MODEL DOMESTIC VIOLENCE LAWS

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Report

April 1999

This Report was prepared by a working group of Commonwealth, State and Territory officials. It does not represent the views of Governments or the Standing Committee of Attorneys-General.

PARTNERSHIPS AGAINST DOMESTIC VIOLENCE

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Preface - Model Domestic Violence Legislation

In September 1996 the Federal Government convened the National Domestic Violence Forum in Canberra. The forum included representatives from each Australian State and Territory, government departments, academics and non-government organisations, with an interest in addressing all issues relating to domestic violence.

A number of recommendations came out of the forum, some of which related to reforms to the laws dealing with domestic violence and the need for greater consistency. While the need for consistency has been recognised previously by the Standing Committee of Attorneys-General (which noted that model legislation prepared by a National Police Working Party on Law Reform in 1991 provides a useful guide), there have been specific initiatives dealing with the portability of orders, the relationship of orders with Family Law orders and the portability of New Zealand orders (which was raised at the Forum). A Working Group of officials from the States and Territories and the Commonwealth has prepared a Discussion Paper after reviewing the existing laws and prepared a revised Model in the context of the initiatives flowing from the Forum for the National Domestic Violence Summit.

A Discussion Paper was released by the Prime Minister, Premiers and Chief Ministers at the Domestic Violence Summit in November 1997. It requested interested persons and agencies to comment upon the paper's proposals, and more than 120 detailed and thoughtful submission were received, as well as oral feedback from meetings organised around Australia by the Office of the Status of Women and State and Territory Governments. Most submissions commented upon the 14 key issues identified in the discussion paper as being of particular significance.

The Discussion Paper contained tentative recommendations for the model using the work in 1991 as its starting point and drawing on experience since then. The 1991 model was based on Victorian legislation and was accepted as a way in which the recommendations of the National Committee on Violence report (1990)[1] could be implemented. The model contained in this Report amounts to a substantial refinement of what was circulated in the Discussion Paper, taking into account submissions received in the consultation period following release of the Discussion Paper. The full Model is contained in the schedule of this Report, while the body of the Report contains individual provisions in the model on left pages and commentary on the right.

The Working Group is very grateful for the assistance of Dawn Ray from the office of the Queensland Parliamentary Counsel and the Parliamentary Counsels' Committee, and for contributions from Ms Leanne Roberts of the South Australian Attorney-General's Department.

1 'Violence - Directions for Australia', National Committee on Violence, Australian Institute of Criminology, 1990.

The Working Group welcomes comments on any aspect of the proposed provisions. Comments should be sent to:

Domestic Violence Legislation Working Group
C/- Criminal Law Division
Attorney-General's Department
National Circuit
Barton ACT 2600

The group can be contacted by telephone on 02 6250 6861.

The Domestic Violence Legislation Working Group

February 1999

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2 The Northern Territory was not an active participant in the Working Group, however it commented on aspects of the Report.

Glossary

References in the commentary to State and Territory legislation or law are references to the statutes listed below.

New South Wales:	Crimes Act 1900 (Part 15A)
Victoria:	Crimes (Family Violence) Act 1987. Where the 1991 model and Victorian law are the same it will be described as the 1991/Victorian model.
Queensland:	Domestic Violence (Family Protection) Act 1989
Western Australia:	Restraining Orders Act 1997
South Australia:	Domestic Violence Act 1994
Tasmania:	Justices Act 1959 (Part XA)
ACT:	Domestic Violence Act 1986
Northern Territory:	Domestic Violence Act 1992

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Introduction

Domestic violence is an issue which has occupied legislators on numerous occasions around Australia and overseas for the past 20 years. However, the recent review of the legislation reveals that there are significant variations in some provisions as between Australian States and Territories. This Report concentrates on reviewing our existing laws and draws upon our national experience with them, with the aim of creating model legislation based on best practice.

It has been estimated that domestic violence costs the Australian community some billions of dollars in social and economic losses every year.[3] This cost alone merits action by Australian society to combat domestic violence. However it is the very real cost in human trauma and dislocation that propels this issue as one requiring comprehensive and cooperative action by Australian governments. The model domestic violence laws in this Report attempts to achieve best practice in this field and aims for better as well as more consistent laws.

Clearly there are benefits that can be gained from greater consistency in view of the very mobile nature of the Australian population generally and in particular the fact that many domestic violence victims will choose to move inter-State to start a new and safer life. The other benefit is that all jurisdictions can draw upon experience elsewhere and create a model that reflects the best features of the law in each jurisdiction. While this is not always easy, because the first instinct is to believe what is local and known is best, the review has revealed many ideas which deserve consideration that have not been adopted in other jurisdictions.

In preparing this Report the officers on the Working Group recognised that there are some strong tensions in relation to the domestic violence issue between protecting victims and ensuring the legislation is not abused by taking away the rights of the defendant to a fair hearing. However while it has been said that domestic violence legislation is used as a strategic tool in Family Law disputes and this is undoubtedly true in some cases, and some submissions included accounts which suggest that there has been misuse, it is not surprising that a system which is designed to accommodate thousands of cases will be the subject of abuse in some cases.

The challenge with legislation of this type is to develop a framework that is fair and at the same time not so inaccessible and inflexible that those who need immediate protection find it difficult to access. While those who are the subject of false allegations may experience hardship through the misuse of this type of legislation, overwhelmingly that hardship falls short of that person being maimed or killed.

3 For example, the 1991 NSW report *Costs of Domestic Violence* estimated the annual cost of domestic violence in NSW to be over $1.5 billion.

The primary role of this legislation is to reduce death and injury at the hands of fellow householders, whether it be a parent or partner. It is important to remember that despite all the sensational reports about serial killings by strangers or armed robbers, the vast majority of homicides are at the hands of people known to the victim. Of those, just over a quarter involve intimate partners and in 4 out of 5 of these cases the killer was a male and the victim a female. The bulk of these intimate killings arose from domestic arguments.[4]

A major concern for Australia is that while the level of intimate homicide has not varied significantly over the period 1989 - 1996, in the US the number of intimate partner homicides has decreased by one third in the past 20 years.

The figures concerning the killing of children by parents and other family members is also alarming. The National Homicide Monitoring Program also reveals that for children under the age of one year, death by homicide is by far the most common cause of death, (exceeding motor vehicle accidents, accidental poisoning, falls or drownings). The figures are probably worse: 20% of the deaths for this age group are described as 'Sudden Death, Cause Unknown'. 8.5% of all homicides have victims who are children under the age of 15. 20% of those involved multiple victims. The figures show that the greatest risk of homicide to children is from members of their own family, primarily a parent (70%). Of these, almost 66% were fathers or defacto fathers of the child. More than half of the children died in incidents involving a dispute between members of their family; a quarter were killed during the imposition of 'discipline'; and the remaining quarter in other circumstances.[5]

The focus of governments on legislation designed to prevent these attacks by providing for a quicker than conventional mechanism for protecting victims of domestic violence is justified. Repeated violence over long periods in the confines of the family home too often results in death.

In reviewing the existing laws it was found that the various States and Territories have a range of approaches to all these issues. Clearly Australia needs to work out what are the best approaches.

The model also deals with important cross-jurisdictional issues such as the portability of orders (including those from New Zealand) and the interaction of the legislation with Family Law Act orders.

4 Australian Institute of Criminology, 'Trends and Issues in Crime and Criminal Justice' No.90, July 1998 drawing from the work of the National Homicide Monitoring Program for the period 1989 - 1996.

5 Australian Institute of Criminology, 'Trends and Issues in Crime and Criminal Justice' No.53, March 1996.

PART 1—PRELIMINARY

Short title and commencement

1(1) This Act may be cited as the Domestic Violence Model Law 1999.

(2) This Act commences on a day to be fixed by proclamation.

Definitions

2 In this Act—

"act of domestic violence" see section 3.

"adult" means a person who is 18 years of age or over.[6]

"aggrieved person", for part 3, division 1, see section 34.

"aggrieved protected person" means—

(a) a protected person who is stated in the protection application, or in an application for a telephone interim protection order, as the person for whose benefit the application is primarily made; or

(b) a protected person for whose benefit a domestic violence order is primarily made.

"appeal court", for part 5, see section 50.

"appeal period" see section 50.

"attached summons", for a protection application, means the summons that, under section 11, the clerk of a court attaches to the protection application.

"attending officer" see subsection 9(1).

"authorised justice" means—

(a) a Magistrate; or

(b) a justice of the peace who is a clerk of a court; or

(c) a justice of the peace .....[7]

["Chief Commissioner of Police"][8]

6 Depending on the jurisdiction, this definition may not be necessary.

7 Some jurisdictions may include other justices of the peace.

8 For the model, the term 'Chief Commissioner of Police' is used. However, a jurisdiction may need to change this term or define it in a particular way. For example, in Queensland the term is 'commissioner of the Police Service'.

Definitions

This Report contains a number of definitions additional to those that appeared in the Discussion Paper. They are largely self-explanatory, but commentary appears where it is considered useful.

'aggrieved protected person'

This is based on the 1991/Victorian model which uses the term 'aggrieved family member'. The 1991/Victorian definition relies on a broad definition of family member. In this model the term 'protected person' replaces 'family member' and avoids any fruitless debate about what is a 'family'. The aim of the model is to focus on protecting people rather than semantics.

Neither NSW, WA nor SA distinguish between family relationships and other forms of relatedness between aggressor and victim when it comes to making orders. (Though in relation to domestic violence offences police officers are required to seek apprehended violence orders in certain situations.)

The Queensland law uses the terminology of 'aggrieved spouse' and 'respondent spouse'. The basis for intervention is whether the victim is the spouse or not, this includes de factos and orders can cover people other than just the spouse.

Submissions were divided regarding the use of 'aggrieved'. A number of contributors considered that the term was cumbersome and recommended that the term 'protected person' be used instead.[9] However other contributors supported the description 'aggrieved protected person', acknowledging the need to distinguish persons coming within this definition from those described by the later definition of 'protected person'.[10] After consideration of these opposing views, the Working Group decided to retain the present title for this definition. Most submissions supported the definition's contents,[11] and no submission suggested changes other than to the title.

The definition has been recast to clarify that it covers two distinct subsets of protected persons, namely those person whose person or property is the subject of a domestic violence application *or* a domestic violence order.

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9 Women's Legal Resource Group Inc Vic, Domestic Violence Advocacy Service, Associate Professor Julie Stubbs, Women's Legal Resource Centre, Women's Legal Service SA Inc, Law Society of NSW, Legal Services Commission of SA, Victorian Community Council Against Violence, Eastern Domestic Violence Outreach Service Inc

10 Family Law Reform and Assistance Association Inc, Fitzroy Legal Service Inc, Uniting Church in Australia National Commission on Women and Men

11 Women's Legal Resource Group Inc Vic, Domestic Violence Advocacy Service, Associate Professor Julie Stubbs, Women's Legal Resource Centre, Women's Legal Service SA Inc, Law Society of NSW, Legal Services Commission of SA, Victorian Community Council Against Violence, Eastern Domestic Violence Outreach Service Inc, Family Law Reform and Assistance Association Inc, Fitzroy Legal Service Inc, Uniting Church in Australia National Commission on Women and Men

"child" means a person who is under the age of 18 years.[12]

"child protection order" means an order under [the jurisdiction's relevant child protection legislation].

["Childrens Court" means]

["clerk", for a court, means][13]

"CrimTrac", for part 3, division 2, see section 40.

"CrimTrac registrar" see section 40.

"court" means any of the following courts—

(a) if an application under this Act is made to, or transferred to, a [Magistrates Court]—the Magistrates Court;

(b) if an application under this Act is made to, or transferred to, a [Childrens Court]—the Childrens Court;

(c) if a person is found guilty of an offence involving an act of domestic violence by a court, whether on a plea of guilty or otherwise, and the court exercises a power under section 15 —the court by which the finding is made.

12 Depending on the jurisdiction, this definition may not be necessary.

13 For the model, the term 'clerk' is used. However, a jurisdiction may need to change this term or define it in a particular way.

'child'

This provision varies across jurisdictions. In Victoria a person is a child until the age of 17 years, in NSW a complainant of 16 years or over has full capacity: subsection 562C(7); but note paragraph 562G(b) under which the Children's Court can make orders where the defendant is less than 18 years of age when the complaint is made. While there is no age nominated in Queensland's domestic violence Act, other Queensland legislation usually provides 18 years. In the WA, SA and ACT law it is 18 years. In Tasmania and the NT the legislation does not define child.

A number of submissions supported this definition.[14] Some contributors also stated that the definition should encompass only those persons under the age of 16 years because some persons aged 16 or 17 years have formed domestic or de facto relationships and may wish to apply for orders in their own name without involving other family members.[15] The model has adopted this definition because it is common and the international standard for the protection of children is 18. However the Working Group acknowledges the need to allow young people to seek orders in their own right if necessary, and provision accordingly has been made in subsection 10(1) of this model.

'court'

Orders are generally dealt with, in the first instance, by the lowest tier of the court system. The definition in the Discussion Paper was only relevant to that tier and is consistent with the law in each jurisdiction.

Few submissions addressed this definition, however it was supported by most of those submissions.[16]

This definition has been recast to include courts before whom a person is found guilty of, or pleads guilty to, an offence involving an act of domestic violence. This will enable such courts to initiate protection orders as prescribed by the redrafted section 15 (section 9 in the Discussion Paper).

Some jurisdictions use different court titles, such as NSW where Magistrates Courts are termed Local Courts. Those jurisdictions will need to consider replacing the Model's court titles with their domestic terminology as necessary.

14 For example, the Legal Services Commisison of SA and the Family Law Reform and Assistance Association Inc

15 Domestic Violence Advocacy Service, Combined Community Legal Group Centres (NSW), Law Institute of Victoria, Legal Aid (NSW), Women's Legal Resources Centre, NSW Health Department

16 For example, the Women's Legal Resource Group Inc Vic and the Family Law Reform and Assistance Association Inc

"defendant"—

(a) for part 3, division 1, see section 34; and

(b) otherwise, means a person—

(i) for an application for a domestic violence order—the person against whom the application is sought; or

(ii) for a domestic violence order—the person against whom the order is made.

"domestic violence order" means—

(a) a protection order; or

(b) an interim protection order; or

(c) a telephone interim protection order.

'defendant'

A majority of jurisdictions prefer and use 'defendant' (eg, NSW). 'Respondent', which is used in the 1991/Victorian model, was preferred by some because it more closely reflected the civil nature of the proceedings. One of the jurisdictions that favoured using 'defendant' suggested that it was preferable because of the quasi-criminal nature of the proceedings. It is noted that in some jurisdictions the recipient of a civil claim is called a 'defendant'.

Submissions were divided regarding the use of the term 'defendant', with some contributors preferring 'respondent' on the basis that this is a civil matter and the descriptor 'defendant' inappropriately implies a form of criminal proceeding.[17] Other contributors agreed that 'defendant' is an appropriate term.[18] After considering the opposing views, the Working Group decided to retain the term 'defendant' on the basis that it is readily understood and already used in a majority of jurisdictions. The content of the definition was supported by all contributors who addressed this issue, except for one submission stating that children should not be capable of being defendants in a domestic violence matter.[19] However the Working Group notes that some persons under the age of 18 are married and others form domestic or de facto relationships and would be capable of committing acts of domestic violence as defined in this model. The definition of 'defendant' is therefore effectively the same as that which appeared in the discussion paper.

'domestic violence order'

This definition replaces the definition of 'order' which appeared in the Discussion Paper. It follows the 1991/Victorian model. The ACT legislation deals with protection orders and interim protection orders but not telephone interim orders. The NSW definition picks up all gradations. Queensland defines a domestic violence order to include both a 'protection order' and a 'temporary protection order'. SA, Tasmania and WA use 'restraining order' (sometimes with additional descriptions).

The content of this definition was universally supported by those submissions which addressed it[20], and two contributors also suggested using the title 'domestic violence order'.[21] The Working Group accepted that the term 'domestic violence order', which this Report adopts, better describes the nature of such orders.

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17 Legal Services Commission of SA, Queensland Police Service, Peter Dunstan

18 Presbyterian Women's Association of Australia in NSW, Women's Legal Resources Centre, Fitzroy Legal Service Inc

19 Youth Advocacy Centre Inc

20 Legal Services Commission of SA, Women's Legal Resource Group Inc Vic, Family Law Reform and Assistance Association Inc

21 Women's Legal Service SA Inc, Women's Health Statewide SA

"external protection order" means an order made under a provision of a law of another Australian jurisdiction or New Zealand that is prescribed under a regulation as a provision under which external protection orders are made or take effect, other than an order that is interim or temporary in nature.

"family contact order" see subsection 5(1).

["firearm" means a firearm under the Firearms Act.

"Firearms Act"][22]

"guardianship order" means an order under [the jurisdiction's relevant legislation for guardianship matters, for example, the Guardianship and Administrative Board Act].

"interim protection order" means—

(a) an order made under section 18 that states it is an interim order; or

(b) an order made under section 22.

["Magistrates Court" means]

"named protected person" means—

(a) a protected person who is named in a protection application, or an application for a telephone interim protection order, as a person for whose benefit the application is made other than the aggrieved protected person; or

(b) a protected person for whose benefit a domestic violence order is made other than the aggrieved protected person.

"nominated representative" see section 6.

"original court"—

(a) in part 3, division 1—see section 34; or

(b) in part 5— see section 50.

"parenting order" see Family Law Act 1975 (Commonwealth), part 7, division 5, section 64B, and Family Court Act 1997 of Western Australia, section 89.

["police officer"][23]

22 For the model, the term 'firearm' and 'Firearms Act' is used. However, a jurisdiction may need to change these terms or define them in a particular way. For example, in Queensland the term is 'weapon' and weapons are dealt with under the Weapons Act 1990.

23 For the model, the term 'police officer' is used. However, a jurisdiction may need to change this term or define it in a particular way. For example, in Queensland the term is defined in the Acts Interpretation Act 1954.

'external protection order'

The model definition is similar to the approach taken in most jurisdictions. However many call them interstate orders. This is no longer appropriate because the Standing Committee of Attorneys-General has agreed there should be provision for the registration of New Zealand orders. New Zealand has legislation which allows recognition of Australia orders. We have opted for 'external protection order' as a term which can apply to gazetted State, Territory and New Zealand orders.

Victoria uses 'interstate summary protection order' and 'New Zealand protection order', while NSW uses the term 'interstate restraint order'.

In Queensland Division 2 of Part 3 deals with the registration of domestic violence orders from other States and Territories. The terminology used is 'interstate order'.

Until recently SA was the only State which provided for registration of New Zealand orders. Accordingly the terminology used to cover orders from other Australian jurisdictions and NZ is 'foreign domestic violence restraining order'.

The ACT provides for registering interstate orders in the *Protection Orders (Reciprocal Arrangements) Act 1992*. WA provides for the recognition of orders from other Australian jurisdictions via Part 3; Tasmania in ss.106GA - 106GD of the *Justices Act 1959* and the NT at ss.17-20A of their Act.

The definition attracted little comment in submissions, but both the content of the definition[24] and the title[25] were supported. Two submission suggested changing the title to 'restraining order'[26] and 'interstate or overseas protection order'[27], but this was not favoured by the Working Group which considered that the title was clear and appropriate.

This definition is limited to domestic violence orders other than interim orders - *ie*, to orders of a final nature. See the commentary under section 35 for the rationale for this limitation.

24 Women's Legal Resource Group Inc Vic
25 Women's Legal Resources Centre (Sydney)
26 Legal Services Commission of SA
27 Women's Legal Service Inc

"possession", of a thing, includes—

(a) having it in one's custody; and

(b) having it under one's control in any place (whether or not another person has custody of it); and

(c) having an ability to obtain its custody at will; and

(d) having a claim to its custody if the claimant has committed it to the custody of another person, even though it is temporarily not in the control of the person having the claim.[28]

"premises" includes any, or part of any, of the following (whether a public place or private property)—

(a) an area of land;

(b) a building or structure (whether movable or immovable), including a dwelling house;

(c) a vehicle, vessel or aircraft;

(d) a caravan or trailer.

"property", of a person, means—

(a) property the person owns; or

(b) property that, even though the person does not own it, is—

(i) in the person's care or custody; or

(ii) used or enjoyed by the person or available for the person's use or enjoyment; or

(iii) at premises at which the person resides or works.

28 Some jurisdictions have expressed a preference to have a definition, while others have expressed a preference to rely on the common law applicable to their jurisdiction.

'possession'

This definition has been included to assist police officers to take appropriate action when seizing firearms under this Model (see section 46). Section 46 permits a police officer to seize firearms in prescribed circumstances. That power will often be used in situations of domestic trauma where access to a firearm may end with tragic results, and it is vital to ensure that such access is removed wherever possible.

Section 46 permits a police officer to remove a firearm in a person's 'possession'. There was concern amongst the Working Group that this word may be narrowly interpreted to mean literally in the possession of a person, and therefore not cover situations where a defendant, being already the subject of a domestic violence order, may secrete a firearm with another person or at a remote location for later access. It was therefore considered necessary to provide a broad interpretation.

The definition appearing in this Model is the Tasmanian definition of 'possession', which was considered to be appropriate.

'premises'

This adopts the broad definition of 'premises' in section 6 of Queensland's Act. It was considered that the term required definition in order to overcome argument whether a particular place constituted a 'premises' under this Model, and especially for the purposes of appropriately permitting the entry and search of premises under section 48.

'property'

This follows the 1991/Victorian model but covers those who live and work at home.

The definition in this Report, which incorporates elements of section 7 of Queensland's Act, is a slightly broader definition than that which appeared in the Discussion Paper. The Discussion Paper's definition may have lead to fruitless argument whether the property concerned was 'used' by the relevant person, and may not have adequately covered property in premises frequented by the person (such as a child-minding centre). The definition in this Report is intended to avoid such problems by covering *any* property in the ownership, possession or use of the relevant person.

Whilst some submissions supported the definition[29], others suggested that the scope be widened to include property owned or jointly owned by the protected person and the defendant[30], property belonging to third parties[31], and property

29 Family Law Reform and Assistance Association Inc, Women's Legal Resources Centre(Sydney)
30 Legal Services Commission of SA, Beenleigh Domestic Violence Assistance Program
31 Women's Legal Resources Group Inc Vic

"protected person" see section 4.

"protection application" means an application for a protection order.

"protection order" means—

(a) an order made under section 14 or 15; or

(b) an order made under section 18 or 19, other than an order that states it is an interim protection order; or

(c) an order that becomes a protection order under section 23.

["Registrar of Firearms" means the person who holds the office of the Registrar of Firearms under the Firearms Act.][33]

"registered external protection order"—

(a) in part 3, division 1—see section 34; or

(b) in part 3, division 2—see section 40.

"relevant family contact order" see subsection 5(2).

33 For the model the term 'Registrar of Firearms' is used. However, a jurisdiction may need to change this term or define it in a particular way. For example, in Queensland, the commissioner of police is responsible for keeping the relevant register under the Weapons Act 1990.

which is not owned by the protected person but which is used by that person[34]. The Working Group agreed that the definition should include property described by the last point and noted that the Discussion Paper's definition already did so.

After considering these submissions the Working Group decided that the definition should not be significantly changed. This was because the core purpose of this model legislation is to ensure the safety of threatened persons and that other legislation is more appropriately placed to deal with property issues. This view was supported by NSW Magistrate Shaughan McCosker, who submitted that the thrust of the legislation is to provide personal protection from physical harm or abuse, and that other legislation, such as the *Family Law Act 1975*, protects the property rights of individuals and should be utilised if necessary.

The word 'property' appears in the definition of 'domestic violence' and certain contributors were concerned to ensure that the definition of 'property' permitted orders to be obtained in situations where the defendant resorts to threats to the protected person's children or animals.[35] The Working Group believes that this is desirable, but considered that this has already been achieved in the model by the definitions of 'property' and 'domestic violence'.

34 Tasmanian Office of the Status of Women, Legal Aid Queensland, Law Council of Australia

35 Women's Legal Resources Group Inc Vic

"relevant party to a proceeding", for a proceeding in relation to a protection application or application for a telephone interim protection order, or in relation to a domestic violence order, means all of the following—

(a) the applicant for the application or order and the defendant against whom the application is sought or order is made;

(b) if the aggrieved protected person was not a party to the proceeding and there is no nominated representative for the aggrieved protected person—the aggrieved protected person;

(c) if there is a nominated representative for the aggrieved protected person named in the application or order but neither the nominated representative or aggrieved protected person were the applicant for the application or order—the nominated representative for the aggrieved protected person;

(d) if there is a nominated representative for the defendant for the application or named in the order but the nominated representative was not a party to the proceeding—the nominated representative for the defendant.

"representative" see section 6.

"telephone" includes facsimile, radio and any other device that may be used as a way of communicating.

"telephone interim protection order" see section 9.

‘relevant party to a proceeding’

This new definition is designed to bring together in one description all the persons who are parties to an application and consequent order. It is intended that use of this definition will reduce some of the wordiness associated with aspects of the Discussion Paper when it individually listed such parties within a number of sections. It is important that the procedures allow for representation of an aggrieved protected person: for example, when he or she is a child or incapable.

Meaning of "act of domestic violence"

3(1) An "act of domestic violence" is any one of the following acts that a person commits against a protected person—

(a) causing or threatening to cause a personal injury to the protected person, or the abduction or confinement of the protected person;

(b) causing or threatening to cause damage to the protected person's property;

(c) causing or threatening to cause the death of, or injury to, an animal, even if the animal is not the protected person's property;

(d) behaving in a harassing or offensive way towards the protected person;

(e) stalking the protected person.

(2) A person stalks another person (the "other person") if—

(a) the person commits any of the following acts on at least 2 separate occasions—

(i) follows the other person;

(ii) loiters outside the place of residence of the other person or some other place frequented by the other person;

(iii) telephones the other person;

(iv) enters or interferes with property in the other person's possession;

(v) gives or sends offensive material to the other person, or leaves offensive material where it may be found by, given to or brought to the attention of the other person;

(vi) keeps the other person under surveillance;

(vii) acts in any other way that could be expected to arouse fear in a reasonable person; and

(b) the person commits the acts with the intention of causing by the acts—

(i) harm to the other person or a third person; or

(ii) the other person, or a third person, to fear harm to any person.

Meaning of 'act of domestic violence'

The 1991/Victorian model has no equivalent and repeats the various acts of domestic violence each time it needs to be mentioned. That approach adds to the wordiness of each provision. The Model is also more explicit in its description of what conduct may attract an application under the legislation.

The approach adopted in this model is similar to the Queensland law. The Queensland definition has the benefit of being self contained, however uses the fault element of 'wilfulness' which is more appropriate to criminal legislation and unnecessarily complicates what is required to be proved. This modified version of the Queensland law has terminology which should be acceptable to all jurisdictions. Another advantage of using a definition of 'domestic violence' is that it assists those using the legislation to focus on what we include in this term. Abduction and confinement were added to the discussion paper's definition.

The definition used in NSW requires looking up the definition of a 'personal violence offence' and then each individual section listed. In Victoria the components are specified in the order making power. The definition is relevant to telephone intervention orders. SA defines domestic violence in subsection 4(2) in essentially the same terms, though it is slightly broader as any behaviour that arouses fear and apprehension in a family member could constitute domestic violence. It is significant that two or more of the acts specified must have occurred before the Act will say that domestic violence is occurring.

As noted above the Tasmanian and new WA schemes are not focussed on domestic violence situations. In WA the violence restraining orders may be issued where any listed 'violent personal offences' are likely to be committed or the defendant behaves in a manner which can reasonably be expected to cause the aggrieved protected person fear (s.11). The 'misconduct restraining order' may be issued where the respondent is likely to behave in a manner that could reasonably be expected to intimidate or offend the applicant, cause damage to property, or is or is likely to lead to a breach of the peace (s.34). Section 4A of the ACT Act is similar to the model definition in that it lists the types of conduct which constitute domestic violence. Note that the ACT provision specifically includes a breach of a protection order as an act, of itself, constituting domestic violence.

The discussion paper's definition of 'domestic violence' attracted considerable attention in submissions and was supported in principle.[36] In particular the specific inclusion of 'abduction or confinement' received strong endorsement from contributors.[37]

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36 For example, Aboriginal Legal Service of WA, Department of Immigration & Multicultural Affairs and the Office of the Status of Women

37 Lismore Women's and Children's Refuge Inc, Edward Free, Victorian Community Council Against Violence, Combined Community Legal Centres Group (NSW), Julie Hansen, Legal Aid WA, Dr Patricia Easteal, WESNET Inc, Maria Gaglia, Presbyterian Women's Association of Australia in NSW, Queensland Police Service, Queensland DPP

(3) For subsection (2), it is immaterial that—

(a) the acts occurred outside [this State/Territory], as long as at least one of the acts committed by the person occurred—

(i) in [this State/Territory]; or

(ii) when the person or other person was in [this State/Territory]; or

(b) the other person did not actually fear the person would personally cause harm or arrange for someone else to cause harm.

Many contributors additionally stated that whilst the definition was appropriately broad it would be useful to explicitly include certain forms of unacceptable behaviour in the definition in order to provide more guidance as to what constitutes domestic violence. Suggested forms of unacceptable behaviour included intimidation[38], assault[39], threats or harm to animals[40], humiliating or demeaning behaviour[41], stalking[42], emotional abuse[43], psychological abuse[44], sexual assault[45], spiritual abuse[46], financial abuse[47], or any behaviour which causes or is intended to cause fear to the victim.[48] The Working Group accepted this argument in part and in particular agreed that 'stalking' and 'threats to, and acts against, pets or other animals' should be explicitly included as these forms of abuse might not otherwise be interpreted by courts to be domestic violence. The latter element was strongly supported in submissions from disabled persons' groups, which made the point that a particularly cruel form of domestic violence involves threats to the safety of a

38 Magistrate P Sloan, Bega Valley Domestic Violence & Sexual Assault Centre, Survivors, Immigrant Women's Speakout Association NSW Inc, Relationships Australia, Illawarra Legal Centre Inc, Queensland DPP, NSW Department for Women, Office of the Status of Women, Legal Aid Queensland, WESNET Inc, Law Council of Australia, NSW Department of Community Services, Law Society of NSW

39 Magistrate P Sloan, Victoria Police, NSW Health Department, Victorian Community Council Against Violence, Women's Legal Resource Group Inc Vic, Women's Legal Service SA Inc, Women's Health Statewide SA

40 Dr Patricia Easteal, NSW Council on Violence Against Women, Women With Disabilities (Australia)

41 Bega Valley Domestic Violence & Sexual Assault Centre, Survivors, Immigrant Women's Speakout Association NSW Inc, Relationships Australia, Illawarra Legal Centre Inc, Women With Disabilities (Australia), NSW Department for Women, Office of the Status of Women

42 Magistrate P Sloan, Bega Valley Domestic Violence & Sexual Assault Centre, Survivors, Immigrant Women's Speakout Association NSW Inc, Relationships Australia, Domestic Violence Coordinating Committee (South Tasmania), Women's Legal Service (Tasmania), Survivors, Education Centre Against Violence, Legal Aid (NSW), Women's Legal Service Inc, Tasmanian Office of the Status of Women, Women With Disabilities (Australia), NSW Department for Women, Office of the Status of Women, WESNET Inc, Law Society of NSW

43 Bega Valley Domestic Violence & Sexual Assault Centre, Survivors, Immigrant Women's Speakout Association NSW Inc, Relationships Australia, Laurel House, Women's Legal Service Inc, Women With Disabilities (Australia), NSW Department for Women, Office of the Status of Women

44 Bega Valley Domestic Violence & Sexual Assault Centre, Survivors, Immigrant Women's Speakout Association NSW Inc, Relationships Australia, Laurel House, Women's Legal Service Inc, Queensland DPP, Women With Disabilities (Australia), NSW Department for Women, Office of the Status of Women

45 Bega Valley Domestic Violence & Sexual Assault Centre, Survivors, Immigrant Women's Speakout Association NSW Inc, Relationships Australia, Associate Professor Rosemary Hunter, Laurel House, Queensland DPP, Office of the Status of Women

46 Women's Legal Service Inc, Queensland DPP

47 Immigrant Women's Speakout Association NSW Inc, Queensland DPP, Women's Legal Services Inc

48 Victorian Community Council Against Violence, Chisholm Inc, Associate Professor Julie Stubbs, Women's Legal Service Inc, Women's Legal Service SA Inc, Women's Health Statewide SA, Law Council of Australia, NSW Department of Community Services

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disabled person's guide dog or other animal companion. This element is broadly defined to include both animals that are the property of the protected person or any other person. The inclusion of 'stalking' in the definition made it necessary to define stalking in the Model (see section 3). The definition is directly drawn from the definition of stalking contained in sections 5.1.22 and 5.1.23 of the Model Criminal Code Report "Non-fatal Offences Against the Person" (October 1998).

For the reasons given in the commentary to section 14 of this Model, the Working Group also accepted submissions that behaviour which causes the victim fear should also be the basis for protection orders. However the Working Group considered that such behaviour would be almost limitless in its variety and difficult to properly define, and that specifically listing types of such behaviour in this definition would run the risk that courts might interpret other unlisted forms of unacceptable behaviour not to constitute domestic violence by virtue of their omission from a tightly or narrowly defined definition. It was therefore decided that a better approach would be to expand the grounds for obtaining a protection order in section 14 to also include a broadly based 'reasonable fear test'.

The Working Group also considered whether other suggested specific forms of abuse, such as intimidation, humiliating or demeaning behaviour, and behaviour which causes fear to the victim, should be specifically listed within the definition of domestic violence. It was decided that the better approach is to cover all of these forms of abuse with a single broadly based descriptor in the definition. In this regard the Working Group considered that the present paragraph (c) of the definition was very broadly structured and would be sufficient to cover all of the remaining types of unacceptable behaviours suggested in submissions.

A few contributors suggested that the title of the definition should be changed from 'domestic violence' to 'violence' or 'prohibited behaviour' because of the connotations of women or persons living in domestic situations.[49] However the Working Group believes that it is important to retain the present title in order to clearly identify and emphasise the fundamental nature of this model legislation.

One contributor stated that the term 'violence' is inappropriate in situations where no physical violence is involved, and the term should be reserved for acts of physical violence with the definition being amended accordingly.[50] The Working Group considers that all of the forms of abuse covered by the definition constitute a form of violence against the victim, and is not inclined to remove the word 'violence' from the definition.

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49 Victorian Community Council Against Violence, Women's Legal Resource Group Inc Vic, Fitzroy Legal Service Inc, National Council of Single Mothers and Their Children, Domestic Violence and Incest Resource Centre

50 Former Federal Member for Dickson, Mr Tony Smith

Meaning of "protected person"

4.(1) A "protected person", in relation to another person, means—

(a) someone who is or was a spouse of the other person; or

(b) someone who is or has been a relative of the other person; or

c) a child who -

(i) ordinarily resides or resided with the other person; or

(ii) regularly resides or stays, or resided or stayed, with the other person; or

(d) a child of whom the other person is a guardian; or

(e) someone who has or has had an intimate personal relationship, or other personal relationship, with the other person; or

(f) someone who is or has been ordinarily a member of the other person's household.

(2) In subsection (1)—

"other personal relationship" means a personal relationship of a domestic nature between two persons in which the lives of the persons are or were enmeshed and the actions of one of them affect or affected the other.

"relative", in relation to a person, means—

(a) someone who is a relative of the person; or

(b) if the person lives with, or lived with, another person (the "partner") and the person and partner are spouses under the definition "spouse", paragraph(b) or (c)—someone who is a relative of the partner;

(c) for someone not within the ordinary concept of a relative of the person—someone whom it is reasonable to regard as a relative, especially considering that for some people the concept of a relative may be wider than is ordinarily understood, including the following people—

(i) Aboriginal people and Torres Strait Islanders;

(ii) members of communities with non-English speaking backgrounds;

(iii) people with particular religious beliefs.

Meaning of 'protected person'

This definition sets the scope of the legislation. We have used the term 'protected person' in preference to 'family member' or other terms which fuel fruitless debate about what is or is not a family. The use of the word 'protected' is consistent with our decision to describe the orders under the model as 'protection orders.' This follows the NSW approach.

The definition is similar to the 1991 model, except for paragraph (e) (intimate relationships) which has been added to the Victorian definition.

This differs from some jurisdictions. For example, in Queensland ss.13-15 specifically exclude same-sex partners. However other jurisdictions include same sex couples either as 'householders' or by reason that their legislation goes beyond domestic relationships. It was recognised that this is an issue where it is unlikely there will be a complete nationwide consensus and the Discussion Paper included optional provisions which encompass the broader definition. The broader definition, based on paragraphs (e) and (f), included more than just same sex couples.

The 'protected person' definition ties in the protection of an order to those listed under it where they have the specified relationship with a person specified in the order, whether they be the alleged perpetrator or the person who is being protected.

The approach taken in relation to relatives is simpler than the 1991/Victorian model which lists them in detail.

This definition attracted considerable comment from submissions and received support from a majority of contributors.[51] Of particular concern to many contributors is whether the definition is broad enough to include all personal or other relationships where domestic violence, as it is understood and defined in this model, could be committed. Some contributors suggested that the definition should specifically include persons in shared accommodation[52],

51 For example, Lismore Women's and Children's Refuge Inc, Family Law Reform and Assistance Association Inc, Education Centre Against Violence, Women's Legal Resources Centre (Sydney), Victorian Law Institute, Julie Hansen, Anglican Church Diocese of Sydney, Federation of Ethnic Communities' Council of Australia inc, Aboriginal Legal Service of WA Inc, Presbyterian Women's Association of Australia in NSW, Legal Aid Queensland, Law Council of Australia, Department of Immigration & Multicultural Affairs

52 Bega Valley Domestic Violence & Sexual Assault Committee, Victoria Police, Domestic Violence and Incest Resource Centre, Illawarra Legal Centre Inc, Chisholm Inc, Associate Professor Julie Stubbs, Legal Aid WA, WESNET Inc, Women's legal Resources Centre (Sydney), NSW Health Department, Uniting Church in Australia National Commission on Women & Men, Legal Aid Queensland, Law Council of Australia, Department of Immigration & Multicultural Affairs, Fitzroy Legal Service

"spouse", of a person, includes any of the following—

(a) the person's husband or wife, or a former husband or wife of the person;

(b) someone else with whom the person is living, or has lived, as if that someone were the spouse of the person even though they are not or were not married to each other;

(c) someone else whom, according to the person's Aboriginal, Torres Strait Islander or other cultural tradition, the person considers to be the person's spouse or previously considered to be the person's spouse.

boyfriend/girlfriend relationships[53], dating relationships[54], same sex partners[55], persons in care-giving situations[56], and non-cohabiting intimate relationships.[57] The Working Group noted the strength of support for these arguments, and the definition has been expanded by inclusion of persons who do not fall within the traditional concepts of a family but who nonetheless merit the protection of these laws. However the Working Group is keen to ensure that the scope of this model is limited to domestic situations and is not extended to situations of a casual or purely temporary nature, such as dating relationships. The Working Group considers that these relationships lie beyond the scope of 'domestic' interaction and that other protective legislation, such as laws proscribing stalking, are better suited to dealing with those situations. Accordingly the test of 'enmeshment of lives' applies to limit the extended scope of this definition and this test appears within the definition.

Some submissions[58] called for the broadening of the model to permit orders for all persons who are in fear of violence, regardless of the nature of the relationship, if any, between the victim and the perpetrator (similarly to the NSW system). However the Working Group considers that such an open-ended scheme lies beyond the scope of its task to prepare domestic violence legislation, and whilst acknowledging the need to ensure that all persons are provided the protection they require, considers that relationships and situations that lie beyond the scope of this definition are better dealt with by other protective laws (such as those proscribing stalking).

'spouse': This definition combines the Discussion Paper definitions of 'spouse' and 'de facto spouse'.

The 1991 model included a spouse according to Aboriginal tradition, but this was not included in the Victorian law. However it is consistent with the NT provision. We have followed the Queensland law by adding "other cultural traditions".

The inclusion of former spouse, de facto spouse and former de facto spouse is common to the ACT and Queensland.

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53 Victorian Community Council Against Violence, Legal Services Commission of SA

54 Queensland DPP

55 Almost all contributors supported the inclusion of same sex relationships in this definition. Only three submissions opposed this inclusion, namely from Peninsula Presbyterian Charge, Edward Free, and the Queensland Police Service.

56 Victorian Community Council Against Violence, Bega Valley Domestic Violence & Sexual Assault Committee, Victoria Police, Beenleigh Domestic Violence Assistance Program, NSW Council on Violence Against Women, Laurel House, Women With Disabilities (Australia), NSW Department for Women, Office of the Status of Women, WESNET Inc, Relationships Australia

57 Women's Legal Service SA Inc, Women's Health Statewide SA

58 NSW Department for Women, Women's Legal Service SA Inc, Women's Health Statewide SA, NSW Department of Community Services

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Only current spouses and de factos are included in the definition in SA though the definition of family member extends this to cover former spouses.

As noted above the nature of the schemes in NSW, WA and Tasmania means that the definition of spouse is not relevant to them.

The definition of 'spouse' was supported by those submissions which addressed it.[59]

The Discussion Paper definition of 'de facto spouse' was supported by all submissions that addressed that issue,[60] with some supporting its extension to same sex relationships and former de facto relationships.[61] However three submissions generally objected to same sex relationships being covered by the legislation.[62] This is discussed further under the definition of 'protected person' (see above).

59 Legal Services Commission of SA, Women's Legal Resource Group Inc Vic, Family Law Reform and Assistance Association Inc, Women's Legal Resources Centre (Sydney)

60 Legal Services Commission of SA, Women's Legal Resources Group Inc Vic, Family Law Reform and Assistance Association Inc

61 Legal Aid (NSW), Women's Legal Service SA Inc, Women's Health Statewide SA

62 Edward Free, Queensland Police Service, Peninsula Presbyterian Charge

Meaning of "family contact order" and "relevant family contact order"

5(1) A "family contact order" means—

(a) a Division 11 contact order within the meaning of the Family Law Act 1975 (Commonwealth), part 7; or

(b) an order made under the Family Court Act 1997 of Western Australia, section 89.

(2) A "relevant family contact order", in relation to a protection application or an application for a telephone interim protection order, means a family contact order that relates to access—

(a) between protected persons; or

(b) between the defendant and either a child of the defendant or a child of a protected person.

Meaning of 'family contact order' and 'relevant family contact order'

These definitions appeared in section 37 of the Discussion Paper. They have been redrafted to improve clarity and in particular the reference to Western Australian legislation.

Meaning of "representative" and "nominated representative"

6(1) A "representative", for a person, means any of the following—

(a) if there is a guardianship order for the person, including a child—a guardian under the guardianship order;

(b) if the person is a child—a parent of the child or an adult with whom the child ordinarily resides, or regularly resides or stays;

(c) if the person is a child about whom there is a child protection order, parenting order or family contact order—a person who, under the order, is responsible for the child;

(d) if the person is an adult, or a child who is 14 years of age or more—an adult appointed in writing by the person to represent the person.

(2) A person who, apart from this subsection, would be a representative for another person (the "other person") is not a representative for the other person if a protection application or application for a telephone interim protection order—

(a) names the other person as an aggrieved protected person or named protected person and the person is the defendant for the application; or

(b) names the person as the aggrieved protected person or named protected person and the other person is the defendant for the application.

(3) A "nominated representative", for an aggrieved protected person, means—

(a) if the person is the aggrieved protected person in relation to a protection application or an application for a telephone interim protection order—a representative of the person who is named in the application as the nominated representative for the aggrieved protected person; or

(b) a representative of the person who is ordered by a court to be the nominated representative for the person for an application or order.

(4) A "nominated representative", for a defendant, means—

(a) if the person is the defendant in relation to a protection application, or an application for a telephone interim protection order, and files a document in the proceeding naming the representative as the nominated representative for the defendant—the named person; or

Meaning of 'representative' and 'nominated representative'

The definitions in this section draw together the various descriptions of persons who are ordinarily responsible for minors or other persons who lack legal capacity or who otherwise may require adult support, guidance or representation at matters such as court hearings. Lists of such persons appeared in a number of provisions throughout the Discussion Paper and imparted unnecessary wordiness to those provisions.

Subsection 6(1) incorporates the Discussion Paper definitions of 'parent' and 'guardian'. Comments were received from contributors about those definitions as follows:

'*Parent*': The definition of 'parent' received support from a number of submissions[63], of which two contributors suggested that the definition be extended to include temporary foster parents.[64] The Working Group accepted this suggestion and considered that the present definition achieves this in the phrase 'with whom the child ... regularly resides'. Another submission suggested that combining the concepts of 'parent' and 'guardian' insults and demeans the role of parents:[65] the Working Group did not accept this view.

'*Guardian*': Two contributors[66] queried the specific mention of 'guardian' in paragraph (d) of the Discussion Paper but not of 'parent', whilst noting that 'parent' is defined elsewhere to include 'guardian'. The reason for this apparent inconsistency in the Discussion Paper is that a parent of a person would come within the meaning of paragraph (b), whereas a guardian would not, and hence the need for specific mention of guardians in this definition.

Following consideration of all these comments, the Working Group considered that the redrafted subsection 6(1) accommodated contributor's concerns and better combined all persons fitting these descriptions in one definition.

Subsection 6(2) excludes certain persons who would otherwise qualify as representatives where those persons are contrary parties to an order.

Subsection 6(3) recognises that in relation to a person there may be a number of other persons who would qualify as representatives - for example, a child's parents. It would not be satisfactory for multiple persons to appear as representatives of the person in domestic violence matters. Accordingly this subsection restricts potential representatives to those who, whilst qualifying as a representative of a person, are nominated as the personal representative of that person in a document lodged with the court or who is directed by a court to be the nominated representative.

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63 Legal Services Commission of SA, Family Law Reform and Assistance Association Inc, Women's Legal Resources Centre (Sydney)

64 Women's Legal Resources Group Inc Vic, Domestic Violence and Incest Resource Centre

65 Garrick Small

66 Chisholm Inc, Women's Legal Service Inc

(b) a representative of the person who is ordered by a court to be the nominated representative for the person for an application or order.

(5) This section does not affect another provision of this Act that states a police officer may make an application for a protected person or an aggrieved protected person.

(6) On application by or for an aggrieved protected person or a defendant, or on its own initiative, a court may—

(a) order a representative of an aggrieved protected person or defendant to be the nominated representative for the person; or

(b) make an order that a representative for the aggrieved protected person or defendant is no longer the nominated representative for the person, whether or not the court appoints another representative for the person.

The ability of police officers to be applicants where permitted by this Model is not affected by this section: see subsection 6(5).

Subsection 6(6) permits a court to appoint, or remove, a nominated representative upon application by any person or upon its own initiative. The latter power may be important where a court concludes that a nominated representative actions are *mala fides* or is otherwise not acting in the best interests of the represented person.

Jurisdiction of Magistrates Court and Childrens Court

7(1) Each of the following courts has jurisdiction to hear and decide an application under this Act (other than an application for a telephone interim protection order) in relation to which the aggrieved protected person or the defendant is a child when the application is made—

(a) the Childrens Court;

(b) a Magistrates Court.

(2) Subsection (1) applies—

(a) even if there is a nominated representative for the aggrieved protected person or for the defendant; and

(b) despite anything to the contrary in [the Acts establishing those courts and any relevant child protection legislation of the jurisdiction].

(3) If an application is made to a Magistrates Court and the Magistrates Court considers that, in all the circumstances, the matter should be dealt with by the Childrens Court, the Magistrates Court may discontinue the proceeding and transfer the application to the Childrens Court.

(4) If an application is made to the Childrens Court and the Childrens Court considers that, in all the circumstances, the matter should be dealt with by a Magistrates Court, the Childrens Court may discontinue the proceeding and transfer the application to a Magistrates Court.

(5) A Magistrates Court or Childrens Court has jurisdiction to extend, vary or revoke an interim protection order or protection order made by it or another court.

Jurisdiction of Magistrates Court and Childrens Court

This follows Victoria. Due to the variety of different systems dealing with the protection and custody of children in each jurisdiction, it is difficult to make concrete proposal as to how the model domestic violence legislation should interact with child protection and custody laws. The contents of this is not an important issue for the modelling purposes.

This provision essentially repeats the equivalent Discussion Paper provision, with minor variations to improve clarity. One submission commented on this section and supported the model provision.[67]

67 Women's Legal Resource Group Inc Vic

PART 2—DOMESTIC VIOLENCE ORDERS

Division 1—Police response required to domestic violence

Obligations of police officers to investigate certain beliefs or suspicions

8(1) This section applies if a police officer believes or suspects an act of domestic violence has been committed, is being committed or is likely to be committed, the police officer must investigate whether the act of domestic violence has been committed, is being committed or is likely to be committed.

(2) If the police officer investigates and does not make a protection application, or an application for a telephone interim protection order, the police officer must make a written record of the officer's reasons for not making an application.

Obligations of police officers to investigate certain beliefs or suspicions

This provision is new to the Model. It draws directly from section 562H of the NSW Act and s54 of the Queensland Act.

This section is intended to provide police officers with clear direction concerning their role in obtaining orders where they are needed and to encourage officers to consider seeking orders in domestic situations. It operates alongside section 9, which establishes a simple and effective method for police officers to obtain orders by telephone in certain circumstances. This section also provides victims of domestic violence with the assurance that police officers will assist with obtaining orders when a crisis situation effectively prevents those victims seeking orders themselves.

Many submissions in relation to section 7 of the Discussion Paper argued in strong terms that there should be greater compulsion on police officers to make a complaint for a protection order where it is warranted.[68] These contributors asserted that the perception is that in some instances police officers are reluctant to seek protection orders where there has been a domestic disturbance but no direct evidence of violence (such as an injury). The Working Group accepted these arguments and concluded that elements from both NSW and Queensland legislation could usefully be incorporated in order to overcome this perceived problem. The Queensland legislation provides that a police officer who has suspicions that an act of domestic violence has taken place, or which may take place, is obliged to investigate and determine whether those suspicions are well founded. NSW practice is that a police officer must make an application for an order in specified circumstances, and if no application is made then the police officer must record in writing the reasons for not making such an application. The Working Group considered that a provision which required a police officer to make an application for an order in *all* situations (similarly to the NSW provisions) would introduce an undesirable degree of inflexibility to the model provisions: nonetheless, the Working Group approved of the NSW practice of obliging police officers to record written reasons for not making an application and saw this as a positive means of ensuring that orders are sought by police when required. A hybrid of the Queensland and NSW approaches has been devised and this new provision has been created to incorporate these concepts. This approach was suggested by some contributors.[69]

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68 Bega Valley Domestic Violence and Sexual Assault Committee, Beenleigh Domestic Violence Assistance Program, Disability Council of NSW, Illawarra Legal Centre Inc, Associate Professor Julie Stubbs, NSW Council on Violence Against Women, Western Region Domestic Violence Collective, WESNET Inc, Women's Legal Resources Centre (Sydney), NSW Health Department, Domestic Violence Interagency (ACT), Immigrant Women's Speakout Association NSW Inc, Legal Aid WA, Office of the Status of Women

69 Women's Legal Service SA Inc, Women's Health Statewide SA

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One contributor suggested that an obligation on police to make a written record of the reasons for not making an application is unjustified, and that such action, if necessary, should form part of the administrative procedures for police (and does so in Victoria).[70] The Working Group considers that the provision of written reasons for not making an application are an important part of a transparent process, because it will assist police officers to consider whether an application is warranted and necessary in each individual instance. However the Working Group accepts that such a provision need not necessarily appear within specific domestic violence legislation, provided that appropriate provision is made elsewhere.

70 Victoria Police

Police officer may apply for telephone interim protection order

9(1) This section applies to a police officer who attends an incident involving a person, and a protected person in relation to the person, in the course of the officer's duties (an "attending officer").

(2) The attending officer may, on the officer's own initiative or at the request of a protected person, apply by telephone to an authorised justice for an interim protection order (a "telephone interim protection order") if—

(a) the attending officer, after investigating as required under section 8, believes or suspects an act of domestic violence has been committed, is being committed or is likely to be committed, by the person against the protected person or another protected person; and

(b) because of the time at which, or the place at which, the incident occurred—

(i) it is not practicable for a protection application to be made to a court by the protected person, the other protected person or the attending officer; or

(ii) if a protection application were made to a court—it is not practicable for the court to hear and decide the application quickly; and

(c) the attending officer believes a telephone interim protection order is necessary to ensure the safety of a protected person or to prevent substantial damage to any property of a protected person.

(3) In deciding whether an application for a telephone interim protection order is necessary to ensure the safety of a protected person or to prevent substantial damage to any property of a protected person, the attending officer must consider whether—

(a) a protection application has been made but not heard; or

(b) the protected person is an adult and intends to make a protection application.

Police officer may apply for telephone interim protection order

This provision comprises subsections 11(1) - (4), (7) and (16) of the Discussion Paper. It was considered that the Discussion Paper's section 11 comprised too many concepts, each of which could be better expressed - and this aspect of the Model rendered more manageable - as separate sections. The remaining subsections of section 11 now appear as sections 24 - 26.

The 1991 model (s.10-12) provided for applications for orders by telephone. The equivalent Victorian provision (s.8) was more restrictive in that it limited the use of the procedure to weekends and outside working hours during the week.

The Model provision mirrors section 562H of the NSW *Crimes Act 1900* where we are informed it is working well accompanied with appropriate police training and procedures.

The relevant Queensland provisions are contained in sections 54, 55, 56, 57, 71, 72 and 73. The general effect of section 10 above is reproduced, with minor differences. Some points of difference are that under the Queensland Act the police are under a duty to apply for a temporary order only if they arrest the offender: sections 69 and 71. The officer has a duty to make an application for a telephone interim protection order if the respondent spouse has been taken into custody and then released on conditions set by the watch-house keeper, and it is unlikely that a protection application could be determined quickly. Under the Queensland Act the telephone interim order lasts for no more than 30 days or until the next sitting day of the Court, if not within 30 days.

The SA Act contains a similar provision in section 8. One restraining feature may be that the telephone application must be made to the Court, there is no mention of out of hours applications. This may be resolved by the definition of a Magistrates Court in the relevant SA law. An interesting feature is the requirement that the conversation be taped: subsection (2).

The Tasmania provisions are at s.106DA. These provisions are not as detailed nor as comprehensive as the NSW provisions but are similar except they only last for 5 days. The longer period of 14 days with an option for the court to extend it was favoured as a more flexible approach which will have benefits in remote areas as well as providing more security for the victim.

Division 2 of the new WA law provides an application may be made by telephone for a violence restraining order (ie where there is likely to be a violent personal offence, not the misconduct restraining order - which applies where there is likely to be offensive conduct or property damage). In other respects the procedure is similar to the model except s.22 of the WA law which less demanding than the NSW law. Under s.22 the defendant may be detained for up to 2 hours if the police officer reasonably believes the person will not remain at a specified location for the purpose of serving the order.

(4) If the attending officer believes a protected person is in imminent danger of personal injury from the defendant, the officer may, in the application for a telephone interim protection order, ask the authorised justice to prohibit or restrict the defendant from—

(a) approaching the protected person; or

(b) entering or remaining at any stated premises occupied by the protected person, whether or not the defendant has a legal or equitable interest in the premises.

(5) The attending officer must inform the authorised justice about any relevant family contact order, or of any pending application for a relevant family contact order, of which the officer is aware.

(6) However, a telephone interim protection order is not invalid merely because an attending officer fails to inform the authorised justice about a relevant family contact order.

(7) The attending officer's application for a telephone interim protection order may be communicated to the authorised justice by another police officer if it is not practicable for the attending officer to apply, by telephone, directly to the authorised justice.

The NT equivalent is s.6 of their law.

The ACT law does not have these provisions.

Submissions overwhelmingly favoured the concept of telephone interim protection orders and the Model provision was broadly supported.[71]

The obligation in subsections 11(3) and (4) of the Discussion Paper (now subsections 9(2) and 9(3)) on police officers to make an application for a telephone interim protection order has been changed to a discretion. The Working Group considered that the obligation sat at odds with section 7 of the Discussion Paper (s.10 of this Report) which enabled, but did not oblige, police officers to apply for domestic violence orders in the circumstances described by that section. Further, the Working Group considered that an inflexible obligation to make an application would result in some orders being obtained in circumstances where they were neither necessary nor useful. The Working Group considered that the better approach lay in enabling police officers to make an application where he or she considered that it was warranted and necessary, and requiring the police officers to give reasons if they did not make an application. In this way the Model achieves both the appropriate flexibility and gives police officers the responsibility, and onus, to make applications where they in their professional capacity consider such applications are appropriate. Support for this approach came from several contributors.[72] Subsections 9(2) and 9(3) therefore have been amended to achieve consistency with the new provision in section 8, which obligates a police officer who suspects that an act of domestic violence has taken place, or which may take place, to investigate and determine whether those suspicions are well founded. Following investigation, if the police officer does not make an application for a protection order or telephone interim protection order the police officer must record in writing the reasons for not making such an application.

Several contributors addressed the issue of who may apply for a telephone interim protection order. Contributors variously suggested that other persons who should be able to apply must include the protected person, Justices of the Peace, health professional, legal workers, domestic violence workers and Aboriginal Community Council nominees.[73] The Working Group accepted the need for

71 Legal Services Commission of SA, NSW Magistrate Shaughan McCosker, Federation of Ethnic Communities' Council of Australia Inc, National Council of Single Mothers and Their Children, Presbyterian Church of Australia NSW "Church and Nation" Committee, Domestic Violence Advocacy Service, Department of Immigration and Multicultural Affairs, NSW Department for Women, NSW Department of Community Services, Office of the Status of Women

72 Domestic Violence Coordinating Committee - South Tasmania, NSW Magistrate Shaughan McCosker, Victoria Police, Tasmanian Office of the Status of Women, Legal Aid Queensland, Law Council of Australia

73 Aboriginal Legal Service of WA (Inc), Legal Aid WA, Women With Disabilities (Australia), Office of the Status of Women, WESNET Inc

Model

flexibility, particularly in relation to remote areas where police resources may not always be immediately available, but considered that this is an issue better addressed by individual jurisdictions when examining their own domestic violence legislation.

One contributor suggested that the types of directions, restrictions or prohibitions available under telephone interim protection orders should be the same as those available under other domestic violence orders.[74] The Working Group agreed with this suggestion and the ostensible distinction imposed by subsection 11(7) of the Discussion Paper has been removed.

The grounds in subsection 9(2)(d) upon which a police officer may make an application for a telephone interim protection order have been extended to include situations where the officer believes it is necessary to restrain the defendant to prevent substantial damage to the protected person's property. This approach was suggested by one contributor,[75] although the Working Group considered that it should be restricted to *substantial* damage to property. This provision would encompass situations where the defendant does not pose a threat to the safety of a protected person but who, in the police officer's belief, does pose a threat to property such as the guide dog or other animal companion of a disabled person, or who has threatened to burn down the protected person's home. It is not acceptable that a protected person, who may be traumatised by a long history of abuse, should be faced with the destruction of such property. The extended provision is intended to provide needed protection in those instances.

74 Legal Aid WA

75 Fitzroy Legal Service Inc

Division 2—Protection applications

Applying for protection orders

10(1) Each of the following persons may make a protection application to a court—

(a) a protected person who is an adult;

(b) a protected person who is a child 14 years of age or more if the court gives leave to the child to make the protection application; or

(c) for a protected person for whom there is a guardianship order—a guardian for the protected person;

(d) a police officer.

(2) Also, the following persons may make a protection application to a court on behalf of a primary applicant—

(a) a person appointed by a primary applicant who is an adult;

(b) a person appointed by a primary applicant who is a child of 14 years of age or more, if the court gives leave for the person to make the protection application for the child;

(c) a person appointed by the court, if the court considers the primary applicant can not make the protection application.

(3) Even though a child mentioned in subsection (1)(b), or another person mentioned in subsection (2)(b), may only make a protection application with the leave of the court, the child or other person may make the protection application if—

(a) the child or other person seeks the leave of the court to make the protection application as part of the protection application; and

(b) the court gives leave for the protection application to proceed.

(4) If a person seeks the leave of the court to make a protection application—

(a) for an application by a child of 14 years of age or more—the court must not give leave unless it is satisfied the child understands the nature and consequences of the protection application and it is in the best interests of the child; and

Applying for protection orders

This follows the 1991/Victorian model. It appeared as section 7 in the Discussion Paper.

NSW section 562C allows only a police officer or the protected person to make a complaint for an order. Where the complainant is under the age of 16 only a police officer can make the complaint: subsection 562C(2). Under subsection 562C(3) a police officer must make a complaint if they suspect that a domestic violence offence or a stalking or intimidation offence or a child abuse offence has recently been or is imminent or is likely to be committed.

Queensland section 14 is similar to the above provision, however a child or a person acting on behalf of a child may not apply for an order. However a child of the aggrieved protected person can be listed on, and protected by, the order of the aggrieved protected person.

Under section 7 of the South Australian Act a complaint can be made by a police officer or the victim. Under section 16 a child of 14 years or more can make a complaint with the leave of the court or a parent or guardian who normally resides with the child can make a complaint.

The new WA legislation is similar to the model. See ss.25 and 38.

The Tasmanian law is also similar but there the court can make an order of its own volition at the conclusion of a matter if there are sufficient grounds to justify it.

In the NT it may be a member of the police or a person in a domestic relationship with the defendant: (section 4(2)).

Section 5 of the ACT Act provides that a child can make a complaint himself or herself. There is no statutory limit on the age at which a child is permitted to make a complaint. Additionally, the Community Advocate - a statutory office holder - may make an application on behalf of the child or other person under a legal disability.

A large number of submissions broadly supported this section and specific provisions of this section.[76] Some contributors suggested that certain provisions within section 7 of the Discussion Paper, principally subparagraph 7(1)(c)(iii) but also paragraphs 7(d) and 7(e), could be open to abuse by permitting individuals other than affected parties to become involved.[77] Of particular concern is that one parent could make a vexatious complaint against the other as a form of harassment,[78] and one contributor suggested that only the parent

76 For example, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Education Centre Against Violence, Women's Legal Service SA Inc, Women's Health Statewide SA

77 Peter Dunstan

78 Domestic Violence Advocacy Centre, Combined Community Legal Centres Group (NSW)

(b) for an application by another person—the court must give leave if it is satisfied that it is in the best interests of the primary applicant on whose behalf the person is seeking the leave to apply.

(5) A protection application must be in writing but an appointment as mentioned in subsection (2)(a) or (b) need not be in writing.

(6) If a person may make a protection application under this section but another person has made the application, including a police officer who is the applicant for a protection application under section 25, the person may apply to the court to be substituted as the applicant for the application.

(7) In this section—

"primary applicant" means a person who may make a protection application under subsection (1)(a), (b) or (c).

with whom the child resides should be able to seek an order to prevent potential misuse of this provision by the other parent.[79] Whilst acknowledging the potential for abuse as an inherent concern in any domestic violence system, the Working Group considered that the provisions of this section permit a necessary degree of flexibility in order in that needed protection can be sought and obtained in widely varying circumstances. The onus will be upon courts to reject applications for orders where they are frivolous, vexatious or otherwise without merit.

However the Model does not permit persons under the age of 14 years to bring applications on their own behalf. In some jurisdictions, such as Queensland, this issue is considered more appropriately dealt with by child protection legislation. The Working Group did not achieve complete consensus on this point.

Two further submissions recommended that the requirement in paragraph 7(1)(d) of the Discussion Paper for an aggrieved protected person's consent to be written be removed as this would tend to discriminate against persons who have literacy difficulties or who have a physical disability that prevents writing.[80] The Working Group accepts that a requirement for consent to be in written form in such circumstances raises an unnecessary barrier to obtaining needed protection, and this section has been amended to remove this concern (see subsection 10(5)).

79 Illawarra Legal Centre Inc

80 Women With Disabilities (Australia), Legal Aid (NSW), WESNET Inc

Summons to issue on protection application

11(1) This section applies if—

(a) a protection application is made to a court; or

(b) an application for a telephone interim protection order is made and the telephone interim protection order is sent to a court under section 25.

(2) The clerk of the court must—

(a) issue a summons directed to the defendant for the hearing of the protection application; and

(b) attach the summons to the protection application.

Warrant may issue for protection application in certain circumstances

12(1) If a police officer makes a protection application to a court and asks for a warrant to issue for the arrest of the defendant, instead of issuing a summons for the hearing of the protection application, the clerk of the court must refer the application to the court.

(2) The court may issue a warrant to arrest the defendant if the court is satisfied it is necessary for the defendant to be arrested and brought into custody because—

(a) the personal safety of the aggrieved protected person or a named protected person is seriously threatened; or

(b) the defendant is likely to cause substantial damage to property of the aggrieved protected person or a named protected person.

(3) A court may, on its own initiative, issue a warrant for the arrest of a defendant when a protection application is made to the court by any other person if the court is satisfied it is necessary as mentioned in subsection (2).

(4) A warrant may be issued under this section even if a charge for a criminal offence is not laid against the defendant.

(5) If a warrant is issued to arrest a person, a police officer may arrest the person, even though the warrant, or an execution copy of the warrant, is not in the officer's possession at the time of the arrest.

(6) A warrant issued under this section has no effect after 1 year after the day it is issued.

Summons to issue on protection application

This section is prescriptive of court administration and need not appear within domestic violence legislation, provided that appropriate provision appears elsewhere, such as in court rules or generic legislation.

Warrant may issue for protection application in certain circumstances

This section, which follows the 1991/Victorian model, incorporates section 12 and 13 of the Discussion Paper.

In NSW, section 562K requires that an authorised Justice issue either a summons or a warrant for the appearance of the defendant. A warrant can be issued where the personal safety of the protected person is an issue. Such a warrant can be executed up to 12 months from the time of issue.

Under s. 69, Queensland allows detention without warrant for up to 4 hours. Section 39 of the Queensland Act lets a court issue a summons to give evidence. If the person fails to appear a warrant may be issued. Also note that under subsection 31(8) a temporary order is also a summons. Under section 47 a summons can be issued following an application for an order. Interestingly, if the application is for a temporary order a summons need not be issued, but if the court refuses to make the temporary order then the clerk of the court must issue a summons and cause it to be served by a police officer. Section 59 states that a warrant should not be issued as a matter of course.

The new WA law does not provide for the issue of a protective warrant or detention pending the lodgment of an application for an order. In WA emphasis is given to getting an order quickly by telephone and ensuring it is served on the defendant as quickly as possible. The defendant can be held in custody for the purpose of service for 2 hours. Once the defendant has the order, if he or she breaches it they will be arrested for committing the offence of breaching the order and dealt with as is any other offender.

S.7 of the NT law provides that where there is imminent danger and the police officer intends to apply for a telephone interim protection order, the police officer may without a warrant remove and detain the defendant as long as is 'reasonably necessary' for an application to be made and an order given or refused but, in any case, not for more than 4 hours after the person was first taken into custody. S.34 of the Tasmanian law provides for similar powers but contains more detailed procedures.

The SA and ACT laws do not have this provision.

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This provision attracted support from some contributors.[81] Other submissions alternately preferred[82] and opposed[83] the WA model, or opposed the issue of warrants in circumstances described by this provision on the basis that the detention of a defendant following the issue of a warrant could be tantamount to a denial of his or her civil liberties.[84] The Working Group considered these arguments and in particular whether the provision achieved the appropriate balance between the need to ensure the safety of protected persons and the civil liberties of defendants, and concluded that the present provision best achieved these goals.

However some members of the Working Group raised concerns over the inclusion of this provision, and in particular felt that it appears to be mixing civil and criminal law. It was further noted that there is no defined purpose or reason for the person's arrest and no provision for what happens to the person following arrest. These are matters which require reliance on police procedures designed primarily for the criminal jurisdiction. It is important that such procedures cater for the special requirements of people made subject to domestic violence orders.

Subsection 12(1) (section 13 of the Discussion Paper) attracted little comment in submissions but was generally approved.[85] Two contributors suggested that provision should be made for a warrant to be issued using similar mechanisms as for telephone interim protection orders, because a requirement to swear on oath in a situation which is serious enough to require a warrant may cause delays in the process and compromise the protected person's safety.[86] By contrast, a third contributor opposed this provision for reasons of concern over civil liberties of defendants.[87] After consideration of these opposing viewpoints, the Working Group concluded that the present provision achieves the appropriate balance between preserving civil liberties and the protection of persons. The Working Group did not favour creating a system where warrants could issue using similar mechanisms as for telephone interim protection orders, noting that there is significant difference between the temporary detention of a defendant in her or his own home and the arrest of that person following issue of a warrant.

81 Legal Services Commission of SA, Women's Legal Resource Group Inc Vic, Women's Legal Service SA Inc, Women's Health Statewide SA, Domestic Violence Advocacy Service

82 Edward Free, Peter Dunstan, Family Law Reform and Assistance Association Inc, National Council of Single Mothers and Their Children, Legal Aid WA

83 Combined Community Legal Centres Group (NSW)

84 Anthony Farr, Legal Aid WA

85 Legal Services Commission of SA, Magistrate P Ashton

86 Associate Professor Julie Stubbs, Tasmanian Office of the Status of Women

87 Legal Aid WA

Court to be informed about relevant family contact orders

13(1) This section applies to a person who makes a protection application.

(2) The person must inform the court about any relevant family contact order, or any pending application for a relevant family contact order, of which the person is aware.

(3) However, neither an application, nor an order under this Act in relation to the application, is invalid merely because a person does not inform the court about a relevant family contact order.

Court to be informed about relevant family contact orders

The Standing Committee of Attorneys-General agreed to the provision contained in the model.

It is desirable that jurisdictions approach this issue in the same way. The *Family Law Act 1975* is a national scheme. It is therefore highly undesirable to have a fragmented approach to implementation of this provision.

Sections 37 and 38 of the Discussion Paper (now sections 13 and 17 of this Report) attracted support from a number of submissions.[88] Several contributors stated that the term 'access' should be changed to 'contact' in order to be consistent with the *Family Law Act*.[89] This change has been effected.

Subsection 37(4) of the Discussion Paper elicited divided opinion. Some contributors suggested that a person's deliberate failure to bring relevant family contact orders to the attention of the court should result in any subsequent order made by the court in ignorance of the family contact order being rendered void.[90] Conversely, another view expressed is that it is the responsibility of the court to inquire about relevant family contact orders, and not for parties to proceedings to advise the court, as many parties would be unaware of this obligation.[91] The Working Group did not accept these views and concluded that the present provisions represent the best position. Those who are the instigators or the subject of the orders are in the best position to ensure the magistrate is properly informed of these details.

88 Legal Services Commission of SA, National Council of Single Mothers and Their Children, Law Council of Australia

89 Domestic Violence and Incest Resource Centre, Legal Aid Queensland, Queensland Director of Public Prosecutions

90 Lone Fathers Association Australia Inc, Rev. Peter Dunstan

91 Domestic Violence Advocacy Service

Division 3—General powers and procedures of court

Court may make protection orders

14(1) A court may make a protection order against a defendant to protect the aggrieved protected person, or the aggrieved protected person's property, if the court is satisfied, on the balance of probabilities, that—

(a) the defendant committed an act of domestic violence against the aggrieved protected person and the defendant is likely again to commit an act of domestic violence against the aggrieved protected person; or

(b) the aggrieved protected person reasonably fears the defendant will commit an act of domestic violence against the aggrieved protected person.

(2) An order under subsection (1) may include a named protected person if the court is satisfied, on the balance of probabilities, that—

(a) the defendant committed an act of domestic violence against the named protected person and the defendant is likely again to commit an act of domestic violence against the named protected person; or

(b) the aggrieved protected person or the named protected person reasonably fears the defendant will commit an act of domestic violence against the named protected person.

(3) The court may make the protection order even though the defendant—

(a) is charged with an offence arising out of the same conduct comprising the act of domestic violence and a proceeding for the offence has started; or

(b) was previously charged with an offence arising out of the same conduct comprising the act of domestic violence and a proceeding for the offence has finished.

Court may make protection orders

Section 14 combines sections 4 and 23 from the Discussion Paper. It was considered that these sections are linked in their operation and warranted their incorporation into the one provision.

Subsection 14(1) is similar to the 1991/Victorian model and also the Queensland law by making use of the 'domestic violence' definition. The equivalent provision in the Discussion Paper (ss4(1)) carefully followed the 1991/Victorian model by referring to the perpetrator as a 'person' rather than 'defendant' which is what he or she is called after an order is made. The provision in this report has been slightly reworded to refer to perpetrators as 'defendants', which aids clarity in interpreting the provision. The definition of 'defendant' (see section 3) includes a person against whom a protection application is made. It is envisaged that each order will nominate who is to be protected and that person must have a relationship to the defendant indicated in the definition of 'protected person.'

The NSW and SA laws do not provide for a trigger based on specified acts of violence. Instead they concentrate on whether the person has reasonable grounds to fear or in fact fears 'domestic violence'. The reasonable grounds may be demonstrated by evidence of previous acts of violence or threats but the fear could be established by other evidence: for example, it may be held there are reasonable grounds if it can be shown the person has an explosive temper and is skilled at martial arts though it is doubtful these characteristics alone would satisfy the test.

The NSW and SA laws simply require a reasonable apprehension or fear on the part of the protected person. It allows all the circumstances to be taken into account and is much less prescriptive. However it has also been criticised for providing much less guidance and certainty and may be criticised as being open to abuse. It can be criticised for focussing too much on the emotions of the victim rather than the behaviour of the perpetrator.

The new WA law is partly dependant on fear. There are two types of order. There is a 'violence restraining order' where the court may make an order if it is satisfied on the balance of probabilities that unless restrained the respondent is likely to commit a 'violent personal offence' against the applicant or behave in a manner reasonably expected to cause fear that the person will commit such an offence (s.11). The second order is called a 'misconduct restraining order' where the court may make an order if it is satisfied on the balance of probabilities that unless restrained, the respondent is likely to behave in a manner that can reasonably be expected to be intimidating or offensive to the applicant and that would in fact intimidate or offend the applicant or is likely to cause damage to the applicant's property or likely to behave in a manner that is, or is likely to, lead to a breach of the peace (s.34).

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The rationale for the WA law is to try and legislatively set priorities for the conduct which gets the primary attention of law enforcement. The penalties for breaching these orders are significantly different (a maximum of 18 months imprisonment for breaching the violence restraining order and a maximum $1000 fine for breaching the misconduct restraining order). It remains to be seen how this will work in practice because the grounds for each order overlap. Regardless of that issue, the approach of determining whether the commission of offences is likely without reference to any particular conduct is unique and was given careful consideration.

Under the NT law there must be at least some provocative or offensive behaviour that might cause another person to reasonably fear violence or harassment: (s.4(1)(c) of the NT law). Tasmania (s.106B(1)(c)) is much the same as the NT. Where the defendant has assaulted the aggrieved protected person it is still necessary to show that unless the person is restrained, that person is likely to again assault. The same applies where there has been harassing or offensive behaviour. It must also be shown to be likely to happen again.

The amended ACT Act does not require the protected person to apprehend or fear violence. Subsection 4(1) enables an order to be made where the court is satisfied on the balance of probabilities that a person has engaged in conduct constituting domestic violence. The definition of conduct constituting domestic violence appears in section 4A and there is no link to the conduct causing apprehension or fear.

Again, under the NSW/SA/WA approach it would be difficult to establish reasonable fear without harassing or offensive behaviour on the part of the defendant. In practice the differences between these schemes may not amount to much.

One of the grounds for a violence restraining order in the WA Act (s.11(a)(ii)) is that "*unless restrained, the respondent is likely to .... behave in a manner that could reasonably be expected to cause the applicant (or if the application is made by another person on behalf of the applicant, that other person) to fear that the respondent will commit such an offence*." This is different to the NSW/SA law because it does not require the applicant to prove the victim actually feared the respondent will commit an offence - only that the person could objectively be expected to have fear about the commission of an offence.

In the Discussion Paper the Victorian and Queensland approaches were preferred because it was felt it should not be necessary to prove that the victim had reasonable grounds for fearing his or her physical safety. An investigation into whether the victim feared he or she would be hurt shifts the focus from the conduct of the defendant. The argument was that if an act of domestic violence can be established, then proof it caused fear seems unduly onerous on the victim. Why should a victim of stronger than usual constitution be subjected to the type of harassment described in the term 'domestic violence'? And, in any case,

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why should that person be exposed to revealing the extent of the fear to the defendant? To do so may be gratifying for the defendant in some cases.

However the Discussion Paper acknowledged there were arguments in favour of each of these approaches and this fundamental issue attracted considerable comment in submissions. Support was almost evenly balanced between the Discussion Paper's 'act based test'[92] and the alternative 'reasonable fear test'[93], and a significant number of contributors acknowledged the merits of both tests and suggested that they form alternative grounds to obtain an order.[94] Supporters of the 'act based test' argued that it would be inappropriate to have a test that involves an analysis whether the applicant's fear is objectively reasonable in order for that person to have access to the protection afforded by this model, that a 'reasonable fear test' is more open to abuse, and that the better method is to focus upon the perpetrator's actions instead of the victim's emotions. Whilst agreeing with these arguments the Working Group was also persuaded by the arguments of those who supported a 'reasonable fear test', and in particular that a person living in fear and who may have become acutely attuned to impending trouble should not have to suffer an act of domestic violence before being afforded protection. Accordingly the Working Group accepted the view that both tests had merit and should appear in this section as alternative basis for obtaining orders. The Working Group noted support for this approach was in some cases based on practical experience of the WA and NT legislation, where there is a mixed test.[95]

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92 Reverend Peter Dunstan, Family Law Reform and Assistance Association Inc, Anthony Farr, Law Institute Victoria, Lone Fathers Association Australia (Inc), Anglican Church Diocese of Sydney Social Issues Committee, Maria Gaglia, Magistrate P Ashton, Legal Aid Queensland, Dr Patricia Easteal, National Council of Single Mothers and Their Children, Law Council of Australia, Fitzroy Legal Service Inc, Department of Immigration & Multicultural Affairs

93 Lismore Women's and Children's Refuge Inc, Coalition for Gun Control (Vic) Inc, Dr Patricia Easteal, Burnside, Uniting Church in Australia National Commission on Women & Men, Bega Valley Domestic Violence & Sexual Assault Committee, Victoria Police, Illawarra Legal Centre Inc, Associate Professor Julie Stubbs, Survivors, Immigrant Women's Support Service, Legal Aid (NSW), Immigrant Women's Speakout Association NSW Inc, NSW Department for Women, NSW Department of Community Services, Women's Legal Service SA Inc, Women's Health Statewide SA, Ethnic Affairs Commission, WESNET Inc, Women's Legal Resources Centre, NSW Health Department, Relationships Australia

94 Rhonda Parker MLA (WA Minister for Women's Interests), Victorian Community Council Against Violence, Legal Services Commission of SA, Magistrate Shaughan McCosker, Geelong Rape Crisis Centre, Presbyterian Women's Association of Australia in NSW, Women's Legal Resource Group Inc Vic, Tharpuntoo Legal Service Aboriginal Corporation, Education Centre Against Violence, Women's Legal Service Inc, Legal Aid WA, Women With Disabilities (Australia), Office of the Status of Women,

95 For example, from Rhonda Parker MLA (WA Minister for Women's Interests), and Legal Aid WA

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There was some adverse comment in several submissions concerning inclusion of the 'likely to commit an act of domestic violence/likely to carry out threat' test.[96] These contributors considered that this additional test would place an unnecessary hurdle before persons seeking protection and may operate so as to deny protection where it might be required. However the Working Group noted that a fundamental aim of this model legislation is to prevent the infliction of *future* acts of domestic violence and decided that the 'likely' test formed an appropriate and desirable barrier to abuse of the system and to deny orders in situations where it is very unlikely, or even extremely unlikely, that further acts of domestic violence will occur. The Working Group also considered that in practice it would operate in a similar manner to the 'reasonable' criterion of the 'reasonable fear test'.

Subsection 4(2) of the Discussion Paper has been removed to subsection 16(2) in this Report, where it better appears with the forms of orders that can be made by a court.

Subsection 14(2) follows the 1991/Victorian model. The equivalent NSW section is section 562O. The ACT has a similar provision in section 16 and NT in s.14. It is not mentioned in Queensland, WA, SA or Tasmania. In WA s.63 provides that where a person is charged with an offence the court may make a restraining order at the request of a party or on the initiative of the court.

This provision attracted strong support from submissions.[97] One contributor suggested that a preferred approach would be to create a compulsion on police to consider laying criminal charges against the defendant, forego making an application for a domestic violence order, and rely on appropriate bail conditions to ensure the victim's safety. The rationale for this approach is to avoid submitting the victim to the trauma of undergoing appearances at two different proceedings, and to prevent cross-examination of the victim's witnesses at the criminal trial on evidence given in proceedings for the domestic violence order.[98] The Working Group considered this but concluded that the present provision is the better approach, because domestic violence orders and the criminal process are designed to meet different needs and accordingly must operate in tandem. The domestic violence order system is better suited to achieving the immediate safety of the victim, and the Working Group also noted that it would be undesirable to rely on varying bail conditions in each individual instance where immediate protection is needed.

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96 Magistrate T Cleary, Victoria Police, Domestic Violence Advocacy Service, Combined Community Legal Centres Group (NSW), Law Institute Victoria, Office of the Status of Women, Law Council of Australia

97 Legal Services Commission of SA, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Domestic Violence Advocacy Service, Women's Legal Resources Centre Sydney

98 Legal Aid WA

Court may make protection order on its own initiative

15(1) A court before which a person pleads guilty to, or is found guilty of, an offence that involves an act of domestic violence may, on its own initiative, make a protection order against the person if the court is satisfied that a court may, assuming it was acting on a protection application, make a protection order against the person under section 14.

(2) If a protection order or interim protection order already names the person as the defendant for the order, the court may extend or vary the order, if the court is satisfied it is appropriate to do so.

(3) However, the court may not make an order under this section naming a person as the aggrieved protected person if the person, or the nominated representative for the person, objects to the order.

(4) The court may make an order under this section whether or not the court makes another order against the defendant in relation to the offence that involves an act of domestic violence.

Court may make protection order on its own initiative

This was not contained in the 1991/Victorian model. There will be occasions when it is more efficient and in no way inappropriate for the court to make an order on its own initiative when the defendant has been found guilty of an offence. This ensures ongoing protection of victims without further proceedings. As mentioned above s.106J of the Tasmanian law and s.63 of the WA law enable this to be done. In Queensland s.30 also enables the District and Supreme Courts to initiate orders.

This section attracted support from a number of submissions,[99] although some also asserted that a court should not of its own initiative be able to make a protection order against the direct objection of the protected person.[100] A similar argument was made in relation to section 21, namely that a court should not of its own initiative be able to vary a protection order against the direct objection of the protected person. The Working Group accepted the argument that it is vital to permit victims of domestic violence to retain control over their domestic arrangements, and accordingly this section has been amended to give the protected person a right of veto over court initiated orders.

Other contributors considered that the provision should be strengthened by creating a non-discretionary obligation on courts to make an order in the circumstances specified by subsection 9(1) of the Discussion Paper.[101] However the Working Group considers that a hard and fast rule in this regard may lead to inappropriate or unnecessary orders being issued, and that permitting courts discretion and flexibility will better ensure that orders are made where required.

The Working Group noted that a number of contributors consider that a court should be able to make an order on its own initiative where a person stands accused of an offence involving an act of domestic violence and proceedings in relation to that matter are continuing.[102] It was argued that such a measure would reduce both the trauma experienced by victims in accessing legal protection and the amount of time and resources expended in dealing with such matters. However the Working Group concluded that this would not be a desirable measure because in such an instance the accused person is simply that - accused of an offence - without proof that such an offence occurred, and making an order on the basis of untried facts alleged against that person may

99 National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Associate Professor Rosemary Hunter, Western Region Domestic Violence Collective, Office of the Status of Women, Women's Legal Service SA Inc, Women's Health Statewide SA

100 Sussex Street Community Law Service Inc, Women's Legal Resource Centre (Sydney)

101 Bega Valley Domestic Violence & Sexual Assault Committee, WESNET Inc, Domestic Violence Advocacy Service, Queensland DPP, NSW Department for Women, NSW Department of Community Services

102 Combined Community Legal Centres Group (NSW), NSW Health Department, NSW Department for Women, NSW Department of Community Services, Legal Aid WA

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readily be seen as a denial of justice. The Working Group notes that a protected person would in any case be able to apply to the same court for an order, which could be granted without the accused being required to admit to any or all of the matters alleged: see amended section 18.

Courts may impose directions, restrictions and prohibitions but certain matters to be of paramount importance

16(1) For a court making a protection order or interim protection order, or an order extending, varying or revoking a protection order or interim protection order, the following is to be of paramount importance to the court—

(a) the need to ensure the aggrieved protected person and any named protected person are protected from any act of domestic violence by the defendant;

(b) the welfare of any child who may be affected by the defendant's behaviour or the operation of the order.

Court may impose directions, restrictions and prohibitions but certain matters to be of paramount importance

Matters the court must take into account, including paramount matters

Subsections 16(1) and (3) generally follow the 1991/Victorian model. These subsections appeared as subsections 4(2) and 5(2) in the Discussion Paper.

In NSW section 562D requires that consideration be given to the accommodation needs of the parties, the welfare of children involved and the consequences to the protected person and children if the order does not restrict the defendant's access to the residence. In this regard section 562DA requires that a court explain why it has not made an order that prohibits or restricts access by the defendant to any premises or place.

In Queensland the combined effect of subsections 25(5) and (6) is that the matters referred to in subsection 16(1) are of paramount consideration. There is no reference to the matters mentioned in paragraph 16(3)(c).

SA section 6 is in very similar terms to the model. Paragraph 6(1)(e) of the SA Act provides that in considering whether to direct the defendant to return property to a family member or to allow a family member to recover or have access to or make use of property - the income, assets and liabilities of the defendant and the family member should be considered. This was not favoured for inclusion in the model because regardless of such calculations a judgment would need to be made as to what items of property are needed in each case.

The new WA law is similar to the model, but also requires the court to consider the hardship that may be caused to the defendant, the criminal record of the defendant and previous similar behaviour (ss.12 and 35).

Similar restrictions are detailed in ss.106B(5) and (5A) of the Tasmanian law.

Subsection 10(2) in the ACT Act also gives primary importance to the matters referred to subsection 16(1). This was strongly supported by other jurisdictions who contributed to the discussion paper.

The NT equivalent is subsection 4(8).

Subsection 5(2) of the Discussion Paper (now ss16(1) and (3)) attracted broad in principle support from contributors[103], however a number of submissions suggested amendments. In particular, several contributors stated that a defendant's previous criminal record should be considered by the court, especially

103 For example, Canberra Goulburn Archdiocesan Catholic Women's League Social Issues Committee, Legal Services Commission of SA, Fitzroy Legal Services Inc, Magistrate Shaughan McCosker, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Associate Professor Julie Stubbs

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where it discloses similar matters and other acts of violence.[104] The Working Group carefully considered this suggestion but considered that a hard and fast rule regarding past conduct would be too arbitrary and inflexible, and may lead to inappropriate orders being made.

The Working Group notes that a court would be able to take a defendant's criminal record into account when making an order despite lack of a specific reference in paragraph 16(3): this more flexible approach would be better able to take all circumstances into account in each instance and is considered by the Working Group to be the better approach.

Many submissions supported the paramountcy given to the factors now listed in paragraphs 16(1)(a) and (b).[105] Some WA submissions drew attention to paragraph 12(1)(c) of Western Australia's *Restraining Orders Act 1997*, which states that a court is to have regard to "the welfare of children who are likely to be affected by the respondent's behaviour or the operation of the proposed order". The Working Group considered that this wording better reflects the intention of the Model, and in particular that the interests of children who are likely to be affected by the defendant's behaviour (but who may not be directly affected by the operation of the order) are also to be considered by the court. Accordingly paragraph 16(1)(b) (paragraph 5(2)(b) of the Discussion Paper) has been amended to incorporate the WA provision.

104 Magistrate P Ashton, Dr Patricia Easteal, NSW Health Department, Education Centre Against Violence, Legal Aid WA

105 For example, Women's Legal Resources Centre (Sydney)

(2) In its order, the court may impose any directions, restrictions or prohibitions on the defendant that appear to the court necessary or desirable in the circumstances, including any or all of the following—

(a) prohibiting or restricting the defendant from approaching an aggrieved protected person or named protected person, including prohibiting the defendant from approaching within a stated distance of the aggrieved protected person or named protected person;

(b) prohibiting or restricting the defendant from entering or remaining at premises in which the aggrieved protected person or named protected person lives or works, or that the aggrieved protected person or named protected person frequents, whether or not the defendant has a legal or equitable interest in the premises;

(c) prohibiting or restricting the defendant from being in an area stated in the order;

(d) prohibiting the defendant from contacting, harassing, threatening or intimidating the aggrieved protected person or a named protected person or of doing any act the court is satisfied is contact with, or harassment or intimidation of, or a threat to, the aggrieved protected person or the named protected person;

(e) prohibiting the defendant from damaging property of the aggrieved protected person or a named protected person whether or not the defendant has a legal or equitable interest in the property;

(f) prohibiting the defendant from causing another person to engage in conduct restrained by the court;

(g) directing the defendant to dispose of a thing that the court is satisfied was used, or may be used, by the defendant to commit an act of domestic violence against the aggrieved protected person or a named protected person (whether or not the thing is wholly or jointly owned by, or is in the possession of, the defendant) by, at the defendant's option—

(i) selling the thing to another person; or

(ii) placing the thing in the custody of another person whom the court considers to be sufficiently responsible to care for the thing while the order has effect;

(h) prohibiting the defendant from acquiring, or having in the defendant's possession, a thing stated in the order if the court has directed the defendant to dispose of things of the same type as mentioned in paragraph (g);

Restrictions in order

These have been developed after a review of all existing legislation. They included ideas from numerous jurisdictions, using the 1991/Victorian model as the starting point. An important addition is the ability to prohibit access to weapons which are not firearms.

Another departure in the Discussion Paper from the earlier model was that paragraph 5(1)(g) in the Discussion Paper provided that the order may *recommend* the defendant to attend counselling, as opposed to the 1991/ Victorian model which provides for a power to *direct* counselling. The Discussion Paper canvassed the possibility of including a power to direct that the defendant participate in prescribed counselling. It was questioned whether counselling under compulsion is effective. Some favoured including the capacity to direct counselling on the basis that it is undesirable to close off options to the court which may be effective in some cases. However the majority of jurisdictions favoured excluding the capacity to direct counselling by specifying that it only be a power to *recommend*. The majority were of the view that there should be no capacity to direct counselling unless it can be shown to be an effective option. They are of the school of thought that counselling is only effective if it is voluntary. This issue is relevant to various counselling programs. Another alternative is to follow s.73 of the WA *Sentencing Act 1995* which provides that an offender must not be ordered to undergo treatment of any sort unless the person qualified to recommend or administer the treatment has recommended that the offender undergo treatment.

In NSW the types of orders that can be made is dealt with in subsection 562D(1) of the *Crimes Act*, and this list does not limit the generality of the grant of power in section 562B. The NSW list contains provisions similar to the matters referred to above. Note 562D(1)(d) which is a fairly general power. There is no direct power in the NSW legislation to order counselling as per paragraph 5(1)(g) of the Discussion Paper.

As noted above the Queensland legislation contains standard conditions that are contained in every order whether or not the order refers to them. Subsections 25(3) & (4) contain examples of conditions that can be included. The examples cover all of the possible listed in this section of the model. In this regard one also has to consider the conditions read into an order by sections 22 and 23, which respectively provide that a protection shall contain standard conditions concerning good behaviour and weapons.

Subsections 5(2) and (3) of the SA Act, and in Tasmania section 106B of the *Justices Act 1959*, generally follow the scheme set out above.

The new WA law is in similar terms to the model (ss.13 and 36). WA also provides a restriction against causing or allowing another person to engage in the restricted conduct. This has been adopted at paragraph 16(2)(k) of the Model.

(i) prohibiting or restricting stated conduct of the defendant towards the aggrieved protected person or a named protected person if the aggrieved protected person or named protected person is a child, including prohibiting or restricting the defendant's presence in a place associated with the child;

(j) directing the defendant to return property stated in the order to the aggrieved protected person or a named protected person, or to allow the aggrieved protected person or a named protected person to recover, have access to or make use of stated property, whether or not the defendant has a legal or equitable interest in the property;

(k) prohibiting or restricting the defendant from causing or allowing another person to engage in the type of conduct mentioned in this subsection.

The equivalent ACT provision is section 9. Subsection 9(2) replicates the effect of 16(2)(b) and (i) above, and paragraph 9(1)(j) is similar to paragraph 16(2)(g). Section 11 of the ACT Act is similar to paragraph 5(1)(g) of the Discussion Paper. Paragraph 16(2)(f) is drawn from the ACT legislation.

Subsection 4(2) of the Discussion Paper (now comprising the opening lines of subsection 16(2) in this Report) generally attracted support in submissions[106]. However one contributor[107] suggested that the phrase 'necessary or desirable' should be amended to 'necessary or desirable for protection of the protected person' in order to provide judicial guidance. The Working Group did not consider this amendment necessary.

Subsection 5(1) of the Discussion Paper attracted considerable comment in submissions. Many submissions gave broad support to the proposed provisions[108] but raised concerns with specific paragraphs. One paragraph of particular interest to contributors was whether a court should be able to recommend or direct that a defendant participate in prescribed counselling, which appeared in the Discussion Paper as paragraph 5(1)(g).

The issue of mandated counselling was addressed in the National Crime Prevention Report: "Ending Domestic Violence? Programs for Perpetrators", which was issued on 8 December 1998 ("NCP Report"). The NCP Report recommend as the strongest level of response to the problem of domestic violence 'an integrated community-based intervention program' which 'could include the mandatory referral of [domestic violence perpetrators] to education programs, with penalties for non-attendance and/or non-participation, and with increasing penalties for repeat offenders'.[109]

Further, the NSW Government has recently taken an initiative in this field. On 1 February 1999, the NSW Minister for Community Services, the Hon Faye Lo Po' MP, announced a new 12 month pilot project to give NSW courts the discretion to require men who are the subject of an Apprehended Violence Order to undertake a special program aimed at changing their violent behaviour. The programs, which will not be available to men who have been charged with criminal offences relating to their violence, will run for 8 to 12 weeks and will highlight the criminality of domestic violence, violent behaviour and anger, and the effects of violence on women and children.

106 For example, the Federation of Ethnic Communities Councils of Australia Inc

107 Anthony Farr

108 For example, Edward Free, Legal Services Commission of SA, National Council of Single Mothers and Their Children

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In submissions to the Working Group concerning the counselling issue, opinion was divided with a number of contributors supporting this provision[110] but a majority opposed to the concept.[111] After careful consideration of the opposing arguments the Working Group was persuaded by the majority view that the provision should not refer to either directed or recommended counselling. The principal reasons given by contributors for rejecting specific inclusion of counselling were that counselling that is involuntary or involves coercion (ie *directed* counselling) is rarely successful and that the alternative option, namely *recommended* counselling, could be ignored by defendants at will; that there would be significant practical difficulties in enforcing counselling; and concerns that some courts may be inclined to direct or recommend counselling as a 'soft' option instead of ordering more appropriate restrictions (such as prohibiting access by the defendant to premises jointly occupied with the victim). Accordingly there is no equivalent of paragraph 5(1)(g) of the Discussion Paper in the Model.

It should be noted that under subsection 16(2) a court has power to make *any* order it considers necessary or desirable in the circumstances, including a direction or recommendation that the defendant undertake counselling. The list of possible orders in paragraphs 16(2)(a) to (k) is inclusive, and the mere fact that there is no specific power in the list to order counselling does not preclude counselling being part of a court's order. However, as stated above

110 Carlie Atkinson, Edward Free, Rhonda Parker MLA (WA Minister for Women's Interests), Coalition for Gun Control (Vic) Inc, Canberra-Goulburn Archdiocesan Catholic Women's League Social Issues Committee, Victorian Community Council Against Violence, Legal Services Commission of SA, Magistrate Shaughan McCosker, John Heathcote, Geelong Rape Crisi Centre, Men's S.H.E.D. Project, Presbyterian Women's Association of Australian in NSW, Women's Legal Resource Group Inc Vic, Tharpuntoo Legal Service Aboriginal Corporation, Presbyterain Church of Australia (NSW 'Church & Nation' Committee), Eastern Domestic Violence Outreach Service Inc, Domestic Violence and Incest Resource Centre, Family Law Reform and Assistance Association Inc, Combined Community Legal Centres Group (NSW), Noeleen Green, Survivors, Women's Legal Service SA, Women's Health Statewide SA, Law Institute Victoria, Uniting Church in Australia national Commission on Women & Men, Queensland Police Service, Anglican Church Diocese of Sydney Social Issues Committee, Maria Gaglia

111 Burnside, Bega Valley Domestic Violence & Sexual Assault Committee, Domestic Violence Coordinating Committee - South Tasmania, Domestic Violence Advocacy Centre, Beenleigh Domestic Violence Assistance Program, Disability Council of NSW, Illawarra Legal Centre Inc, Chisholm Inc, Associate Professor Julie Stubbs, NSW Council on Violence Against Women, Women's Legal Service (Tasmania), Aboriginal Legal Service of WA (Inc), Anthony Farr, Manning District Emergency Accommodation Inc, Immigrant Women's Support Service, Education Centre Against Violence, Legal Aid (NSW), Women's Legal Service Inc, Women With Disabilities (Australia), Immigrant Women's Speakout Association NSW Inc, NSW Department for Women, NSW Department for Community Services, Office of the Status of Women, WESNET Inc, Catholic Women's League Australia (Inc) NSW, NSW Health Department, Community Mediation Service Tasmania (Inc), Domestic Violence Interagency ACT, Department of Immigration & Multicultural Affairs, NSW Magistrate T Cleary, Lismore Women's and Children's Refuge Inc, Victoria Police, Legal Aid WA, Tasmanian Office of the Status of Women, Western Region Domestic Violence Collective, Legal Aid Queensland, Law Society of NSW

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there was significant opposition to the concept of courts directing or recommending counselling the Working Group considered that it should only be used very rarely. To specify directed or recommended counselling as one of the more common options would, in its view, suggest that the option should be used more regularly.

A second provision which attracted significant interest was that concerning the court's ability to order appropriate disposal of weapons or other dangerous items (Discussion Paper paragraph 5(1)(h), now 16(2)(g)).[112] A number of submissions stated that the Discussion Paper's provision was too narrowly focussed on certain types of weapons[113], and in this report the provision has been broadened by adding 'a thing that the court is satisfied was used, or could be used, to commit an act of domestic violence'. However the effectiveness of this provision has been enhanced by inclusion in this Report of the provision prohibiting the defendant from acquiring or possessing things of the kind referred to in an order arising under 16(2)(g).

One contributor suggested that the title of this section did not properly describe the section's contents because not all orders are restrictions.[114] The title has been amended in this Report.

A number of contributors suggested that paragraph 5(1)(b) (now 16(2)(b)) should be amended to state 'wherever the protected person may from time to time reside, work or frequent'[115] and to include a presumption in favour of an exclusion order against the defendant from the domestic residence[116] as is the case in the NSW *Crimes Act*. However the Working Group decided against making such amendments because orders are capable of being constructed in a sufficiently broad manner as to be portable and because it is considered that the accommodation needs of *all* parties should be considered in each individual case, with the relevant court being the best arbiter of those needs. In this regard it was considered that leaving the content of orders to courts would allow appropriate flexibility in each instance.

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112 Presbyterian Church of Australia (NSW 'Church & Nation' Committee, Western Region Domestic Violence Collective, Women's Legal Service SA Inc, Women's Health Statewide SA, Fitzroy Legal Service Inc

113 Domestic Violence Coordinating Committee - South Tasmania, Lismore Women's and Children's Refuge Inc, Rhonda Parker MLA (WA Minister for Women's Interests), Edward Free, Coalition for Gun Control (Vic) Inc, Victorian Community Council Against Violence, Legal Services Commission of SA, Presbyterian Women's Association of Australia in NSW, Domestic Violence Advocacy Service, Illawarra Legal Centre Inc, Aboriginal Legal Service of WA (Inc), Survivors, Legal Aid (NSW), Legal Aid WA, Law Institute Victoria

114 Women's Legal Service Inc

115 Domestic Violence Advocacy Service, Combined Community Legal Centres Group (NSW), NSW Department for Women

116 Office of the Status of Women, Women's Legal Service SA Inc, Women's Health Statewide SA, WESNET Inc

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Paragraph 5(1)(d) (now 16(2)(d)) attracted comment in several submissions. Two contributors[117] suggested that the paragraph be amended by specific inclusion of 'stalking' in the list of unacceptable behaviours. After careful consideration of this point, the Working Group decided against this amendment on the basis that actions comprising stalking would fall within the behaviours proscribed by this paragraph. A further suggestion recommended that the word 'contacting' be replaced with 'communicate or attempt to communicate by whatever means with the person protected by the order' because certain courts had read 'contact' down to a purely physical sense, ie touching.[118] The Working Group considered this submission but decided that the word 'contacting' should be unchanged as its normal meaning is 'communication' as well as physical contact of the victim by the defendant. There are limits on how far one can go in legislating against fanciful interpretations.

Two contributors stated that paragraph 5(1)(i) (now 16(2)(i)) should be broadened from 'child of the aggrieved protected person' to include any person with whom the aggrieved protected person has a 'domestic relationship'[119] or, even more broadly, a 'relationship'[120]. The Working Group declined to make these amendments because it considered that the core purpose of the model is to provide protection for persons suffering violence in domestic situations, and that other legislation is more appropriately placed to deal with unacceptable behaviour directed towards persons outside domestic situations. A further contributor argued that 5(1)(i) should be removed altogether, because it would result in children being separated from parents even though they were in no risk of domestic violence, and that the only purpose of this paragraph is to promote the abuse of protection orders to determine custody cases.[121] The Working Group does not accept this reasoning and points out that the paragraph refers to prohibiting '*specified* conduct of the defendant', such as violent and unacceptable behaviour, rather than granting custody of children to certain persons.

Paragraph 5(1)(j) (now 16(2)(j)) attracted support from those contributors which addressed this issue[122], although there was also a suggestion that the paragraph should also define how property should be returned.[123] One contributor suggested that an application for a protection order, with reference to this paragraph, may be seen by a magistrate as a property dispute and may be used by some applicants as a way to claim property, which could impact on the

117 WESNET Inc, Law Society of NSW
118 Legal Aid WA
119 NSW Department for Women
120 NSW Council on Violence Against Women
121 Anthony Farr
122 Combined Community Legal Centres Group (NSW), Women's Legal Service SA Inc, Women's Health Statewide SA
123 Queensland Director of Public Prosecutions

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integrity of the laws.[124] The Working Group considered these suggestions but concluded that the paragraph should remain unchanged because the purpose of an order is to protect a person. It should not be a means by which to recover property or to settle a property dispute, and the Working Group considers that the present paragraph does not detract from this purpose.

Several contributors suggested that paragraphs 5(1)(f) and 5(1)(k) (now 16(2)(f) and 16(2)(k)) appear to restrict the same conduct.[125] The difference is that the latter provision refers to the '*type* of conduct *mentioned in this subsection*', which is a broader reference than the *specific* conduct *actually prohibited* by a court under paragraph 16(2)(f). The intention behind paragraph 16(2)(k) is to capture conduct where a defendant may cause or allow another person to engage in unacceptable behaviour similar to, but not the same as, conduct specifically proscribed by an order. Two contributors additionally stated that 16(2)(k) appeared harsh because the word 'allowing' appears to render a defendant liable for the conduct of another person over whom the defendant may have no control: unless an individual is acting pursuant to a request of the defendant he or she is by definition acting on their volition, and it would be wrong to assume that the defendant has control over the other person's actions when that may not be the case.[126] The Working Group notes the basic principle that a person must be held liable only for those acts over which he or she has control, and points out that the word 'allow', with its essential meaning of permitting an action to take place, establishes a threshold that the defendant must have had control over the acts in question perpetrated by the other person in order for a breach of this paragraph to be found.

124 Domestic Violence Advocacy Service
125 Victoria Police, Legal Aid Western Australia
126 Law Institute Victoria, Law Society of NSW

(3) Before making a protection order or interim protection order, or an order extending, varying or revoking a protection order or interim protection order, that prohibits or restricts the defendant from entering or remaining at any premises, the court must take into account—

(a) the accommodation needs of all persons who may be affected by the operation of the order; and

(b) existing guardianship orders, child protection orders, parenting orders and family contact orders in relation to a child of the aggrieved protected person, if the terms of the orders are known; and

(c) anything else the court considers relevant in the circumstances.

(4) The address at which the aggrieved protected person or a named protected person resides, or intends to reside, must not be stated in a protection order or interim protection order, unless the court is satisfied—

(a) the defendant knows the address; or

(b) it is necessary to state the address in the order to achieve compliance with the order and the personal safety of the aggrieved protected person or a named protected person would not be seriously threatened, or damage would not be likely to be caused to any property of the aggrieved protected person or a named protected person, by stating the address.

Certain non-paramount matters a court must take into account when making an order

A number of submissions also recommended that paragraph 5(2)(c) of the Discussion paper (now paragraph 16(3)(a)) would benefit by inclusion of a presumption in favour of excluding the defendant from the domestic residence.[127] The Working Group considered that the present structure of 16(3)(a) achieves the most appropriate and just accommodation of the competing needs of all parties, and declined to include such a provision for the reasons given in this commentary in relation to paragraph 16(2)(b) above.

Paragraph 5(2)(d) of the Discussion Paper (now 16(3)(b)) attracted some adverse comment in submissions on the basis that it implied that pre-existing Family Court orders are privileged and might inhibit the making of appropriate domestic violence orders,[128] or result in a protected person with children being treated differently from other protected persons.[129] Further, it was argued that paragraph 5(2)(d) should be replaced with text which clearly sets out the power of a court to vary or amend a Family Court Division 11 order and which states that any failure to comply with the requirement that such an order be considered when making a domestic violence order does not invalidate the latter order.[130] The Working Group acknowledges the provisions of the *Family Law Act 1975* and points to the cooperative scheme developed by sections 13 and 17 of this Model.

Addresses

Subsection 5(3) of the Discussion Paper (now ss16(4)) provides additional protection not contained in the 1991/Victorian model by ensuring that the address of those receiving protection is not routinely included in the order. The court will be required to consider whether including an address is necessary and safety concerns.

This provisions attracted broad support from submissions,[131] and only one contributor opposed it on the basis that it would be unreasonable to make an order prohibiting access to a particular location but not inform the defendant what that location is.[132] One other contributor stated that the address should be included in the order unless the court specifically orders otherwise, else

127 Legal Services Commission of SA, Fitzroy Legal Services Inc, NSW Department for Women, Ethnic Affairs Commission, Immigrant Women's Speakout Association NSW Inc, Office of the Status of Women, Women's Legal Services SA Inc, Women's Health Statewide SA, WESNET Inc

128 Associate Professor Julie Stubbs

129 Women's Legal Resources Centre (Sydney)

130 NSW Department for Women, NSW Department of Community Services, WESNET Inc

131 Edward Free, Women's Legal Resource Group Inc Vic, Combined Community Legal Centres Group (NSW), Women's Legal Service Inc, Legal Aid Queensland

132 Anthony Farr

Model

orders made under a number of subsection 16(2) paragraphs might be unenforceable on any breach proceedings.[133] However the Working Group considered that such breaches would only be unenforceable if the defendant was genuinely unaware of the address and inadvertently breached the order, in which instance it would not be desirable for breach proceedings to occur. This view was supported by NSW Magistrate P Ashton.

Subsection 5(4) of the Discussion Paper has been removed to section 20 (explanation of orders) where it is more appropriately located.

133 Law Society of NSW

Court must take into account certain contact orders

17(1) In deciding whether or not to make an order under this Act, including an order extending, varying or revoking a protection order or interim protection order, a court must—

(a) consider whether contact between the aggrieved protected person or the defendant, and a child of either of those persons, is relevant to the making the order; and

(b) have regard to any relevant family contact order of which the court has been informed in relation to the aggrieved protected person, the defendant or a child of either of those persons.

(2) However, an order under this Act is not invalid merely because the court does not—

(a) consider whether contact is relevant; or

(b) have regard to a relevant family contact order.

Protection orders and interim protection orders by consent

18(1) A court may make a protection order or an interim protection order against a defendant (a "consent order"), whether or not the defendant admits to any or all of the particulars of the protection application, if—

(a) the applicant for the protection order or, if the applicant is not the aggrieved protected person, the aggrieved protected person or the nominated representative for the aggrieved protected person, consents to the court making the order; and

(b) the defendant, or the nominated representative for the defendant, consents to the court making the order.

(2) The court may make a consent order without being satisfied about the matters mentioned in section 14.

(3) If the court considers the interests of justice require it to conduct a hearing into any or all of the particulars of the protection application before making a consent order, the court may conduct the hearing.

Court must take into account certain contact orders

Section 17 (section 38 in the Discussion Paper) operates in tandem with section 13 of this Report. See the commentary under that section for amendments made in response to submissions on this topic.

Protection orders and interim protection orders by consent

Section 18 follows the 1991/Victorian model. The equivalent provision in NSW is s.562BA; Queensland, s.33; and NT, s.5. In Tasmania section 106E allows for consent orders to be made. There is no equivalent in SA, however there is of course no bar to a person agreeing to the order. In WA the defendant may consent in writing to an interim order being made a final order (s.32). General consent orders are provided for under s.41. ACT legislation is similar to NSW. Section 10A provides that a court can make an order with the consent of the parties without proof or admission that the respondent has engaged in conduct constituting domestic violence.

A number of submissions, particularly from NSW, recommended that the model adopt the effect of subsection 562BA(2) of NSW's *Crimes Act 1900*.[134] Subsection 562BA(2) permits a court to make an order with the consent of both parties to the order, without the defendant first admitting all or any of the particulars comprising the complaint for the order. The NSW submissions stated that this provision worked well in securing needed orders and minimising court appearance time. The Working Group found this provision attractive and section 18 has been amended to incorporate it.

This provision was otherwise broadly supported.[135]

Section 18 has been amended to ensure that a court making an order under this section takes into account the paramount matters specified by subsection 16(1) (paragraphs 5(2)(a) and (b) of the Discussion Paper).

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134 Domestic Violence Advocacy Centre, Combined Community Legal Centres Group (NSW), Disability Council of NSW, NSW Council on Violence Against Women, Legal Aid NSW, Women's Legal Resources Centre Sydney, NSW Department for Women, NSW Department of Community Services, Law Society of NSW, NSW Magistrate T Cleary

135 Legal Services Commission of SA, National Council of Single Mothers and Their Children.

Procedures in absence of defendant

19(1) This section applies if—

(a) a defendant in a protection application does not appear in person in the court at the time fixed for the hearing of the application; and

(b) the court is satisfied the defendant has been served with the application and attached summons, or has been bailed to appear at the hearing.

(2) The court may—

(a) proceed to hear and decide the protection application in the defendant's absence; or

(b) adjourn the hearing; or

(c) make an interim protection order under section 22; or

(d) issue a warrant to arrest the defendant if the court is satisfied it is necessary for the defendant to be arrested and brought into custody because—

(i) the personal safety of the aggrieved protected person or a named protected person is seriously threatened; or

(ii) the defendant is likely to cause substantial damage to property of the aggrieved protected person or a named protected person.

(3) Before the court issues a warrant to arrest a defendant, the court must consider if the defendant is a person for whom there is a representative or nominated representative.

Procedures in absence of defendant

Follows the 1991/Victorian model. There is no equivalent in the NSW legislation, but ss.562J(2) and (2A) indicate that the complaint may be heard in the absence of the defendant.

As noted above in the discussion following section 15, the relevant Queensland provision is section 49 under which the court may hear and determine the application or issue a warrant for the arrest of the defendant or adjourn the matter or make a temporary order. Section 49 applies where the defendant fails to appear after being served with certain documents. Under section 32 the court may make a temporary order without proof of service if it appears that the protected person is in danger of personal injury or his or her property is in danger of substantial damage.

Subsections 27 and 29 of the new WA law allow the complaint to be heard in the absence of the defendant. The procedures are discussed in more detail in the commentary on s.15 which deals with service. In SA (s.9) and Tasmania (s.106E) the procedure for getting the defendant to appear is probably more persistent, but orders can be made in his or her absence.

ACT section 13 is similar to the model. Subsections 4(3) and 6(a) of the NT law achieves the same outcome.

This provision attracted broad support in submissions.[136] One contributor supported the model provision but recommended that it be made mandatory that a court proceed where a defendant has failed to appear after being served with a summons or being bailed to appear.[137] The contributor also recommended that paragraph 16(d) of the Discussion Paper (Report subsection 19(3)) be deleted because proceedings are frequently adjourned several times if a defendant fails to appear, despite service having been effected, causing unnecessary distress and hardship to the protected person. Whilst sympathetic to the problems caused by a defendant's repeated non-appearance, the Working Group concluded that it is important to permit courts flexibility to deal with individual situations in a manner most appropriate in all the circumstances. Where a court considers that a defendant does not possess a valid reason for his or her absence, the court is free to proceed and make orders.

Another contributor[138] suggested that the hearing process should clearly delineate that the first return date is not the hearing of the matter, so that a final order cannot be made on the first occasion the application is returnable before the court. Accordingly, if an order is to be made in the absence of the defendant, it

136 Legal Services Commission of SA, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Domestic Violence Advocacy Service, Education Centre Against Violence, Women's Legal Resources Centre Sydney, NSW Health Department, Julie Hansen

137 Combined Community Legal Centres Group (NSW)

138 Law Society of NSW

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ought to be by way of an ex-parte hearing on another occasion after the first return date. The Working Group did not concur with this argument, because domestic violence situations may involve real and present danger to the safety of protected persons and those persons must not be made to wait indefinitely in order to obtain protection.

There was also a related suggestion that a defendant should be permitted to be represented by a third person, for example a legal practitioner, and give evidence by affidavit in circumstances where a defendant cannot be present at a hearing for good reason, for example where an application is lodged in a place far distant from the defendant's residence.[139] The Working Group accepted that there may be legitimate reasons whereby a defendant cannot be present in court. However it decided against permitting third person representation because this would raise significant procedural and legal difficulties with regard to the explanation of orders required by section 20 and consequently with prosecution for breach of an order (section 64) if the defendant was not present in court and did not receive an adequate explanation of an order from his or her representative.

Paragraph 19(3)(b) has been added to permit a court to make an interim protection order in the defendant's absence. This may be of particular utility if the court is faced with repeated non-appearance by a defendant and it becomes imperative to provide a protected person with needed protection afforded by a domestic violence order as soon as possible.

New subsection 19(4) requires a court to consider whether a defendant has a representative or nominated representative prior to issuing a warrant for the defendant's arrest. This will be of singular importance where the defendant is not an adult.

Finally, this section has been amended to ensure that a court considering the issue of a warrant for the defendant's arrest must first be satisfied of the safeguard matters specified in subsection 12(3).

139 Peter Dunstan

Explanation of protection orders and interim protection orders

20(1) A court that makes a protection order, or interim protection order, must explain the following to the defendant, the aggrieved protected person or nominated representative for the defendant or aggrieved protected person, who is in the court when the order is made—

(a) the purpose, terms and effect of the order, including that a protection order may be registered and enforceable in another Australian jurisdiction or New Zealand without further notice;

(b) the consequences that may follow if the defendant contravenes the protection order or interim protection order;

(c) the order must be varied or revoked if the defendant intends to have contact or reconcile with the aggrieved protected person or a named protected person;

(d) the means by which the protection order or interim protection order may be extended, varied or revoked;

(e) that, under the Firearms Act, the defendant named in a protection order is, subject to other lawful authority, not authorised to possess, carry or use a firearm for 5 years.

(2) If a person to whom an explanation must be given under subsection (1) does not readily understand English or the court is not satisfied the person understood the explanation, the court must, to the extent practicable, arrange for someone else to give the explanation to the person in a way the person can understand.

(3) However, an order under this Act is not invalid merely because—

(a) the court did not explain a matter mentioned in subsection (1), or arrange for someone else to give the explanation, to a person; or

(b) if the court made an arrangement for someone else to give the explanation, the person did not give the explanation.

Explanation of protection orders and interim protection orders

This section follows the 1991/Victorian model, but extends the requirement by making it also apply to the aggrieved protected person. Compliance with the order is assisted by both parties having a good understanding of the restrictions which are placed on the defendant. The aggrieved protected person is then in a position to ensure he or she does not do anything which makes it difficult for the defendant to comply.

In NSW section 562GC provides the court must explain the effect of the order to both the defendant and the protected person: subsection (1). This also applies when an order is varied (subsection (2)). Written explanations must also be given (subsection (3)) and the court must be satisfied, where it is reasonably practicable, to give the explanation in a language that is likely to be readily understood (subsection (4)). Subsection (4) is taken up in the model at subsection 20(2). Failing to comply with this section does not affect the validity of the order or variation: subsection (5).

Queensland's section 50 is similar in effect to the NSW provision even though written explanation is not required and the requirement to use a language the defendant would understand is not explicitly stated, though it could be read into the words "ensure that the respondent spouse understands".

There is no specific provision in the WA, SA and Tasmanian Acts.

ACT subsection 15(1) is similar in effect with the additional proviso that the court must explain to the defendant that reciprocal legislation and enforcement mechanisms exist in other jurisdictions. ACT subsection 15(2) deals with interim orders. This is not required in the Model provision due to the way in which 'order' is defined. ACT subsection 15(3) requires that an explanation be given to a child if a child is the aggrieved protected person.

The NT equivalent for consent orders is subsection 5(5) of their law.

The terms of this provision attracted significant support from contributors,[140] and in particular that the explanation shall be made to both the defendant and the aggrieved protected person. In this regard it was recommended that subsection 20(1) should also refer to the aggrieved protected person,[141] and this subsection has been amended accordingly.

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140 Victorian Community Council Against Violence, Julie Hansen, Legal Services Commission of SA, Federation of Ethnic Communities' Councils of Australia Inc, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Associate Professor Rosemary Hunter, Combined Community Legal Centres Group (NSW), Disability Council of NSW, Women's Legal Service Inc, Women With Disabilities (Australia), Women's Legal Resources Centre Sydney, Department of Immigration & Multicultural Affairs, Domestic Violence Advocacy Service, NSW Council on Violence Against Women

141 Queensland Director of Public Prosecutions, Legal Aid Queensland

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Two contributors stated that the task of making the explanation should fall to an officer of the court rather than to a magistrate, because a magisterial explanation would be akin to providing legal advice to the parties and because of resource implications for magistrates.[142] Other submissions recommended that the model adopt the NSW requirement that the court must additionally provide written explanations to the parties.[143] The Working Group considered these opposing arguments and concluded that the present provision represents a reasonable position with regard to court resources, and preserves the important step of the magistrate who makes the order giving the explanation and thus strongly impressing upon the respective parties that the order carries full legal force and significant consequences if breached. The Working Group considered that if the explanation is given by a court officer rather than the magistrate then some parties, and particularly defendants, may not regard the order as being serious or significant.

Several contributors stressed the need for courts to provide translators or other forms of assistance if the parties to the order require these in order to appreciate the explanation.[144] The Working Group appreciated this argument and points to the provisions of subsection 20(2).

A NSW contributor suggested that it would be prudent if the model adopted the NSW provision which states that failing to comply with the equivalent NSW section does not affect the validity of the order (ss.562GC(5)).[145] The Working Group agreed with this reasoning and the model provision has been amended accordingly.

Firearms prohibition

Paragraph 20(1)(e) (Discussion Paper subsection 5(4)) provides the defendant must be notified he or she is longer authorised keep or use firearms, subject to other legal authority. In some places the legislation still provides that the court may include a restriction that the person may not possess, carry or use a firearm.

However the relevant Australasian Police Ministers Council resolution makes it clear that the minimum standard is that where a protection order is made, the defendant should not be able to have a firearm for 5 years. There is no discretion. In some jurisdictions (ACT and NSW) the period is set at 10 years - what is contained in the model is only a minimum. In Victoria it is 5 years and although the domestic violence law still provides for the making of orders, their firearms legislation provides for a prohibition. In others it is for the duration of the order (Queensland and South Australia). WA has a comprehensive scheme that also includes discretion.

142 NSW Magistrate Shaughan McCosker, NSW Magistrate P Sloan

143 NSW Department of Women, NSW Health Department, NSW Department of Community Services

144 NSW Department of Women, NSW Health Department, NSW Department of Community Services, Women's Legal Service SA Inc, Women's Health Statewide SA, Women With Disabilities (Australia), WESNET Inc

145 Women's Legal Resources Centre Sydney

Model

Various submissions commented on the duration of the 5 year period in which a defendant would not be permitted to possess, carry or use a firearm. Contributors variously favoured the model provision,[146] preferred a 10 year period,[147] or stated that the firearms prohibition should not be of greater duration than the domestic violence order.[148] The last point was raised in the context that a loss of a firearms licence might affect the defendant's employment or livelihood. The Working Group considered that the only appropriate response is to follow the minimum standards outlined in the 10 May 1996 Australasian Police Ministers Council resolution on this topic.

146 Edward Free, NSW Health Department, Women's Legal Resource Group Inc Vic

147 Illawarra Legal Centre Inc, Western Region Domestic Violence Collective

148 Reverend Peter Dunstan, Magistrate P Ashton, Magistrate Shaughan McCosker, Legal Aid Queensland

Duration of protection order

21 A protection order remains in force—

(a) if a time is stated in the order for its duration—until the time stated in the order unless it is sooner revoked by the court or set aside on appeal; or

(b) if no time is stated in the order—until it is revoked by the court or set aside on appeal.

Duration of protection order

The Victorian law provided that the order remain in force for the period specified by the court. This has produced problems where a period has not been specified. The provision in the model follows the 1997 Victorian amendments. The original 1991 model was similar to the earlier Victorian law but also provided that the order ceases to have effect where the parties resume cohabitation for a continuous period of not less than 14 days. This limit was too arbitrary and no doubt difficult to establish.

In Queensland a domestic violence order generally lasts for a specified period of up to 2 years: subsection 34(2). In special circumstances the court can impose a longer period: subsection 34(3). Temporary orders last until the order is returnable, or is revoked: subsection 34(5). New South Wales is similar. In the ACT, section 17 creates a presumption that an order will be made for a period of 2 years. The court, where satisfied, can make an order of indefinite duration or for a specified period greater than 2 years.

The South Australian Act does not deal with this directly. Presumably the general grant of power in section 5 enables the setting of a period that the court believes will be adequate. Tasmania and the NT are similar.

Under new section 16, in WA a violence restraining order lasts up to 72 hours ('cooling-off' order requested in consultation by Aboriginal people); up to 3 months (regular interim order) or if no period is specified, 2 years. In the case of a misconduct restraining order, if no period is specified, 1 year.

This section essentially repeats section 6 of the Discussion Paper with minor redrafting to improve clarity.

The Discussion Paper provision attracted support in principle from most contributors who addressed it.[149] A number of contributors suggested alternative duration periods, principally 12 months[150] or 2 years,[151] and a default period of 12 months[152] or of indefinite duration.[153] Other contributors suggested that orders be stated to endure for a particular period unless a court orders otherwise,[154] that there should be no expiration period unless requested by the protected person,[155] or that there should be a minimum duration of 2 years.[156]

149 Legal Services Commission of SA, Presbyterian Women's Association of Australia in NSW, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Combined Community Legal Centres Group (NSW), Domestic Violence Advocacy Centre

150 Peter Dunstan, Anthony Farr,

151 Beenleigh Domestic Violence Assistance Program

152 NSW Council on Violence Against Women, NSW Department for Women, Women's Legal Resources Centre (Sydney), NSW Health Department, NSW Department of Community Services

153 Women's Legal Service Inc

154 Julie Hansen

155 Women's Legal Service SA Inc, Women's Health Statewide SA

156 Beenleigh Domestic Violence Assistance Program, Queensland Director of Public Prosecutions, Legal Aid Queensland

Model

After consideration of these submissions, the Working Group concluded that the present provision represents the best balance of interests by permitting courts the flexibility to set a duration period that is appropriate in each individual circumstance. The Working Group also concluded that setting a specific duration period, either directly or as a default, would be unnecessarily arbitrary.

Division 4—Interim protection orders

Interim protection orders

22(1) An interim protection order may be made by a court in relation to a protection application if—

(a) the court adjourns the hearing of the protection application for any reason; or

(b) the court has not started to hear the protection application because the defendant has not appeared or the court is not satisfied the defendant, or a representative for the defendant, has been served with the protection application and attached summons.

(2) Before the court may make an interim protection order, it must appear to the court, by oral or affidavit evidence, that the interim protection order is necessary—

(a) to ensure the safety of an aggrieved protected person or a named protected person; or

(b) to prevent substantial damage to property of an aggrieved protected person or a named protected person.

(3) An interim protection order remains in force until the earliest of the following happens—

(a) if a time is stated in the order about when the order ends—when the time stated in the order is reached; or

(b) a court makes the protection order or the protection order arises under section 23;

(c) a court revokes the interim protection order.

Interim protection orders

Again the 1991/Victorian model was the starting point.

NSW section 562BB is similar, however under subsection (3) the court may act on affidavit evidence. After the interim order is made the court must summon the defendant to appear at a further hearing as soon as is practicable.

Under section 49 of the Queensland law the court may hear and determine the application or issue a warrant for the arrest of the defendant or adjourn the matter or make a temporary order. Section 49 applies where the defendant fails to appear after being served with certain documents. Under section 32 the court may make a temporary order without proof of service if it appears that the protected person is in danger of personal injury or his or her property is in danger of substantial damage.

Section 9 of the SA Act is relevant. If the defendant failed to appear the court can determine the matter and issue an order. If the defendant was not summonsed and is not present the evidence has to be in affidavit form and in subsequent hearings of the matter, to confirm the order, the deponent must appear and confirm their affidavit evidence otherwise it cannot be used. If the defendant has not appeared the court may make an order and must issue a summons returnable up to 7 days later. If the defendant does not appear at the subsequent hearing the court can roll over the summonses indefinitely but cannot confirm the order until the defendant has appeared. The roll-over period of the summons can be greater than 7 days if the court finds adequate reasons.

The new WA law tries a completely new approach. S.26 enables the complainant to elect whether the initial hearing should be held in the absence of the defendant. If this is to occur the complainant must lodge an affidavit of evidence in support of the complaint and must attend the hearing. At the hearing the court may make an interim violence restraining order (up to 3 months) or a 'cooling-off' order (up to 72 hours). The 'cooling-off' order must be served within 24 hours or it will lapse, but the defendant has no avenue for having the order reversed. However if it is an interim order, s.31 provides that the defendant has 21 days after service to indicate whether he or she objects to the order. If there is no objection it will be made into a permanent order (ie 2 year order). If there is an objection it will be set down for hearing.

It is understood this process was devised at the request of victims who felt appearing in court onerous, distressing and in these circumstances unnecessary. The position under the old WA law was that the applicant was required to reappear on a 'confirmation date' to see whether or not the defendant would oppose the order being confirmed. In the applicant did not appear, that person ran the risk that the order would cease even if the defendant also failed to appear. Not uncommonly, this resulted in applicants being required to appear in court on more than one occasion in an attempt to have interim orders confirmed, because interim orders had not been served prior to the confirmation

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date. Multiple attendance causes stress and inconvenience to the applicants, many of whom are single parents with young children and limited incomes. Confirmation dates are also the cause of tension in waiting areas around courts with opposing parties in close proximity to one another.

It was considered that "reversing" the process of confirmation would lessen the inconvenience and anxiety of applicants and reduce the number of people attending court unnecessarily. This, in turn would make more court time available for the hearing of the applications, both for orders and for their revocation or variation.

However the disadvantage might be that the seriousness of the situation will not register in the mind of some defendants. They may see the notice as just a piece of paper and will not have the advantage of the explanations given by the court which will no doubt stress the consequences of breaching the order (even if it is by consent).

S.106D of the Tasmanian Act provides for interim restraint orders in similar terms to s.10. However it may only be for a maximum of 60 days.

ACT section 14 substantially reproduces the effect of section 10 above. However, an interim order may not exceed 21 days. There is no limit on the period for which such an order can be extended where the extension is until the date to which the hearing for the protection order has been adjourned. Subsection (2A) requires the court to consider whether access to children is relevant when making an interim protection order.

The NT provides for the equivalent of interim orders at section 6 of their law.

This aspect of the Model was the subject of significant interest to contributors. A large number of submissions opposed the restriction in the Discussion Paper's subsection 10(4) (only oral evidence permitted) on the basis that for many domestic violence victims a court appearance is additional trauma, and that affidavit evidence should be allowed in the alternative.[157] The Working Group is committed to ensuring that only properly adduced evidence is brought before the court, and noted that there are merits in allowing the court to properly assess the victim's evidence by having the benefit of the victim personally appearing: however the Working Group also acknowledges the arguments made in submissions. Affidavit evidence, being evidence taken on oath or affirmation,

157 Magistrate T Cleary, Legal Services Commission of SA, Associate Professor Rosemary Hunter, Domestic Violence Advocacy Service, Combined Community Legal Centres Group (NSW), Disability Council of NSW, Women's Legal Service (Tasmania), Survivors, Women's Legal Service Inc, Queensland Director of Public Prosecutions, WESNET Inc, Law Council of Australia, NSW Health Department, Domestic Violence Coordinating Committee - South Tasmania, NSW Council on Violence Against Women, Office of the Status of Women, NSW Department for Women, Western Region Domestic Violence Collective, Tasmanian Office of the Status of Women, Queensland Police Service, Law Society of NSW, Bega Valley Domestic Violence & Sexual Assault Committee, Legal Aid Queensland

Model

is an acceptable alternative, and it is desirable that victims should not endure further trauma. Subsection 22(2) (formerly subsection 10(4)) has accordingly been amended to also permit affidavit evidence.

Two contributors recommended that the model stipulate a maximum duration period for interim protection orders.[158] The Working Group considered that the amended duration provision now (subsection 22(3)) provided adequate protection for defendants, principally by not permitting interim protection orders to have effect beyond the point in time at which a related protection order is made by the court.

158 Canberra Goulburn Archdiocesan Catholic Women's League Social Issues Committee, Rev. Peter Dunstan

Protection order may arise after interim protection order

23(1) This section applies if a court makes an interim protection order in the absence of the defendant and any representative for the defendant.

(2) After the court makes the order, the clerk—

(a) must arrange for the order to be put in writing; and

(b) no later than 21 days before the day stated in the interim protection order as the day on which the proceedings for the protection order may continue (the "hearing day")—must arrange for 2 copies of the interim protection order, one of which is marked as being the endorsement copy (the "endorsement copy"), to be served on—

(i) the defendant; and

(ii) if the defendant is a child—a representative for the defendant.

(3) The defendant, or the nominated representative for the defendant, may—

(a) complete an endorsement copy in compliance with the instructions on the copy; and

(b) return it to the clerk at least 7 days before the hearing day.

(4) The interim protection order becomes a protection order against the defendant with the same terms as the interim protection order if—

(a) the clerk receives an endorsement copy from the defendant, or the nominated representative for the defendant, at least 7 days before the hearing day; and

(b) the defendant, or the nominated representative for the defendant, indicated on the endorsement copy the clerk received that the defendant does not object to the interim protection order becoming a protection order.

(5) The protection order comes into force under subsection (4) on the day on which the clerk receives the endorsement copy.

(6) Also, the interim protection order becomes a protection order with the same terms as the interim protection order, if the defendant, or the nominated representative for the defendant, does not return an endorsement copy to the clerk at least 7 days before the hearing day indicating the defendant objects to the interim protection order becoming a protection order.

Protection order may arise after interim protection order

This section is new to the Model.

A number of submissions in relation to section 10 of the Discussion Paper brought the provisions of s32 of WA's *Restraining Orders Act 1997* to the Working Group's attention.[159] Section 32 provides that interim orders made in the defendant's absence crystallise into final orders if the interim orders have been served on the defendant and he or she does not object to final orders being made. Contributors reported that the benefit of this provision is to obviate unnecessary court appearances and consequent trauma for the victims of domestic violence. The Working Group considered that the Model would benefit from inclusion of this provision, and section 23 has been created by largely adopting section 32 of the WA Act.

Crystallisation of an interim protection order into a protection order occurs only if the defendant has been served 21 days or more before the date scheduled for hearing the protection application. This is intended to give the defendant sufficient time to consider his or her response and to obtain legal advice if desired. The process continues if the defendant fails to respond within the nominated period or responds with his or her consent to the orders becoming final. The defendant is equally at liberty to prevent crystallisation of orders by lodging an objection and then to oppose the protection application at the subsequent hearing.

The requirement that the defendant must complete and return the endorsement copy at least 7 days before the hearing day (subsection 23(3)) is designed to allow the aggrieved protected person an appropriate period in which to prepare if the defendant objects to crystallisation of the order and elects to contest the hearing.

159 Legal Aid Western Australia, National Council of Single Mothers and Their Children, Associate Professor Rosemary Hunter, Magistrate Shaughan McCosker

(7) The protection order comes into force under subsection (6) on the hearing day.

(8) If, at least 7 days before the hearing day, the defendant, or the nominated representative for the defendant, returns an endorsement copy indicating the defendant objects to the interim protection order becoming a protection order, the court may proceed to hear and decide the protection application on the hearing day or a later day.

Division 5—Telephone interim protection order

Authorised justice may make telephone interim protection order

24(1) This section applies if a police officer applies under section 9 to an authorised justice for a telephone interim protection order.

(2) The authorised justice may make a telephone interim protection order, if the justice is satisfied the order is necessary to ensure—

(a) the protection of the aggrieved protected person or a named protected person from an act of domestic violence by the defendant; or

(b) the welfare of any child who may be affected by the defendant's behaviour.

(3) The authorised justice may include in the telephone interim protection order any directions, restrictions or prohibitions that a court, under section 16, may include in a protection order.

(4) Before the authorised justice includes any prohibitions or restrictions as mentioned in subsection 9(4), the authorised justice must be satisfied the defendant is an adult and there is no guardianship order for the defendant.

(5) In deciding whether to grant a telephone interim protection order, the authorised justice may inform himself or herself in a way the authorised justice thinks fit and is not bound by the rules or practice as to evidence.

(6) The authorised justice must inform the police officer about the following by telling the police officer or sending the order, or a copy, to the officer—

(a) the terms of the telephone interim protection order;

(b) the date and time when it is made.

(7) If, under subsection (6), the authorised justice tells the police officer about the terms of the order, the police officer must complete a prescribed form for a telephone interim protection order by writing on the form—

(a) the terms as stated by the authorised justice; and

(b) the name of the authorised justice; and

(c) the date and time the authorised justice made the order.

Authorised justice may make telephone interim protection order

This section comprises subsections 11(5) - (6) and (9) - (11) and paragraph 11(17)(a) of the Discussion Paper. These subsections and paragraph were supported by contributors in general terms.

The matters in subsection 24(2) of which an authorised justice must be satisfied before making an order pick up the provisions of section 16, and thus achieve consistency with protection orders and interim protection orders.

Subsection 24(3) now permits an authorised justice to include any directions, restrictions or prohibitions which may been included in a protection order. This equation was suggested by one contributor.[160]

Subsection 24(5) permits an authorised justice to inform herself or himself in any way considered fit and specifically frees the authorised justice from the rules or practice as to evidence. This is broader than related section 30 which is limited in its application to courts exercising powers under this Model. The rationale for the broader application in this section is that an application to an authorised justice for a telephone interim protection order is likely to be made in circumstances of emergency or which otherwise prevent the authorised justice hearing properly adduced evidence (such as being able to question the protected person over the telephone). It is therefore appropriate that the authorised justice be granted greater flexibility as circumstances dictate.

Subsections 24(7) - (10) create a system whereby the applicant police officer will quickly have a written order at hand which can immediately be served upon the defendant. The first two of these subsections respectively cover situations where the authorised justice communicates the terms of the order to the police officer by telephone and by other electronic means, such as facsimile, e-mail etcetera.

160 Legal Aid WA

(8) The completed form under subsection (7) is the telephone interim protection order made by the authorised justice.

(9) However, if the authorised justice sends the order, or a copy, to the police officer, the order sent, or the copy received or printed out, by the officer is taken to be the original telephone interim protection order.

(10) A police officer must personally serve the telephone interim protection order on the defendant as soon as practicable after—

(a) the form is completed under subsection (7); or

(b) the order is received, or a copy of the order is received or printed out, under subsection (9).

Protection application taken to be made after telephone interim protection order

25(1) If an authorised justice makes a telephone interim protection order, the police officer who made the application for the order, or another police officer on behalf of that police officer, must—

(a) if the application was in writing—send it and the order to a court; or

(b) if otherwise—complete a written application for a telephone interim protection order in the prescribed form and send it, and the order, to a court.

(2) The application for a telephone interim protection order sent with the telephone interim protection order to a court is a protection application made by the police officer for the aggrieved protected person.

Protection order taken to be made after telephone interim protection order

This section adopts subsection 11(8) of the Discussion Paper. It is a mechanical or administrative provision designed to ensure that a telephone interim protection order is followed by an application for a more enduring protection order.

Subsection 25(1) permits another police officer to carry out the requirements on behalf of the applicant police officer.

Duration of telephone interim protection order

26(1) A telephone interim protection order against a defendant for the protection of the aggrieved protected person and any named protected persons remains in force until the first of the following happens—

(a) midnight on the fourteenth day after the day the order is made;

(b) if a time is stated in the order about when that order ends and that time is earlier than the time under paragraph (a)—the time stated in the order is reached;

(c) the order is revoked by a court;

(d) a court refuses to grant a protection application against the defendant for the protection of the aggrieved protected person;

(e) the telephone interim protection order ends under subsection (2).

(2) If a court makes a protection order, or interim protection order, against the defendant for the protection of the aggrieved protected person, the telephone interim protection order ends—

(a) if the defendant is in court when the court makes the protection order or interim protection order—when the court makes the order; or

(b) if otherwise—when the protection order or interim protection order is served on the defendant under section 62.

(3) A telephone interim protection order must not be extended or varied and a further telephone interim protection order against the defendant for the protection of the aggrieved protected person must not be made in relation to the same incident.

Duration of telephone interim protection order

Section 26 comprises subsections 11(12) - (14) and paragraph 11(17)(b) of the Discussion Paper. It provides the duration period for telephone interim protection orders and proscribes the extension, variation, replacement or renewal of telephone interim protection orders.

A number of contributors addressed the question of duration of such orders (ss11(12) of the Discussion Paper). Submissions alternatively supported[161] or opposed the maximum 14 day limit, with the latter variously suggesting maximum duration periods of two hours,[162] 30 days[163] or unrestricted duration.[164] The Working Group concluded that telephone interim protection orders must have a finite life span as they are granted without the benefit of a court hearing. To grant such orders indefinitely would amount to a denial of natural justice to the defendant. Given the need to set a time limit, the Working Group then considered that 14 days is an appropriate period in which to bring a protection application.

Subsection 26(3) (paragraph 11(17)(b) of the Discussion Paper) prevents replacement or renewal of telephone interim protection orders. This was opposed by one contributor[165] as arbitrary: however the Working Group considers that this is restriction is important in order to bring the parties before a court and thus uphold natural justice for all parties.

161 Western Region Domestic Violence Collective, Tasmanian Office of the Status of Women

162 Family Law Reform and Assistance Association Inc

163 Chisholm Inc, Queensland Police Service

164 Office of the Status of Women, Women's Legal Service SA Inc and Women's Health Statewide SA (the latter two only in relation to telephone interim protection orders made in country areas)

165 Associate Professor Julie Stubbs

Division 6—Extensions, variations and revocations of domestic violence orders

Persons who may apply for extension, variation or revocation of domestic violence orders

27(1) A relevant party to a proceeding for a domestic violence order may apply to a court for —

(a) an extension, variation or revocation of a protection order or interim protection order; or

(b) a revocation of a telephone interim protection order.

Persons who may apply for extension, variation or revocation of domestic violence orders

Sections 27 and 29 are based on the 1991/Victorian model, except that there is also provision for court initiated variations (section 15) and there is a safety exception to the requirement that applications for variations be served on the defendant (see section 61).

Section 562F of the NSW legislation deals with the variation or revocation of orders. Both the protected person and the defendant must be served with copies of the application. The court may decline to hear the application if satisfied that the circumstances have not changed. Where the protected person is a child under the age of 16 only a police officer may make an application. An order that protects several people can only be varied with respect to each party if they consent or, if they are a child, the court is satisfied that the variation or revocation will meet their needs. Subsection (7) deals with service.

Queensland regulates applications for variations and revocations in sections 35, 36 and 51. In the main these provisions are similar to the above provision. One notable departure is that the court can vary an order of its own volition under section 30 (if the defendant is convicted of a domestic violence offence); a revocation can only be ordered following an application under section 51. Section 51 regulates the mechanics of applying for a variation or revocation.

This is dealt with in section 12 of the SA law. Any of the parties may apply. A firearms order can only be revoked where the whole order is revoked or the court is satisfied that there is no history of using guns in domestic violence and the defendant requires a gun to earn a 'livelihood'.

In WA it is dealt with in section 49 of their new Act. Any party may apply for a variation or revocation. Where a defendant applies, a hearing is held to consider whether leave should be granted to make the application as an additional protection for the protected person. Where a registered interstate order is varied or revoked the clerk of the court is obligated to inform the issuing court.

The Tasmanian equivalent is section 106G. It is similar in effect to the model.

The NT has the most detailed procedures under ss 8-9 of their Act. They provide for variations by telephone. This was not followed in the model because it was thought the procedure at s.9 which deals with telephone interim protection orders adequately deals with emergencies and it is undesirable to move towards regularising the use of the telephone procedure. In many circumstances variations can be as significant as the original order.

This section replaces subsection 21(2) of the Discussion Paper. It delineates who may apply for an extension, variation or revocation of a domestic violence order: see the definition of 'relevant party to a proceeding' in section 2. It also restricts applications in relation to telephone interim protection orders to applications for revocation. This slightly reduces the scope of applications that

Model

were possible under the Discussion Paper, namely applications for extension or variation of telephone interim protection orders are no longer possible.

This limitation was made because it was considered that the short duration period of telephone interim protection orders (maximum of 14 days: see ss26(1)) did not permit sufficient time for applications for variation or extension to be brought and heard within that duration period. However the Working Group acknowledged that defendants should nonetheless retain the right to apply for revocation of a telephone interim protection order, although there may similarly be some difficulty in having such an application heard before the telephone interim protection order expires by virtue of one of the grounds stated in subsection 26(1).

Whilst the time constraint exists in identical terms for applications for variation or revocation, considerations of justice hold that it is singularly important that defendants be able to bring an application for revocation in circumstances where they believe a telephone interim protection order has been wrongly granted. This is particularly so because a defendant would not normally have been afforded an opportunity to present her or his perspective when the telephone interim protection order was made.

One contributor suggested that only the victim of domestic violence, and not the defendant, should be able to apply for variation of a domestic violence order.[166] The Working Group did not agree with this suggestion, considering that such an unequal scheme would constitute a denial of natural justice.

166 Western Region Domestic Violence Collective

Applications under section 27 by defendants

28(1) This section applies if the person who makes an application, as mentioned in section 27, for a domestic violence order is—

(a) the defendant against whom the order is made; or

(b) a representative for the defendant.

(2) The defendant or representative must serve a copy of the application on the Chief Commissioner of Police but the aggrieved protected person or any nominated representative for the aggrieved protected person is not required to be served.

(3) If the clerk of the court is satisfied the Chief Commissioner of Police has been served under subsection (2), the clerk must—

(a) fix a time and day for a preliminary hearing at which the court must consider whether to grant leave for the application to continue; and

(b) give written notice about the time and day of the preliminary hearing to—

(i) the defendant or other applicant; and

(ii) the Chief Commissioner of Police.

(4) The preliminary hearing must be held in the absence of the aggrieved protected person, any nominated representative for the aggrieved protected person and a named protected person unless the aggrieved protected person or nominated representative for the aggrieved protected person appears and seeks, and obtains, leave of the court to be heard.

(5) If the defendant or representative does not attend the preliminary hearing, the court must—

(a) dismiss the application if it is satisfied the defendant or representative was given notice about the hearing under subsection (3)(b); or

(b) adjourn the hearing if it is not satisfied the defendant or representative was given the notice.

(6) If the defendant or representative attends the preliminary hearing, the court must—

(a) grant leave for the application to continue if it is satisfied there has been a substantial change in the relevant circumstances since the order was made; or

(b) dismiss the application if it is not satisfied there has been a substantial change.

Applications under section 27 by defendants

This section is new to this Model.

In response to section 21 of the Discussion Paper, a number of contributors suggested that the Model would be improved by incorporating section 46 of the Western Australia *Restraining Orders Act 1997* or subsection 562F(4A) of the NSW Act.[167] Section 46 provides for a preliminary ex-parte hearing to be conducted in order to determine the merits of an application by a defendant for variation or revocation of an order. If the court considers that there has been a substantial change in the relevant circumstances then the court is to grant leave for the application to continue. If the defendant is unable to demonstrate a substantial change in the relevant circumstances to the court's satisfaction, then the court is to deny leave for the defendant's application to progress to a full hearing. The intention behind the ex-parte hearing is to prevent a defendant further abusing the aggrieved protected person by bringing repeated and unmeritorious applications. The ex-parte hearing will enable courts to weed out such applications and thus prevent an abuse both of the aggrieved protected person and of the court's resources. However applications with merit will be permitted to progress to a full hearing. In this regard this section is similar to subsection 562F(4A) of the NSW Act.

The Working Group accepted these arguments and this section, which largely adopts section 46, was created.

This section differs from section 46 in that subsection 28(2) requires a defendant to serve a copy of his or her application upon the Chief Commissioner of Police. This process differs from the service provisions of section 57 of this Model, in that it solely refers to service of applications to which leave has not been granted to continue. The intention behind this subsection is to give police sufficient notice of such applications in cases where the original applicant was a police officer or where the police have reason to intervene in the ex-parte hearing.

The other difference from section 46 of the WA Act is that subsection 28(4) states that the ex-parte hearing *may* be held, rather than *shall* be held, in the absence of the aggrieved protected person. This enables an aggrieved protected person who is aware of the ex-parte hearing to engage in that hearing, but places no obligation to attend upon the aggrieved protected person. The Working Group considered that an aggrieved protected person must not be precluded from attending the hearing if he or she elects to do so. However it should be noted that, similar to section 46, the Model provision does not provide for service of the application upon the aggrieved protected person until the court has granted leave for the application to continue.

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167 Legal Aid Western Australia, Magistrate T Cleary, Domestic Violence Advocacy Service, Associate Professor Rosemary Hunter, NSW Department for Women, Women's Legal Service SA Inc, Women's Health Statewide SA, NSW Health Department, NSW Department of Community Services, WESNET Inc, Queensland Police Service, Office of the Status of Women

(7) Subsections (3)(b), (5) and (6) apply to an adjournment of a preliminary hearing under subsection (5)(b) in the same way as they apply to the preliminary hearing.

Decision about application for extension, variation or revocation

29 If a person applies to extend or vary a protection order or interim protection order, or revoke a domestic violence order, the court may make an order as it considers appropriate—

(a) granting the application by extending or varying the protection order or interim protection order, or by revoking the domestic violence order; or[168]

(b) refusing to grant the application.

168 Also, under section 15, a court may extend or vary an existing domestic violence order on its own initiative.

Decision about application for extension, variation or revocation

This section appeared as subsection 21(1) of the Discussion Paper and repeats the actions a court may take when considering an application for extension, variation or revocation of an order after conducting a hearing for the same.

The courts power to vary, extend or revoke an order on its own initiative, which appeared in subsection 21(1) of the Discussion Paper, has been moved to section 15 of the Report where it is listed with the court's other powers to be exercised upon its own initiative.

A court exercising power under this provision is required to first consider the matters listed in section 16, including the paramount matters stated in subsection 16(1), and any relevant contact orders that have been brought to the court's attention.

Division 7—Miscellaneous

Hearsay evidence

30 A court exercising powers under this Act may admit and act on hearsay evidence unless the interests of justice require otherwise.

Hearsay evidence

Section 30 (section 14 of the Discussion Paper) is drawn from the NT Act and accords with s.6 of the original 1991 model. Victoria has a broader provision (s.13A) which provides the court may inform itself on a matter in such manner as it thinks fit despite any rules of evidence to the contrary. Many who were involved in developing the model favoured expanding this provision.

Queensland's section 84 makes the rules of evidence optional in relation to proceedings under the Act.

Part XV of the ACT *Magistrates Court (Civil Jurisdiction) Act 1982* provides the court can dispense with compliance with the rules of evidence for proving any matter which is not bona fide in dispute or where compliance might occasion or involve unnecessary or unreasonable expense or delay. The recently inserted section 8B of the *Domestic Violence Act* enables the court to inform itself in any manner it thinks fit.

NSW, WA and SA do not have this type of provision. Tasmania has no special rules except that a spouse may be compelled to give evidence in these cases.

This provision was well supported in submissions,[169] however some contributors preferred the Victorian[170] and Queensland provisions[171] for reasons of greater flexibility in the admission of material in support of an application.

Other contributors opposed any relaxation of rules of evidence, especially given the extensive prohibitions a defendant can be made subject to and the serious penalties for breach of any order,[172] because of the enhanced prospect of abuse of the system,[173] and also because relaxing the rules of evidence may give the impression that protection orders are easy to obtain and therefore proceedings for protection orders are not as serious as other proceedings.[174]

The Working Group examined these arguments and concluded that the present provision establishes the necessary balance between the competing interests of fairness to defendants and the need to permit flexibility in situations where the court is inquiring into the homelife of people which is often closed to the rest of the world. In these situations it may be vital to present hearsay evidence.

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169 Legal Services Commission of SA, ACT Department of Education & Training, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Aboriginal Legal Service of WA (Inc), Women's Legal Service SA Inc, Women's Health Statewide SA, Julie Hansen, Sussex Street Community Law Service Inc, Rhonda Parker MLA (WA Minister for Women's Interests), Legal Aid WA

170 Edward Free, Victoria Police, Victorian Community Council Against Violence, Dr Patricia Easteal, Burnside

171 Women's Legal Service Inc, Legal Aid Queensland, Queensland Police Service

172 Law Society of NSW

173 Lone Fathers Association Australia (Inc), Canberra Goulburn Archdiocesan Catholic Women's League Social Issues Committee, Peter Dunstan

174 Combined Community Legal Centres Group (NSW)

Model

The Working Group notes that the provision simply permits a court to admit and act on hearsay evidence: whether a court does so will remain at the court's discretion. This discretion will operate as a safety mechanism by allowing the admittance of hearsay evidence only where a court considers it appropriate to do so.

As stated above, there was no clear consensus amongst the Working Group concerning preference for the Victorian or Queensland provisions (or the recent ACT amendment), which enable a court to inform itself in any way it considers fit. The Working Group is also cognizant of the uniform Evidence Act which is a similar project initiated by the Standing Committee of Attorneys-General. The uniform Evidence Act, which has been enacted by the Commonwealth, NSW and the ACT, provides for the broader admission of hearsay evidence in codified instances. The Model provision is consistent with the trend towards liberalisation of the law in relation to hearsay found in the Evidence Act.

Costs

31 A court may not award costs against a person who makes an application under this Act, even though the court refuses to make or confirm an order, unless the court is satisfied—

(a) the person made the application knowing it contained matter that, in a material particular, was false or misleading; or

(b) the application was intentionally frivolous or vexatious.

Domestic violence order prevails over order under Children and Young Persons Act

32 An order under this Act applies despite any order under the [Children and Young Persons Act (Victoria)].

Costs

This section follows s.61 of the Queensland law and s.15 of the NT law. It can operate as a disincentive for the vexatious. The 1991/Victorian model only provided for the awarding of costs in 'exceptional circumstances' (s.23/14A). In NSW (s.562N) and WA (s.69) costs can be awarded to either party, but not against a victim unless the complaint was frivolous or vexatious. NSW also excludes police (which is difficult to justify under the model given the limitations in s.19). This issue is not specifically dealt with in other jurisdictions.

The new ACT section 19E enables the court, where satisfied that an application is frivolous, vexatious or not made in good faith, and a person other than the applicant has reasonably incurred expenses in relation to the proceeding, to order the applicant to pay an amount to that other person, not exceeding the expenses incurred and which the court considers reasonable in the circumstances.

The Discussion Paper's section 19 has been slightly amended to more closely follow the Queensland provision. The test for mala fides applications, namely "unreasonable and in bad faith", has been amended to incorporate the Queensland concept of "intentionally false, frivolous, vexatious or in bad faith". This approach was favoured in several submissions.[175]

There was also a recommendation that this provision should equally apply to applications for variation, revocation and extension.[176] The Working Group agreed and this section has been amended accordingly. Another contributor recommended that there should be a clear indication that the costs rule also applies to proceedings for breach of an order.[177] It has been experienced that some magistrates are awarding costs against police where an application to have a defendant dealt with for breach of an order is unsuccessful. The Working Group did not agree with this change because these are criminal proceedings and the ordinary rules for costs in relation to a malicious prosecution would apply.

This provision was otherwise well supported by contributors.[178]

Protection order prevails over order under *Children and Young Persons Act*

This provision attracted support from both contributors who addressed it.[179]

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175 Legal Aid Queensland, Women's Legal Service Inc

176 NSW Magistrate TG Cleary

177 Victoria Police

178 Legal Services Commission of SA, Women's Legal Service SA Inc, Women's Health Statewide SA, NSW Magistrate P Ashton, Federation of Ethnic Communities' Council of Australia Inc, National Council of Single Mothers and Their Children, Victoria Police, Women's Legal Resources Centre Sydney, Queensland Police

179 Legal Services Commission of SA, National Council of Single Mothers and Their Children

Closure of proceedings involving a child or on application

33(1) A court proceeding under this Act involving a child, whether as a relevant party to the proceeding or a witness, is closed to the public.

(2) Also, the court may close a proceeding on application of a relevant party to the proceeding.

(3) Even if a court proceeding is closed under subsection (1) or (2)—

(a) both the aggrieved protected person and the defendant have the right to have one person each with him or her throughout the proceeding to give support or other help; and

(b) the court may allow other specific persons to attend the court proceeding.

Closure of proceedings involving a child or on application

This is based on s.81 of the Queensland law. However in Queensland and the NT the court is closed to the public in relation to any proceedings of this nature. In NSW s.562NA of their law provides for closure in cases involving children.

The 1991/Victorian model does not provide for a closed court. It would seem that if there is to be an offence for disclosing details relevant to children such as provided in section 36 of the model, it is only consistent that the court should be closed in those circumstances.

There is of course a general principle that our courts should be open so that the public can satisfy itself that its procedures are fair and just. While these proceedings can be embarrassing and are of a personal nature, the same can be said of other civil and criminal proceedings before the courts. However one fear is that the public or media could inadvertently report on the location of the aggrieved protected person and place that person in danger.

Where the defendant is a child different rules may be necessary. For example in WA the court may require the defendant to attend court with a "responsible adult" because it is felt that person may exercise some influence over the defendant to comply with the order.

The principle that courts should be closed when hearing domestic violence matters involving children commanded overwhelming support from submissions.[180]

The question of whether this provision should be extended to all courts when hearing domestic violence matters was divided, with the balance being in favour of keeping the courts open, subject to the courts' usual discretion to close in appropriate cases. The Working Group accepted this view for reasons given in the Discussion Paper, although the Model has been slightly amended to permit either party to apply for the court to exercise its discretion to close.

180 Legal Services Commission of SA, ACT Department of Education & Training, National Council of Single Mothers and Their Children, Domestic Violence Advocacy Service, Combined Community Legal Centres Group NSW, Western Region Domestic Violence Collective, Lismore Women's and Children's Refuge, Burnside, Women's Legal Resource Group Inc Vic, Eastern Domestic Violence Outreach Service Inc, Associate Professor Rosemary Hunter, Department of Immigration & Multicultural Affairs, Rhonda Parker MLA (WA Minister for Women's Interests), Geelong Rape Crisis Centre, Domestic Violence and Incest Resource Centre, Combined Community Legal Centres Group NSW, Illawarra Legal Centre Inc, Laurel House, Aboriginal Legal Service of WA Inc, Tasmanian Office of the Status of Women, Legal Aid Queensland, Coalition for Gun Control (Vic) Inc, Presbyterian Women's Association of Australia in NSW, Tharpuntoo Legal Service Aboriginal Corporation, Women's Legal Service SA Inc, Women's Health Statewide SA, Catholic Women's League Australia Inc NSW

Model

Two contributors suggested that, in the interests of fairness, the provision permitting an aggrieved protected person to have a person with her or him throughout proceedings for support should be extended to defendants.[181] This will be of particular importance where a defendant is a child or otherwise has special need for assistance. The Working Group accepted this view and the section has been amended accordingly.

181 Rev. Peter Dunstan, Women's Legal Service Inc

PART 3—EXTERNAL PROTECTION ORDERS

Division 1—Manual method of registering external protection orders

Definitions for division 1

34 In this division—

"aggrieved person" means a person—

(a) for whose benefit an external protection order is made in another Australian jurisdiction or New Zealand, however the person is described in the order; and

(b) who, in the other Australian jurisdiction or New Zealand, may apply to have the order extended, varied or revoked.

"defendant" means a person against whom an external protection order is made, however the person is described in the order.

"original court", for an external protection order, means the court in another Australian jurisdiction or New Zealand that made the external protection order.

"registered external protection order" means an external protection order registered under this division.

Definitions for division 1

'aggrieved person'

This definition is used to identify those who are protected by the terms of an *external* protection order.

'defendant'

Unlike the term 'aggrieved person', the Working Group did not consider it necessary to use differing terminology from 'defendant' in section 3. This definition has a restricted meaning in comparison with the same term used elsewhere in the Model. It is intended to restrict coverage by this definition to those persons against whom an external protection order has been granted, rather than those persons against whom a protection application has been made but not yet determined. The rationale for this limited definition is that this system is designed to enable the registration of orders - not applications - and thus permit the enforcement of orders in the registering jurisdiction.

'original court'

The reference to New Zealand in this definition is the basis for registration of New Zealand domestic violence orders in Australian States and Territories.

'registered external protection order'

This definition is used to identify orders registered under this Division.

Registration of external protection orders

35(1) A person may apply to the clerk of a Magistrates Court to register an external protection order.

(2) The person need not give notice of the application to the defendant, but may do so.

(3) If the clerk is satisfied the external protection order is in force in the jurisdiction in which it was made, the clerk must—

(a) register the external protection order in the court; and

(b) give notice about the registration to the original court; and

(c) forward a copy of the registered external protection order to the Chief Commissioner of Police [and a copy to the Register of Firearms].

(4) Subject to section 37, the registered external protection order—

(a) has the same effect in [this State/Territory] as a protection order made by the clerk's court; and

(b) may be enforced in [this State/Territory] as if it were a protection order that had been personally served on the defendant.

(5) A registered external protection order remains in force in the State/Territory for the time for which the external protection order is, at the time of the application for registration in the State/Territory, to remain in force in the jurisdiction in which the order was made.

Registration of external protection orders

This section appeared as subsections 24(1) and (2) and section 26 in the Discussion Paper.

The original 1991/Victorian model is varied to reflect existing legislation and a concern in Victoria that allowing variations made by the external court to have effect after the order is registered may cause unnecessary confusion. This will be a problem when the external court has not officially notified the court of the variation. It is much better for the court to have a firmer basis from which it can act to protect those covered by the order.

The model still provides that the external courts should be notified of any registrations. Even if the registration will have no effect in the other jurisdiction, it is important that courts be kept officially informed of developments rather than placing them in the hands of one or both the parties to the order. This notification procedure is also an important link in the deregistration process where that becomes necessary.

Another change to the original model is the new provisions give the court clear authority to revoke the registered order. Most States and Territories already have this capacity. Victoria found that it was very difficult to properly administer the external protection orders without this capacity. See section 37 for the revised model.

NSW deals with the registration of interstate orders in sections 562S, 562T, 562U and 562V. Section 562S is procedural. Section 562T allows for the variation of an order, before it is registered. Section 562U makes the registered interstate order equivalent to an order made under Part 15A Division 2 of the Crimes Act (NSW). The variation or revocation of an order in the jurisdiction in which it was originally registered has no effect in NSW. Section 562V allows for the variation or revocation of registered interstate orders in their application in NSW. Note section 562U of the NSW legislation which equates a registered interstate order to an order made under the NSW legislation, in effect bringing all the other provisions of the NSW legislation into play.

In Queensland the relevant provisions are sections 40 to 46. A registered order is treated as an order made under the Queensland Act, but their legislation envisages that variations might be considered at the point of registration, to ensure the effective operation of the order in that State. Elsewhere the policy of leaving the order alone unless there is an application for variation in the usual way is preferred. Clearly it is preferable to avoid variations which might confuse the parties.

In SA the registration of orders is dealt with in section 14 (they may be varied) and makes the registered interstate order equivalent to an order made under the SA Act. The ACT provides for registration in similar terms under the *Protection Orders (Reciprocal Arrangements) Act 1992*. Similar provisions also apply in WA (Part 7 of the new Act), Tasmania and the NT (Part 3).

Model

The concept of registering external protection orders attracted a great deal of thoughtful comment in submissions and was strongly supported.[182] Many submissions urged the creation of a national registration scheme in order to overcome the problems associated with inter-jurisdictional registration.[183] The Working Group agreed that a national registration scheme is desirable, and with the advent of the Federal Government's CrimTrac policy this goal has become attainable. See sections 40 - 44 of this Model for details of a national registration scheme utilising CrimTrac. However the Working Group also recognised that it will take some time to implement the CrimTrac policy, and in the interim a manual inter-jurisdictional registration system must be available.

The Working Group accordingly agreed to the following measures to enhance the manual external protection order registration system, and changes have been made to this division where appropriate to reflect these decisions.

When an external protection order can be registered: the Working Group accepted that an external protection order should be capable of registration in another jurisdiction at any time following the making of the order. It would be unreasonable to make the protected person wait until the appeal period prescribed by section 50 of this Model expired, because the original order remains in effect in the original State or Territory during the appeal period or process.

What may be registered: some members of the Working Group considered that the only external domestic violence orders which should be capable of being registered are final orders ('protection orders'), including those orders still subject to the appeal period prescribed by section 50 and those orders against which an appeal has been lodged under section 51. The rationale for confining portability to final orders is that interim protection orders (including telephone interim protection orders) are very short-term, transitory by nature and significantly more subject to change than final orders; they are untested by hearing in a court and therefore already involve a possible denial of natural justice to the defendant, the effect of which is increased if such orders are registered in another jurisdiction; and interim orders are of such short lifespan that, rather than permitting cross-jurisdictional registration, it would be more efficient for the person protected by an interim order in one jurisdiction to apply for a separate order in the new jurisdiction if necessary.

182 Legal Services Commission of SA, Women's Legal Resources Centre Sydney, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Domestic Violence Advocacy Service, Combined Community Legal Centres Group NSW

183 Bega Valley Domestic Violence & Sexual Assault Committee, Manning District Emergency Accommodation Inc, Country Women's Association of WA (Inc), Victoria Police, Women's Legal Service SA Inc, Women's Health Statewide SA, Queensland Police Service, Victorian Community Council Against Violence, Legal Aid WA, Rhonda Parker MLA (WA Minister for Women's Interests)

Model

Conversely, members of the Working Group who considered that interim orders should be capable of registration stated that an aggrieved protected person should have the benefit of an interim order's protection regardless of location because a court has seen fit to issue the interim order, and pointed out that the domestic violence legislation in some jurisdictions, such as the Northern Territory, already permit such registration without difficulty. However the majority view is that the Model should provide for inter-jurisdictional registration only of final orders.

Duration of registered order: Subsection 35(5) restricts the duration of a registered external protection order to the lifespan of the original order. The Working Group accepted that setting a specific duration period for registered external protection orders would be unreasonably arbitrary, and that the only acceptable duration would be for the same period as the original order. This period will be clear in all instances, either directly on the face of the order or by operation of the default provisions of section 21. It is appropriate that the original order and the registered order should exist in tandem: and this restriction is necessary to prevent the registered order outlasting the original order.

Appeal against registration of an external protection order: The Working Group accepted that there should be no ability for any person to appeal against the registration of an external protection order. The issues have already been litigated in the home jurisdiction. If there is some issue concerning the location of the protected person, it is likely to be relatively minor compared to the public interest in providing adequate protection to that person. The Model has therefore been drafted to deny the possibility of an appeal against registration.

Notification to the defendant of registration: The Discussion Paper identified as a key issue whether a person seeking registration of an order should be obliged to inform the defendant of that application or registration, and sought specific comment. The idea of this provision comes from s.46 of the Queensland law. However it has been extensively modified because the Queensland law also provided that the defendant need not be notified of variations to the order. This is because in Queensland the court is asked to consider whether the order should be varied to suit enforcement in Queensland when it is first registered. The policy behind this is to ensure that the defendant is not tipped off about the location of those protected by the order without the agreement of the aggrieved protected person. In some cases this could affect the personal safety of those protected by the order.

In other States and Territories notification of the application for registration is either not required by the statute (Victoria, SA and the ACT) or specifically prohibited without the consent of the aggrieved protected person (NSW, s.562T; Tasmania, s.562T(5) and the NT, s.18(5)). The new WA law (s.75(3)) provides the application for registration 'need not be served on the person who is bound by the order.' However in each of these jurisdictions applications for variations must be served on the defendant.

Model

Section 26 of the Discussion Paper (now subsection 35(2) of the Model) provided that an applicant for inter-jurisdictional registration need not inform the defendant. Strong support for this provision was received from many contributors,[184] although two contributors preferred the equivalent NSW section (s.562T).[185] Most contributors accepted the public policy ground for denying notification of registration to defendants, namely that the safety of the aggrieved protected person is the paramount concern and that notification may pose an unjustified risk to that person's safety.

One contributor[186] suggested that the provision should be amended to state that notification of registration shall be given to the defendant unless otherwise ordered by the court. The Working Group did not consider that this amendment was warranted in light of the overwhelming cross-community support for the provision in its present form.

184 Queensland Director of Public Prosecutions, NSW Health Department, Women's Legal Resources Centre Sydney, Law Council of Australia, Legal Aid Queensland, Office of the Status of Women, Western Region Domestic Violence Collective, Women's Legal Service Inc, Education Centre Against Violence, Women's Legal Resource Group Inc Vic, National Council of Single Mothers and Their Children, Julie Hansen, Edward Free, Lismore Women's and Children's Refuge Inc, Victorian Community Council Against Violence, Legal Services Commission of SA, Dr Patricia Easteal, Victoria Police, Eastern Domestic Violence Outreach Service Inc, Domestic Violence and Incest Resource Centre, NSW Council on Violence Against Women, Legal Aid WA, Law Institute Victoria

185 Domestic Violence Advocacy Service, Combined Community Legal Centres Group (NSW)

186 Law Society of NSW

Deregistration of registered external protection order

36(1) The clerk of a Childrens Court or Magistrates Court must apply to the court for a registered external protection order to be deregistered if the clerk (whether on application by a person or on his or her own initiative) is satisfied—

(a) the external protection order is no longer in force in the jurisdiction in which it was made; or

(b) a protection order has been made under this Act that protects the person who is the aggrieved protected person against the person who is the defendant named in the registered external protection order.

(2) If the court is satisfied about a matter mentioned in subsection (1)(a) or (b), the court must order the deregistration of the order.

(3) If the court is satisfied the external protection order no longer is in force in the jurisdiction in which it was originally made, the court must order the deregistration of the order.

(4) The clerk must give notice about the deregistration in [this State/Territory to]—

(a) the aggrieved person; and

(b) the Chief Commissioner of Police [and a copy to the Registrar of Firearms].

Deregistration of registered external protection order

This is a new provision to this Model. It provides for a system of deregistration of a registered external protection order where the original order is no longer in force in the original State or Territory or in New Zealand if the order originates from that country. Such a system is necessary to remove old and outdated registrations and to prevent registered orders outlasting the relevant original order in the other jurisdiction. The latter situation would not be acceptable because the registered order has not been tested by a court in the registering jurisdiction, whereas the original order resulted from a hearing by the original court. This situation becomes even more undesirable where the original order has been revoked or the subject of a successful appeal.

The clerk of the registering court may receive advice that the original order is no longer in force and is obliged to seek deregistration of the registered order if satisfied that the advice is correct. The Model does not prescribe the means whereby the clerk must satisfy himself or herself - this is a matter for each jurisdiction. However, often the original order will indicate its duration. In those cases the clerk will be notified of the expiry of the order in that way. Where the order is not specific as to duration, the clerk may need to rely on advice from the original court.

Following deregistration, the clerk is to give advice of the deregistration to appropriate authorities in the registering State or Territory.

This section also provides that a registered order is to be deregistered if a court in the registering jurisdiction makes a fresh order between the parties to the registered order. This is necessary to prevent potentially conflicting orders being in force in the one jurisdiction. It is also desirable that a defendant should be the subject of only one comprehensive order in relation to a protected person, in order to assist the defendant to understand the terms of the order and to comply with those terms.

No variation, extension or revocation of registered external protection orders

37(1) A court in [this State/Territory] may not vary a registered external protection order or extend the time for which the order is to remain in force in [this State/Territory].

(2) A variation or extension of an external protection order by the original court, or another court in the jurisdiction within which the original court is located, has no effect in [this State/Territory].

No variation, extension or revocation of registered external protection orders

Subsection 37(2) picks up subsection 24(4) of the Discussion Paper. One contributor suggested that there should be additional provision to register variations of original orders in other States.[187] The Working Group noted this but points out that the registration system would permit the registration of all original orders, whether varied or otherwise. This provision was accepted by other contributors.

Subsection 37(1) is new to the Model. It prevents a court in a registering jurisdiction from varying the terms (including the duration) of a registered external protection order, whether on application or otherwise. The Working Group did not achieve a consensus on this issue. Some members of the Working Group pointed out that provision to vary registered orders already exists in some jurisdictions, such as Victoria, that disallowing variation may result in different orders operating in different jurisdictions if an original order is varied, and that requiring a protected person to travel interstate to seek variation of an original order may be inconvenient.

Other members of the Working Group accepted the weight of these arguments in principle but nonetheless considered it important that registered orders not be capable of variation. The rationale for this view is that if an aggrieved protected person finds it necessary to vary a registered order then the processes involved will essentially be the same as those involved in obtaining a fresh order in the registering jurisdiction. The defendant must be notified of the application and a hearing must be held, all in the new jurisdiction. Given this reality, it is preferable that the aggrieved protected person be required either to seek a variation of the order in the original jurisdiction and have it re-registered or to seek a fresh order in the new jurisdiction because it will enable a court to examine whether the evidence merits a domestic violence order rather than simply varying an order *which has never been tested by a court in the registering jurisdiction*. This is particularly in issue if there has been a significant passage of time since the original order was granted. It is useful to note that the desire to vary an order may arise some time, possibly years, after the original order was granted, and the circumstances meriting the grant of the original order may well have significantly changed. The issue thus becomes one of ensuring that natural justice is extended to the parties, particularly to the defendant. In these circumstances it would be wholly appropriate for a fresh hearing to be conducted by a court, and given that essentially the same processes are involved in varying an order and obtaining a fresh order, it is desirable that the latter occur. Accordingly the Model prevents the variation of registered external protection orders.

187 Associate Professor Rosemary Hunter

Model

If a fresh order is obtained between the parties in the new jurisdiction then the registered order is to be deregistered in order to prevent potentially conflicting orders operating in the jurisdiction: see section 37. This is a necessary adjunct to disallowing variation, because it will prevent different orders operating at the same time in the one jurisdiction.

Finally, the Working Group notes that the advent of the alternative registration system (through the national CrimTrac scheme detailed in the next Division) would overcome all these concerns by permitting the nationwide enforcement of orders, as originally made or as varied, without the need for manual registration.

Clerk must give notice about certain matters to other jurisdictions

38(1) This section applies to the clerk of a court in [this State/Territory] if the court revokes a protection order, or sets aside a protection order on an appeal, that the clerk knows, or has reason to believe, has been registered in a court under a law of another Australian jurisdiction or New Zealand.

(2) Without limiting section 62, the clerk must give written notice about the revocation of, or order setting aside, the protection order to an officer of the court in which the order is registered in another Australian jurisdiction or New Zealand.

(3) The notice must be given in writing or by electronic means that is capable of being produced or reproduced in writing.

Clerk must give notice about certain matters to other jurisdictions

Section 38 is an administrative provision designed to ensure that registered orders which 'piggyback' an original order are deregistered if the original order is revoked or if the original order is set aside on appeal.

An external protection order can be registered without the registering court hearing any of the evidence presented to the court in the first jurisdiction when that court made the original order. It follows that if the defendant successfully appeals the making of the original order, or successfully applies for revocation of that order, then the registered external protection order should be deregistered. Following registration, the registering court is required to advise the original court of the registration (see section 35). This places the original court on notice that there is an order in effect in the registering jurisdiction which 'piggybacks' the original order. In the event of a successful appeal against, or successful application for revocation of, the original order, the originating court will be obliged to advise the clerk of the registering court. The registering court's clerk must then take steps to deregister the registered external protection order without need for an application by the defendant or any other person.

Enforcement of external protection orders before registration

39(1) This section applies to an external protection order even though it is not registered under section 35.

(2) If a police officer forms an opinion, on reasonable grounds, that a person is the defendant named in an external protection order that continues to remain in force in the jurisdiction in which it was made, the officer must—

(a) make a written declaration about the officer's opinion and include in the declaration the date and time at which it is made; and

(b) give the declaration to the Chief Commissioner of Police.

(3) After the police officer forms the opinion, but within 72 hours after making the declaration, the officer may exercise the officer's powers in relation to the defendant as if the external protection order were a registered external protection order, including, under section 46, seizing a firearm in the defendant's possession.

Enforcement of external protection orders before registration

The proposed provisions originates from s.11 of the NT Act. NT authorities advise it has worked well in that jurisdiction. The provision provides a safety valve which recognises Australia's vast size and the inevitable communication problems which go with it. There is no equivalent elsewhere.

This provision was strongly supported by a significant number of contributors.[188]

One contributor[189] queried the need for a police officer acting under this provision to make the declaration and forward it to the Commissioner of Police, whilst acknowledging the Discussion Paper's statement that a similar provision works well in the Northern Territory. The rationale for these requirements is that a written declaration of the officer's beliefs provides some accountability in relation to the exercise of fairly exceptional powers under this section, and the requirements have been retained in the amended model.

However the provision has been slightly amended to permit an officer to exercise his or her powers under this section after forming the opinion but before making the declaration. The reason for this change is that it is likely that police officers will need to enforce an external protection order prior to registration in circumstances where there is an urgent need for protection. It would not be acceptable to make the officer complete and lodge paperwork, however important, *prior* to rendering protective assistance to a victim of domestic violence. It should however be noted that subsection 40(3) limits the period in which a police officer can take action under this section to 72 hours after making the declaration. The Model does not specify that the police officer must make the declaration within a certain period after forming the opinion: this is something that may be best addressed in police procedures rather than legislation.

The same contributor also suggested that the requirement in the Discussion Paper's paragraph 25(2)(b) for the police officer to take steps to effect registration of the order might result in such registration occurring contrary to the wishes of the aggrieved protected person. It is obvious that a victim of domestic violence may have good reasons to preserve her or his anonymity after fleeing to a new jurisdiction, including not taking steps to register the order, and the Working Group accepted the position that registration should solely lie at the behest of the aggrieved protected person. Paragraph 25(2)(b) from the Discussion Paper has therefore been removed from the Model, however the Working Group was not unanimous on this point.

188 Edward Free, Julie Hansen, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Combined Community Legal Centres Group (NSW), Beenleigh Domestic Violence Assistance Program, Tasmanian Office of the Status of Women, Legal Aid Queensland, Law Council of Australia, Women's Legal Resources Centre Sydney, Legal Aid WA

189 Victoria Police

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The Working Group also considered whether it should be possible for a police officer to enforce an interim protection order made in another jurisdiction, which according to this Model cannot be registered outside that jurisdiction. This consideration was made whilst bearing in mind the speed with which some incidents can develop, and consequently the need to ensure that adequate and appropriate protection is afforded to protected persons. The Working Group was uncomfortable with police officers exercising power on the basis of an interim order which is not registrable, and decided that this is not desirable. It was recognised that the Model provides for a streamlined telephone interim protection order system to deal with situations where there is an urgent need for protection, and which includes a capacity to detain a defendant for up to 4 hours. The Working Group concluded that the better approach is for the protected person to have an ability to utilise this streamlined domestic system, rather than a police officer acting on the basis of a very temporary order from another jurisdiction and which is unregistrable. However the approach of the Working Group is therefore very much conditional upon the telephone interim protection order provisions of the Model being implemented in all jurisdictions.

Division 2—External protection orders under the CrimTrac system

Definitions for division 2

40 In this division—

"CrimTrac" means the database mentioned in subsection 41(1).

["CrimTrac registrar" means][190]

"registered external protection order" means an external protection order that is registered in CrimTrac and continues to have effect in the jurisdiction in which it was made or took effect.

190 The office holder is yet to be finalised but should be the one person for all States and Territories.

Definitions for division 2

'CrimTrac'

CrimTrac describes a proposed national database of domestic violence orders. See the commentary under the next section for a description of its operation and purpose.

'CrimTrac Registrar'

This generic term refers to a person or authority in each participating State and Territory who will be responsible for the maintenance of the CrimTrac database, especially making entries in the database concerning the grant, variation, extension, revocation and appeal of domestic violence orders in the registrar's State or Territory.

'registered external protection order'

A core feature of the CrimTrac scheme is the entry, or registration, of domestic violence orders into the national database. Orders will have nationwide status, operation and enforceability immediately upon such entry or registration.

The definition of 'external protection order' (see section 3) effectively restricts registrable to protection orders, namely final orders, and excludes orders of an interim nature. The reasons for this limitation are given in the commentary to section 35. It may be that individual jurisdictions would be more comfortable with the registration of interim orders under the CrimTrac scheme than under the manual registration scheme described in the previous division.

Purpose of division

41(1) The purpose of this division is to give effect to the State's/Territory's undertaking to participate in an arrangement for an Australian database of protection orders (however called).

(2) CrimTrac is to contain information about protection orders (however called) made in jurisdictions participating in the arrangement mentioned in subsection (1).

(3) Also, CrimTrac is to provide police officers in the participating jurisdictions with access to the information in the database about registered external protection orders.

Purpose of division

CrimTrac refers to the Federal Government's policy to create a national database of domestic violence orders which can be accessed by prescribed authorities in each Australian jurisdiction. Whilst complete details of the database were yet to be finalised at the time of preparing this Report, the concept of a national database and registration scheme represents an exciting opportunity to streamline and simplify the inter-jurisdictional registration of domestic violence orders. In this way domestic violence orders can attain immediate and true nationwide portability and provide needed protection to the victims of domestic violence, no matter where they live in Australia. The CrimTrac concept will also accommodate New Zealand domestic violence orders, and thus afford protection to New Zealand nationals in Australia who have obtained orders in that country.

Some basic details of the CrimTrac scheme are available. It is intended that court authorities in each State and Territory which participates in the scheme will be able to amend the database as required. In this way it will be possible to enter new domestic violence orders on the national database as soon as they are made; to delete expired, revoked or appealed orders; and to amend existing orders if they varied or extended. It is anticipated that such entries will be made immediately upon a court exercising its powers under this Model. In this way there will be a single reliable national database of all domestic violence orders, constantly updated to take account of all changes.

This Model provides that domestic violence orders are deemed to have been registered in each participating State and Territory as soon as they are registered upon the CrimTrac database. CrimTrac policy also provides for access to the database by law enforcement authorities in participating jurisdictions, and the Model provides immediate enforceability of registered domestic violence orders in each of those jurisdictions. Again, whilst final details of CrimTrac's operation are not yet available, it is envisaged that a police officer in a participating jurisdiction will be able to access the database, take a print of a specific domestic violence order, and immediately enforce that order as necessary. In this way the Model provides a swift, simple, reliable and effective means of enforcing orders across Australia and thus giving domestic violence victims the immediate protection they need.

Other aspects of CrimTrac are discussed in subsequent sections.

CrimTrac appears to offer a vastly improved concept in national registration of orders and overcomes all of the problems associated with manual registration, such as notice to the defendant of registration, mechanical or administrative processes and costs incurred by State and Territory courts, reliability of orders and enforcement of orders. It is consequently the Working Group's preferred option with regard to the alternative registration schemes detailed in this division and the previous division. However the Working Group acknowledges that CrimTrac is a new policy and may take some time to become an operational reality, and the manual registration scheme in the previous division is offered as an interim system.

Protection order registered in CrimTrac is enforceable in [this State/Territory]

42(1) A registered external protection order—

(a) is taken to be registered in [this State/Territory]; and

(b) has the same effect in [this State/Territory] as a protection order; and

(c) may be enforced in [this State/Territory] as if it were a protection order that had been personally served on the defendant.

(2) Subsection (1) has effect subject to section 44.

(3) For this Act, a document, in the prescribed form, purporting to be an extract from CrimTrac is evidence of—

(a) the registration of the order in CrimTrac; and

(b) the order continuing to have effect in the jurisdiction in which it was made or came into effect; and

(c) the information stated in the document.

(4) If the document mentioned in subsection (3) is signed by the CrimTrac registrar, the document is conclusive evidence of the matters mentioned in the subsection in the absence of evidence to the contrary.

Protection order registered in CrimTrac is enforceable in [this State/ Territory]

This section provides the key deemed registration and enforceability features of CrimTrac. It means a protection order made in one State or Territory is taken to be a protection order made in each other participating jurisdiction, thus obviating any need for manual registration in those other jurisdictions.

Subsection (1) also provides the basis for the immediate enforcement of orders across Australia without further notice to the defendant. This overcomes the dilemma associated with having to choose between informing the defendant of inter-jurisdictional registration (under the manual registration system) and the need to ensure the victim's safety by denying the defendant knowledge of the victim's interstate movements. (Under section 35 the person applying for registration need not give notice to the defendant, but may do so). As stated earlier, the decision to deny advice of registration to the defendant may represent an obstacle to the successful prosecution of his or her breach of an order because it is necessary to prove that the defendant knew the order operated in the particular jurisdiction. Under CrimTrac, all defendants will know that the order will automatically be registered throughout Australia. The CrimTrac scheme is therefore a significant development for national portability of domestic violence orders.

Subsection 42(3) provides the basis for a police officer in a participating jurisdiction to access the CrimTrac database, obtain a print of a current registered domestic violence order, and utilise this print as the ground for enforcing the order in her or his jurisdiction. Given the requirement that all amendments to domestic violence orders (including variations and revocations of, and successful appeals against, orders) be immediately registered in the CrimTrac database, it is possible for police officers to rely on the database as an accurate and up to date record of *current* domestic violence orders. It is appropriate that an extract from such a reliable system should form the basis for enforcement of those orders.

Subsection 42(4) effectively provides that a print taken from the database and signed by the responsible CrimTrac authority, in this instance the CrimTrac registrar, provide conclusive evidence of the existence and currency of a specific domestic violence order. This is designed to assist a court to exercise any of its powers under this Model, including in the prosecution of breaches of orders.

Clerk to notify CrimTrac registrar about protection orders

43(1) The clerk of a court must, as soon as possible, give written notice about the following to the CrimTrac registrar—

(a) the making of a protection order by the court;

(b) the coming into force under section 23 of a protection order after an interim protection order is made by the court;

(c) the extension, variation or revocation of a protection order by the court;

(d) the setting aside, on appeal, of a protection order about which the clerk has previously given notice to the CrimTrac registrar and of which the clerk has been given notice under section 55.

(2) A notice must state the following to the extent they are relevant—

(a) the court that made the protection order and the date on which it was made;

(b) the names of the relevant parties to a proceeding;

(c) any directions, prohibitions or restrictions imposed under the protection order or a variation of the protection order;

(d) the period for which the protection order has effect or the way in which the period is affected by an extension.

(3) A notice must be given in writing or by electronic means that is capable of being produced or reproduced in writing.

Registered external protection order cannot be changed by court in [this State/Territory]

44 A court in [this State/Territory] may not extend, vary or revoke a registered external protection order.

Clerk to notify CrimTrac registrar about protection orders

Section 43 provides the administrative link between courts and the CrimTrac registrar, and requires the court's clerk to provide all relevant information concerning domestic violence orders to the CrimTrac registrar.

Registered external protection order cannot be changed by court in [this State/Territory]

This section disallows the variation, extension or revocation by courts in each State or Territory of a registered external protection order made in another jurisdiction. The rationale for this measure is given in the commentary under section 37.

PART 4—POLICE FUNCTIONS AND POWERS

Police officer detaining person for telephone interim protection order

45(1) A police officer who makes, or is about to make, an application for a telephone interim protection order may direct the person against whom the order is sought to remain at a place stated by the officer.

(2) If the person does not comply with the police officer's direction, the officer may—

(a) detain the person at the place stated by the officer in the direction; or

(b) take the person to a police station and detain the person at the station.

(3) However, the person may only be detained until the first of the following happens—

(a) the elapsing of 4 hours from when the detention begins;

(b) the making of the telephone interim protection order by an authorised justice and its service on the person;

(c) the denial by an authorised justice of the police officer's application for a telephone interim protection order against the person.

Police officer detaining person for telephone interim protection order

This section appeared as subsection 11(15) in the Discussion Paper, which identified this provision as a key issue and specifically invited comment from contributors.

Contributors gave overwhelming support to the principle that a police officer should be able to detain a defendant in the circumstances prescribed by this provision,[191] with only one submission in opposition.[192] Such a provision is seen to be of benefit as a 'cooling-off' mechanism and to enable efficient service of telephone interim protection orders. However a number of contributors expressed the view that for civil liberties reasons detention should be kept to a minimum and particularly should be of a limited maximum period, usually up to 4 hours. The Working Group agreed with these concerns and the provision has been amended to restrict detention until the events described in subsection 45(3) result, whichever is first occurring.

One contributor stated that the Discussion Paper provision unnecessarily limited the place where the defendant could be directed to remain at 'the scene of the incident'.[193] It was pointed out that in practice police rarely make a telephone application at the scene of an incident (often a private domestic residence) but return to the police station, where there is greater access to communication facilities, appropriate forms and procedural requirements. Directing the defendant to remain at the domestic residence in these circumstances may in fact endanger the victim. The Working Group accepted this argument and the provision has been amended to permit greater flexibility in this regard.

191 Rhonda Parker MLA (WA Minister for Women's Interests), Coalition for Gun Control (Vic) Inc, Victorian Community Council Against Violence, Domestic Violence and Incest Resource Centre, Immigrant Women's Support Service, Legal Services Commission of SA, Dr Patricia Easteal, Geelong Rape Crisis Centre, Burnside, Victoria Police, Women's Legal Resource Group Inc Vic, Tharpuntoo Legal Service Aboriginal Corporation, Eastern Domestic Violence Outreach Service Inc, Survivors, Legal Aid WA, Port Pirie Domestic Violence Action Group, Western Region Domestic Violence Collective, Women's Legal Service SA Inc, Women's Health Statewide SA, Women's Legal Resources Centre Sydney, Queensland Police Service

192 Law Institute Victoria

193 Queensland Police Service

Seizure of firearms

46(1) A police officer must seize any firearm, of which the officer is aware, that is in the possession of a person who is a defendant named in a domestic violence order.

((2) Also, if a police officer is satisfied there are grounds arising out of an incident (the "incident") for a court to make a protection order or interim protection order against a person, or an authorised justice to make a telephone interim protection order against a person, the officer must—

(a) seize any firearm, of which the officer is aware, that is in the person's possession; and

(b) make a protection application or an application for a telephone interim protection order against the person within 7 days after the day on which the officer seized the firearm, unless the officer reasonably believes that another person has made a protection application against the person for the incident.

(3) In order to seize a firearm under subsection (1) or (2), a police officer may, without warrant, enter and search any of the following premises if the police officer reasonably believes that the firearm may be at the premises—

(a) where the person lives or works or which the person frequents;

(b) where the person has lived or worked or which the person has frequented.

Seizure of firearms

This section is consistent with the Australasian Police Ministers Firearms Policy. It departs from the 1991/Victorian model which envisaged there would be discretion not to seize firearms. The section, which appeared as section 28 in the Discussion Paper, has been redrafted to improve clarity.

A number of contributors supported this provision,[194] although several positive amendments were also suggested. In particular, contributors[195] recommended that the phrase 'must seize' replace the discretionary 'may seize' in subclause 28(3) of the Discussion Paper (now subsection 47(1)), and that 'premises' be broadened to include motor vehicles and other places where firearms may be kept.[196] The Working Group accepted these recommendations and the Model has been amended accordingly. (See the definition of 'premises' in section 2).

One submission suggested that the term 'reasonable apprehension' replace 'on the balance of probabilities' as the test which a police officer must use in determining whether there are grounds for the issue of a domestic violence order against a person, and acting upon that determination in seizing any firearms from that person.[197] The Working Group considered this suggestion but concluded that the term 'satisfied' should be used instead, because it is more readily understood and used, particularly in the emergency situations in which this provision is likely to be utilised.

A further submission recommended that subclauses 28(1) and (3) of the Discussion Paper (now the seizure provisions of subsections 46(1) and (2)) be deleted entirely.[198] The contributor argued that the threshold test 'is too low to justify police being given such extraordinary powers', and that such powers should only be exercised by police once they are the subject of a court order. The Working Group was not persuaded by this submission, pointing out that seizure of firearms is most useful in emergency situations, often involving real and present danger to persons, and the safety of those persons must not be made to wait until an order has been obtained (whether from a court or otherwise). The Working Group also notes the terms of the national firearms agreement, which require the seizure of firearms in circumstances described by subsections 46(1) and (2).

194 Legal Services Commission of SA, Legal Aid Queensland, Julie Hansen, National Council of Single Mothers and Their Children, Women's Legal Service SA Inc, Women's Health Statewide SA, Uniting Church in Australia National Commission on Women & Men, Women's Legal Resource Group Inc Vic, Combined Community Legal Centres Group NSW

195 Victoria Police

196 Legal Aid Queensland

197 Sussex Street Community Law Service Inc

198 Law Society of NSW

Firearms seized under section 46

47(1) This section applies to a firearm seized under section 46.

(2) If a protection order has been or is made against the person from whom the firearm is seized but no appeal against the order is made within the appeal period, the firearm is forfeited on the day after the end of the period and must be disposed of as if it were seized and forfeited under the Firearms Act.

(3) If a protection order has been or is made against the person from whom the firearm is seized, an appeal is made against the order but the order is upheld, the firearm is forfeited on the day the order is made upholding the protection order and must be disposed of as if it were seized and forfeited under the Firearms Act.

(4) If a protection order has been or is made against the person from whom the firearm is seized, an appeal is made against the order and the order is overturned, the firearm must be returned to the person from whom the firearm was seized as soon as practicable after the day the court overturns the order and, in no case, more than 7 days after that day.

(5) For a seizure under subsection 46(2)—

(a) if a protection application is not made within 60 days after the day of the seizure of the firearm—the firearm must be returned to the person from whom the firearm is seized as soon as practicable after the end of the 60 days after the day of the seizure;

(b) if a protection application is made within 60 days after the day of the seizure of the firearm but the court refuses to make a protection order and dismisses the application—the firearm must be returned to the person from whom the firearm was seized as soon as practicable after the day the court refuses to make the order and dismisses the application and, in no case, more than 7 days after that day.

(6) A firearm is forfeited, and must be disposed of, as if it were seized and forfeited under the Firearms Act, if—

(a) the firearm must be returned to a person under subsection (4) or (5); and

(b) the person may not possess the firearm under the Firearms Act.

Firearms seized under section 46

This new section of the Model provides for the return of firearms to persons in the circumstances described by subsections 46(4)-(6). These circumstances principally relate to situations where a domestic violence order has been set aside on appeal, and where a firearm has been seized pursuant to subsection 46(2) but no order has been granted against the person within the specified period. This section has been further amended to provide that a police officer who seizes a firearm under subsection 46(2) is obliged to apply for a domestic violence order within 7 days of seizing the firearm.

However the Model also provides that the return of firearms provisions in subsections 47(4)-(5) are subject to a requirement that the person from whom a firearm is seized be lawfully entitled to possession of that firearm: see subsection 47(6).

Entry and search of premises

48(1) A police officer may, using reasonable force if necessary, enter and search any premises without a warrant if—

(a) the officer believes, on reasonable grounds, that a person is on the premises and the person—

(i) has committed or is committing an act of domestic violence against a protected person; or

(ii) is on the premises in breach of a domestic violence order; or

(b) an occupier of the premises expressly or impliedly consents to the officer entering and searching the premises.

(2) This section does not limit any other power a police officer may have to enter or search premises under this Act, another Act or at common law.

Entry and search of premises

Many jurisdictions prefer to centralise all police search powers in one place. Clearly that approach has advantages, so the model includes this provision for the sake of completeness. For modelling purposes it really does not matter where these powers are located, as long as they exist.

It should be noted that in some jurisdictions the powers are prescribed in greater detail than the model. Part 6 of the Queensland legislation gives police officers powers to enter and search premises (particularly for firearms), request identification and detain suspected domestic violence 'offenders' until an application for a protection order or interim protection order is heard but no longer than 4 hours.

Like the model some jurisdictions (Victoria, ACT and SA) have legislation which does not envisage taking the defendant into custody unless there are grounds for arrest in relation to a criminal offence. This follows the philosophy that if the defendant has committed a crime, he or she should be dealt with as a criminal. If it falls short of a crime, then the emergency procedure for obtaining orders, including a warrant for the defendant's arrest, should be utilised. WA is similar except there is no provision for issuing a warrant. In WA the defendant can be detained for up to 2 hours for the purpose of serving an order, but is only arrested in relation to the offence of breaching the order.

However the original 1991 model (s.16 - maximum 24 hours); NSW (s.562H(12)); Queensland (s.69 - maximum 4 hours); Tasmania (s.106L(1A)) and the NT (s.7) in prescribed circumstances enable the defendant to be kept in custody by the police pending the hearing of a complaint for an interim or final protection order.

The entry and search of premises is an area of law which should be carefully prescribed in the general law. Where there is an arrest, safeguards like Queensland's 4 hour limit will often be consistent with what applies in relation to the investigation of criminal offences more generally. While it is not proposed that the model should detail these, it is expected that they should be no less than those which apply to those who have committed criminal offences.

This provision attracted considerable support in submissions[199], although some contributors suggested that the provision should explicitly empower police officers to arrest persons for breach of an order[200] or service of an order,[201] or to

199 Canberra Goulburn Archdiocesan Catholic Women's League Social Issues Committee, Edward Free, Women's Legal Resources Centre Sydney, Julie Hansen, Legal Services Commission of SA, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Domestic Violence Advocacy Service.

200 Victoria Police

201 NSW Department for Women, NSW Department of Community Services

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seize firearms.[202] The Working Group considered these suggestions and concluded that the present broadly defined grounds for a police officer to enter and search premises would operate in tandem with the powers to arrest a person for breach of an order (section 65) and to seize firearms (section 46). Other contributors suggested that 'premises' should be broadly defined and include motor vehicles.[203] A new definition of 'premises' has been created (section 2) which incorporates these suggestions.

202 Queensland Director of Public Prosecutions, Tasmanian Office of the Status of Women

203 Queensland Director of Public Prosecutions, Tasmanian Office of the Status of Women, Queensland Police Service

Applications generally by police officers

49(1) If a police officer makes an application under this Act, another police officer may represent the police officer at the hearing of the application.

(2) A police officer is not liable in any civil action arising out of the conduct of the hearing if the officer—

(a) makes an application under this Act or represents another police officer at a hearing; and

(b) acts in good faith and in the normal course of duty in making the application or appearing at the hearing.

(3) A liability that would, apart from subsection (2), attach to a police officer attaches to [the State/Territory].

Applications generally by police officers

The ACT and SA laws do not contain equivalent provisions.

NSW does not contain similar provisions, but note section 562N which deals with costs.

Queensland contains an exhaustive list of discretionary powers and duties in relation to police officers. The majority of these provisions are contained in Part 6. Subsection 86(2) is similar to subsection 49(2); subsection 86(1) is also relevant.

This provision attracted little comment in submissions but was supported by contributors.[204] One contributor objected to subsection 8(2) of the Discussion Paper on the basis that this may protect police officers who act falsely.[205] However the Working Group does not accept this argument, and points to the requirement that a police officer must act in 'good faith' in order to attract the protection of this provision.

204 National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Education Centre Against Violence

205 Peter Dunstan

PART 5—APPEALS

Definitions for part 5

50 In this part—

"appeal court" means—

(a) for a protection order made by a Magistrates Court or Childrens Court—[a District/County] Court; or

(b) for a protection order made by a [District/County] Court—the Supreme Court; or

(c) for a protection order made by the Supreme Court—[the Full Court of the Supreme Court/Court of Appeal].

"appeal period", in relation to a protection order, means the period of one month after the date of the protection order.

"original court" means—

(a) the court that made a protection order or refused to grant a protection application; or

(b) the court that granted, or refused to grant, an application for an extension, variation or revocation of a protection order; or

(c) the court that, under section 28(5) or (6), dismissed an application for an extension, variation or revocation of a protection order.

Definitions for part 5

"appeal court"

As stated above in the commentary to section 7, the terminology of courts differs between jurisdictions, and each State or Territory will need to amend terms as necessary. The terminology used by this Model is common to a number of jurisdictions.

Paragraphs (b) and (c) refer to protection orders made by a court own its own initiative when hearing a criminal matter (see section 15).

"original court"

This definition sets the scope for matters that may be appealed within this scheme. Appeals are limited to the making or denial of protection orders, the grant or refusal of an application for the extension, variation or revocation of protection orders, and the refusal of a court to grant leave for continuance of a defendant's application for variation or revocation of a protection order (see section 28).

For reasons similar to those given in the commentary to section 28, it was considered that time limitations necessarily restrict appeals in relation to interim protection orders and telephone interim protection orders. However this Model provides each party the full range of appeals possible in relation to protection orders.

Appeals against certain orders by relevant parties to proceedings

51(1) Each relevant party to a proceeding in relation to any of the following may appeal to an appeal court against the order of the original court—

(a) the making of a protection order or the refusal to make a protection order;

(b) an order extending, varying or revoking a protection order or refusal to extend, vary or revoke a protection order;

(c) a dismissal, under section 28(5) or (6), of a defendant's application for an extension, variation or revocation of a protection order.

(2) However, the appellant must, within the appeal period, start the appeal by filing a notice of appeal in the appeal court.

(3) The notice must state the person's grounds of appeal.

(4) The appeal court must not start or continue hearing an appeal if—

(a) the appellant is other than the aggrieved protected person, the nominated representative for the aggrieved protected person or the defendant, under the protection order; and

(b) the aggrieved protected person, or the nominated representative for the aggrieved protected person, by written notice given to the clerk of the appeal court, objects to an appeal.

(5) An appeal to an appeal court does not of itself stay the operation of the order the subject of the appeal.

Appeals against certain orders by relevant parties to proceedings

Section 51 effectively combines the appeals mechanisms set out in sections 30 and 31 of the Discussion Paper. It ensures that the appeal process is identical for both the defendant to an order and for other parties to the order.

This provision follow the 1991/Victorian model except they make it clear there may be an appeal against variations, revocations or extensions of orders made under section 28.

There is provision for appeals in each jurisdiction in the equivalent legislation or elsewhere but in each case the alternatives are unremarkable.

Sections 30[206] and 31[207] of the Discussion Paper generally attracted favourable comment from contributors. However following comment in a number of submissions[208] it has been amended to grant the defendant and applicant an equal length of time in which to bring an appeal. The time set for either party to bring an appeal is within the 'appeal period' as defined by section 50, namely that the appellant must file notice of the appeal within one month after the making of the order the subject of the appeal.

The Discussion Paper provisions describing service of notice of the appeal by defendants and applicants (subsections 30(3) and 31(2)) have been combined in order to provide that the same requirements apply to any appellant. This equation of procedures was requested in submissions.[209]

One contributor suggested that the giving of notice of an appeal by a defendant should stay the operation of the order the subject of the appeal, conditional on the defendant entering into appropriate bail conditions.[210] The rationale for this suggestion is that a length of time will often elapse between the making of the order and the hearing of an appeal against that order, during which the defendant could be considerably disadvantaged. The Working Group did not agree with this suggestion because bail conditions, which inevitably will vary considerably between cases, will not always provide an acceptable level of protection for the aggrieved protected person. Conversely, if bail conditions are set with the intention of maintaining the immediacy of protection envisaged by the order they will effectively duplicate the terms of the order, with the

206 For example: Legal Services Commission of SA, National Council of Single Mothers and Their Children, Combined Community Legal Centres Group NSW

207 For example: Legal Services Commission of SA, Women's Legal Resource Group Inc Vic, Women's Legal Resource Centre Sydney, National Council of Single Mothers and Their Children

208 Domestic Violence Coordinating Committee - South Tasmania, Queensland Director of Public Prosecutions, Women's Legal Service SA Inc, Women's Health Statewide SA, Victoria Police, Legal Aid Queensland, Women's Legal Service (Tasmania), Women's Legal Service Inc, Womens' Legal Resources Centre Sydney

209 Victoria Police, Domestic Violence Coordinating Committee - South Tasmania, Women's Legal Service Inc

210 Law Society of NSW

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result that the defendant is no less disadvantaged. The Working Group considered that the provision permitting a defendant to apply to a court for stay of the order's operation (now section 53) provided an appropriate safeguard, with the court being able to stay orders where desirable.

Subsection 31(4) of the Discussion Paper, which proscribed the applicant's ability to bring a further appeal against the decision of the appeal court, has been equally extended to the defendant: see subsection 54(4). The Working Group accepted the view that appeal rights must be identical in order to promote an appropriately just and even-handed appeal structure.

Clerk of appeal court to arrange service of notice of appeal

52 If a person appeals to an appeal court under section 51 about an order, the clerk of the appeal court must arrange service of copies of the notice about the appeal on each of the following—

(a) the parties to the proceedings for the order, other than the appellant;

(b) the clerk of the original court;

(c) the Chief Commissioner of Police.

Clerk of appeal court to arrange service of notice of appeal

This provision establishes the necessary administrative step of service of notice of appeal upon all parties who have, or who may have, an interest in the proceedings. It is important that the Chief Commissioner of Police be served with the notice along with the other parties, because in many instances the original applicant for the order would have been a police officer. Giving notice to the Chief Commissioner enables police authorities to be heard in proceedings as appropriate.

In each jurisdiction the service of notices will be prescribed under other legislation or in court rules. It follows that it is not strictly necessary that this provision appears in domestic violence legislation, provided that appropriate provision for service is made.

Application for stay of operation of protection orders

53(1) A defendant may apply to the original court to stay the operation of a protection order pending the decision of an appeal.

(2) The original court may only stay the operation of the protection order if it considers that it is appropriate to grant the stay having regard to—

(a) the need to ensure the aggrieved protected person and any named protected person is protected from an act of domestic violence by the defendant; and

(b) the welfare of any child who may be affected by the defendant's behaviour.

(3) If the original court stays the operation of the protection order—

(a) the court may impose conditions on the defendant as if the defendant were a person accused of an offence and were being released from custody on bail; and

(b) the [Bail Act] applies to the defendant for a contravention of any conditions imposed under paragraph (a).

(4) If the defendant does not start an appeal within the appeal period, the original court's order staying the operation of the protection order ends at the same time as the appeal period ends.

(5) Also, the original court may revoke or amend its order staying the operation of the protection order.

Application for stay of operation of protection orders

This section, which adopts much of section 30 in the Discussion Paper, provides a defendant with the right to apply for the operation of a protection order to be stayed pending the hearing of his or her appeal in relation to that order (see section 51). This is appropriate in certain situations: for example, a widely drafted order may inadvertently prevent a defendant from approaching his or her place of employment and the defendant may seek the stay of that part of the order pending an appeal for variation of the order. The court may order the stay of operation of a protection order only after having regard to the paramount principles derived from section 16 and repeated in subsection 53(2). It follows that an order for the stay of a protection order will not be made lightly.

Section 53 further permits the relevant courts to impose bail conditions upon a defendant if a stay is granted, and to revoke the stay order itself. Finally. the provision provides for an automatic lapse of the stay order if a defendant does not start the relevant appeal within the appeal period.

Procedure of appeal court and related matter

54(1) An appeal court to which an appeal is made about an order must proceed to hear the appeal by way of a re-hearing on the record.

(2) However, the appeal court may hear evidence afresh, or hear additional evidence, if the court considers it appropriate to effectively dispose of the appeal.

(3) The appeal court may, by order, do one or more of the following—

(a) set-aside, confirm or vary the order;

(b) make any decision the original court could have made.

(4) A person may not appeal against a decision of the appeal court.

[(5) The provisions of the Magistrates Court Act, or the Children and Young Persons Act, so far as applicable and with any modifications and adaptations necessary extend and apply to appeals under this section.]

Notice of results of appeal

55 As soon as practicable after an appeal court has made an order as mentioned in section 54(3), the clerk of the appeal court must arrange for service of the order on each of the following—

(a) the parties to the proceedings for the order the subject of the appeal;

(b) the clerk of the original court;

(c) the Chief Commissioner of Police;

[(d) the Registrar of Firearms.]

Procedure of appeal court and related matter

This section establishes the basic rules for the hearing of an appeal. It is not intended to be comprehensive: rather, it is for each jurisdiction to ascertain and establish comprehensive rules for the conduct of appeal hearings.

The proscription contained within subsection 31(4) of the Discussion Paper, which provided that an unsuccessful appellant complainant could not bring a further appeal, has been extended to defendants (ss54(4)).

Notice of results of appeal

Similarly to section 52, this administrative provision does not necessarily need to appear within domestic violence legislation provided that appropriate provision is made elsewhere.

In addition to the persons listed in section 52, this section requires notice to be given to the Registrar of Firearms. The distinction arises because it is not useful for the Registrar to be given simple notice of appeals, compared to the results of those appeals.

PART 6—SERVICE

Division 1—Service of applications

Service of protection applications

56(1) This section applies to a clerk of a court to which a protection application is made.

(2) The clerk must arrange for a copy of the protection application and attached summons to be served personally on—

(a) if the applicant is the aggrieved protected person or the nominated representative for the aggrieved protected person—the defendant and, if there is a representative for the defendant, the representative; or

(b) if otherwise—the aggrieved protected person, the defendant and, if there is a representative for either or both, the representative or representatives.

Service of protection applications

This section appeared as subsection 15(1) in the Discussion Paper, and follows the 1991/Victorian model. The ACT law is similar: see section 12. NSW does not refer to this issue, but general principles apply. Queensland requires service to be carried out by the police: subsections 47(4) & (5). Under section 11 of the SA Act the order is not binding until it is served.

The new WA law tries a completely new approach. While serving the application is provided for, section 26 enables the complainant to elect whether the initial hearing should be held in the absence of the defendant. At such a hearing the court may accept affidavits of evidence. If the complainant does not attend such a hearing but before the time of the hearing files an affidavit of evidence, the court must hear the matter in the absence of the complainant. At the hearing the court may make an interim violence restraining order (up to 3 months) or a 'cooling-off' order (up to 72 hours). The 'cooling-off' order must be served within 24 hours or it will lapse, but the defendant has no avenue for having the order reversed. However if it is an interim order, s.31 provides that the defendant has 21 days after service to indicate whether he or she objects to the order. If there is no objection it will be made into a permanent order (ie a 2 year order). If there is an objection it will be set down for hearing.

Subsection 15(1) of the Discussion Paper attracted support from some contributors[211] while others preferred the WA approach, principally on the basis that a court may conduct an ex-parte interim hearing in the absence of the defendant and grant an interim protection order following that hearing.[212] The Working Group considered this argument but concluded that the present model provision better met the objectives of this section. The Working Group noted the ability under this model's provisions for a court to grant interim protection orders in the absence of the defendant: see section 19.

One submission stated that there is no need for personal service of a protection application upon the aggrieved protected person.[213] However the Working Group noted that the amended section 15 of this Model (section 9 of the Discussion Paper) provides that a protected person may object to the making of an order in his or her favour, and it follows that the aggrieved protected person must be made aware of the application. A second contributor considered that a copy of the application should also be served on a non-custodial parent, if any, where the aggrieved protected person is a child.[214] The Working Group considered this suggestion but concluded that it would not be necessary: where

211 Domestic Violence Advocacy Service, Legal Services Commission of SA, Combined Community Legal Centres Group (NSW)

212 Peninsula Presbyterian Charge, Professor Chilla Bulbeck, Legal Aid WA, National Council of Single Mothers and Their Children, WESNET Inc

213 Legal Services Commission of SA

214 Victoria Police

Model

the non-custodial parent is the defendant, she or he will be served with a copy of the application (see subsection 56(2)), and where the non-custodial parent is not the defendant then there appears to be little, if any, gain in effecting service upon this person.

Service of other applications under this Act

57(1) This section applies to a clerk of a court to which any application under this Act is made, other than a protection application.

(2) The clerk must arrange for a copy of the application to be served personally on each of the following, other than the applicant—

(a) each relevant party to the proceeding;

(b) the Chief Commissioner of Police.

(3) If the application is an application for an extension, variation or revocation of a domestic violence order made by the defendant, the clerk must not arrange service unless a court has given leave for the application to continue.[215]

215 Under section 28, the court undertakes a preliminary hearing and decides whether the defendant's application for an extension, variation or revocation is to continue. Section 28(2) states '(T)he defendant must serve a copy of the application on the Chief Commissioner of Police.'.

Service of other applications under this Act

This section appeared as subsection 21(4) in the Discussion Paper and deals with the service of any application under this Model except protection applications.

Similarly to section 52, service provisions such as this are usually dealt with in generic legislation or in court rules. It is not strictly necessary that this provision appears within domestic violence legislation provided that appropriate provision is made elsewhere.

The issue whether a defendant should be notified of applications for variations of orders, particularly where the variation is comparatively minor, was identified as a key issue in the Discussion Paper. Submissions on this question largely supported notification of the defendant despite the potential risk to the victim's safety.[216] These submissions identified the defendant's right to be notified of matters directly affecting him or her, the need to demonstrate a defendant's awareness of the varied terms of the order in order to prosecute appropriately a breach of that order, and that 'minor' variations would be very difficult to define with any line drawn in distinction from 'non-minor' variations being inevitably arbitrary. Conversely, several contributors argued that the potential risk to the victims' safety outweighed these considerations.[217] The Working Group was persuaded by the arguments in favour of notification, and section 57 correspondingly requires that defendants be notified of applications for variation, extension or revocation.

216 Rhonda Parker MLA (WA Minister for Women's Interests), Victorian Community Council Against Violence, Eastern Domestic Violence Outreach Service Inc, Legal Services Commission of SA, Victoria Police, Domestic Violence and Incest Resource Centre, Illawarra Legal Centre Inc, Legal Aid NSW, Legal Aid WA, Catholic Women's League Australia (Inc) NSW, Law Institute Victoria, Lone Father's Association Australia (Inc)

217 Lismore Women's and Children's Refuge Inc, Dr Patricia Easteal, Presbyterian Women's Association of Australia in NSW, Tharpuntoo Legal Service Aboriginal Corporation, Burnside

Way applications are to be served

58(1) This section applies if a protection application and attached summons (collectively "the document"), or another application (also "the document") must, under section 56 or 57, be served on the aggrieved protected person, the defendant or the representative of the aggrieved protected person or defendant.

(2) The document must be served on the person by—

(a) personally delivering a copy of it to the person to be served; or

(b) leaving a copy of the application for the person at the person's current, last or most usual place of residence or business with someone who apparently resides or works there and appears to be 16 years of age or more.

Instruction for service

59(1) If a person has given written instructions to a clerk of a court about service of an application under this Act on the person that states the application is to be served by sending it to, or leaving it at, a stated address, the application must be served by sending it to, or leaving it at, the stated address.

(2) This section applies despite section 58.

Way applications are to be served

This section combines and simplifies the means by which an application is to be served upon specified parties, regardless of whether the application is a protection application or another form of application under this Model. It is drawn from the provisions of subsection 21(4) of the Discussion Paper.

It is not strictly necessary that this provision appear within domestic violence legislation provided that appropriate provision is made elsewhere.

Instruction for service

This new provision provides for an agreed place of service. It may alleviate difficulties in serving some persons who cannot otherwise be easily located, such as persons who in remote locations or who may not have a fixed place of residence or employment.

Substituted service for applications

60 If a court is satisfied, by evidence on oath or by affidavit, that it is not reasonably practicable to serve a copy of an application under this Act on a person under section 56 or 57, the court may—

(a) for a protection application—order the application and attached summons be served by other means it considers appropriate; or

(b) for another application—order the application be served by any means it considers appropriate.

Substituted service for applications

Section 60 combines the operation of subsections 15(3) and 21(3) of the Discussion Paper. Subsections 15(3)[218] and 21(3)[219] were supported by contributors who addressed them in submissions.

Subsection 15(2) of the Discussion Paper was supported by some contributors[220] whilst two others respectively disagreed with its inclusion because of difficulties associated with enforcement of orders if the defendant is not made aware of the order's terms,[221] and because of the consequences for the defendant of a breach of an order.[222] The Working Group noted these concerns and pointed out that this section deals with applications for orders, rather than orders themselves. The Working Group considered that this section is necessary given the importance of bringing applications to the notice of defendants, but also recognised that some defendants will go to extreme lengths to avoid service. In these circumstances it is not reasonable to deny an endangered person the protection he or she needs.

Other contributors suggested that the model should make provision for service of the application upon the defendant by registered mail[223] or by any means which a court considered appropriate in order to ensure that a defendant could not avoid service indefinitely.[224] The Working Group agreed, and section 60 has been amended to create consistency amongst the application-related service terms of this Model (see sections 15 and 21 of the Discussion Paper), and the amended provision would permit the court to direct service of the application by any means it considered appropriate in certain circumstances.

218 Legal Services Commission of SA, NSW Magistrate P Ashton, Domestic Violence Advocacy Service, Combined Community Legal Centres Group NSW, Women's Legal Service SA Inc, Women's Health Statewide SA, Women's Legal Resources Centre Sydney, Queensland Police Service

219 Canberra Goulburn Archdiocesan Catholic Women's League Social Issues Committee, Women's Legal Resource Group Inc Vic

220 Domestic Violence Coordinating Committee - South Tasmania, Women's Legal Service (Tasmania), Queensland Director of Public Prosecutions

221 Legal Services Commission of SA

222 Law Society of NSW

223 Queensland Director of Public Prosecutions

224 Office of the Status of Women

Dispensing with service

61 A court may dispense with service of a document on a person if it is satisfied it is not in the public interest to serve the person because to do so would mean the personal safety of an aggrieved protected person or a named protected person would be seriously threatened.

Dispensing with service

Section 61 deals with the safety exception to the requirement for service. The idea for this comes from section 46 of the Queensland law which dispenses the requirement for service in relation to variations of external protection orders. However the policy behind section 46 is equally applicable to internal orders and applications for orders. The policy is to ensure that the defendant is not tipped off about the location of the aggrieved protected person unless he or she agrees. In some cases this could affect the personal safety of those protected by the order. For reasons of natural justice the defendant should normally be notified, however the safety issue should not be ignored. Section 61 therefore gives a court the capacity to dispense with service after weighing the competing public interests of fairness and the security of those for whose benefit the protection application or protection order is made.

Division 2—Service of orders

Clerk to deal with orders and cause service

62(1) This section applies if a court makes—

(a) a domestic violence order, including a protection order that is made under section 22; or

(b) an order extending, varying or revoking a domestic violence order, or another order under this Act.

(2) The clerk of the court must arrange for the order to be put in writing and for a copy of the order to be served on—

(a) the defendant; or

(b) if there is a nominated representative for the defendant—the defendant and the nominated representative.

(3) However, subsection (2) does not apply to an interim protection order made under section 23.

(4) The clerk of the court must arrange for a copy of the order to be served on—

(a) each relevant party to the proceeding, other than the defendant; and

(b) the Chief Commissioner of Police; and

[(c) the Registrar of Firearms].

(5) Despite subsections (2) and (4), if a person has given written instructions to the court about service of any order under this Act on the person that states the order is to be served by sending it to, or leaving it at, a stated address, the order must be served by sending it to, or leaving it at, the stated address.

(6) To remove doubt, it is declared that this section does not apply to the registration of an external protection order by the clerk of a court.

Substituted service of orders

63 If a court is satisfied, by evidence on oath or by affidavit, that it is not reasonably practicable to serve a copy of an order on a person, it may—

(a) order a copy of the order be served by any means it thinks appropriate; or

(b) make an order for substituted service.

Clerk to deal with orders and cause service

This provision appeared as subsection 22(1) in the Discussion Paper and follows the 1991/Victorian model, except it provides for a straight-forward notification to the Registrar of Firearms in recognition of the APMC resolution that the firearms ban should be mandatory for 5 years.

The equivalent NSW provision is section 562J. Under subsection 562J(4) the Commissioner of Police is required to keep records of the making of the order for 10 years.

Section 58 of the Queensland Act deals with service of court orders. Essentially the clerk is responsible and may forward copies to a police officer who is then required to perform service.

As noted above section 11 of the SA Act requires service before the order is effective. Section 13 of the SA Act has similar provisions for the service of an order on the police commissioner and the complainant.

The new WA law provides for a detailed procedure in ss.54-60.

Service of an order is required if it is to bind the defendant in Tasmania (s.106EA). S.10 of the NT Act requires proof of service for enforcement purposes, but provides for deemed service where the defendant is orally notified by the court or police whether in person or by telephone and by post.

The ACT equivalent is section 19.

This provision attracted support from most of the contributors who addressed it.[225]

Substituted service of orders

This provision adopts the principle of substituted service, which appeared in the Discussion Paper at subsections 15(3) and 22(3).

Substituted service of orders attracted strong support from contributors because general experience has shown that some perpetrators of domestic violence will go to great lengths to avoid service.[226]

225 Julie Hansen, Legal Services Commission of SA, National Council of Single Mothers and Their Children, Combined Community Legal Centres Group (NSW), Women's Legal Service SA Inc, Women's Health Statewide SA, Law Council of Australia

226 Queensland Police Service, NSW Magistrate P Ashton, Women's Legal Service SA Inc, Women's Health Statewide SA, Women's Legal Resources Centre (Sydney)

PART 7—OFFENCES AND MISCELLANEOUS

Division 1—Offences and arrest

Breach of an order

64(1) A defendant in relation to a domestic violence order must comply with the order if—

(a) the defendant has been served with a copy of it; or

(b) the order has been explained to the defendant under section 20.

Maximum penalty—

(a) for a first offence—$24 000 or 1 years imprisonment; or

(b) for a subsequent offence—2 years imprisonment.[227]

(2) A defendant in relation to a registered external protection order must comply with the order.

Maximum penalty—

(a) for a first offence—$24 000 or 1 years imprisonment; or

(b) for a subsequent offence—2 years imprisonment.

(3) An offence under this section is a summary offence.

227 It is the intention that the model law indicates that breaching an order is a serious offence by creating an offence with a maximum penalty of $24 000. Some jurisdictions use the concept of penalty units and will need to make the necessary conversion.

Breach of an order

This follows the Victorian law (s.22). The $24,000 monetary penalty is much higher than elsewhere. Both penalties are much higher than the original 1991 model which provided for a maximum of 6 months imprisonment and/or $2000.

Under subsection 562I(1) and (2) of the NSW legislation breaching an order is an offence punishable by a 50 penalty unit fine and/or 2 years imprisonment. Under subsection (2A) where the offender is 18 years or more at the time of the offence the penalty must be a term of imprisonment if the offence was an act of violence against the person. If imprisonment is not part of the sentence the court must give reasons.

Under section 80 of the Queensland Act breaching an order or a registered external protection order is an offence punishable by a fine of 40 penalty units or 1 year imprisonment. It is a summary offence due to subsection 83(1).

Under section 15 of the SA Act contravening or failing to comply with a domestic violence order is an offence punishable by 'Division 5 imprisonment' - 2 years.

Section 106I of the Tasmanian law provides for an offence with a maximum penalty of 6 months imprisonment and/or $1000. The equivalent ACT provision is section 19D. The penalty for a first offence is a fine of 50 penalty units and/or imprisonment for 2 years. The penalty for a second offence is a fine of 50 penalty units and/or imprisonment for 5 years. An ACT order has extraterritorial effect and a defendant can be prosecuted for an offence for engaging in conduct outside the ACT. This is no doubt necessary because of the small size of the jurisdiction and its proximity to NSW population centres. Section 10 of the NT Act prescribes a maximum 6 months imprisonment and/or $2000 for the first offence and a minimum of 7 days and maximum of 6 months for any subsequent offences. The court may not make any other order if its effect would be to release the offender from the requirement to actually serve the term of imprisonment. The original 1991 model also provided for minimum penalties, but these do not accord with criminal law policy in most jurisdictions. They leave insufficient flexibility.

S.61 of the new WA law provides an offence is committed punishable by imprisonment for 6 months and/or a fine of $2,000 for breaching a violence restraining order of 72 hours or less; 18 months and/or a fine of $6,000 for breaching a violence restraining order and only a fine of $1,000 for breaching a misconduct restraining order. One difficulty with this is that there is some overlap between the two types of orders. The WA law introduces a new idea by providing in s.62 that it is a defence to the breach offence if an aggrieved protected person (other than a child or incapable person) consents to the breach.

The Discussion Paper's provision was supported by a number of contributors.[228]

228 NSW Health Department, Department of Immigration & Multicultural Affairs, Legal Services Commission of SA, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic

Model

Comments were sought on whether the WA provision that it is a defence to the breach offence if an aggrieved protected person (other than a child or incapable person) consents to the breach represents a desirable development. Submissions[229] were largely opposed to this defence being incorporated into the Model Laws because of concerns that the 'consent' may often have been a response to fear or a threat. Further, it was stated in submissions that the defence failed to acknowledge that a domestic violence order is an order of a court, and not an agreement between two individuals which is capable of being varied at will. The Working Group concurred with this reasoning and the defence has been omitted from the Model.

Contributors were divided in their support[230] and opposition[231] to the high penalties set in the Discussion Paper for breach of an order, with the majority favouring a reduction in penalty. The penalties have been amended to bring them into line with accepted practice in the various Australian jurisdictions.

Several contributors suggested that imprisonment should be mandatory,[232] particularly where breaches involved actual violence against the aggrieved protected person.[233] The Working Group concluded that mandatory imprisonment would be unduly harsh in many cases, and that granting courts sufficient flexibility to impose an appropriate sentence after careful consideration of all the circumstances (including imprisonment where warranted) represents the better approach. The circumstances surrounding a breach of an order and the nature of the orders breached will vary considerably. There will be minor breaches that do not warrant punishment in the form of imprisonment.

229 Dr Patricia Easteal, Bega Valley Domestic Violence & Sexual Assault Committee, Combined Community Legal Centres Group NSW, Beenleigh Domestic Violence Assistance Program, Associate Professor Julie Stubbs, WESNET Inc, NSW Department for Women, Women's Legal Resources Centre Sydney, NSW Department of Community Services, Women's Legal Service SA Inc, Women's Health Statewide SA

230 Julie Hansen, Edward Free

231 NSW Magistrate T Cleary, Domestic Violence Advocacy Centre, Family Law Reform and Assistance Association Inc, Combined Community Legal Centres Group NSW, Legal Aid NSW, Lone Fathers Association Australia Inc

232 Immigrant Women's Speakout Association NSW Inc, Office of the Status of Women

233 Women's Legal Service (Tasmania)

Arrest for breach of order

65 A police officer may, without warrant, arrest a person if the police officer is satisfied the person is the defendant named in any of the following orders and is contravening or has contravened the order—

(a) a domestic violence order;

(b) a registered external protection order;

(c) an external protection order if the police officer may, under subsection 39(3), exercise the officer's powers in relation to the order as if it were a registered external protection order.

Arrest for breach of order

This follows the 1991 model. In each jurisdiction the defendant can be arrested for breaching an order.

This provision attracted broad support from most contributors who addressed it.[234] One contributor stated that, similarly to Victorian legislation, the provision does not indicate what happens after arrest, and that it should indicate that the *Bail Act* should apply to a person arrested under this provision.[235] The Working Group accepted this recommendation and section 67 of this Model (section 29 of the Discussion Paper) has been amended to cover persons arrested without a warrant.

234 Legal Services Commission of SA, National Council of Single Mothers and Their Children, Domestic Violence Advocacy Service, Women's Legal Service SA Inc, Women's Health Statewide SA, Women's Legal Resources Centre Sydney

235 Victoria Police

Restriction on information about proceedings involving children

66(1) This section applies to—

(a) an application under this Act to a court or authorised justice if the aggrieved protected person, a named protected person or the defendant in the application is a child; and

(b) a proceeding under this Act involving a child, whether as a relevant party to the proceeding or as a witness.

(2) A person must not publish, or cause to be published, information in relation to the application, or information about the proceeding, if the person intends to identify, or is reckless as to whether the information identifies, any of the following—

(a) the child, including, for example, characteristics of the child's physical appearance, employment, place of education and interests;

(b) a person who is named in the application, or who is a party to or a witness in the proceeding, including, for example, characteristics of the person's physical appearance, employment, lifestyle and interests;

(c) the locality of the court to which the application is made or in which the proceeding is to be or is heard, or the authorised justice to whom the application is made.

Maximum penalty—

(a) if the offender is an individual—$5 000 or imprisonment for 2 years, or both;

(b) if the offender is a corporation—$75 000.

(3) Subsection (2) does not apply if the publishing was done under a direction or order of the court for the proceeding.

(4) In this section—

"information about the proceeding" means—

(a) a report or account of the proceeding; or

(b) an application, order or any other document in relation to the proceeding; or

(c) a drawing, photograph or other representation of a person in the proceeding, whether the person is a party to or a witness in the proceeding, or comprising the court or an officer of the court.

Restriction on information about proceedings involving children

The offence is tighter than the 1991/Victorian model and draws on s.30 of the ACT law. The new model has higher and more appropriate penalties than the maximum $2000 fine of the previous model. The offence has been improved so as to ensure the information is not published by indirect means. The conduct involved in such reporting is a low act which could cause serious harm to a child. It deserves strong punishment. Imprisonment is the maximum punishment in Queensland (12 months) and the ACT (6 months). Even those penalties are on the light side for this type of conduct - 2 years imprisonment is a more appropriate maximum.

It should be noted that in Queensland and the ACT the offence extends to publication of the details of anyone involved in the proceedings.

This section attracted support from most submissions who addressed it, and in particular those contributors submitted that the penalties established by this provision are appropriate.[236] One contributor suggested that the penalties should be increased.[237] The question of appropriate penalties is ultimately one for each jurisdiction when examining its domestic criminal legislation. However consistency is desirable, given that a media publication will usually appear simultaneously in each jurisdiction.

Section 66 has been amended in order that the offence additionally captures the conduct of a person who prints or publishes material (or causes this to be done) and is *reckless* as to whether the printing or publication will identify all or any of the matters listed in section 66. It has also been extended to persons who *cause* another to commit the basic offence, and to proceedings where children appear as witnesses although not a party to proceedings.

236 Peninsula Presbyterian Charge, Rhonda Parker MLA (WA Minister for Women's Interests), Victorian Community Council Against Violence, Burnside, Victoria Police, Tharpuntoo Legal Service Aboriginal Corporation, Domestic Violence and Incest Resource Centre, Illawarra Legal Centre Inc, Fitzroy Legal Service Inc, Law Institute Victoria, Canberra Goulburn Archdiocesan Women's League Social Issues Committee, Legal Services Commission of SA, ACT Department of Education & Training, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic, Catholic Women's League Australia, Domestic Violence Advocacy Service, Combined Community Legal Centres Group NSW, Disability Council of NSW, NSW Council on Violence Against Women, Women's Legal Service Inc

237 Uniting Church in Australia National Commission on Women & Men

"publish", in relation to information about an application or proceeding, includes communicating by any of the following ways, other than a direct communication from one person to another that, in the normal course of events, is not likely to be read, overheard or communicated to other persons—

(a) print in any publication that is sold or distributed without charge, including flyers, magazines, newspapers and pamphlets;

(b) broadcast by radio, television or any other electronic method of communication, whether the method is a commercial method or not.

Person arrested under this Act may be bailed

67 If a person is arrested under this Act, the [Bail Act] applies to the person as if the person had been arrested on a charge for an offence.

Person arrested under this Act may be bailed

The model is now based on subsection 59(2) of the Queensland law which has the same effect as the 1991/Victorian model but is better drafted.

The equivalent NSW provision is section 562L.

This is not specifically mentioned in some legislation because of reliance on general provisions elsewhere.

In the ACT the presumption in favour of bail has been reversed in cases where a person is charged with a domestic violence offence. Under new section 8A the offender can only be released on bail if the authorised officer is satisfied that the victim's safety is not in issue.

The policy of the model is that bail considerations should not be more or less strict than those which would apply where the defendant has committed an offence.

This provision was supported by several contributors,[238] although two contributors further suggested that the defendant should not be released on bail unless the officer is satisfied that the victim's safety will not be put at risk by the defendant's release.[239] After consideration of this suggestion the Working Group concluded that the provisions of each jurisdiction's *Bail Act*, which broadly obliges the court to carefully consider all the circumstances in each individual case, presented the better approach.

Other submissions recommended the provisions additionally state that police officers are able to apply[240] (or are required to apply)[241] for an interim protection order in the event that a defendant is released on bail. The rationale for this recommendation is to ensure that victims of domestic violence are not left unprotected whilst the defendant is released on bail. Whilst agreeing with the sentiment of this recommendation, the Working Group points to the interim protection order provisions of this model and notes that courts are at liberty to impose an interim protection order in appropriate circumstances. A police officer would be able to request that this be done if the officer believes that the defendant's liberty represents a threat to the safety of a protected person. The Working Group did not agree with the recommendation that police officers be compulsorily obliged to apply for an interim protection order in such circumstances, as hard and fast rules would create orders in some circumstances where none are required and may lead to injustice.

As stated in the commentary to section 65, this provision has been extended to cover persons arrested without warrant under this Model.

238 Legal Services Commission of SA, Legal Aid Queensland, National Council of Single Mothers and Their Children, Women's Legal Resource Group Inc Vic

239 Bega Valley Domestic Violence & Sexual Assault Committee, WESNET Inc

240 Domestic Violence Advocacy Service

241 Women's Legal Resources Centre Sydney

Division 2—Registrar of Firearms

Registrar to enter information about domestic violence order in register

68 On receiving a copy of an order under this Act, the Registrar of Firearms must enter information about the order in the register that the Registrar keeps under the Firearms Act.

Division 3—Regulations

Regulation-making power

69 The Governor in Council may make regulations under this Act.

Registrar to enter information about domestic violence order in register

This provision appeared as subsection 22(2) in the Discussion Paper. It obliges the Registrar to record appropriately all information in relation to domestic violence orders in the register that the Registrar keeps under the Firearms Act. Such information would come to the Registrar under several provisions of this Model and include notification of orders made, revoked, registered and deregistered. The recording requirement accords with the Australasian Police Ministers Council's decision concerning firearms.

Regulation-making power

This provision has been included in case there is a need for regulations.

SCHEDULE 1

REPORT AND DISCUSSION PAPER SECTION COMPARISON TABLE

Report section number	Discussion Paper section number	Report section number	Discussion Paper section number	Report section number	Discussion Paper section number
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2	1	14	4, 23	26	11(12)-(14) (17)(b)
3	2	15	9	27	21(2)
4	2(1) (part)	16	5	28	-
5	2(1) (part) (definition of 'parent' etc)	17	38	29	21(1)
6	-	18	18	30	14
7	3	19	16	31	19
8	-	20	20	32	36
9	11(1)-(4), (7), (16)	21	6	33	34
10	7	22	10	34	-
11	12(1)(a)	23	-	35	24(1)-(3), 26
12	remainder of 12, 13	24	11(5)-(6), (9)-(11), (17)(a)	36	-

Schedule 1

Report section number	Discussion Paper section number	Report section number	Discussion Paper section number	Report section number	Discussion Paper section number
37	24(4)	48	27	59	-
38	-	49	8	60	15(3), 21(3)
39	25	50	-	61	21(6)
40	-	51	30(1), (2) (part), (3) (part), (6), 31 (1), (6)	62	22(1)-(2)
41	-	52	30(3), 31(2)	63	22(3)
42	-	53	30(2) (part), (4)-(5)	64	32
43	-	54	31(3)-(5)	65	33
44	-	55	-	66	35
45	11(15)	56	15(1)	67	29
46	28	57	21(4)	68	22(2)
47	-	58	15(2)	69	39

SCHEDULE 2 - THE 1999 MODEL

PART 1—PRELIMINARY

Short title and commencement

1(1) This Act may be cited as the Domestic Violence Model Law 1999.

(2) This Act commences on a day to be fixed by proclamation.

Definitions

2 In this Act—

"act of domestic violence" see section 3.

"adult" means a person who is 18 years of age or over.[242]

"aggrieved person", for part 3, division 1, see section 34

"aggrieved protected person" means—

(a) a protected person who is stated in the protection application, or in an application for a telephone interim protection order, as the person for whose benefit the application is primarily made; or

(b) a protected person for whose benefit a domestic violence order is primarily made.

"appeal court", for part 5, see section 50.

"appeal period" see section 50.

"attached summons", for a protection application, means the summons that, under section 11, the clerk of a court attaches to the protection application.

"attending officer" see subsection 9(1).

"authorised justice" means—

(a) a Magistrate; or

(b) a justice of the peace who is a clerk of a court; or

(c) a justice of the peace .....[243]

["Chief Commissioner of Police"][244]

242 Depending on the jurisdiction, this definition may not be necessary.

243 Some jurisdictions may include other justices of the peace.

244 For the model, the term 'Chief Commissioner of Police' is used. However, a jurisdiction may need to change this term or define it in a particular way. For example, in Queensland the term is 'commissioner of the Police Service'.

"child" means a person who is under the age of 18 years.[245]

"child protection order" means an order under [the jurisdiction's relevant child protection legislation].

["Childrens Court" means]

["clerk", for a court, means][246]

"CrimTrac", for part 3, division 2, see section 40.

"CrimTrac registrar" see section 40.

"court" means any of the following courts—

(a) if an application under this Act is made to, or transferred to, a [Magistrates Court]—the Magistrates Court;

(b) if an application under this Act is made to, or transferred to, a [Childrens Court]—the Childrens Court;

(c) if a person is found guilty of an offence involving an act of domestic violence by a court, whether on a plea of guilty or otherwise, and the court exercises a power under section 15 —the court by which the finding is made.

"defendant"—

(a) for part 3, division 1, see section 34; and

(b) otherwise, means a person—

(i) for an application for a domestic violence order—the person against whom the application is sought; or

(ii) for a domestic violence order—the person against whom the order is made.

"domestic violence order" means—

(a) a protection order; or

(b) an interim protection order; or

(c) a telephone interim protection order.

"external protection order" means an order made under a provision of a law of another Australian jurisdiction or New Zealand that is prescribed under a regulation as a provision under

245 Depending on the jurisdiction, this definition may not be necessary.

246 For the model, the term 'clerk' is used. However, a jurisdiction may need to change this term or define it in a particular way.

which external protection orders are made or take effect, other than an order that is interim or temporary in nature.

"family contact order" see subsection 5(1).

["firearm" means a firearm under the Firearms Act.

"Firearms Act"][247]

"guardianship order" means an order under [the jurisdiction's relevant legislation for guardianship matters, for example, the Guardianship and Administrative Board Act].

"interim protection order" means—

(a) an order made under section 18 that states it is an interim order; or

(b) an order made under section 22.

["Magistrates Court" means]

"named protected person" means—

(a) a protected person who is named in a protection application, or an application for a telephone interim protection order, as a person for whose benefit the application is made other than the aggrieved protected person; or

(b) a protected person for whose benefit a domestic violence order is made other than the aggrieved protected person.

"nominated representative" see section 6.

"original court"—

(a) in part 3, division 1—see section 34; or

(b) in part 5— see section 50.

"parenting order" see Family Law Act 1975 (Commonwealth), part 7, division 5, section 64B, and Family Court Act 1975 of Western Australia, section 36A.

["police officer"][248]

"possession", of a thing, includes—

(a) having it in one's custody; and

247 For the model, the term 'firearm' and 'Firearms Act' is used. However, a jurisdiction may need to change these terms or define them in a particular way. For example, in Queensland the term is 'weapon' and weapons are dealt with under the Weapons Act 1990.

248 For the model, the term 'police officer' is used. However, a jurisdiction may need to change this term or define it in a particular way. For example, in Queensland the term is defined in the Acts Interpretation Act 1954.

(b) having it under one's control in any place (whether or not another person has custody of it); and

(c) having an ability to obtain its custody at will; and

(d) having a claim to its custody if the claimant has committed it to the custody of another person, even though it is temporarily not in the control of the person having the claim.[249]

"premises" includes any, or part of any, of the following (whether a public place or private property)—

(a) an area of land;

(b) a building or structure (whether movable or immovable), including a dwelling house;

(c) a vehicle, vessel or aircraft;

(d) a caravan or trailer.

"property", of a person, means—

(a) property the person owns; or

(b) property that, even though the person does not own it, is—

(i) in the person's care or custody; or

(ii) used or enjoyed by the person or available for the person's use or enjoyment; or

(iii) at premises at which the person resides or works.

"protected person" see section 4.

"protection application" means an application for a protection order.

"protection order" means—

(a) an order made under section 14 or 15; or

(b) an order made under section 18 or 19, other than an order that states it is an interim protection order; or

(c) an order that becomes a protection order under section 23.

249 Some jurisdictions have expressed a preference to have a definition, while others have expressed a preference to rely on the common law applicable to their jurisdiction.

["Registrar of Firearms" means the person who holds the office of the Registrar of Firearms under the Firearms Act.][250]

"registered external protection order"—

(a) in part 3, division 1—see section 34; or

(b) in part 3, division 2—see section 40.

"relevant family contact order" see subsection 5(2).

"relevant party to a proceeding", for a proceeding in relation to a protection application or application for a telephone interim protection order, or in relation to a domestic violence order, means all of the following—

(a) the applicant for the application or order and the defendant against whom the application is sought or order is made;

(b) if the aggrieved protected person was not a party to the proceeding and there is no nominated representative for the aggrieved protected person—the aggrieved protected person;

(c) if there is a nominated representative for the aggrieved protected person named in the application or order but neither the nominated representative or aggrieved protected person were the applicant for the application or order—the nominated representative for the aggrieved protected person;

(d) if there is a nominated representative for the defendant for the application or named in the order but the nominated representative was not a party to the proceeding—the nominated representative for the defendant.

"representative" see section 6.

"telephone" includes facsimile, radio and any other device that may be used as a way of communicating.

"telephone interim protection order" see section 9.

Meaning of "act of domestic violence"

3(1) An "act of domestic violence" is any one of the following acts that a person commits against a protected person—

(a) causing or threatening to cause a personal injury to the protected person, or the abduction or confinement of the protected person;

250 For the model the term 'Registrar of Firearms' is used. However, a jurisdiction may need to change this term or define it in a particular way. For example, in Queensland, the commissioner of police is responsible for keeping the relevant register under the Weapons Act 1990.

(b) causing or threatening to cause damage to the protected person's property;

(c) causing or threatening to cause the death of, or injury to, an animal, even if the animal is not the protected person's property;

(d) behaving in a harassing or offensive way towards the protected person;

(e) stalking the protected person.

(2) A person stalks another person (the "other person") if—

(a) the person commits any of the following acts on at least 2 separate occasions—

(i) follows the other person;

(ii) loiters outside the place of residence of the other person or some other place frequented by the other person;

(iii) telephones the other person;

(iv) enters or interferes with property in the other person's possession;

(v) gives or sends offensive material to the other person, or leaves offensive material where it may be found by, given to or brought to the attention of the other person;

(vi) keeps the other person under surveillance;

(vii) acts in any other way that could be expected to arouse fear in a reasonable person; and

(b) the person commits the acts with the intention of causing by the acts—

(i) harm to the other person or a third person; or

(ii) the other person, or a third person, to fear harm to any person.

(3) For subsection (2), it is immaterial that—

(a) the acts occurred outside [this State/Territory], as long as at least one of the acts committed by the person occurred—

(i) in [this State/Territory]; or

(ii) when the person or other person was in [this State/Territory]; or

(b) the other person did not actually fear the person would personally cause harm or arrange for someone else to cause harm.

Meaning of "protected person"

4.(1) A "protected person", in relation to another person, means—

(a) someone who is or was a spouse of the other person; or

(b) someone who is or has been a relative of the other person; or

c) a child who -

(i) ordinarily resides or resided with the other person; or

(ii) regularly resides or stays, or resided or stayed, with the other person; or

(d) a child of whom the other person is a guardian; or

(e) someone who has or has had an intimate personal relationship, or other personal relationship, with the other person; or

(f) someone who is or has been ordinarily a member of the other person's household.

(2) In subsection (1)—

"other personal relationship" means a personal relationship of a domestic nature between two persons in which the lives of the persons are or were enmeshed and the actions of one of them affect or affected the other.

"relative", in relation to a person, means—

(a) someone who is a relative of the person; or

(b) if the person lives with, or lived with, another person (the "partner") and the person and partner are spouses under the definition "spouse", paragraph(b) or (c)—someone who is a relative of the partner;

(c) for someone not within the ordinary concept of a relative of the person—someone whom it is reasonable to regard as a relative, especially considering that for some people the concept of a relative may be wider than is ordinarily understood, including the following people—

(i) Aboriginal people and Torres Strait Islanders;

(ii) members of communities with non-English speaking backgrounds;

(iii) people with particular religious beliefs.

"spouse", of a person, includes any of the following—

(a) the person's husband or wife, or a former husband or wife of the person;

(b) someone else with whom the person is living, or has lived, as if that someone were the spouse of the person even though they are not or were not married to each other;

(c) someone else whom, according to the person's Aboriginal, Torres Strait Islander or other cultural tradition, the person considers to be the person's spouse or previously considered to be the person's spouse.

Meaning of "family contact order" and "relevant family contact order"

5(1) A "family contact order" means—

(a) a Division 11 contact order within the meaning of the Family Law Act 1975 (Commonwealth), part 7; or

(b) an order made under the Family Court Act 1975 of Western Australia, section 36A.

(2) A "relevant family contact order", in relation to a protection application or an application for a telephone interim protection order, means a family contact order that relates to access—

(a) between protected persons; or

(b) between the defendant and either a child of the defendant or a child of a protected person.

Meaning of "representative" and "nominated representative"

6(1) A "representative", for a person, means any of the following—

(a) if there is a guardianship order for the person, including a child—a guardian under the guardianship order;

(b) if the person is a child—a parent of the child or an adult with whom the child ordinarily resides, or regularly resides or stays;

(c) if the person is a child about whom there is a child protection order, parenting order or family contact order—a person who, under the order, is responsible for the child;

(d) if the person is an adult, or a child who is 14 years of age or more—an adult appointed in writing by the person to represent the person.

(2) A person who, apart from this subsection, would be a representative for another person (the "other person") is not a representative for the other person if a protection application or application for a telephone interim protection order—

(a) names the other person as an aggrieved protected person or named protected person and the person is the defendant for the application; or

(b) names the person as the aggrieved protected person or named protected person and the other person is the defendant for the application.

(3) A "nominated representative", for an aggrieved protected person, means—

(a) if the person is the aggrieved protected person in relation to a protection application or an application for a telephone interim protection order—a representative of the person who is named in the application as the nominated representative for the aggrieved protected person; or

(b) a representative of the person who is ordered by a court to be the nominated representative for the person for an application or order.

(4) A "nominated representative", for a defendant, means—

(a) if the person is the defendant in relation to a protection application, or an application for a telephone interim protection order, and files a document in the proceeding naming the representative as the nominated representative for the defendant—the named person; or

(b) a representative of the person who is ordered by a court to be the nominated representative for the person for an application or order.

(5) This section does not affect another provision of this Act that states a police officer may make an application for a protected person or an aggrieved protected person.

(6) On application by or for an aggrieved protected person or a defendant, or on its own initiative, a court may—

(a) order a representative of an aggrieved protected person or defendant to be the nominated representative for the person; or

(b) make an order that a representative for the aggrieved protected person or defendant is no longer the nominated representative for the person, whether or not the court appoints another representative for the person.

Jurisdiction of Magistrates Court and Childrens Court

7(1) Each of the following courts has jurisdiction to hear and decide an application under this Act (other than an application for a telephone interim protection order) in relation to which the aggrieved protected person or the defendant is a child when the application is made—

(a) the Childrens Court;

(b) a Magistrates Court.

(2) Subsection (1) applies—

(a) even if there is a nominated representative for the aggrieved protected person or for the defendant; and

(b) despite anything to the contrary in [the Acts establishing those courts and any relevant child protection legislation of the jurisdiction].

(3) If an application is made to a Magistrates Court and the Magistrates Court considers that, in all the circumstances, the matter should be dealt with by the Childrens Court, the Magistrates Court may discontinue the proceeding and transfer the application to the Childrens Court.

(4) If an application is made to the Childrens Court and the Childrens Court considers that, in all the circumstances, the matter should be dealt with by a Magistrates Court, the Childrens Court may discontinue the proceeding and transfer the application to a Magistrates Court.

(5) A Magistrates Court or Childrens Court has jurisdiction to extend, vary or revoke an interim protection order or protection order made by it or another court.

PART 2—DOMESTIC VIOLENCE ORDERS

Division 1—Police response required to domestic violence

Obligations of police officers to investigate certain beliefs or suspicions

8(1) This section applies if a police officer believes or suspects an act of domestic violence has been committed, is being committed or is likely to be committed, the police officer must investigate whether the act of domestic violence has been committed, is being committed or is likely to be committed.

(2) If the police officer investigates and does not make a protection application, or an application for a telephone interim protection order, the police officer must make a written record of the officer's reasons for not making an application.

Police officer may apply for telephone interim protection order

9(1) This section applies to a police officer who attends an incident involving a person, and a protected person in relation to the person, in the course of the officer's duties (an "attending officer").

(2) The attending officer may, on the officer's own initiative or at the request of a protected person, apply by telephone to an authorised justice for an interim protection order (a "telephone interim protection order") if—

(a) the attending officer, after investigating as required under section 8, believes or suspects an act of domestic violence has been committed, is being committed or is likely to be committed, by the person against the protected person or another protected person; and

(b) because of the time at which, or the place at which, the incident occurred—

(i) it is not practicable for a protection application to be made to a court by the protected person, the other protected person or the attending officer; or

(ii) if a protection application were made to a court—it is not practicable for the court to hear and decide the application quickly; and

(c) the attending officer believes a telephone interim protection order is necessary to ensure the safety of a protected person or to prevent substantial damage to any property of a protected person.

(3) In deciding whether an application for a telephone interim protection order is necessary to ensure the safety of a protected person or to prevent substantial damage to any property of a protected person, the attending officer must consider whether—

(a) a protection application has been made but not heard; or

(b) the protected person is an adult and intends to make a protection application.

4) If the attending officer believes a protected person is in imminent danger of personal injury from the defendant, the officer may, in the application for a telephone interim protection order, ask the authorised justice to prohibit or restrict the defendant from—

(a) approaching the protected person; or

(b) entering or remaining at any stated premises occupied by the protected person, whether or not the defendant has a legal or equitable interest in the premises.

(5) The attending officer must inform the authorised justice about any relevant family contact order, or of any pending application for a relevant family contact order, of which the officer is aware.

(6) However, a telephone interim protection order is not invalid merely because an attending officer fails to inform the authorised justice about a relevant family contact order.

(7) The attending officer's application for a telephone interim protection order may be communicated to the authorised justice by another police officer if it is not practicable for the attending officer to apply, by telephone, directly to the authorised justice.

Division 2—Protection applications

Applying for protection orders

10(1) Each of the following persons may make a protection application to a court—

(a) a protected person who is an adult;

(b) a protected person who is a child 14 years of age or more if the court gives leave to the child to make the protection application; or

(c) for a protected person for whom there is a guardianship order—a guardian for the protected person;

(d) a police officer.

(2) Also, the following persons may make a protection application to a court on behalf of a primary applicant—

(a) a person appointed by a primary applicant who is an adult;

(b) a person appointed by a primary applicant who is a child of 14 years of age or more, if the court gives leave for the person to make the protection application for the child;

(c) a person appointed by the court, if the court considers the primary applicant can not make the protection application.

(3) Even though a child mentioned in subsection (1)(b), or another person mentioned in subsection (2)(b), may only make a protection application with the leave of the court, the child or other person may make the protection application if—

(a) the child or other person seeks the leave of the court to make the protection application as part of the protection application; and

(b) the court gives leave for the protection application to proceed.

(4) If a person seeks the leave of the court to make a protection application—

(a) for an application by a child of 14 years of age or more—the court must not give leave unless it is satisfied the child understands the nature and consequences of the protection application and it is in the best interests of the child; and

(b) for an application by another person—the court must give leave if it is satisfied that it is in the best interests of the primary applicant on whose behalf the person is seeking the leave to apply.

(5) A protection application must be in writing but an appointment as mentioned in subsection (2)(a) or (b) need not be in writing.

(6) If a person may make a protection application under this section but another person has made the application, including a police officer who is the applicant for a protection application under section 25, the person may apply to the court to be substituted as the applicant for the application.

(7) In this section—

"primary applicant" means a person who may make a protection application under subsection (1)(a), (b) or (c).

Summons to issue on protection application

11(1) This section applies if—

(a) a protection application is made to a court; or

(b) an application for a telephone interim protection order is made and the telephone interim protection order is sent to a court under section 25.

(2) The clerk of the court must—

(a) issue a summons directed to the defendant for the hearing of the protection application; and

(b) attach the summons to the protection application.

Warrant may issue for protection application in certain circumstances

12(1) If a police officer makes a protection application to a court and asks for a warrant to issue for the arrest of the defendant, instead of issuing a summons for the hearing of the protection application, the clerk of the court must refer the application to the court.

(2) The court may issue a warrant to arrest the defendant if the court is satisfied it is necessary for the defendant to be arrested and brought into custody because—

(a) the personal safety of the aggrieved protected person or a named protected person is seriously threatened; or

(b) the defendant is likely to cause substantial damage to property of the aggrieved protected person or a named protected person.

(3) A court may, on its own initiative, issue a warrant for the arrest of a defendant when a protection application is made to the court by any other person if the court is satisfied it is necessary as mentioned in subsection (2).

(4) A warrant may be issued under this section even if a charge for a criminal offence is not laid against the defendant.

(5) If a warrant is issued to arrest a person, a police officer may arrest the person, even though the warrant, or an execution copy of the warrant, is not in the officer's possession at the time of the arrest.

(6) A warrant issued under this section has no effect after 1 year after the day it is issued.

Court to be informed about relevant family contact orders

13(1) This section applies to a person who makes a protection application.

(2) The person must inform the court about any relevant family contact order, or any pending application for a relevant family contact order, of which the person is aware.

(3) However, neither an application, nor an order under this Act in relation to the application, is invalid merely because a person does not inform the court about a relevant family contact order.

Division 3—General powers and procedures of court

Court may make protection orders

14(1) A court may make a protection order against a defendant to protect the aggrieved protected person, or the aggrieved protected person's property, if the court is satisfied, on the balance of probabilities, that—

(a) the defendant committed an act of domestic violence against the aggrieved protected person and the defendant is likely again to commit an act of domestic violence against the aggrieved protected person; or

(b) the aggrieved protected person reasonably fears the defendant will commit an act of domestic violence against the aggrieved protected person.

(2) An order under subsection (1) may include a named protected person if the court is satisfied, on the balance of probabilities, that—

(a) the defendant committed an act of domestic violence against the named protected person and the defendant is likely again to commit an act of domestic violence against the named protected person; or

(b) the aggrieved protected person or the named protected person reasonably fears the defendant will commit an act of domestic violence against the named protected person.

(3) The court may make the protection order even though the defendant—

(a) is charged with an offence arising out of the same conduct comprising the act of domestic violence and a proceeding for the offence has started; or

(b) was previously charged with an offence arising out of the same conduct comprising the act of domestic violence and a proceeding for the offence has finished.

Court may make protection order on its own initiative

15(1) A court before which a person pleads guilty to, or is found guilty of, an offence that involves an act of domestic violence may, on its own initiative, make a protection order against the person if the court is satisfied that a court may, assuming it was acting on a protection application, make a protection order against the person under section 14.

(2) If a protection order or interim protection order already names the person as the defendant for the order, the court may extend or vary the order, if the court is satisfied it is appropriate to do so.

(3) However, the court may not make an order under this section naming a person as the aggrieved protected person if the person, or the nominated representative for the person, objects to the order.

(4) The court may make an order under this section whether or not the court makes another order against the defendant in relation to the offence that involves an act of domestic violence.

Courts may impose directions, restrictions and prohibitions but certain matters to be of paramount importance

16(1) For a court making a protection order or interim protection order, or an order extending, varying or revoking a protection order or interim protection order, the following is to be of paramount importance to the court—

(a) the need to ensure the aggrieved protected person and any named protected person are protected from any act of domestic violence by the defendant;

(b) the welfare of any child who may be affected by the defendant's behaviour or the operation of the order.

(2) In its order, the court may impose any directions, restrictions or prohibitions on the defendant that appear to the court necessary or desirable in the circumstances, including any or all of the following—

(a) prohibiting or restricting the defendant from approaching an aggrieved protected person or named protected person, including prohibiting the defendant from approaching within a stated distance of the aggrieved protected person or named protected person;

(b) prohibiting or restricting the defendant from entering or remaining at premises in which the aggrieved protected person or named protected person lives or works, or that the aggrieved protected person or named protected person frequents, whether or not the defendant has a legal or equitable interest in the premises;

(c) prohibiting or restricting the defendant from being in an area stated in the order;

(d) prohibiting the defendant from contacting, harassing, threatening or intimidating the aggrieved protected person or a named protected person or of doing any act the court is satisfied is contact with, or harassment or intimidation of, or a threat to, the aggrieved protected person or the named protected person;

(e) prohibiting the defendant from damaging property of the aggrieved protected person or a named protected person whether or not the defendant has a legal or equitable interest in the property;

(f) prohibiting the defendant from causing another person to engage in conduct restrained by the court;

(g) directing the defendant to dispose of a thing that the court is satisfied was used, or may be used, by the defendant to commit an act of domestic violence against the aggrieved protected person or a named protected person (whether or not the thing is wholly or jointly owned by, or is in the possession of, the defendant) by, at the defendant's option—

(i) selling the thing to another person; or

(ii) placing the thing in the custody of another person whom the court considers to be sufficiently responsible to care for the thing while the order has effect;

(h) prohibiting the defendant from acquiring, or having in the defendant's possession, a thing stated in the order if the court has directed the defendant to dispose of things of the same type as mentioned in paragraph (g);

(i) prohibiting or restricting stated conduct of the defendant towards the aggrieved protected person or a named protected person if the aggrieved protected person or named protected person is a child, including prohibiting or restricting the defendant's presence in a place associated with the child;

(j) directing the defendant to return property stated in the order to the aggrieved protected person or a named protected

person, or to allow the aggrieved protected person or a named protected person to recover, have access to or make use of stated property, whether or not the defendant has a legal or equitable interest in the property;

(k) prohibiting or restricting the defendant from causing or allowing another person to engage in the type of conduct mentioned in this subsection.

(3) Before making a protection order or interim protection order, or an order extending, varying or revoking a protection order or interim protection order, that prohibits or restricts the defendant from entering or remaining at any premises, the court must take into account—

(a) the accommodation needs of all persons who may be affected by the operation of the order; and

(b) existing guardianship orders, child protection orders, parenting orders and family contact orders in relation to a child of the aggrieved protected person, if the terms of the orders are known; and

(c) anything else the court considers relevant in the circumstances.

(4) The address at which the aggrieved protected person or a named protected person resides, or intends to reside, must not be stated in a protection order or interim protection order, unless the court is satisfied—

(a) the defendant knows the address; or

(b) it is necessary to state the address in the order to achieve compliance with the order and the personal safety of the aggrieved protected person or a named protected person would not be seriously threatened, or damage would not be likely to be caused to any property of the aggrieved protected person or a named protected person, by stating the address.

Court must take into account certain contact orders

17(1) In deciding whether or not to make an order under this Act, including an order extending, varying or revoking a protection order or interim protection order, a court must—

(a) consider whether contact between the aggrieved protected person or the defendant, and a child of either of those persons, is relevant to the making the order; and

(b) have regard to any relevant family contact order of which the court has been informed in relation to the aggrieved protected person, the defendant or a child of either of those persons.

(2) However, an order under this Act is not invalid merely because the court does not—

(a) consider whether contact is relevant; or

(b) have regard to a relevant family contact order.

Protection orders and interim protection orders by consent

18(1) A court may make a protection order or an interim protection order against a defendant (a "consent order"), whether or not the defendant admits to any or all of the particulars of the protection application, if—

(a) the applicant for the protection order or, if the applicant is not the aggrieved protected person, the aggrieved protected person or the nominated representative for the aggrieved protected person, consents to the court making the order; and

(b) the defendant, or the nominated representative for the defendant, consents to the court making the order.

(2) The court may make a consent order without being satisfied about the matters mentioned in section 14.

(3) If the court considers the interests of justice require it to conduct a hearing into any or all of the particulars of the protection application before making a consent order, the court may conduct the hearing.

Procedures in absence of defendant

19(1) This section applies if—

(a) a defendant in a protection application does not appear in person in the court at the time fixed for the hearing of the application; and

(b) the court is satisfied the defendant has been served with the application and attached summons, or has been bailed to appear at the hearing.

(2) The court may—

(a) proceed to hear and decide the protection application in the defendant's absence; or

(b) adjourn the hearing; or

(c) make an interim protection order under section 22; or

(d) issue a warrant to arrest the defendant if the court is satisfied it is necessary for the defendant to be arrested and brought into custody because—

(i) the personal safety of the aggrieved protected person or a named protected person is seriously threatened; or

(ii) the defendant is likely to cause substantial damage to property of the aggrieved protected person or a named protected person.

(3) Before the court issues a warrant to arrest a defendant, the court must consider if the defendant is a person for whom there is a representative or nominated representative.

Explanation of protection orders and interim protection orders

20(1) A court that makes a protection order, or interim protection order, must explain the following to the defendant, the aggrieved protected person or nominated representative for the defendant or aggrieved protected person, who is in the court when the order is made—

(a) the purpose, terms and effect of the order, including that a protection order may be registered and enforceable in another Australian jurisdiction or New Zealand without further notice;

(b) the consequences that may follow if the defendant contravenes the protection order or interim protection order;

(c) the order must be varied or revoked if the defendant intends to have contact or reconcile with the aggrieved protected person or a named protected person;

(d) the means by which the protection order or interim protection order may be extended, varied or revoked;

(e) that, under the Firearms Act, the defendant named in a protection order is, subject to other lawful authority, not authorised to possess, carry or use a firearm for 5 years.

(2) If a person to whom an explanation must be given under subsection (1) does not readily understand English or the court is not satisfied the person understood the explanation, the court must, to the extent practicable, arrange for someone else to give the explanation to the person in a way the person can understand.

(3) However, an order under this Act is not invalid merely because—

(a) the court did not explain a matter mentioned in subsection (1), or arrange for someone else to give the explanation, to a person; or

(b) if the court made an arrangement for someone else to give the explanation, the person did not give the explanation.

Duration of protection order

21 A protection order remains in force—

(a) if a time is stated in the order for its duration—until the time stated in the order unless it is sooner revoked by the court or set aside on appeal; or

(b) if no time is stated in the order—until it is revoked by the court or set aside on appeal.

Division 4—Interim protection orders

Interim protection orders

22(1) An interim protection order may be made by a court in relation to a protection application if—

(a) the court adjourns the hearing of the protection application for any reason; or

(b) the court has not started to hear the protection application because the defendant has not appeared or the court is not satisfied the defendant, or a representative for the defendant, has been served with the protection application and attached summons.

(2) Before the court may make an interim protection order, it must appear to the court, by oral or affidavit evidence, that the interim protection order is necessary—

(a) to ensure the safety of an aggrieved protected person or a named protected person; or

(b) to prevent substantial damage to property of an aggrieved protected person or a named protected person.

(3) An interim protection order remains in force until the earliest of the following happens—

(a) if a time is stated in the order about when the order ends—when the time stated in the order is reached; or

(b) a court makes the protection order or the protection order arises under section 23;

(c) a court revokes the interim protection order.

Protection order may arise after interim protection order

23(1) This section applies if a court makes an interim protection order in the absence of the defendant and any representative for the defendant.

(2) After the court makes the order, the clerk—

(a) must arrange for the order to be put in writing; and

(b) no later than 21 days before the day stated in the interim protection order as the day on which the proceedings for the protection order may continue (the "hearing day")—must arrange for 2 copies of the interim protection order, one of which is marked as being the endorsement copy (the "endorsement copy"), to be served on—

(i) the defendant; and

(ii) if the defendant is a child—a representative for the defendant.

(3) The defendant, or the nominated representative for the defendant, may—

(a) complete an endorsement copy in compliance with the instructions on the copy; and

(b) return it to the clerk at least 7 days before the hearing day.

(4) The interim protection order becomes a protection order against the defendant with the same terms as the interim protection order if—

(a) the clerk receives an endorsement copy from the defendant, or the nominated representative for the defendant, at least 7 days before the hearing day; and

(b) the defendant, or the nominated representative for the defendant, indicated on the endorsement copy the clerk received that the defendant does not object to the interim

protection order becoming a protection order.

(5) The protection order comes into force under subsection (4) on the day on which the clerk receives the endorsement copy.

(6) Also, the interim protection order becomes a protection order with the same terms as the interim protection order, if the defendant, or the nominated representative for the defendant, does not return an endorsement copy to the clerk at least 7 days before the hearing day indicating the defendant objects to the interim protection order becoming a protection order.

(7) The protection order comes into force under subsection (6) on the hearing day.

(8) If, at least 7 days before the hearing day, the defendant, or the nominated representative for the defendant, returns an endorsement copy indicating the defendant objects to the interim protection order becoming a protection order, the court may proceed to hear and decide the protection application on the hearing day or a later day.

Division 5—Telephone interim protection order

Authorised justice may make telephone interim protection order

24(1) This section applies if a police officer applies under section 9 to an authorised justice for a telephone interim protection order.

(2) The authorised justice may make a telephone interim protection order, if the justice is satisfied the order is necessary to ensure—

(a) the protection of the aggrieved protected person or a named protected person from an act of domestic violence by the defendant; or

(b) the welfare of any child who may be affected by the defendant's behaviour.

(3) The authorised justice may include in the telephone interim protection order any directions, restrictions or prohibitions that a court, under section 16, may include in a protection order.

(4) Before the authorised justice includes any prohibitions or restrictions as mentioned in subsection 9(4), the authorised justice must be satisfied the defendant is an adult and there is no guardianship order for the defendant.

(5) In deciding whether to grant a telephone interim protection order, the authorised justice may inform himself or herself in a way the

authorised justice thinks fit and is not bound by the rules or practice as to evidence.

(6) The authorised justice must inform the police officer about the following by telling the police officer or sending the order, or a copy, to the officer—

(a) the terms of the telephone interim protection order;

(b) the date and time when it is made.

(7) If, under subsection (6), the authorised justice tells the police officer about the terms of the order, the police officer must complete a prescribed form for a telephone interim protection order by writing on the form—

(a) the terms as stated by the authorised justice; and

(b) the name of the authorised justice; and

(c) the date and time the authorised justice made the order.

(8) The completed form under subsection (7) is the telephone interim protection order made by the authorised justice.

(9) However, if the authorised justice sends the order, or a copy, to the police officer, the order sent, or the copy received or printed out, by the officer is taken to be the original telephone interim protection order.

(10) A police officer must personally serve the telephone interim protection order on the defendant as soon as practicable after—

(a) the form is completed under subsection (7); or

(b) the order is received, or a copy of the order is received or printed out, under subsection (9).

Protection application taken to be made after telephone interim protection order

25(1) If an authorised justice makes a telephone interim protection order, the police officer who made the application for the order, or another police officer on behalf of that police officer, must—

(a) if the application was in writing—send it and the order to a court; or

(b) if otherwise—complete a written application for a telephone interim protection order in the prescribed form and send it, and the order, to a court.

(2) The application for a telephone interim protection order sent with the telephone interim protection order to a court is a protection application made by the police officer for the aggrieved protected person.

Duration of telephone interim protection order

26(1) A telephone interim protection order against a defendant for the protection of the aggrieved protected person and any named protected persons remains in force until the first of the following happens—

(a) midnight on the fourteenth day after the day the order is made;

(b) if a time is stated in the order about when that order ends and that time is earlier than the time under paragraph (a)—the time stated in the order is reached;

(c) the order is revoked by a court;

(d) a court refuses to grant a protection application against the defendant for the protection of the aggrieved protected person;

(e) the telephone interim protection order ends under subsection (2).

(2) If a court makes a protection order, or interim protection order, against the defendant for the protection of the aggrieved protected person, the telephone interim protection order ends—

(a) if the defendant is in court when the court makes the protection order or interim protection order—when the court makes the order; or

(b) if otherwise—when the protection order or interim protection order is served on the defendant under section 62.

(3) A telephone interim protection order must not be extended or varied and a further telephone interim protection order against the defendant for the protection of the aggrieved protected person must not be made in relation to the same incident.

Division 6—Extensions, variations and revocations of domestic violence orders

Persons who may apply for extension, variation or revocation of domestic violence orders

27(1) A relevant party to a proceeding for a domestic violence order may apply to a court for —

(a) an extension, variation or revocation of a protection order or interim protection order; or

(b) a revocation of a telephone interim protection order.

Applications under section 27 by defendants

28(1) This section applies if the person who makes an application, as mentioned in section 27, for a domestic violence order is—

(a) the defendant against whom the order is made; or

(b) a representative for the defendant.

(2) The defendant or representative must serve a copy of the application on the Chief Commissioner of Police but the aggrieved protected person or any nominated representative for the aggrieved protected person is not required to be served.

(3) If the clerk of the court is satisfied the Chief Commissioner of Police has been served under subsection (2), the clerk must—

(a) fix a time and day for a preliminary hearing at which the court must consider whether to grant leave for the application to continue; and

(b) give written notice about the time and day of the preliminary hearing to—

(i) the defendant or other applicant; and

(ii) the Chief Commissioner of Police.

(4) The preliminary hearing must be held in the absence of the aggrieved protected person, any nominated representative for the aggrieved protected person and a named protected person unless the aggrieved protected person or nominated representative for the aggrieved protected person appears and seeks, and obtains, leave of the court to be heard.

(5) If the defendant or representative does not attend the preliminary hearing, the court must—

(a) dismiss the application if it is satisfied the defendant or representative was given notice about the hearing under subsection (3)(b); or

(b) adjourn the hearing if it is not satisfied the defendant or representative was given the notice.

(6) If the defendant or representative attends the preliminary hearing, the court must—

(a) grant leave for the application to continue if it is satisfied there has been a substantial change in the relevant circumstances since the order was made; or

(b) dismiss the application if it is not satisfied there has been a substantial change.

(7) Subsections (3)(b), (5) and (6) apply to an adjournment of a preliminary hearing under subsection (5)(b) in the same way as they apply to the preliminary hearing.

Decision about application for extension, variation or revocation

29 If a person applies to extend or vary a protection order or interim protection order, or revoke a domestic violence order, the court may make an order as it considers appropriate—

(a) granting the application by extending or varying the protection order or interim protection order, or by revoking the domestic violence order; or[251]

(b) refusing to grant the application.

251 Also, under section 15 (Court may make protection or on its own initiative), a court may extend or vary an existing domestic violence order on its own initiative.

Division 7—Miscellaneous

Hearsay evidence

30 A court exercising powers under this Act may admit and act on hearsay evidence unless the interests of justice require otherwise.

Costs

31 A court may not award costs against a person who makes an application under this Act, even though the court refuses to make or confirm an order, unless the court is satisfied—

(a) the person made the application knowing it contained matter that, in a material particular, was false or misleading; or

(b) the application was intentionally frivolous or vexatious.

Domestic violence order prevails over order under Children and Young Persons Act

32 An order under this Act applies despite any order under the [Children and Young Persons Act (Victoria)].

Closure of proceedings involving a child or on application

33(1) A court proceeding under this Act involving a child, whether as a relevant party to the proceeding or a witness, is closed to the public.

(2) Also, the court may close a proceeding on application of a relevant party to the proceeding.

(3) Even if a court proceeding is closed under subsection (1) or (2)—

(a) both the aggrieved protected person and the defendant have the right to have one person each with him or her throughout the proceeding to give support or other help; and

(b) the court may allow other specific persons to attend the court proceeding.

PART 3—EXTERNAL PROTECTION ORDERS

Division 1—Manual method of registering external protection orders

Definitions for division 1

34 In this division—

"aggrieved person" means a person—

(a) for whose benefit an external protection order is made in another Australian jurisdiction or New Zealand, however the person is described in the order; and

(b) who, in the other Australian jurisdiction or New Zealand, may apply to have the order extended, varied or revoked.

"defendant" means a person against whom an external protection order is made, however the person is described in the order.

"original court", for an external protection order, means the court in another Australian jurisdiction or New Zealand that made the external protection order.

"registered external protection order" means an external protection order registered under this division

Registration of external protection orders

35(1) A person may apply to the clerk of a Magistrates Court to register an external protection order.

(2) The person need not give notice of the application to the defendant, but may do so.

(3) If the clerk is satisfied the external protection order is in force in the jurisdiction in which it was made, the clerk must—

(a) register the external protection order in the court; and

(b) give notice about the registration to the original court; and

(c) forward a copy of the registered external protection order to the Chief Commissioner of Police [and a copy to the Register of Firearms].

(4) Subject to section 37, the registered external protection order—

(a) has the same effect in [this State/Territory] as a protection order made by the clerk's court; and

(b) may be enforced in [this State/Territory] as if it were a protection order that had been personally served on the defendant.

(5) A registered external protection order remains in force in the State/Territory for the time for which the external protection order is, at the time of the application for registration in the State/Territory, to remain in force in the jurisdiction in which the order was made.

Deregistration of registered external protection order

36(1) The clerk of a Childrens Court or Magistrates Court must apply to the court for a registered external protection order to be deregistered if the clerk (whether on application by a person or on his or her own initiative) is satisfied—

(a) the external protection order is no longer in force in the jurisdiction in which it was made; or

(b) a protection order has been made under this Act that protects the person who is the aggrieved protected person against the person who is the defendant named in the registered external protection order.

(2) If the court is satisfied about a matter mentioned in subsection (1)(a) or (b), the court must order the deregistration of the order.

(3) If the court is satisfied the external protection order no longer is in force in the jurisdiction in which it was originally made, the court must order the deregistration of the order.

(4) The clerk must give notice about the deregistration in [this State/Territory to]—

(a) the aggrieved person; and

(b) the Chief Commissioner of Police [and a copy to the Registrar of Firearms].

No variation, extension or revocation of registered external protection orders

37(1) A court in [this State/Territory] may not vary a registered external protection order or extend the time for which the order is to remain in force in [this State/Territory].

(2) A variation or extension of an external protection order by the original court, or another court in the jurisdiction within which the original court is located, has no effect in [this State/Territory].

Clerk must give notice about certain matters to other jurisdictions

38(1) This section applies to the clerk of a court in [this State/Territory] if the court revokes a protection order, or sets aside a protection order on an appeal, that the clerk knows, or has reason to believe, has been registered in a court under a law of another Australian

jurisdiction or New Zealand.

(2) Without limiting section 62, the clerk must give written notice about the revocation of, or order setting aside, the protection order to an officer of the court in which the order is registered in another Australian jurisdiction or New Zealand.

(3) The notice must be given in writing or by electronic means that is capable of being produced or reproduced in writing.

Enforcement of external protection orders before registration

39(1) This section applies to an external protection order even though it is not registered under section 35.

(2) If a police officer forms an opinion, on reasonable grounds, that a person is the defendant named in an external protection order that continues to remain in force in the jurisdiction in which it was made, the officer must—

(a) make a written declaration about the officer's opinion and include in the declaration the date and time at which it is made; and

(b) give the declaration to the Chief Commissioner of Police.

(3) After the police officer forms the opinion, but within 72 hours after making the declaration, the officer may exercise the officer's powers in relation to the defendant as if the external protection order were a registered external protection order, including, under section 46, seizing a firearm in the defendant's possession.

Division 2—External protection orders under the CrimTrac system

Definitions for division 2

40 In this division—

"CrimTrac" means the database mentioned in subsection 41(1).

["CrimTrac registrar" means][252]

"registered external protection order" means an external protection order that is registered in CrimTrac and continues to have effect in the jurisdiction in which it was made or took effect.

252 The office holder is yet to be finalised but should be the one person for all States and Territories.

Purpose of division

41(1) The purpose of this division is to give effect to the State's/Territory's undertaking to participate in an arrangement for an Australian database of protection orders (however called).

(2) CrimTrac is to contain information about protection orders (however called) made in jurisdictions participating in the arrangement mentioned in subsection (1).

(3) Also, CrimTrac is to provide police officers in the participating jurisdictions with access to the information in the database about registered external protection orders.

Protection order registered in CrimTrac is enforceable in [this State/Territory]

42(1) A registered external protection order—

(a) is taken to be registered in [this State/Territory]; and

(b) has the same effect in [this State/Territory] as a protection order; and

(c) may be enforced in [this State/Territory] as if it were a protection order that had been personally served on the defendant.

(2) Subsection (1) has effect subject to section 44.

(3) For this Act, a document, in the prescribed form, purporting to be an extract from CrimTrac is evidence of—

(a) the registration of the order in CrimTrac; and

(b) the order continuing to have effect in the jurisdiction in which it was made or came into effect; and

(c) the information stated in the document.

(4) If the document mentioned in subsection (3) is signed by the CrimTrac registrar, the document is conclusive evidence of the matters mentioned in the subsection in the absence of evidence to the contrary.

Clerk to notify CrimTrac registrar about protection orders

43(1) The clerk of a court must, as soon as possible, give written notice about the following to the CrimTrac registrar—

(a) the making of a protection order by the court;

(b) the coming into force under section 23 of a protection order after an interim protection order is made by the court;

(c) the extension, variation or revocation of a protection order by the court;

(d) the setting aside, on appeal, of a protection order about which the clerk has previously given notice to the CrimTrac registrar and of which the clerk has been given notice under section 55.

(2) A notice must state the following to the extent they are relevant—

(a) the court that made the protection order and the date on which it was made;

(b) the names of the relevant parties to a proceeding;

(c) any directions, prohibitions or restrictions imposed under the protection order or a variation of the protection order;

(d) the period for which the protection order has effect or the way in which the period is affected by an extension.

(3) A notice must be given in writing or by electronic means that is capable of being produced or reproduced in writing.

Registered external protection order cannot be changed by court in [this State/Territory]

44 A court in [this State/Territory] may not extend, vary or revoke a registered external protection order.

PART 4—POLICE FUNCTIONS AND POWERS

Police officer detaining person for telephone interim protection order

45(1) A police officer who makes, or is about to make, an application for a telephone interim protection order may direct the person against whom the order is sought to remain at a place stated by the officer.

(2) If the person does not comply with the police officer's direction, the officer may—

(a) detain the person at the place stated by the officer in the direction; or

(b) take the person to a police station and detain the person at the station.

(3) However, the person may only be detained until the first of the following happens—

(a) the elapsing of 4 hours from when the detention begins;

(b) the making of the telephone interim protection order by an authorised justice and its service on the person;

(c) the denial by an authorised justice of the police officer's application for a telephone interim protection order against the person.

Seizure of firearms

46(1) A police officer must seize any firearm, of which the officer is aware, that is in the possession of a person who is a defendant named in a domestic violence order.

((2) Also, if a police officer is satisfied there are grounds arising out of an incident (the "incident") for a court to make a protection order or interim protection order against a person, or an authorised justice to make a telephone interim protection order against a person, the officer must—

(a) seize any firearm, of which the officer is aware, that is in the person's possession; and

(b) make a protection application or an application for a telephone interim protection order against the person within 7 days after the day on which the officer seized the firearm, unless the officer reasonably believes that another person has made a protection application against the person for the incident.

(3) In order to seize a firearm under subsection (1) or (2), a police officer may, without warrant, enter and search any of the following premises if the police officer reasonably believes that the firearm may be at the premises—

(a) where the person lives or works or which the person frequents;

(b) where the person has lived or worked or which the person has frequented.

Firearms seized under section 46

47(1) This section applies to a firearm seized under section 46.

(2) If a protection order has been or is made against the person from whom the firearm is seized but no appeal against the order is made within the appeal period, the firearm is forfeited on the day after the end of the period and must be disposed of as if it were seized and forfeited under the Firearms Act.

(3) If a protection order has been or is made against the person from whom the firearm is seized, an appeal is made against the order but the order is upheld, the firearm is forfeited on the day the order is made upholding the protection order and must be disposed of as if it were seized and forfeited under the Firearms Act.

(4) If a protection order has been or is made against the person from whom the firearm is seized, an appeal is made against the order and the order is overturned, the firearm must be returned to the person from whom the firearm was seized as soon as practicable after the day the court overturns the order and, in no case, more than 7 days after that day.

(5) For a seizure under subsection 46(2)—

(a) if a protection application is not made within 60 days after the day of the seizure of the firearm—the firearm must be returned to the person from whom the firearm is seized as soon as practicable after the end of the 60 days after the day of the seizure;

(b) if a protection application is made within 60 days after the day of the seizure of the firearm but the court refuses to make a protection order and dismisses the application—the firearm must be returned to the person from whom the firearm was seized as soon as practicable after the day the court refuses to make the order and dismisses the application and, in no case, more than 7 days after that day.

(6) A firearm is forfeited, and must be disposed of, as if it were seized and forfeited under the Firearms Act, if—

(a) the firearm must be returned to a person under subsection (4) or (5); and

(b) the person may not possess the firearm under the Firearms Act.

Entry and search of premises

48(1) A police officer may, using reasonable force if necessary, enter and search any premises without a warrant if—

(a) the officer believes, on reasonable grounds, that a person is on the premises and the person—

(i) has committed or is committing an act of domestic violence against a protected person; or

(ii) is on the premises in breach of a domestic violence order; or

(b) an occupier of the premises expressly or impliedly consents to the officer entering and searching the premises.

(2) This section does not limit any other power a police officer may have to enter or search premises under this Act, another Act or at common law.

Applications generally by police officers

49(1) If a police officer makes an application under this Act, another police officer may represent the police officer at the hearing of the application.

(2) A police officer is not liable in any civil action arising out of the conduct of the hearing if the officer—

(a) makes an application under this Act or represents another police officer at a hearing; and

(b) acts in good faith and in the normal course of duty in making the application or appearing at the hearing.

(3) A liability that would, apart from subsection (2), attach to a police officer attaches to [the State/Territory].

PART 5—APPEALS

Definitions for part 5

50 In this part—

"appeal court" means—

(a) for a protection order made by a Magistrates Court or Childrens Court—[a District/County] Court; or

(b) for a protection order made by a [District/County] Court—the Supreme Court; or

(c) for a protection order made by the Supreme Court—[the Full Court of the Supreme Court/Court of Appeal].

"appeal period", in relation to a protection order, means the period of one month after the date of the protection order.

"original court" means—

(a) the court that made a protection order or refused to grant a protection application; or

(b) the court that granted, or refused to grant, an application for an extension, variation or revocation of a protection order; or

(c) the court that, under section 28(5) or (6), dismissed an application for an extension, variation or revocation of a protection order.

Appeals against certain orders by relevant parties to proceedings

51(1) Each relevant party to a proceeding in relation to any of the following may appeal to an appeal court against the order of the original court—

(a) the making of a protection order or the refusal to make a protection order;

(b) an order extending, varying or revoking a protection order or refusal to extend, vary or revoke a protection order;

(c) a dismissal, under section 28(5) or (6), of a defendant's application for an extension, variation or revocation of a protection order.

(2) However, the appellant must, within the appeal period, start the appeal by filing a notice of appeal in the appeal court.

(3) The notice must state the person's grounds of appeal.

(4) The appeal court must not start or continue hearing an appeal if—

(a) the appellant is other than the aggrieved protected person, the nominated representative for the aggrieved protected person or the defendant, under the protection order; and

(b) the aggrieved protected person, or the nominated representative for the aggrieved protected person, by written notice given to the clerk of the appeal court, objects to an appeal.

(5) An appeal to an appeal court does not of itself stay the operation of the order the subject of the appeal.

Clerk of appeal court to arrange service of notice of appeal

52 If a person appeals to an appeal court under section 51 about an order, the clerk of the appeal court must arrange service of copies of the notice about the appeal on each of the following—

(a) the parties to the proceedings for the order, other than the appellant;

(b) the clerk of the original court;

(c) the Chief Commissioner of Police.

Application for stay of operation of protection orders

53(1) A defendant may apply to the original court to stay the operation of a protection order pending the decision of an appeal.

(2) The original court may only stay the operation of the protection order if it considers that it is appropriate to grant the stay having regard to—

(a) the need to ensure the aggrieved protected person and any named protected person is protected from an act of domestic violence by the defendant; and

(b) the welfare of any child who may be affected by the defendant's behaviour.

(3) If the original court stays the operation of the protection order—

(a) the court may impose conditions on the defendant as if the defendant were a person accused of an offence and were being released from custody on bail; and

(b) the [Bail Act] applies to the defendant for a contravention of any conditions imposed under paragraph (a).

(4) If the defendant does not start an appeal within the appeal period, the original court's order staying the operation of the protection order ends at the same time as the appeal period ends.

(5) Also, the original court may revoke or amend its order staying the

Procedure of appeal court and related matter

54(1) An appeal court to which an appeal is made about an order must proceed to hear the appeal by way of a re-hearing on the record.

(2) However, the appeal court may hear evidence afresh, or hear additional evidence, if the court considers it appropriate to effectively dispose of the appeal.

(3) The appeal court may, by order, do one or more of the following—

(a) set-aside, confirm or vary the order;

(b) make any decision the original court could have made.

(4) A person may not appeal against a decision of the appeal court.

[(5) The provisions of the Magistrates Court Act, or the Children and Young Persons Act, so far as applicable and with any modifications and adaptations necessary extend and apply to appeals under this section.]

Notice of results of appeal

55 As soon as practicable after an appeal court has made an order as mentioned in section 54(3), the clerk of the appeal court must arrange for service of the order on each of the following—

(a) the parties to the proceedings for the order the subject of the appeal;

(b) the clerk of the original court;

(c) the Chief Commissioner of Police;

[(d) the Registrar of Firearms.]

PART 6—SERVICE

Division 1—Service of applications

Service of protection applications

56(1) This section applies to a clerk of a court to which a protection application is made.

(2) The clerk must arrange for a copy of the protection application and attached summons to be served personally on—

(a) if the applicant is the aggrieved protected person or the nominated representative for the aggrieved protected person—the defendant and, if there is a representative for the defendant, the representative; or

(b) if otherwise—the aggrieved protected person, the defendant and, if there is a representative for either or both, the representative or representatives.

Service of other applications under this Act

57(1) This section applies to a clerk of a court to which any application under this Act is made, other than a protection application.

(2) The clerk must arrange for a copy of the application to be served personally on each of the following, other than the applicant—

(a) each relevant party to the proceeding;

(b) the Chief Commissioner of Police.

(3) If the application is an application for an extension, variation or revocation of a domestic violence order made by the defendant, the clerk must not arrange service unless a court has given leave for the application to continue.[253]

Way applications are to be served

58(1) This section applies if a protection application and attached summons (collectively "the document"), or another application (also "the document") must, under section 56 or 57, be served on the aggrieved protected person, the defendant or the representative of the aggrieved protected person or defendant.

(2) The document must be served on the person by—

(a) personally delivering a copy of it to the person to be served; or

(b) leaving a copy of the application for the person at the person's current, last or most usual place of residence or business with someone who apparently resides or works there and appears to be 16 years of age or more.

Instruction for service

59(1) If a person has given written instructions to a clerk of a court about service of an application under this Act on the person that states the application is to be served by sending it to, or leaving it at, a stated address, the application must be served by sending it to, or leaving it at, the stated address.

(2) This section applies despite section 58.

253 Under section 28, the court undertakes a preliminary hearing and decides whether the defendant's application for an extension, variation or revocation is to continue. Section 28(2) states '(T)he defendant must serve a copy of the application on the Chief Commissioner of Police.'.

Substituted service for applications

60 If a court is satisfied, by evidence on oath or by affidavit, that it is not reasonably practicable to serve a copy of an application under this Act on a person under section 56 or 57, the court may—

(a) for a protection application—order the application and attached summons be served by other means it considers appropriate; or

(b) for another application—order the application be served by any means it considers appropriate.

Dispensing with service

61 A court may dispense with service of a document on a person if it is satisfied it is not in the public interest to serve the person because to do so would mean the personal safety of an aggrieved protected person or a named protected person would be seriously threatened.

Division 2—Service of orders

Clerk to deal with orders and cause service

62(1) This section applies if a court makes—

(a) a domestic violence order, including a protection order that is made under section 22; or

(b) an order extending, varying or revoking a domestic violence order, or another order under this Act.

(2) The clerk of the court must arrange for the order to be put in writing and for a copy of the order to be served on—

(a) the defendant; or

(b) if there is a nominated representative for the defendant—the defendant and the nominated representative.

(3) However, subsection (2) does not apply to an interim protection order made under section 23.

(4) The clerk of the court must arrange for a copy of the order to be served on—

(a) each relevant party to the proceeding, other than the defendant; and

(b) the Chief Commissioner of Police; and

[(c) the Registrar of Firearms].

(5) Despite subsections (2) and (4), if a person has given written instructions to the court about service of any order under this Act on the person that states the order is to be served by sending it to, or leaving it at, a stated address, the order must be served by sending it to, or leaving it at, the stated address.

(6) To remove doubt, it is declared that this section does not apply to the registration of an external protection order by the clerk of a court.

Substituted service of orders

63 If a court is satisfied, by evidence on oath or by affidavit, that it is not reasonably practicable to serve a copy of an order on a person, it may—

(a) order a copy of the order be served by any means it thinks appropriate; or

(b) make an order for substituted service.

PART 7—OFFENCES AND MISCELLANEOUS

Division 1—Offences and arrest

Breach of an order

64(1) A defendant in relation to a domestic violence order must comply with the order if—

(a) the defendant has been served with a copy of it; or

(b) the order has been explained to the defendant under section 20.

Maximum penalty—

(a) for a first offence—$24 000 or 1 years imprisonment; or

(b) for a subsequent offence—2 years imprisonment.[254]

(2) A defendant in relation to a registered external protection order must comply with the order.

Maximum penalty—

(a) for a first offence—$24 000 or 1 years imprisonment; or

254 It is the intention that the model law indicates that breaching an order is a serious offence by creating an offence with a maximum penalty of $24 000. Some jurisdictions use the concept of penalty units and will need to make the necessary conversion.

(b) for a subsequent offence—2 years imprisonment.

(3) An offence under this section is a summary offence.

Arrest for breach of order

65 A police officer may, without warrant, arrest a person if the police officer is satisfied the person is the defendant named in any of the following orders and is contravening or has contravened the order—

(a) a domestic violence order;

(b) a registered external protection order;

(c) an external protection order if the police officer may, under subsection 39(3), exercise the officer's powers in relation to the order as if it were a registered external protection order.

Restriction on information about proceedings involving children

66(1) This section applies to—

(a) an application under this Act to a court or authorised justice if the aggrieved protected person, a named protected person or the defendant in the application is a child; and

(b) a proceeding under this Act involving a child, whether as a relevant party to the proceeding or as a witness.

(2) A person must not publish, or cause to be published, information in relation to the application, or information about the proceeding, if the person intends to identify, or is reckless as to whether the information identifies, any of the following—

(a) the child, including, for example, characteristics of the child's physical appearance, employment, place of education and interests;

(b) a person who is named in the application, or who is a party to or a witness in the proceeding, including, for example, characteristics of the person's physical appearance, employment, lifestyle and interests;

(c) the locality of the court to which the application is made or in which the proceeding is to be or is heard, or the authorised justice to whom the application is made.

Maximum penalty—

(a) if the offender is an individual—$5 000 or imprisonment for 2 years, or both;

(b) if the offender is a corporation—$75 000.

(3) Subsection (2) does not apply if the publishing was done under a direction or order of the court for the proceeding.

(4) In this section—

"information about the proceeding" means—

(a) a report or account of the proceeding; or

(b) an application, order or any other document in relation to the proceeding; or

(c) a drawing, photograph or other representation of a person in the proceeding, whether the person is a party to or a witness in the proceeding, or comprising the court or an officer of the court.

"publish", in relation to information about an application or proceeding, includes communicating by any of the following ways, other than a direct communication from one person to another that, in the normal course of events, is not likely to be read, overheard or communicated to other persons—

(a) print in any publication that is sold or distributed without charge, including flyers, magazines, newspapers and pamphlets;

(b) broadcast by radio, television or any other electronic method of communication, whether the method is a commercial method or not.

Person arrested under this Act may be bailed

67 If a person is arrested under this Act, the [Bail Act] applies to the person as if the person had been arrested on a charge for an offence.

Division 2—Registrar of Firearms

Registrar to enter information about domestic violence order in register

68 On receiving a copy of an order under this Act, the Registrar of Firearms must enter information about the order in the register that the Registrar keeps under the Firearms Act.

Division 3—Regulations

Regulation-making power

69 The Governor in Council may make regulations under this Act.