August 2017, p 1.

¹⁴ *ibid.*, p 2.

¹⁵ Law, Crime and Community Safety Council Communique, 19 May 2017, p 8.

Commencement of the Bill

- 5.5 The Attorney General advised that ‘*The Government intends that Western Australia will join the scheme on this date [25 November 2017], in step with all other jurisdictions, subject to the Bill being passed.*’¹⁶
- 5.6 In order to achieve the 25 November 2017 deadline, the Bill needs to pass through the Legislative Council by no later than 9 November 2017, being the last sitting date prior to 25 November 2017.
- 5.7 The Committee observes that, in general, this type of commitment to intergovernmental action can impose upon parliamentary sovereignty by pressing the Parliament to:
- enact legislation within a timeframe set by the Executive
 - expedite consideration of legislation at the possible cost of adequate scrutiny.
- 5.8 The Committee expects that the Government is conscious of the steps necessary to achieve timely passage of the Bill, and draws the Legislative Council’s attention to the need for timely consideration of the Bill if it is of the view that the deadline proposed in the LCCSC Communique of 19 May 2017 should be achieved.

Finding 1: The Committee finds that agreements made by the Council of Australian Governments may impose upon parliamentary sovereignty by requiring the State to take certain action within a set timeframe. This may result in the Parliament being pressed to expedite consideration of legislation at the possible cost of adequate scrutiny.

Finding 2: The Committee finds that it will be necessary for the Government to prioritise Parliamentary consideration of the Bill with a view to its passage, should the Parliament agree to it, as soon as practicable.

6 THE DOMESTIC VIOLENCE ORDERS (NATIONAL RECOGNITION) BILL 2017

Structure of the Bill

- 6.1 The Bill comprises 7 Parts and 46 clauses as follows:
- Part 1 contains preliminary clauses such as the commencement clause and the definitions of terms used in the Bill.
 - Part 2 is concerned with the recognition and enforceability of DVOs, which is the crux of the NDVOS.
 - Part 3 deals with variation and cancellation of recognised non-local DVOs.
 - Part 4 contains exchange of information provisions.

¹⁶ Hon John Quigley MLA, Attorney General, Letter, 28 August 2017, p 2.

- Part 5 contains miscellaneous provisions.
 - Part 6 contains transitional provisions.
 - Part 7 contains clauses that amend the *Restraining Orders Act 1997*.
- 6.2 The Bill is based on a model law framework that was developed by a national working group.¹⁷ The Attorney General advised that the Bill was based on the New South Wales Bill for the NDVOS.¹⁸
- 6.3 ‘Model’ legislation, also known as mirror legislation, involves the enactment of uniform legislation in Western Australia with local variations as necessary to achieve the agreed uniform national policy when legislation forms part of the local law. Former President of the Legislative Council, Hon Barry House MLC, described this structure as, in theory, the least potentially disadvantageous structure for a State from a legislative sovereignty viewpoint because it is the ‘*only structure where the legislation and any amendments are always within the control of each jurisdiction’s own Parliament, as they each implement their own version of an agreed model law.*’¹⁹
- 6.4 In her second reading speech the Minister said:

*Developed through a collaborative national process, the model law framework reflects key policy parameters approved by COAG whilst affording jurisdictions flexibility to achieve consistency with local legislation and meet local operational requirements. The objective of the framework is to achieve national reciprocity, not complete uniformity.*²⁰

Departure from the model law framework

- 6.5 The Bill contains one substantive departure from the model law framework.
- 6.6 The model law includes a provision that would prohibit a police officer from making a police order – a short-term restraining order used in emergency situations – if the officer is aware that a nationally recognised court order is already in force. The Minister advised that ‘*This provision has not been adopted on the basis that it unjustifiably limits the protective options that are available to victims of family violence....the making of a police order provides critical interim protection while the court order is being obtained*

¹⁷ Domestic Violence Orders (National Recognition) Bill 2017, *Explanatory Memorandum*, Legislative Council, p 1.

¹⁸ Hon John Quigley MLA, Attorney General, Letter, 28 August 2017, p 4.

¹⁹ *When a Nod and a Wink Amounts to an Intergovernmental Agreement: Issues faced by the Legislative Council of Western Australia in the identification and scrutiny of uniform legislation*, paper presented by former President of the Legislative Council, Hon Barry House MLC, Parliament of Western Australia, Darwin, July 2010.

²⁰ Hon Sue Ellery MLC, Leader of the House representing the Attorney General, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 17 August 2017, pp 2988-2989.

*or strengthened as required. This is particularly true in regional and remote Western Australia.*²¹

- 6.7 The Bill does not prevent a police officer from making a police order when a recognised interstate DVO is in force. It does, however, provide that a later police order will not supersede, and thereby prevail over, the earlier court order.²² It appears to be intended that both the earlier court order and the new police order will operate concurrently.

Overview of the Bill

- 6.8 The Bill, in conjunction with the corresponding laws in other jurisdictions:

- defines which domestic violence orders (DVOs) are recognised under the NDVOS
- sets out the consequences of national recognition, including in relation to enforcement, variation and cancellation
- authorises information sharing and establishes other practical measures to support the scheme.²³

- 6.9 In her second reading speech the Minister advised that:

*The bill is primarily concerned with the status of non-local domestic violence orders in WA and the functions and powers of local authorities. The capacity for WA orders to be enforced, varied and cancelled in other jurisdictions is established in the corresponding laws that have been enacted by other states and territories.*²⁴

Recognition of domestic violence orders

- 6.10 The Bill defines which DVOs are recognised under the NDVOS. The NDVOS affords recognition to Western Australian and other State, Territory and New Zealand DVOs, and certain foreign orders.
- 6.11 The effect of the Bill is that the NDVOS will apply to restraining orders that address family and domestic violence and are made by:
- a court or police officer in a participating Australian jurisdiction
 - a New Zealand court and registered in an Australian jurisdiction.²⁵

²¹ *ibid*, pp 2989-2990.

²² Domestic Violence Orders (National Recognition) Bill 2017, cl 14.

²³ Hon Sue Ellery MLC, Leader of the House representing the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 17 August 2017, p 2989.

²⁴ *ibid*.

²⁵ There is a capacity to prescribe an order that is made under a law of another country: definition of 'foreign order' in cl 4(1) of the Domestic Violence Orders (National Recognition) Bill 2017.

- 6.12 The Bill limits recognition of Western Australian DVOs to those made on or after the day that the Act commences.²⁶ DVOs made prior to commencement will not automatically be recognised, but may be declared recognised on the application to a court.²⁷

Consequences of recognition of domestic violence orders

- 6.13 A key principle underpinning the NDVOS is that a recognised DVO operates in all participating jurisdictions irrespective of where it was made. The Bill gives effect to this principle by providing that a recognised non-local DVO may be enforced in Western Australia as if it is a local DVO.²⁸
- 6.14 A Western Australian law that prohibits the granting of a licence, permit or other authorisation to a person subject to a local DVO applies to a person subject to a recognised non-local DVO.²⁹
- 6.15 If a recognised non-local DVO disqualifies a person from holding a non-local firearms licence, that disqualification applies in Western Australia.³⁰ That is, the person is also disqualified from holding a local firearms licence.
- 6.16 The Bill empowers Western Australian courts to vary or cancel a recognised non-local DVO as if it were a local DVO.³¹

Information sharing and support for the National Domestic Violence Order Scheme

- 6.17 The Explanatory Memorandum for the Bill states that ‘*The effective operation of the NDVOS hinges on the ability of courts and law enforcement agencies to obtain information about orders and variations made in other jurisdictions.*’³²
- 6.18 The provisions of Part 4 of the Bill enable Western Australian authorities to exchange information that is relevant to the NDVOS with police and courts in other jurisdictions.

Clauses that preserve Parliamentary sovereignty and law-making powers

- 6.19 It is a matter for the State to decide if it wishes to opt out of the NDVOS. There is no requirement in the COAG Communique or the Bill for Western Australia to be bound by the terms of the COAG agreement or a party to the NDVOS. Accordingly, the State can leave the NDVOS by repealing the Act or amending it in a manner that is inconsistent with the NDVOS. As the Attorney General stated, ‘*If the Parliament of*

²⁶ Domestic Violence Orders (National Recognition) Bill 2017, cl 36.

²⁷ *ibid*, cl 38.

²⁸ *ibid*, cl 18.

²⁹ *ibid*, cl 20.

³⁰ *ibid*, cl 21.

³¹ *ibid*, cl 24.

³² Domestic Violence Orders (National Recognition) Bill 2017, *Explanatory Memorandum*, Legislative Council, p 14.

*Western Australia passes legislation to give effect to the national scheme, it will be a matter for Government decision making and public and Parliamentary scrutiny if there is any future wish to 'opt out' of the scheme.*³³

- 6.20 Similarly, if the State wishes to amend the Bill at some future time, it is open for it to do so. The Attorney General advised that *'In the short term, State and Territory officials have agreed to notify one another of any proposed amendments to corresponding legislation enacted in each State and Territory should this become necessary due to changing local circumstances.'*³⁴
- 6.21 The COAG Communique and the Bill appear to demonstrate the highest threshold of state parliamentary sovereignty and preserve the Western Australian Parliament's capacity for oversight of its own legislation.

Clauses that may impinge upon Parliamentary sovereignty and law-making powers

Clause 2

- 6.22 Clause 2(a) of the Bill provides that sections 1 and 2 will come into operation on the day of the Royal Assent and clause 2(b) provides that the rest of the Act will come into operation on a day or different days fixed by proclamation³⁵. This is an Executive action.
- 6.23 This impinges the Parliament's sovereignty as the commencement dates will be controlled by the Executive. There is nothing in the Bill that requires proclamation within a specified time. It is conceivable that a proclamation may never be made and the will of the Parliament, in passing the Bill, would be frustrated.
- 6.24 A failure to proclaim is unlikely in this case as the NDVOS is due to commence nationally on 25 November 2017 and the Western Australian Government has committed to meeting that deadline for symbolic reasons, namely White Ribbon Day.
- 6.25 Nevertheless, the Committee takes the view that Parliament should be responsible for determining when laws are to come into effect.
- 6.26 The Explanatory Memorandum states that this approach preserves flexibility in the event that the scheduled commencement of the national scheme is adjusted for operational reasons.³⁶
- 6.27 The Attorney General advised that if the Bill is passed, the Government intends to proclaim the Bill so as to commence on 25 November 2017.³⁷

³³ Hon John Quigley MLA, Attorney General, Letter, 28 August 2017, p 4.

³⁴ *ibid.*

³⁵ 'proclamation' means *a proclamation made by the Governor ['with the advice and consent of the Executive Council'] and published in the Gazette': Interpretation Act 1984 ss 5 and 60.*

³⁶ Domestic Violence Orders (National Recognition) Bill 2017, *Explanatory Memorandum*, Legislative Council, p 2.

³⁷ Hon John Quigley MLA, Attorney General, Letter, 28 August 2017, p 2.

Committee comment

- 6.28 The Committee is of the view that the lack of express commencement date or dates for the majority of clauses in this Bill is an erosion of the Western Australian Parliament's sovereignty and law-making powers.
- 6.29 However the Committee accepts that, in all the circumstances, there are sound reasons for leaving the proclamation of the Bill to be determined by the Executive.

Finding 3: The Committee finds that clause 2(b) of the Domestic Violence Orders (National Recognition) Bill 2017, in providing that the Executive determines commencement dates, erodes the Western Australian Parliament's sovereignty and law-making powers.

Finding 4: The Committee finds that there are sound reasons for leaving the proclamation of the Bill to be determined by the Executive.

Clause 9(1)

- 6.30 Clauses 9(1)(a) and (1)(b) refer to an 'act of family and domestic violence' as defined in section 6(1) of the former *Restraining Orders Act 1997* as in force before 1 July 2017. That section has been deleted and is not accessible by reference to the current version of the Act. A reader would need to refer to a reprint of the Act before the passage of the amendments effected by the *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016* (Act No 49 of 2016).
- 6.31 To facilitate compliance, it is important that laws affecting rights and obligations and imposing responsibilities and penalties be clear and easily ascertainable.
- 6.32 In this instance, clause 9(1) requires the reader seeking to ascertain whether a violence restraining order addresses a 'domestic violence concern' to refer to a repealed section of an earlier version of the principal Act.
- 6.33 The Committee asked the Attorney General why that method of drafting was adopted and why an explanation for this was not set out in the Explanatory Memorandum.
- 6.34 The Attorney General advised:

The RO Act [Restraining Orders Act 1997] was substantially amended on 1 July 2017 by the Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016 (WA) (ROAR Act). In order to describe the previous environment with legal certainty, Parliamentary Counsel advised that it would not be sufficient simply to restate particular pre-ROAR sections (such as section 6(1), (3) and (4)) in isolation. Rather, the standard drafting practice in this State and other jurisdictions is to address what are essentially transitional elements by reference to the Act as in force at a previous time.

*The above approach to drafting was not explained in the Explanatory Memorandum because it was not considered material to the explanation of the purpose of the clause. Only where there was a significant departure from the Model Law Framework was this noted in the Explanatory Memorandum.*³⁸

- 6.35 As to the Attorney General's comments as to the Explanatory Memorandum, the Committee takes the view that it should explain not only departures from the model law framework but should sufficiently explain to the Parliament required to consider the merits of the Bill the purpose, effect and intended operation of the laws being proposed.
- 6.36 The Committee notes and draws the attention of the Legislative Council to the Attorney General's explanation, and invites him at least to consider whether some note regarding, or reproducing, section 6(1) of the former *Restraining Order Act 1997* would assist readers of the Bill. The Committee considers there is no reason why the Attorney General's explanation could not have been included in the Explanatory Memorandum.

Clause 9(4)

- 6.37 Clauses 9(1), (2) and (3) set out what orders are taken to address a 'domestic violence concern' for the purposes of the proposed Act. Clause 9(4) provides that regulations may prescribe circumstances in which an order made in a participating jurisdiction is taken for the purposes of the proposed Act to be an order that addresses a 'domestic violence concern'. A literal reading of the clause suggests the possibility that regulations could prescribe any order made in a participating jurisdiction, regardless of whether or not it relates to an act of family and domestic violence.
- 6.38 The Attorney General advised:

The Model Law Framework specifically contemplated that a regulation-making power could be added to this clause to modify the definition of 'domestic violence concern' to respond to any changes in SA or WA legislation.

*Clause 9(4) was included out of an abundance of caution. Given that WA has already amended its legislation to create separate FVROs [Family Violence Restraining Orders], regulations will only be required under this provision if South Australia amends its legislation - the Intervention Orders (Prevention of Abuse) Act 2009 (SA) - to alter the grounds upon which an intervention order can be made in domestic violence situations. Regulations could then prescribe further details about the circumstances in which new South Australian orders will be deemed to address a 'domestic violence concern'. Those circumstances may well be **different** to the circumstances in which an old VRO made*

³⁸ Hon John Quigley MLA, Attorney General, Letter, 7 September 2017, pp 1-2.

*in WA under the former RO Act is deemed to address a 'domestic violence concern.'*³⁹

- 6.39 The Committee understands the limitations on being able to give effect to a broader policy while balancing certainty against flexibility, but remains concerned that the 'circumstances in which an order made in a participating jurisdiction is taken, for the purposes of [the proposed] Act, to be an order that addresses a domestic violence concern'⁴⁰ will be left to subordinate legislation.

Clause 31

- 6.40 Clause 31 provides for Western Australian issuing authorities and local law enforcement agencies to exchange relevant information with a person or body prescribed in regulations. The Explanatory Memorandum states that, in practice, this provision will be used to enable information sharing with the Australian Criminal Intelligence Commission (ACIC), the Commonwealth agency responsible for developing and managing the information sharing system that will support the NDVOS.⁴¹
- 6.41 There are no criteria to govern what persons or bodies may be prescribed, although clause 31(2) provides that the information exchange must be for the purposes of exercising functions under the Act. There are no details in the proposed Act of the class of persons or bodies which may be prescribed. Clause 31(2) provides no guidance about the qualifications or experience of the persons, or status of the body, to whom authority may be delegated.
- 6.42 Clause 31 may constitute an inappropriate delegation of power.
- 6.43 The Attorney General advised:

Clause 31 is intended to enable bodies to be prescribed in regulations without having to amend the legislation. At this stage, the Australian Criminal Intelligence Commission (ACIC) is the only body intended to be prescribed under clause 31 as it is responsible for developing the interim information sharing system. States and Territories will be providing information to, and obtaining information from, the ACIC.

Provisions like clause 31(2)(c) are necessary to provide flexibility in the law so that it can adapt to the changing structure of government. The ACIC was formally known as CrimTrac. It is possible that there will be a further name-change to this agency, or that another Commonwealth agency may be given responsibilities once the dedicated information sharing platform is established. For these reasons, it was considered appropriate to include a regulation-making

³⁹ *ibid*, p 2.

⁴⁰ Domestic Violence Orders (National Recognition) Bill 2017, cl 9(4).

⁴¹ Domestic Violence Orders (National Recognition) Bill 2017, *Explanatory Memorandum*, Legislative Council, p 15.

power rather than name a particular agency in the Act. The same approach was adopted in a recent amendment to section 70 of the Restraining Orders Act 1997 (WA).

The clause does not, in our view, constitute an inappropriate delegation of power. The power to prescribe persons or bodies must be read in its legislative context, which includes not only clause 31 but also the rest of the Bill. Clause 31(2)(c) relates to an issuing authority or a local law enforcement agency exercising functions under the Act. If an attempt were made to prescribe a person or body without any nexus to such an issuing authority or local law enforcement agency, the prescription would arguably be invalid.

...the Australian Criminal Intelligence Commission is currently the only body that is intended to be prescribed under clause 31.⁴²

- 6.44 The Committee accepts that it is desirable that information exchange focused on the objectives of public safety sought to be achieved by the Bill should not be impeded by the necessity to amend the proposed Act from time to time to accommodate organisational name changes or reallocations of relevant responsibilities.
- 6.45 However, in general the Committee cautions against subordinate legislation that may permit prescribing persons or bodies who may not have a sufficiently cogent nexus with the purposes sought to be achieved by an Act.

Absence of a review clause

- 6.46 The Bill lacks a review clause.
- 6.47 Thornton defines a review clause as a clause ‘*[t]he purpose of [which] is to oblige the responsible Minister or some other identified authority or person to review the operation of legislation after a specified period and to report to Parliament with appropriate recommendations.*’⁴³
- 6.48 Given that the Bill gives effect to a national cross-recognition scheme it is arguable there should be legislative provision for a periodic statutory review of how the provisions in the Bill are operating, including whether they have been effective in carrying out the purpose of the Bill.

⁴² Hon John Quigley MLA, Attorney General, Letter, 7 September 2017, pp 2-3.

⁴³ GC Thornton, *Legislative Drafting*, (4th edition, 1996) Butterworths, London, p 216.

6.49 The Committee has previously commented on the lack of a review clause in uniform legislation. Review clauses are an important mechanism for Parliamentary accountability and oversight of legislation.⁴⁴

6.50 The Committee asked the Minister whether there are any plans to undertake a review of the operation of the Bill and sought his view on the possibility of the Bill being amended to include a statutory review of the Act three years after commencement of the Bill.

6.51 The Attorney General advised:

The operation and effectiveness of the Bill will be monitored by the Department of Justice and the Law Crime and Community Safety Council's National Domestic Violence Legislation Working Group, under a Business Continuity and Post-Implementation Plan. The aim of the Plan is to evaluate the business processes and procedures established to support the Scheme and the collection of data from the States and Territories. Any deficiencies or improvements required to the legislation will be identified as part of this process.

The Bill does not contain any controversial provisions but simply sets up the legal architecture for the operation of the National Scheme, therefore a statutory review clause is not considered warranted. As noted above, the operation of the National Scheme as a whole, including business processes and procedures, will be directly overseen by the LCCSC National Domestic Violence Legislation Working Group, and by the Department of Justice in an ongoing fashion.⁴⁵

6.52 However, the Committee notes that the monitoring, evaluation of business processes and procedures, and the collection of data, will be focused on 'the National Scheme as a whole'⁴⁶ rather than whether the proposed Act is operating in the interests of the State and citizens of Western Australia. While the information gathered may very well contribute to exposing issues in the NDVOS that may be of specific relevance to Western Australia, that will not be its prime concern.

⁴⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 91, *Rail Safety National Law (WA) Bill 2014*, 24 March 2015, p 24. See also Committee Report 92, *Directors' Liability Reform Bill 2015*, 21 April 2015, pp 14-16, Report 91, *Business Names (Commonwealth Powers) Bill 2011*, 6 March 2012, pp 20-21, Committee Report 96, *Co-operatives Amendment Bill 2015*, 25 February 2016, pp 17-18 and Committee Report 106, *Petroleum Legislation Amendment Bill 2017*, August 2017, pp14-15.

⁴⁵ Hon John Quigley MLA, Attorney General, Letter, 7 September 2017, p 3.

⁴⁶ *ibid.*

Finding 5: The Committee finds that it is desirable that the operation and effectiveness of the proposed Domestic Violence Orders (National Recognition) Act 2017 be reviewed as soon as practicable after the end of three years of operation and reported to Parliament so that the benefits and consequences arising from Western Australia's participation in the NDVOS can be assessed.

Recommendation 1: The Committee recommends that the *Domestic Violence Orders (National Recognition) Bill 2017* be amended as follows:

Page 28 – after line 25 – to insert as follows:

Part 8 – Review of Act

47. Review of Act

(1) The Minister —

- (a) must carry out a review of the operation and effectiveness of this Act as soon as is practicable after the end of the period of 3 years beginning on the day on which this section commences; and**
- (b) may carry out a further review of the operation and effectiveness of this Act at any time after the period referred to in paragraph (a).**

(2) The Minister must —

- (a) prepare a report based on the review; and**
- (b) as soon as is practicable after the preparation of the report cause it to be laid before each House of Parliament.**

7 CONCLUSIONS

- 7.1 The Committee concludes that the Bill is materially consistent with the COAG Communique which outlines the agreement to introduce a national domestic violence order scheme.
- 7.2 Under its terms of reference, the Committee is confined to investigating whether the Bill has an impact on the parliamentary sovereignty and law-making powers of the Parliament of Western Australia. Notwithstanding that some issues have been identified that may affect parliamentary sovereignty and Parliament's law-making powers as identified in this report, the Committee is of the opinion that subject to its recommendation that there be provision made for a review of the Act, they have been adequately explained and justified.

Recommendation 2: The Committee recommends that the Legislative Council note the Committee's findings and comments during consideration of the Domestic Violence Orders (National Recognition) Bill 2017.



**Hon Michael Mischin MLC
Chairman**

10 October 2017

Standing Committee on Uniform Legislation and Statutes Review

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'6. Uniform Legislation and Statutes Review Committee

- 6.1 *A Uniform Legislation and Statutes Review Committee is established.*
- 6.2 The Committee consists of 4 Members.
- 6.3 The functions of the Committee are –
 - (a) to consider and report on Bills referred under Standing Order 126;
 - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
 - (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
 - (d) to review the form and content of the statute book; and
 - (e) to consider and report on any matter referred by the Council.
- 6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.'



Parliament House
4 Harvest Terrace, West Perth WA 6005
Telephone: 08 9222 7300
Email: lcco@parliament.wa.gov.au
Website: www.parliament.wa.gov.au