

**A REVIEW OF THE
*PEACE AND GOOD BEHAVIOUR ACT 1982***

Discussion Paper

WP No 59

Queensland Law Reform Commission
March 2005

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COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues in this Discussion Paper.

Written comments and submissions should be sent to:

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Closing date: 17 June 2005

It would be helpful if comments and submissions addressed specific issues or questions in the Discussion Paper.

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Chapter 1

The review

TERMS OF REFERENCE

1.1 The Attorney-General has asked the Queensland Law Reform Commission to review the *Peace and Good Behaviour Act 1982* (Qld).¹

1.2 Under the terms of reference the Commission is to consider whether the Act provides an appropriate, easily accessible and effective mechanism for protecting the community from breaches of the peace.²

1.3 The Act permits a magistrate to grant to a person (the complainant) an order requiring another person (the defendant) to “keep the peace and be of good behaviour” for a period of time specified in the order, and to comply with any other conditions imposed by the order.³

1.4 The factors to be taken into account by the Commission in its review include:

- the kind of conduct covered by the Act;
- the complexity of the process for obtaining an order;
- whether the existence of a filing fee deters people from making an application; and
- the enforcement of orders made under the Act.

1.5 In the event that the Commission is of the view that the Act fails to provide the community with appropriate, easily accessible and effective protection from “breaches of the peace”, it is also to consider whether such a goal can be achieved by changes to the existing mechanism, or whether an entirely new mechanism should be established.

1.6 The Commission is to report to the Attorney-General by 31 December 2005.

1 Letter to the Chairperson of the Commission dated 7 July 2004.

2 The terms of reference are set out in full in Appendix 1 to this Discussion Paper.

3 The provisions of the Act are discussed in Chapter 2 of this Discussion Paper.

THE SCOPE OF THE REVIEW

1.7 When the Act was passed in 1982, it was intended to create a means of preventing “[a] considerable variety of disturbances [that] occur in the community where actual or threatened violence is involved, such as domestic disturbances, disputes between neighbours, child abuse and the like.”⁴

1.8 The parliamentary debate that accompanied the introduction of the Act in 1982 demonstrated a growing public awareness of domestic violence.⁵ Five years later, the Queensland Government appointed a task force to investigate the problem and to recommend ways in which it could be prevented. The task force reported in 1988. It found that, for a number of reasons, the Act was largely ineffective in helping domestic violence victims.⁶ However, the task force considered that, while the Act did not provide sufficient protection for spouses who were being abused or threatened by their partners, it nonetheless had “a meaningful role in protecting a wide range of persons, including neighbours, acquaintances and tenants, from threatening or abusive behaviour.”⁷

1.9 Accordingly, the task force was of the view that the relief provided by the Act for those classes of persons should remain, and chose not to include domestic violence matters in the ambit of the *Peace and Good Behaviour Act 1982* (Qld).⁸ Instead the task force recommended the introduction of separate legislation to deal specifically with domestic violence.⁹ As a result of the work of the task force, the *Domestic Violence (Family Protection) Act 1989* (Qld) was enacted. That Act was substantially amended in 1992 and again in 2002, when it was renamed the *Domestic and Family Violence Protection Act 1989* (Qld). The 2002 amendments significantly expanded the types of relationship to which the Act applies.¹⁰

1.10 Although the *Peace and Good Behaviour Act 1982* (Qld) is still theoretically capable of applying in a domestic violence situation, it has, in practical terms, been overtaken by the provisions of the later Act. In view of the nature and extent of the protection now provided against domestic violence by

4 Hon SS Doumany MLA, Minister for Justice and Attorney-General, Second Reading Speech, Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1982, 841.

5 See for example: Queensland, *Parliamentary Debates*, Legislative Assembly, 10 November 1982, at 2138, 2140, 2144.

6 Queensland Domestic Violence Task Force, Report, *Beyond These Walls* (1988) at 157.

7 Id at 160.

8 Ibid.

9 Id at 160 ff, Recommendation 24 at 173-177.

10 *Domestic Violence Legislation Amendment Act 2002* (Qld). For those relationships now covered by domestic violence legislation see *Domestic and Family Violence Protection Act 1989* (Qld) ss 11A (Relationships that are domestic relationships for this Act), 12 (What is a spousal relationship and who is a spouse), 12A (What is an intimate personal relationship), 12B (Meaning of “family relationship” and “relative”) and 12C (What is an informal care relationship).

the *Domestic and Family Violence Protection Act 1989* (Qld), it is not necessary for the Commission to consider the effect of the *Peace and Good Behaviour Act 1982* (Qld) in the context of relationships that are covered by the domestic violence legislation.¹¹

1.11 A community legal centre has informed the Commission that, since the 2002 amendments to the domestic violence legislation, inquiries about peace and good behaviour orders most often arise in the following contexts:¹²

- neighbourhood disputes;
- disputes between ex-flatmates or co-tenants;
- disputes between co-workers or former co-workers; and
- where a prospective applicant is receiving or has rejected unwanted advances in circumstances where the relationship is not covered by domestic violence legislation.

THE COMMISSION'S METHODOLOGY

1.12 This Discussion Paper has been produced to provide information to interested organisations and individuals on the issues that the Commission envisages will need to be addressed during the course of the review. It provides a summary of the provisions of the *Peace and Good Behaviour Act 1982* (Qld), as well as equivalent legislation in other Australian jurisdictions, and raises a number of questions for consideration.

1.13 In order to prepare this Paper, the Commission sought preliminary information from a number of people and organisations with experience in the operation of the *Peace and Good Behaviour Act 1982* (Qld). Requests for information were made to:

- the Chief Magistrate;
- the Commissioner of Police;
- Legal Aid Queensland;
- Caxton Legal Centre;

¹¹ However, as part of its review, the Commission is to have regard to the protection provided against domestic violence by the *Domestic and Family Violence Protection Act 1989* (Qld) and to the expansion of that Act's jurisdiction in 2002 to cover many persons who might otherwise have sought an order under the *Peace and Good Behaviour Act 1982* (Qld). The terms of reference are set out in full in Appendix 1 of this Discussion Paper.

¹² Information provided to the Commission by the Caxton Legal Centre 23 August 2004.

- the Justices of the Peace Branch of the Department of Justice and Attorney-General;
- the Dispute Resolution Branch of the Department of Justice and Attorney-General;
- Association of Justices of the Peace and Commissioners for Declarations Inc;
- Justice of the Peace Society (Qld) Inc; and
- Queensland Justice Association (Inc).

1.14 The Commission was greatly assisted by the information received in response to these requests.

1.15 This Paper does not represent the Commission's final views on any of the issues raised by the review. Rather, it is published for the purpose of inviting submissions to enable the Commission to take respondents' views into consideration in the formulation of its recommendations.

1.16 Those recommendations will be published in the Commission's final Report, which will be presented to the Attorney-General for tabling in Parliament.

1.17 Unless otherwise specified, the law is stated as at 1 March 2005.

CALL FOR SUBMISSIONS

1.18 In order to assist it in making its recommendations, the Commission seeks comments on issues arising from the terms of reference. The Commission invites submissions from members of the public, relevant professionals, organisations and individuals with an interest or expertise in the area, on issues raised by the Commission, and on other issues relevant to the review.

1.19 Details of how to make a submission are provided at the beginning of this Paper.

Chapter 2

The *Peace and Good Behaviour Act 1982* (Qld)

INTRODUCTION

2.1 The *Peace and Good Behaviour Act 1982* (Qld) provides that a justice of the peace may, in certain circumstances, issue a summons for a person to appear or a warrant for the person to be apprehended and brought before a Magistrates Court.¹³ The court may make an order requiring the person (the defendant) to “keep the peace and be of good behaviour” for the period specified in the order,¹⁴ and may impose such other conditions as it thinks fit.¹⁵

2.2 In the financial year to 30 June 2004, approximately 450 matters relating to peace and good behaviour orders were dealt with by Magistrates Courts throughout Queensland.¹⁶ During the same period, Legal Aid Queensland received 86 applications for a grant of legal assistance to make or respond to an application.¹⁷ However, Legal Aid Queensland noted that many potential applicants would receive advice that they did not qualify for legal aid funding and would therefore not proceed with their legal aid application. A community legal centre observed that, although it had directly advised only a small number of clients in relation to orders under the Act, this number represented only a fraction of the advice given about such orders, because the majority of advice would be related to separate substantive issues, and would be entered into the centre’s databases as advices about those substantive issues.¹⁸ The Queensland Police Service does not collate data about the number of calls received each year about *Peace and Good Behaviour Act* matters.¹⁹

13 *Peace and Good Behaviour Act 1982* (Qld) s 4.

14 *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

15 *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

16 Information provided by the Chief Magistrate, Judge M P Irwin, 25 August 2004.

17 Information provided by Legal Aid Queensland 8 September 2004.

18 Information provided by Caxton Legal Centre 23 August 2004.

19 Information provided by the Acting Commissioner, Queensland Police Service, 6 September 2004.

HISTORICAL BACKGROUND

2.3 In introducing the Peace and Good Behaviour Bill 1982 (Qld) into the Queensland Parliament, the then Minister for Justice and Attorney-General, the Hon SS Doumany MLA, observed:²⁰

The purpose of this Bill ... is, in the main, one of preventive justice. The contents of the Bill are ... designed to provide some remedy for actual or threatened breaches of the peace, such as the ever-present problem of actual or threatened violence occurring in the community.

2.4 The historical origins of the power to make “peace and good behaviour” orders are somewhat obscure, and have been traced back at least seven hundred years. It has been suggested that, initially, justices of the peace had two separate powers - a common law power to bind over to keep the peace a person who had made threats against others or otherwise displayed propensities towards violence, and a power granted by a fourteenth century statute²¹ to bind a person over to be of good behaviour generally - but that by the time of colonial settlement in Australia in the nineteenth century, the two had merged and had come to be regarded as manifestations of the same power, without distinguishing between the sources of either of them.²² Australian courts have recognised both the common law²³ and legislative²⁴ bases for the power.

2.5 In Queensland, the power was first given statutory recognition by the *Justices Act 1886* (Qld).²⁵ However, the relevant provisions of that Act were repealed in 1964.²⁶

WHO CAN APPLY FOR AN ORDER

2.6 The *Peace and Good Behaviour Act 1982* (Qld) does not contain any criteria for eligibility for seeking an order. There is no requirement for there to be a relationship of any kind between the parties. The Act merely provides for one person (the complainant) to make a complaint about the conduct of another person (the defendant) towards the complainant or the complainant’s

20 Hon SS Doumany MLA, Minister for Justice and Attorney-General, Second Reading Speech, Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1982, 840.

21 34 Edw III c 1 (1361).

22 *R v Wright, Ex parte Klar* (1971) 1 SASR 103 per Bray CJ at 106-107.

23 See for example *Carr v Werry* [1979] 1 NSWLR 144 per Lee J at 146.

24 See for example *O’Kane v Sellheim* (1882) QLJ 85 per Lilley CJ at 87-88.

25 *Justices Act 1886* (Qld) ss 198 (Complaint praying for surety of the peace), 199 (Complaint praying for surety for the good behaviour).

26 The parliamentary debate accompanying the amending legislation does not provide any insight into the reason for the repeal of these provisions, apart from modernising the Act and bringing it up to date: Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1964, 2696.

property.²⁷

2.7 A complainant may also complain about the conduct of the defendant in relation to a person under the complainant's care or charge.²⁸

2.8 There is no provision for a person other than the complainant to seek an order.

GROUNDS FOR OBTAINING AN ORDER

2.9 A complainant may make a complaint that the defendant has made certain threats and that the complainant is in fear of the defendant.²⁹

2.10 The Act requires the defendant's threatening conduct to be directed towards the person of the complainant or of a person under the complainant's care or charge, or towards the property of the complainant.

2.11 The substance of the threat must be:

- to assault or to do any bodily injury to the complainant or to a person under the complainant's care or charge;³⁰
- to procure another person to do any bodily injury to the complainant or to a person under the complainant's care or charge;³¹
- to destroy or damage any property of the complainant;³² or
- to procure another person to destroy or damage any property of the complainant.³³

27 *Peace and Good Behaviour Act 1982* (Qld) s 4(1), (2). The conduct complained of may also include procuring another person to do certain things in relation to the complainant or the complainant's property: *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(b), (d).

28 *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(a). The conduct complained of may also include procuring another person to do certain things in relation to a person under the complainant's care or charge: *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(b).

29 *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

30 *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(a).

31 *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(b).

32 *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(c).

33 *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(d).

2.12 A complainant may also make a complaint that the intentional conduct of the defendant towards the complainant has caused the complainant to fear that the defendant will destroy or damage any property of the complainant.³⁴

THE PROCEDURE FOR OBTAINING AN ORDER

2.13 The procedure for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) involves a two step process.

2.14 The first step is the making of a complaint before a justice of the peace.

2.15 A complaint will not necessarily result in a peace and good behaviour order but may, with the complainant's consent, be submitted to mediation if the justice of the peace considers that the matter would be better resolved in this way.³⁵ The Act is silent as to what happens if the matter is not resolved at mediation, or if the complainant does not consent to mediation.

2.16 Alternatively, the justice of the peace may issue a summons requiring the defendant to appear or a warrant requiring that the defendant be apprehended and brought before a Magistrates Court.³⁶

2.17 The second step in the process of obtaining an order is the hearing before the Magistrates Court. At the hearing, the court may either dismiss the complaint,³⁷ or make an order that the defendant keep the peace and be of good behaviour for such time, specified in the order, as the court thinks fit.³⁸ The order may also contain any other conditions that the court thinks appropriate.³⁹

2.18 If the defendant does not appear in court to answer the complaint, the court may nonetheless proceed and may, in the absence of the defendant, make an order against him or her.⁴⁰

³⁴ *Peace and Good Behaviour Act 1982* (Qld) s 4(2). The grounds for making a complaint pursuant to this subsection of the Act were recently amended by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66(3). The amendment commenced on 3 December 2004.

³⁵ *Peace and Good Behaviour Act 1982* (Qld) s 4(3). This subsection was recently amended to apply to complaints made pursuant to both subsections 4(1) and 4(2) of the *Peace and Good Behaviour Act 1982* (Qld): see *Justice and Other Legislation Amendment Act 2004* (Qld) s 66(4). The amendment commenced on 3 December 2004. Mediation is discussed in Chapter 6 of this Discussion Paper.

³⁶ *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

³⁷ *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(a).

³⁸ *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

³⁹ *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

⁴⁰ *Peace and Good Behaviour Act 1982* (Qld) s 7(1)(b).

THE NATURE OF THE PROCEEDING

2.19 The *Peace and Good Behaviour Act 1982* (Qld) does not expressly state whether the hearing of an application for a peace and good behaviour order is civil or criminal in nature.

2.20 Given that, historically, the object of peace and good behaviour orders was preventive rather than punitive - “a precautionary measure to prevent a future crime, ... not by way of punishment for something past”⁴¹ - it is difficult to characterise the proceeding as criminal.⁴² However, the Act provides that a hearing is to be conducted as if it were the summary prosecution of an offence under the *Justices Act 1886* (Qld).⁴³

2.21 The question as to the nature of the proceeding is relevant because of its bearing on the issue of the standard of proof required for the granting of an order. In a criminal proceeding, the allegations against the defendant must be proved beyond a reasonable doubt. However, in a civil proceeding, the standard of proof is merely on the balance of probabilities - that is, more likely than not.

2.22 In Queensland it has been held that, notwithstanding the reference in the Act to prosecutions under the *Justices Act 1886* (Qld), the proceeding for a peace and good behaviour order is not criminal in character:⁴⁴

The appellant naturally enough placed much stress on s8 of the Act as showing that the statutory proceedings were intended to be criminal. The submission is plainly not without force; but it is also legitimate to regard s8 as having been drawn with the specific purpose of avoiding that result. ... In assimilating the statutory procedure to the procedure for summary prosecution of offences, the legislation appears to have deliberately stopped short of expressly declaring a matter of complaint under the Act to be an offence. ... there is nothing to suggest that the order itself involves conviction for an offence.

2.23 Accordingly, although the hearing may be “analogous to a criminal proceeding”,⁴⁵ the criminal standard of proof does not apply.⁴⁶

2.24 However, proof to the civil standard of the balance of probabilities may not be sufficient for a complainant to succeed. It is necessary for the court, in weighing the evidence, to take into account the seriousness of the allegations against the defendant and the adverse consequences that a finding of a threat

41 *R v Davis, ex parte* (1871) 35 JP 551 per Blackburn J at 551-552.

42 See also *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45 per McPherson JA at 52.

43 *Peace and Good Behaviour Act 1982* (Qld) s 8.

44 *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45 per McPherson JA at 51. See also per Fitzgerald P at 49.

45 *Id* per Shepherdson J at 53.

46 *Id* per McPherson JA at 52 and per Shepherdson J at 55 (Fitzgerald P not deciding).

to do violence to a person or a person's property may have for the defendant's reputation or standing.⁴⁷

BREACH OF AN ORDER

2.25 Although the hearing of an application for a peace and good behaviour order is characterised as a civil proceeding,⁴⁸ once an order has been made a person who contravenes or fails to comply with the order, or any condition of the order, commits a criminal offence, for which the maximum penalty is \$7,500 or imprisonment for one year.⁴⁹

2.26 A person convicted of the offence may, upon conviction, be made subject to a further order for such time as the court thinks fit.⁵⁰

47 Id per Fitzgerald P at 49, per McPherson JA at 52 and per Shepherdson J at 55. See also *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Rejtek v McElroy* (1965) 112 CLR 517.

48 *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45.

49 *Peace and Good Behaviour Act 1982* (Qld) s 10. Section 10(1) imposes a fine of 100 penalty units. One penalty unit is \$75: *Penalties and Sentences Act 1992* (Qld) s 5. Appeal is to a single judge of the District Court: *Peace and Good Behaviour Act 1982* (Qld) s 8, *Justices Act 1886* (Qld) s 222.

50 *Peace and Good Behaviour Act 1982* (Qld) s 11.

Chapter 3

Who can apply for an order?

INTRODUCTION

3.1 The Commission's terms of reference involve a review of the mechanism established by the *Peace and Good Behaviour Act 1982* (Qld) to determine whether it provides an "appropriate, easily accessible" means of protecting the community against breaches of the peace.⁵¹

3.2 One of the factors relevant to the accessibility of the mechanism created by the Act is eligibility to make a complaint about the behaviour of another person.

ELIGIBILITY TO MAKE A COMPLAINT UNDER THE *PEACE AND GOOD BEHAVIOUR ACT 1982* (QLD)

3.3 The *Peace and Good Behaviour Act 1982* (Qld) provides that "a person" (the complainant) may make a complaint about the conduct of another person (the defendant) towards the complainant or the complainant's property,⁵² or towards a person under the complainant's care or charge.⁵³ Eligibility to make a complaint is therefore limited to a person actually affected by the behaviour complained of, or to a person who has the "care or charge" of such a person.

3.4 The expression "care or charge" is not defined. However, when the Act was introduced into Parliament the then Minister for Justice and Attorney-General, in outlining the provisions of the Act, spoke of its application to "any person under the care or charge of the complainant, such as a child".⁵⁴ It would seem that the words encompass situations involving responsibility for the

51 The terms of reference are set out in full in Appendix 1 to this Discussion Paper.

52 *Peace and Good Behaviour Act 1982* (Qld) s 4(1), (2). The conduct complained of may also include procuring another person to do certain things in relation to the complainant or the complainant's property: *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(b), (1)(d). The grounds for obtaining an order are discussed in Chapter 4 of this Discussion Paper.

53 *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(a). The conduct complained of may also include procuring another person to do certain things in relation to a person under the care or charge of the complainant: *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(b).

54 Hon SS Doumany MLA, Minister for Justice and Attorney-General, Second Reading Speech, Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1982, 841.

protection or custody of another person, but not confined to formal legal relationships:⁵⁵

The child may be in the care or charge of a master or tutor, servant, relation or friend ...

3.5 This interpretation might permit a complaint to be made on behalf of a child not only by a parent or legal guardian, but also by any other person with whom the child lives or on whom the child relies for protection.

3.6 By analogy, a complaint might also be able to be made for an adult who lacks capacity to complain on his or her own behalf by a person who has a responsibility to look after or protect the adult, even if that responsibility is not founded on a formal legal relationship.⁵⁶

... in the context of this Act, these two words - the first general and the second a more formal word - the intention is to protect those who by reason of infancy, illness, infirmity whether of body or mind, are or may be unable to act to seek the protection afforded by the Act.

3.7 However, the concept of “care” in the *Peace and Good Behaviour Act 1982* (Qld) is different from the common law duty of care in negligence, or that owed to an employee under an employment contract or legislation such as the *Workplace Health and Safety Act 1995* (Qld). An employee is therefore not in the care or charge of an employer, and an employer cannot bring an application on behalf of an employee.⁵⁷

LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS

3.8 The legislation in other Australian States and Territories varies in the criteria for eligibility to make an application for a restraining order. In one jurisdiction, an application may be made only by the person affected by the relevant conduct. Some jurisdictions make specific provision for applications brought on behalf of children or of adults unable to apply on their own behalf. In several jurisdictions an application may be made by a police officer and, in some jurisdictions, provision is made for specific categories of applicant - for example, an employer.

⁵⁵ *Schtraks v Government of Israel and Others* [1962] 3 All ER 529 per Lord Hodson at 552. See also *Criminal Code* (Qld) s 363A (Abduction of child under 16), which makes it an offence to take a child “out of the custody or protection of the child’s father or mother, or other person having lawful care or charge of the child”, and *Thompson v Grey* (1904) 24 NZLR 457 per Stout CJ at 465.

⁵⁶ *SJ Mead on behalf of Telstra Corporation Limited v KC Ivory* (District Court of Queensland, Appeal No 1431 of 1997, Wylie DCJ, 20 February 1998) at [14].

⁵⁷ *Ibid.*

Australian Capital Territory

3.9 Under the *Protection Orders Act 2001* (ACT), an application for a personal protection order or a workplace order may be made by an “aggrieved person”.⁵⁸

3.10 In relation to behaviour for which a workplace order may be sought, the aggrieved person is the employer of the person against whom the behaviour is directed. In relation to behaviour that may constitute personal violence, an aggrieved person is a person against whom the behaviour has been, or is likely to be, directed.⁵⁹

3.11 The Act also provides that an application for a workplace order or a personal protection order may be made on behalf of an aggrieved person by a police officer.⁶⁰

3.12 An aggrieved person who has a legal disability (because, for example, the person is a minor or has impaired decision-making capacity) cannot apply for a personal protection order or a workplace order in the person’s own right.⁶¹ However, an application on behalf of the person may be made by a next friend,⁶² including the community advocate.⁶³

3.13 The Act does not affect any other right of a person - for example a parent of a child who is an aggrieved person or an agent of an aggrieved person - to make an application on behalf of the aggrieved person.⁶⁴

New South Wales

3.14 A complaint for an apprehended personal violence order may be made only by the person for whose protection the order would be made or by a police officer.⁶⁵

58 *Protection Orders Act 2001* (ACT) s 11(2).

59 *Protection Orders Act 2001* (ACT) Dictionary (definition of “aggrieved person”).

60 *Protection Orders Act 2001* (ACT) s 11(3).

61 *Protection Orders Act 2001* (ACT) s 12(1). Note, proposed amendments to s 12 of the *Protection Orders Act 2001* (ACT) provide that a person under a legal disability may apply for an order in his or her own right with leave of the court: see Domestic Violence and Protection Orders Amendment Bill 2005 (ACT) cl 10.

62 *Protection Orders Act 2001* (ACT) s 12(1).

63 *Protection Orders Act 2001* (ACT) s 11(4). The community advocate is a statutory officer under the *Community Advocate Act 1991* (ACT) who has certain functions in relation to people who have a disability and to children: *Community Advocate Act 1991* (ACT) ss 4, 13.

64 *Protection Orders Act 2001* (ACT) s 11(5).

65 *Crimes Act 1900* (NSW) s 562C(2). In certain circumstances it is obligatory for a police officer to make a complaint: *Crimes Act 1900* (NSW) s 562C(3), (3A).

3.15 If the complainant is a child under the age of 16 years at the time of the complaint, the child cannot make the complaint in his or her own right. In such a situation, any complaint must be made by a police officer.⁶⁶

Northern Territory

3.16 Under the *Justices Act* (NT), it is only a person affected by the defendant's conduct (the complainant) who may make a complaint for an order for the defendant to keep the peace or be of good behaviour towards the complainant.⁶⁷

South Australia

3.17 The *Summary Procedure Act 1921* (SA) provides that a complaint may be made by a member of the police force or by a person against whom, or against whose property, the behaviour that forms the subject matter of the complaint has been, or may be, directed.⁶⁸

3.18 If the person affected by the behaviour that is the subject matter of the complaint is a child who has attained the age of 14 years, the child may, with the leave of the court, make a complaint.⁶⁹ A complaint may also be made on behalf of a child by a parent or guardian of the child or by a person with whom the child normally or regularly resides.⁷⁰

Tasmania

3.19 An application for a restraint order may be made by a police officer or by a person against whom, or against whose property, the behaviour that forms the subject matter of the application was directed. If that person is a child, an application may be made by a parent or guardian of the child.⁷¹

3.20 There is an additional provision that allows a person other than those specified in the preceding paragraph to apply for leave to make an application.⁷²

66 *Crimes Act 1900* (NSW) s 562C(2A).

67 *Justices Act* (NT) s 99(1).

68 *Summary Procedure Act 1921* (SA) s 99A.

69 *Summary Procedure Act 1921* (SA) s 99J(a).

70 *Summary Procedure Act 1921* (SA) s 99J(b).

71 *Justices Act 1959* (Tas) s 106B(2)(a), (b).

72 *Justices Act 1959* (Tas) s 106B(2)(c), (3).

Victoria

3.21 The *Magistrates' Court Act 1989* (Vic) provides that an application for an order that a person keep the peace or be of good behaviour may be made by "a person".⁷³

3.22 A complaint for an intervention order under the *Crimes (Family Violence) Act 1987* (Vic), based on an allegation of stalking,⁷⁴ may be made by a member of the police force,⁷⁵ the aggrieved person⁷⁶ or, if the aggrieved person is or is over 17 years of age, by any other person with the aggrieved person's written consent.⁷⁷

3.23 If the aggrieved person is a child, the complaint may be made by a member of the police force, a parent of the child, or any other person with the written consent of a parent of the child or with the leave of the court.⁷⁸ If the child is or is over the age of 14 years, he or she may, with the leave of the court, make a complaint on his or her own behalf.⁷⁹

3.24 If the aggrieved person has a guardian appointed under the *Guardianship and Administration Act 1986* (Vic), a complaint may be made on the person's behalf by the guardian or, with the leave of the court, by any other person.⁸⁰

Western Australia

3.25 An application for a violence restraining order under the *Restraining Orders Act 1997* (WA) may be made by the person seeking to be protected or by a police officer on behalf of that person.⁸¹ If the person seeking to be protected is a child, a parent or guardian of the child, or a child welfare officer, may make an application on behalf of the child.⁸² Similarly, if the person seeking to be protected is a person for whom a guardian has been appointed

73 *Magistrates' Court Act 1989* (Vic) s 126A(1).

74 A complaint for an intervention order to restrain stalking behaviour may be made under the *Crimes (Family Violence) Act 1987* (Vic) even though there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5). See para 4.49-4.51 of this Discussion Paper.

75 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(a).

76 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(b).

77 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(d).

78 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(c)(i)-(iii).

79 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(c)(iv).

80 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(e).

81 *Restraining Orders Act 1997* (WA) s 25(1).

82 *Restraining Orders Act 1997* (WA) s 25(2)(a).

under the *Guardianship and Administration Act 1990* (WA), an application may be made on behalf of the person by the guardian.⁸³

3.26 The Act contains identical provisions in relation to an application for a misconduct restraining order.⁸⁴ If there is no particular person to be protected by a misconduct restraining order, an application may be made by a police officer on behalf of the public generally.⁸⁵

ISSUES FOR CONSIDERATION

3.27 In a number of Australian jurisdictions, there is provision for a person to seek an order on behalf of a person affected by the behaviour complained of, in circumstances where this would not be possible in Queensland. Under the existing provisions of the Queensland Act, a person may bring an application on behalf of another only if the other is under the person's "care or charge".⁸⁶

3.28 In particular, provisions in New South Wales, South Australia and Western Australia allow an application to be made by a police officer. The introduction of a provision of this kind in Queensland would obviously have resource implications for the Queensland Police Service, members of which already have certain rights and responsibilities in relation to applying for protection orders under domestic violence legislation.⁸⁷ Currently, the policy of the Queensland Police Service is for officers attending or advised of an incident that would constitute grounds for complaint under the *Peace and Good Behaviour Act 1982* (Qld) to advise the complainant of the terms of the Act and of the procedures for making an application, and to refer the complainant to the most convenient courthouse to seek further information and to make the application.⁸⁸

3.29 In the Australian Capital Territory, there is specific provision for an employer to seek to restrain certain conduct against the employer's employees. In Queensland, it has been held that an employee is not under the "care or charge" of his or her employer,⁸⁹ so that an employer is not able to bring an application on behalf of an employee or a group of employees. At present, therefore, in a situation where, for example, the behaviour of a disgruntled client or customer is perceived as threatening to members of an employer's staff, an

83 *Restraining Orders Act 1997* (WA) s 25(2)(b).

84 *Restraining Orders Act 1997* (WA) s 38(1), (2).

85 *Restraining Orders Act 1997* (WA) s 38(3).

86 See para 3.4-3.7 of this Discussion Paper.

87 *Domestic and Family Violence Protection Act 1989* (Qld) ss 14(1)(c), (3), 67(2), 69, 71(1).

88 Queensland Police Service, *Operational Procedures Manual* Part 1 s 13.4.1. Information provided by the Acting Commissioner, Queensland Police Service, 6 September 2004.

89 *SJ Mead on behalf of Telstra Corporation Limited v KC Ivory* (District Court of Queensland, Appeal No 1431 of 1997, Wylie DCJ, 20 February 1998) at [14]. See para 3.7 of this Discussion Paper.

application under the Act for an order could be made only by an individual employee in relation to conduct towards that particular employee. An employer would be powerless under the Act to take action to restrain the conduct of a present or past employee towards other staff.

3.30 The lack of definition of the term “care or charge” may lead to uncertainty about whether certain persons are entitled to make a complaint for another person. For example, under the *Guardianship and Administration Act 2000* (Qld), a statutory officer called the Adult Guardian has a number of obligations in relation to people with impaired decision-making capacity. The Adult Guardian’s responsibilities include protecting adults who have impaired capacity from neglect, exploitation or abuse.⁹⁰ However, in a situation where the Adult Guardian is not a person’s appointed guardian under that Act, it is not clear whether the Adult Guardian’s statutory role would be sufficient to bring the person under the Adult Guardian’s “care or charge”.

3.31 To remove doubt, it would be possible for the Act to specify particular people who were authorised to make an application on behalf of another person. These people could include, for example, a welfare officer or child advocate to act on behalf of a child, or a guardian or an administrator appointed under the *Guardianship and Administration Act 2000* (Qld),⁹¹ a person acting under an enduring power of attorney,⁹² or the Adult Guardian to act on behalf of an adult with impaired capacity.

3.32 However, there may also be problems associated with this approach. While it would remove the uncertainty created by the use of the term “care or charge”, it could also result in the loss of some degree of flexibility. It may be, for example, that under the existing provision it is not necessary for a person to be appointed as a guardian or administrator or under an enduring power of attorney in order to make a complaint on behalf of a person lacking capacity to act on his or her own behalf. The practice of specifying particular people who may perform a certain role under legislation also carries the risk that the list may be incomplete, although in Tasmania this possibility seems to have been avoided by a provision allowing persons other than those specified to apply to the court for leave to make an application.⁹³

3.33 A further issue arises in relation to an application made on behalf of a child. Under the existing Queensland legislation it is not clear whether a child could make a complaint on his or her own behalf. For most civil proceedings a

⁹⁰ *Guardianship and Administration Act 2000* (Qld) s 174(2)(a).

⁹¹ A person may be appointed as a guardian for a personal matter or an administrator for a financial matter for an adult lacking capacity to make decisions for himself or herself: *Guardianship and Administration Act 2000* (Qld) s 12. A “personal matter” includes a legal matter not relating to the adult’s financial or property matters: *Guardianship and Administration Act 2000* (Qld) Schedule 2 s 2(i). A “financial matter” includes a legal matter relating to the adult’s financial or property matters: *Guardianship and Administration Act 2000* (Qld) Schedule 2 s 1(p).

⁹² *Powers of Attorney Act 1998* (Qld) s 32.

⁹³ See para 3.20 of this Discussion Paper.

litigation guardian is required,⁹⁴ and there is no provision in the *Peace and Good Behaviour Act 1982* (Qld) or in the regulations made under the Act dispensing with that requirement. However, anecdotal evidence supplied to the Commission suggests that some magistrates may make orders in favour of children without the involvement of a litigation guardian.⁹⁵

3.34 There are significant variations in the legislation in other Australian jurisdictions. In the Australian Capital Territory, a child may not apply in his or her own right. In New South Wales, a child of 16 or 17 years of age may make an application, while in Victoria a child of 14 years or over may seek the leave of the court to make a complaint. In Western Australia, there is a provision, which does not include an age restriction, for a person other than those specifically authorised to make an application to seek the leave of the court to apply.

3.35 There may be circumstances in which it is desirable for a child to be able to make a complaint in his or her own right. It may be, for example, that a vulnerable child is living with abusive or neglectful carers who are not prepared to act on the child's behalf.

3.36 There may also be other circumstances that give rise to a need for a third party application. Apart from people with impaired decision-making capacity and children, there may be other groups of people who face barriers of such magnitude that they are prevented from being able to take effective action to protect themselves.

CALL FOR SUBMISSIONS

3.37 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the persons who should be able to make a complaint for an order under the *Peace and Good Behaviour Act 1982* (Qld):

3-1 Do the existing provisions of the *Peace and Good Behaviour Act 1982* (Qld) provide a sufficiently accessible mechanism for making a complaint?

3-2 Should the *Peace and Good Behaviour Act 1982* (Qld) identify particular persons or groups of persons who may need an application to be made on their behalf by another person?

⁹⁴ *Uniform Civil Procedure Rules 1999* (Qld) r 93.

⁹⁵ Information provided by Legal Aid Queensland 8 September 2004.

- 3-3** If yes to 3-2, who should those persons be:
- (a) people with impaired decision-making capacity;
 - (b) children;
 - (c) other?
- 3-4** Should the *Peace and Good Behaviour Act 1982* (Qld) identify particular persons who may make a complaint on behalf of another person?
- 3-5** If yes to 3-4, who should those persons be?
- 3-6** Should the court be given power to grant leave to make a complaint to a person other than those specified?
- 3-7** Are there any circumstances in which a person - for example, a police officer - should be under an obligation to make a complaint on behalf of another person and, if so, what are those circumstances?
- 3-8** Should the *Peace and Good Behaviour Act 1982* (Qld) make provision for a child to make a complaint in his or her own right?
- 3-9** If yes to 3-8, should the provision be limited in any way - for example with respect to the age of the child or the circumstances in which a child may make a complaint?

Chapter 4

Grounds for obtaining an order

INTRODUCTION

4.1 At common law, a breach of the peace involves some degree of physical assault or public violence.⁹⁶ Historically, a justice of the peace could bind a person over to keep the peace only if the applicant proved “just cause to fear that another will do him some bodily harm, as by killing or beating him or his wife or child”.⁹⁷

4.2 The English Court of Appeal, while endorsing the need for proof of violence, or fear of violence, as an element of a breach of the peace, widened the concept to include damage to a person’s property, provided that the damage occurred in the person’s presence:⁹⁸

... keeping the peace in this country in the latter half of the twentieth century presents formidable problems which bear on the evolving process of the development of this branch of the common law. Nevertheless, even in these days when affrays, riotous behaviour and other disturbances happen all too frequently, we cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. ... there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance.

4.3 The idea of violence as an element of a breach of the peace was echoed in the Second Reading Speech of the then Minister for Justice and Attorney-General in introducing the *Peace and Good Behaviour Act 1982* (Qld) into Parliament.⁹⁹

The basic function and purpose to which the [Bill] relates is a form of preventive justice by which a person in threatening or causing actual violence or other such breach of the peace to another through his behaviour or conduct may be dealt with by means of a readily accessible, speedy and inexpensive process.

96 James JS, *Stroud’s Judicial Dictionary of Words and Phrases* (5th ed, 1986) Vol 2 at 1100 (definition of “good behaviour”).

97 Hailsham, the Rt Hon Viscount (ed), *Halsbury’s Laws of England* (2nd ed, 1933) Vol IX para 330 at 234.

98 *R v Howell* [1981] 3 All ER 383 per Watkins LJ for the Court at 388-389.

99 Hon SS Doumany MLA, Minister for Justice and Attorney-General, Second Reading Speech, Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1982, 841.

4.4 The concept of “a breach of the peace” is relevant to the Commission’s review of the Act, since the terms of reference for the review require the Commission to consider whether the Act provides “an appropriate, easily accessible and effective mechanism for protection of the community” from such breaches.¹⁰⁰

THE PROVISIONS OF THE *PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)*

4.5 Obtaining an order under the Act involves a two step process. The first step is the issue by a justice of the peace, on the complaint of a person (the complainant), of a summons or warrant for another person (the defendant) to appear before a Magistrates Court.¹⁰¹ The second step is the hearing and determination of the matter in the Magistrates Court.¹⁰²

Grounds for the issue of a summons or warrant

Threatening behaviour

4.6 A complainant may complain to a justice of the peace that the defendant has made a threat against the complainant or a person in the complainant’s care or charge, or against the complainant’s property, and that the complainant is in fear of the defendant.¹⁰³

4.7 The nature of the threat must be that the defendant will:¹⁰⁴

- personally assault or do bodily injury to the complainant or a person in the complainant’s care or charge;
- procure another person to assault or do bodily injury to the complainant or a person in the complainant’s care or charge;
- personally destroy or damage any property of the complainant;

¹⁰⁰ The terms of reference are set out in full in Appendix 1 to this Discussion Paper.

¹⁰¹ *Peace and Good Behaviour Act 1982* (Qld) s 4. However, a justice of the peace before whom a complaint is made may order, with the complainant’s consent, that the matter be submitted to mediation rather than to a Magistrates Court if the justice of the peace considers that the matter would be better resolved in this way: *Peace and Good Behaviour Act 1982* (Qld) s 4(3). Mediation is discussed in Chapter 6 of this Discussion Paper.

Section 4 of the Act was recently amended by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66. The amendments, which commenced on 3 December 2004, changed the grounds for making an order under s 4(2) of the Act, and enlarged the power of a justice of the peace to refer a complaint to mediation under s 4(3).

¹⁰² *Peace and Good Behaviour Act 1982* (Qld) s 6.

¹⁰³ *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

¹⁰⁴ *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(a)-(d).

- procure another person to destroy or damage any property of the complainant.

4.8 If the matter of the complaint is substantiated to the satisfaction of the justice of the peace and if the justice of the peace is satisfied that the complainant's fear is reasonable in the circumstances, the justice of the peace may issue a summons or warrant.¹⁰⁵

4.9 In order to initiate the process on the basis of the defendant's threats, a complainant must therefore demonstrate three things - that the defendant has made a threat of a kind specified in the Act; that the complainant is in fear of the defendant; and that, in the circumstances, the complainant's fear is reasonable.

Behaviour that causes fear of damage to property

4.10 The Act also provides that a complainant may make a complaint to a justice of the peace that the intentional conduct of the defendant towards the complainant has caused the complainant to fear that the defendant will destroy or damage the complainant's property.¹⁰⁶

4.11 If the matter of the complaint is substantiated to the satisfaction of the justice of the peace, and if the justice of the peace is satisfied that the complainant's fear is reasonable in the circumstances, the justice of the peace may issue a summons or warrant.¹⁰⁷

4.12 In order to initiate the process on the basis of the defendant's conduct, a complainant must therefore demonstrate that there has been intentional conduct directed at the complainant by the defendant; that that conduct has caused the complainant to fear damage or destruction of the complainant's property by the defendant; and that, in the circumstances, the complainant's fear is reasonable.

Grounds for obtaining an order

4.13 The Magistrates Court before which the defendant appears in response to the summons or warrant is to hear and determine "the matter of the complaint".¹⁰⁸ The court, after having considered the evidence, may dismiss the complaint or make an order requiring the defendant to keep the peace or be of good behaviour.¹⁰⁹

¹⁰⁵ *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

¹⁰⁶ *Peace and Good Behaviour Act 1982* (Qld) s 4(2). The grounds for making a complaint under this section were recently amended by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66. The amendment commenced on 3 December 2004.

¹⁰⁷ *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

¹⁰⁸ *Peace and Good Behaviour Act 1982* (Qld) s 6(1).

¹⁰⁹ *Peace and Good Behaviour Act 1982* (Qld) s 6(3).

4.14 The matter of the complaint to the Magistrates Court is the same as that which was substantiated to the satisfaction of the justice of the peace - namely, a threat of violent behaviour or intentional behaviour towards the complainant by the defendant and fear on the part of the complainant. It would appear that the third element necessary for the issue of a summons or warrant - that the complainant's fear is objectively reasonable in the circumstances - is not a matter of complaint but rather a factor relevant to the exercise of discretion by the justice of the peace,¹¹⁰ which may also be relevant to the Magistrate's discretion to either dismiss the complaint or make an order.¹¹¹

CONDUCT NOT COVERED BY THE ACT

4.15 There are certain kinds of behaviour that may not entitle a complainant to obtain an order under the *Peace and Good Behaviour Act 1982* (Qld).

Actual assault or bodily injury

4.16 One of the grounds that entitle a complainant to obtain a summons or warrant requiring the defendant to appear before the court is that the defendant has made threats of assault or bodily injury to the complainant or to a person under the care or charge of the complainant.

4.17 However, there is no express ground for obtaining relief from actual violence to the complainant's person or to a person in the complainant's care or charge in the absence of a threat. It is therefore unclear whether the Act captures situations where the defendant has committed an assault or bodily injury without any accompanying threat in relation to the future.¹¹²

4.18 Anecdotal evidence suggests there may be some inconsistency in the application of the Act, with some magistrates considering that an actual assault is not a sufficient ground for the grant of an order, whilst others consider that the carrying out of an assault may itself constitute a threat to repeat the conduct.¹¹³

Actual property damage

4.19 A complainant may be entitled to obtain a summons or warrant requiring the defendant to appear before the court if the intentional conduct of the defendant directed at the complainant has caused the complainant to

¹¹⁰ *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45 per McPherson JA at 50-51.

¹¹¹ *Scheumack v Duncan* (Unreported, District Court of Queensland, Appeal No 10 of 1996, Wall DCJ, 28 April 1997).

¹¹² Further, where violent behaviour by the defendant was intentionally directed at the complainant, there may be no express ground for obtaining relief unless the defendant's conduct specifically caused the complainant to fear damage to the complainant's property: see *Peace and Good Behaviour Act 1982* (Qld) s 4(2).

¹¹³ Information provided by Legal Aid Queensland 8 September 2004.

reasonably fear that the defendant will destroy or damage the complainant's property.¹¹⁴

4.20 There is no express ground for obtaining relief from actual damage to the complainant's property. However, it may be arguable that actual property damage may give rise to a reasonable fear of additional damage to the complainant's property by the defendant.

4.21 The Act would not appear to capture situations where a defendant has actually damaged a complainant's property without any accompanying fear of additional property damage on the part of the complainant.

Conduct that is neither violent nor overtly threatening

4.22 A person may be subjected to harassing behaviour that is neither violent nor overtly threatening.

4.23 The offence of stalking,¹¹⁵ for example, while including acts or threats of violence¹¹⁶ that cause apprehension or fear,¹¹⁷ may also be committed by conduct intentionally directed at a person¹¹⁸ that consists of:

- following, loitering near, watching or approaching the person;¹¹⁹
- contacting the person in any way, including by telephone, mail, fax, email or through the use of any other technology;¹²⁰
- loitering near, watching, approaching or entering a place where the person lives, works or visits;¹²¹
- leaving offensive material where it will be found by, given to, or brought to the attention of, the person;¹²²
- giving offensive material to the person directly or indirectly;¹²³ or

114 *Peace and Good Behaviour Act 1982* (Qld) s 4(2), (2A).

115 *Criminal Code* (Qld) ss 359B, 359E.

116 *Criminal Code* (Qld) s 359B(c)(vi), (vii).

117 *Criminal Code* (Qld) s 359B(d)(i).

118 *Criminal Code* (Qld) s 359B(a).

119 *Criminal Code* (Qld) s 359B(c)(i).

120 *Criminal Code* (Qld) s 359B(c)(ii).

121 *Criminal Code* (Qld) s 359B(c)(iii).

122 *Criminal Code* (Qld) s 359B(c)(iv).

123 *Criminal Code* (Qld) s 359B(c)(v).

- an intimidating, harassing or threatening act against the person, not necessarily involving violence or a threat of violence;¹²⁴

and that causes detriment, reasonably arising in all the circumstances, to the person or another person.¹²⁵

4.24 “Detriment” includes:¹²⁶

- serious mental, psychological or emotional harm;
- prevention or hindrance from doing an act that a person is lawfully entitled to do - for example, no longer walking outside the person’s place of residence or employment or significantly changing the route or form of transport the person would ordinarily use to travel to work or other places; and
- compulsion to do an act the person is lawfully entitled to abstain from doing - for example, selling a property that the person would not otherwise sell.

4.25 The offence of stalking can therefore be committed without violent or threatening behaviour on the part of the defendant, and even though the defendant’s conduct does not cause the person against whom it is directed to be afraid. In other words, the elements of threat and fear, and of personal injury or property damage, which must be demonstrated to obtain a peace and good behaviour order, are not necessary to prove a stalking offence.

4.26 A person suffering detriment as a result of intrusive, offensive or harassing conduct would therefore not be entitled to obtain an order under the *Peace and Good Behaviour Act 1982* (Qld) unless the conduct complained of:

- involved a threat of violence to the person or his or her property that caused the person to experience a degree of fear that was reasonable in the circumstances;¹²⁷ or
- was intentionally directed at the person and caused the person to fear damage to his or her property and, in the circumstances, that fear was reasonable.¹²⁸

124 *Criminal Code* (Qld) s 359B(c)(vi).

125 *Criminal Code* (Qld) s 359B(d)(ii).

126 *Criminal Code* (Qld) s 359A (definition of “detriment”).

127 *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

128 *Peace and Good Behaviour Act 1982* (Qld) s 4(2).

Conduct that does not cause fear

4.27 An essential element of a complaint under the *Peace and Good Behaviour Act 1982* (Qld) is that the complainant be fearful of the defendant¹²⁹ or of property damage resulting from the defendant's intentional conduct towards the complainant,¹³⁰ and that that fear must be reasonable in the circumstances.¹³¹ Further, even though the complaint may concern a threat of violence towards a person who is under the complainant's care or charge, the complainant must show that he or she is personally in fear of the defendant.¹³²

4.28 Conduct that does not cause fear on the part of the complainant is not a sufficient ground for a complaint under the Act.

LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS

4.29 The legislation in other Australian States and Territories varies in the criteria that must be satisfied to obtain an order requiring the perpetrator to refrain from engaging in the conduct complained of. Some jurisdictions have adhered to the common law concept of breach of the peace.¹³³ However, others have adopted a wider approach, in some cases dispensing with the need for an allegation of actual or threatened violence, or for the perpetrator's conduct to cause fear on the part of the applicant.

Australian Capital Territory

4.30 The *Protection Orders Act 2001* (ACT) provides for personal protection orders, including workplace orders.

4.31 The Magistrates Court may make a personal protection order if it is satisfied that the respondent has engaged and may, during the time the order is proposed to operate, engage in personal violence towards the aggrieved person¹³⁴ if the order is not made.¹³⁵

129 *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

130 *Peace and Good Behaviour Act 1982* (Qld) s 4(2).

131 *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

132 *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

133 For what constitutes a breach of the peace, see para 4.1-4.4 of this Discussion Paper.

134 For the purposes of a personal protection order, the "aggrieved person" is the person against whom the behaviour that may constitute personal violence has been, or is likely to be, directed: *Protection Orders Act 2001* (ACT) Dictionary (definition of "aggrieved person").

135 *Protection Orders Act 2001* (ACT) s 40(b). Note, proposed amendments to s 40 of the *Protection Orders Act 2001* (ACT) provide that a final order may be made if the court is satisfied that the respondent has engaged in domestic violence or personal violence towards the aggrieved person: see Domestic Violence and Protection Orders Amendment Bill 2005 (ACT) cl 22.

4.32 For the purposes of a personal protection order, “personal violence” is behaviour that:¹³⁶

- causes personal injury to the aggrieved person or damage to the aggrieved person’s property; or
- threatens to cause personal injury to the aggrieved person or damage to the aggrieved person’s property; or
- is harassing or offensive to the aggrieved person.

4.33 A workplace order may be made if the court is satisfied that the respondent has engaged in and may, during the time the order is proposed to operate, engage in personal violence in relation to the workplace if the order is not made.¹³⁷ “Personal violence in relation to the workplace” is behaviour that:¹³⁸

- causes, or threatens to cause, personal injury to an employee in the employee’s capacity as an employee at the workplace;
- causes, or threatens to cause, damage to property in the workplace in a way that causes reasonable fear in an employee; or
- is harassing or offensive to an employee in the employee’s capacity as an employee at the workplace.

New South Wales

4.34 In New South Wales the relevant provisions are located in the *Crimes Act 1900* (NSW). Part 15A of that Act, which deals with apprehended violence, provides for the making of apprehended violence orders in certain circumstances.¹³⁹

4.35 An apprehended personal violence order (APVO) may be made if the court is satisfied that a person has reasonable grounds to fear and in fact fears.¹⁴⁰

136 *Protection Orders Act 2001* (ACT) s 10.

137 *Protection Orders Act 2001* (ACT) s 45.

138 *Protection Orders Act 2001* (ACT) s 44.

139 Note, the Crimes and Firearms Legislation Amendment (Apprehended Violence Orders) Bill 2004 (NSW) proposes amendments to the provisions of the *Crimes Act 1900* (NSW) that deal with apprehended violence orders. The proposed amendments provide that a court must refuse to make an apprehended violence order in certain circumstances, including that the complaint was frivolous or vexatious.

140 *Crimes Act 1900* (NSW) s 562A(1).

- the commission by the person against whom the order is sought of a personal violence offence against the person;¹⁴¹
- the engagement of the person against whom the order is sought in conduct amounting to harassment or molestation of the person, being conduct that, in the opinion of the court, is sufficient to warrant the making of the order; or
- the engagement of the person against whom the order is sought in conduct that intimidates or stalks the person, being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

4.36 The element of fear is not necessary if the person for whose protection the order is sought is under the age of 16 years or is, in the opinion of the court, suffering from an appreciably below average general intelligence function.¹⁴²

4.37 Conduct can amount to harassment or molestation of a person even though it does not involve actual or threatened violence to the person, or even though it consists only of actual or threatened damage to property belonging to, in the possession of, or used by the person.¹⁴³

4.38 “Stalking” is defined as the following of a person about or the watching or frequenting of the vicinity of or an approach to a person’s place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity.¹⁴⁴

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“Personal violence offence” is defined to mean an offence under, or mentioned in, ss 24 (Manslaughter - punishment), 27 (Acts done to the person with intent to murder), 28 (Acts done to property with intent to murder), 29 (Certain other attempts to murder), 30 (Attempts to murder by other means), 33 (Wounding with intent to do bodily harm or resist arrest), 33A (Discharging loaded arms with intent), 35 (Malicious wounding or infliction of grievous bodily harm), 39 (Using poison so as to endanger life), 41 (Administering poison with intent to injure or annoy), 44 (Not providing wife, child or servant with food), 46 (Causing bodily injury by gunpowder), 47 (Using explosive substance or corrosive fluid), 48 (Causing explosives to be placed in or near building, conveyance or public place), 49 (Setting trap), 58 (Assault with intent to commit a serious indictable offence on certain officers), 59 (Assault occasioning actual bodily harm), 61 (Common assault prosecuted by indictment), 61I (Sexual assault), 61J (Aggravated sexual assault), 61JA (Aggravated sexual assault in company), 61K (Assault with intent to have sexual intercourse), 61L (Indecent assault), 61M (Aggravated indecent assault), 61N (Act of indecency), 61O (Aggravated act of indecency), 195 (Maliciously destroying or damaging property), 196 (Maliciously destroying or damaging property with intent to injure a person), 198 (Maliciously destroying or damaging property with the intention of endangering life), 199 (Threatening to destroy or damage property), 200 (Possession of explosive or other article with intent to destroy or damage property), 562I (Offence of contravening order) or an offence of attempting to commit any of those offences: *Crimes Act 1900* (NSW) s 4 (definition of “personal violence offence”).

The New South Wales Law Reform Commission has recommended the inclusion of the following provisions in the definition: ss 26 (Conspiring to commit murder), 31 (Documents containing threats), 35A (Maliciously cause dog to inflict grievous bodily harm or actual bodily harm), 65A (Sexual intercourse procured by intimidation, coercion and other non-violent threats), 80D (Causing sexual servitude), 86 (Kidnapping), 87 (Child abduction), 93G (Causing danger with firearm or speargun): New South Wales Law Reform Commission, Report, *Apprehended Violence Orders* (NSWLRC R 103, October 2003) Recommendation 10 at 92.

142

Crimes Act 1900 (NSW) s 562AI(2).

143

Crimes Act 1900 (NSW) s 562AI(3).

144

Crimes Act 1900 (NSW) s 562A(1) (definition of “stalking”).

Northern Territory

4.39 The *Justices Act* (NT) provides that the court has power to make an order requiring a defendant to keep the peace or be of good behaviour.¹⁴⁵

4.40 There are no grounds specified in the legislation for the making of an order.

South Australia

4.41 The *Summary Procedure Act 1921* (SA) enables the Magistrates Court to make a restraining order in certain circumstances.

4.42 Although there is separate domestic violence legislation in South Australia, the grounds for obtaining a restraining order under the *Summary Procedure Act 1921* (SA) do not distinguish between domestic violence and other kinds of behaviour that support the making of an order. However, the Act provides that a complaint made under the restraining order provisions that could have been made under the *Domestic Violence Act 1994* (SA) may be dealt with as if it had been made under that Act.¹⁴⁶

4.43 The court may, if it considers it appropriate in the circumstances, make a restraining order under the *Summary Procedure Act 1921* (SA) against a person (the defendant) whose conduct gives rise to a reasonable apprehension that the person may, unless restrained:¹⁴⁷

- cause personal injury or damage to property; or
- behave in an intimidating or offensive manner.

4.44 A defendant's behaviour is intimidating or offensive if, on two or more separate occasions, in such a way as to reasonably arouse in a person apprehension or fear of personal injury or damage to property or any significant apprehension or fear, the defendant:¹⁴⁸

- follows the person;
- loiters outside the person's residence or some other place frequented by the person;
- enters or interferes with property occupied by, or in the possession of, the person;

145 *Justices Act* (NT) s 99(3).

146 *Summary Procedure Act 1921* (SA) s 99L.

147 *Summary Procedure Act 1921* (SA) s 99(1).

148 *Summary Procedure Act 1921* (SA) s 99(2).

- gives or sends offensive material to the person, or leaves offensive material where it will be found by, given to, or brought to the attention of, the person;
- publishes or transmits offensive material by means of the internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of, the person;
- communicates with the person, or to others about the person, by way of mail, telephone, facsimile transmission or the internet or some other form of electronic communication;
- keeps the person under surveillance; or
- takes any other action in relation to the person or the person's property.

Tasmania

4.45 The *Justices Act 1959* (Tas) provides that a restraint order may be granted on the following grounds:¹⁴⁹

- that a person has caused personal injury or damage to property and, unless restrained, is likely again to cause personal injury or damage to property;
- that a person has threatened to cause personal injury or damage to property and, unless restrained, is likely to carry out that threat;
- that a person has behaved in a provocative or offensive manner that is likely to lead to a breach of the peace and that the person, unless restrained, is likely again to behave in the same or a similar manner; or
- that a person has stalked the person for whose benefit the application is made or a third person the stalking of whom has caused the person for whose benefit the application is made to feel apprehension or fear.

4.46 "Stalking" is defined as the doing of any one or more of the following:¹⁵⁰

- following another person;
- loitering outside the residence of another person or another place frequented by another person;
- entering or interfering with the property of another person;

¹⁴⁹ *Justices Act 1959* (Tas) s 106B(1).

¹⁵⁰ *Justices Act 1959* (Tas) s 106A(1) (definition of "stalking").

- keeping another person under surveillance;
- giving offensive material to, or leaving offensive material where it is likely to be found by, given to, or brought to the attention of, another person;
- acting in a way that could reasonably be expected to arouse another person's apprehension or fear.

Victoria

4.47 The *Magistrates' Court Act 1989* (Vic) provides that the court has power to make an order requiring a person to keep the peace or to be of good behaviour.¹⁵¹

4.48 There are no grounds specified in the legislation for the making of an order.

4.49 Where the conduct complained of consists of stalking, there is an alternative remedy under the Victorian domestic violence legislation. A person who has been stalked may apply under that legislation for an intervention order against the defendant, even though there is no family relationship between the defendant and the victim.¹⁵²

4.50 "Stalking" consists of a course of conduct, intended to cause physical or mental harm to the victim or to arouse apprehension or fear in the victim for his or her own safety or that of any other person, that includes any of the following:¹⁵³

- following the victim or any other person;
- contacting the victim or any other person by any means, including electronic means of communication;
- certain conduct in relation to the internet, email or other electronic means of communication;
- entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;

151 *Magistrates' Court Act 1989* (Vic) s 126A(1).

152 *Crimes Act 1958* (Vic) s 21A(5). A recent review of family violence legislation in Victoria noted dissatisfaction with this provision. Initial consultations revealed a perception that the provision was being used in ways that were not intended - for example, in neighbourhood disputes - and that these types of applications were clogging the system and delaying the processing of family violence matters. Applications of this kind were also seen as causing intervention orders to be viewed less seriously by the community and certain magistrates, court staff and police to treat people seeking family violence orders less seriously and with greater scepticism and impatience: Victorian Law Reform Commission, Consultation Paper, *Review of Family Violence Laws* (November 2004) at para 4.36-4.39.

153 *Crimes Act 1958* (Vic) s 21A(2).

- interfering with property in the possession of the victim or any other person;
- giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of the victim or any other person;
- keeping the victim or any other person under surveillance; or
- acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of any other person.

4.51 The order may be granted if the court is satisfied that the stalking allegation has been made out and that the defendant is likely to continue to stalk the person or to do so again.¹⁵⁴

Western Australia

4.52 The *Restraining Orders Act 1997 (WA)* provides for the making of two kinds of orders - violence restraining orders and misconduct restraining orders.

4.53 A court may make a violence restraining order against a person (the respondent) if it considers it appropriate to do so in the circumstances and if it is satisfied that:¹⁵⁵

- the respondent has committed an act of abuse against a person seeking to be protected and the respondent is likely again to commit such an act against the person; or
- a person seeking to be protected, or a person who has applied for the order on behalf of that person, reasonably fears that the respondent will commit an act of abuse against the person seeking to be protected.

4.54 An “act of abuse” is defined as “an act of family and domestic violence or an act of personal violence”.¹⁵⁶

¹⁵⁴ *Crimes Act 1958 (Vic)* s 21A(5).

¹⁵⁵ *Restraining Orders Act 1997 (WA)* s 11A.

¹⁵⁶ *Restraining Orders Act 1997 (WA)* s 3 (definition of “act of abuse”). For the meaning of “act of family and domestic violence” and “act of personal violence” see *Restraining Orders Act 1997 (WA)* ss 3, 6. Section 6 of the Act provides that “act of family and domestic violence” and “act of personal violence” mean:

(1) In this Act -

“**act of family and domestic violence**” means one of the following acts that a person commits against another person with whom he or she is in a family and domestic relationship -

(a) assaulting or causing personal injury to the person;

(b) kidnapping or depriving the person of his or her liberty;

4.55 The grounds for a misconduct restraining order are that the court considers that the granting of an order is appropriate in the circumstances and is satisfied that, unless restrained, the respondent is likely to:¹⁵⁷

- behave in a manner that could reasonably be expected to be intimidating or offensive to the person seeking to be protected and that would, in fact, intimidate or offend the applicant;
- cause damage to property owned by, or in the possession of, the person seeking to be protected; or
- behave in a manner that is, or is likely to lead to, a breach of the peace.

-
- (c) damaging the person's property, including the injury or death of an animal that is the person's property;
 - (d) behaving in an ongoing manner that is intimidating, offensive or emotionally abusive towards the person;
 - (e) causing the person or a third person to be pursued -
 - (i) with intent to intimidate the person; or
 - (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the person;
 - (f) threatening to commit any act described in paragraphs (a) to (c) against the person.
- (2) In this Act -
- “act of personal violence”** means one of the following acts that a person commits against another person with whom he or she is not in a family and domestic relationship -
- (a) assaulting or causing personal injury to the person;
 - (b) kidnapping or depriving the person of his or her liberty;
 - (c) causing the person or a third person to be pursued -
 - (i) with intent to intimidate the person; or
 - (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the person;
 - (d) threatening to commit any act described in paragraph (a) or (b) against the person;
 - (e) if the person who commits the act has an imagined personal relationship with the person against whom the act is committed, an act that would constitute an act of family and domestic violence if those persons were in a family and domestic relationship.
- (3) For the purposes of this Act, a person who procures another person to commit an act of abuse, or part of such an act, is to be taken to have also committed the act himself or herself.
- (4) In this section -
- “assaulting”** includes -
- (a) an assault within the meaning of *The Criminal Code*; and
 - (b) behaving in a manner described in paragraph (a), (b) or (c) of section 319(3) of *The Criminal Code*;
- “intimidate”** has the same meaning as in section 338D of *The Criminal Code*;
- “kidnapping or depriving the person of his or her liberty”** includes behaving in a manner described in section 332 of *The Criminal Code*;
- “pursue”** has the same meaning as in section 338D of *The Criminal Code*.

ISSUES FOR CONSIDERATION

4.56 The Commission's terms of reference require it to consider the grounds specified in the *Peace and Good Behaviour Act 1982* (Qld), in particular whether the ambit of conduct covered by the Act is inappropriate, being either too wide or too restrictive. The terms of reference specifically raise the question of whether conduct that causes apprehension or fear of personal violence or violence against property, but that falls short of an actual threat, should be a sufficient ground for obtaining an order.¹⁵⁸

4.57 It is clear that the legislation in a number of other jurisdictions allows for an order to be made in circumstances that are considerably broader than those contained in the *Peace and Good Behaviour Act 1982* (Qld).

Conduct that is neither violent nor overtly threatening

4.58 In most jurisdictions, an order can be obtained where the behaviour complained of is neither violent nor overtly threatening, but rather harassing or intimidating. A person towards whom such behaviour is directed does not have a remedy under the *Peace and Good Behaviour Act 1982* (Qld).

4.59 However, some kinds of behaviour - for example following a person or loitering outside a person's home - may, in the circumstances of a particular situation, be frightening or intimidating even though no specific threat has been made.¹⁵⁹

4.60 A community legal centre has informed the Commission that one of the contexts in which it most frequently receives inquiries about peace and good behaviour orders is where a prospective applicant is receiving or has rejected unwanted advances in circumstances where the relationship is not covered by domestic violence legislation.¹⁶⁰

Assault or bodily injury

4.61 Under the Queensland Act, it is not clear whether an actual assault or bodily injury, in the absence of a specific threat to cause further injury is a sufficient ground for the granting of an order.¹⁶¹ However, there may be

¹⁵⁸ The terms of reference are set out in full in Appendix 1 to this Discussion Paper.

¹⁵⁹ See also *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(c), which provides that an act of intimidation or harassment committed by one person against another can, within certain relationships, constitute an act of domestic violence.

¹⁶⁰ Information provided by the Caxton Legal Centre 23 August 2004.

¹⁶¹ See para 4.16-4.18 of this Discussion Paper.

situations where there has been no actual threat, but where a person's past behaviour might create a legitimate concern about future violence.¹⁶²

4.62 In most jurisdictions there is no express requirement of a threat. Rather, the test for the grant of an order revolves around whether past conduct gives rise to an apprehension of personal injury, or whether there is a likelihood that violence will occur in the future.¹⁶³

Conduct that does not cause fear

4.63 In most jurisdictions, there is no requirement that the conduct complained of actually cause fear, whereas under the *Peace and Good Behaviour Act 1982* (Qld) it is necessary for the complainant to be in fear of the person complained against,¹⁶⁴ or fear damage to property,¹⁶⁵ and for the complainant's fear to be reasonable in the circumstances.¹⁶⁶

4.64 The objective element protects a defendant from an overly timorous complainant. But the need for a person to show that he or she is afraid of the defendant means that, unlike in a number of other jurisdictions, the Act does not provide a remedy against behaviour that is harassing or offensive or that constitutes an invasion of a person's privacy, but that does not cause fear. It may be that a person subjected to certain behaviour that could constitute the offence of stalking¹⁶⁷ is not actually afraid of the perpetrator, but wants a way to make the behaviour stop without resorting to a criminal prosecution of the person responsible.

4.65 Further, even though the complaint may concern conduct towards a person who is under the complainant's care or charge, the complainant must show that he or she is personally in fear of the defendant.¹⁶⁸

162 However, there will be grounds for obtaining relief where violent behaviour by the defendant was intentionally directed at the complainant and the defendant's conduct specifically caused the complainant to fear damage to the complainant's property: see *Peace and Good Behaviour Act 1982* (Qld) s 4(2).

163 Ibid. See also *Domestic and Family Violence Protection Act 1989* (Qld) s 20, which provides that a protection order may be made if a person has committed an act of domestic violence and is likely to commit an act of domestic violence again.

164 *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

165 *Peace and Good Behaviour Act 1982* (Qld) s 4(2).

166 *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

167 The offence of stalking is discussed at para 4.22-4.25 of this Discussion Paper.

168 *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

Conduct that causes fear of damage to property

4.66 Section 4(2) of the *Peace and Good Behaviour Act 1982* (Qld) provides that a complainant may make a complaint that the intentional conduct of the defendant has caused the complainant to fear that the defendant will destroy or damage the complainant's property. For the complaint to proceed, the complainant's fear must be reasonable in the circumstances.¹⁶⁹ A very similar provision operates in South Australia.¹⁷⁰

4.67 A community legal service observed that, in the context of disputes between neighbours, for example, conduct such as verbal abuse and harassment involving behaviour such as loud and offensive noise, and interference with (but not damage to) property, can undermine an occupant's appreciation of "home" as a safe place of private refuge. The conduct can therefore be a source of severe stress.¹⁷¹ However, such conduct may not amount to a reasonable fear of property damage on the part of the complainant. Further, unless the behaviour of the defendant was "intentional conduct ... directed at the complainant",¹⁷² it may not be sufficient to ground a complaint under the Act.

Actual property damage

4.68 As noted earlier,¹⁷³ there is no ground contained in the Act that expressly enables a complainant to obtain relief from actual violence to the complainant's property. However, it may be arguable that actual property damage may give rise to a reasonable fear of additional or future damage to the complainant's property by the defendant.

4.69 A complaint under the Act would not be sustainable where a defendant had actually damaged a complainant's property but the complainant did not fear further property damage by the defendant. Whilst fear is a necessary element of a complaint made under the Queensland Act and in some other jurisdictions, there is legislation that operates elsewhere that does not require reasonable fear of property damage to be established before an order may be obtained.¹⁷⁴

4.70 It may be that a complainant may not be afraid of further property damage but apprehend that, unless the defendant is restrained in some way, he or she is likely to further damage property of the complainant. On that basis,

¹⁶⁹ *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

¹⁷⁰ *Summary Procedure Act 1921* (SA) s 99(1)(a).

¹⁷¹ Information provided by Caxton Legal Centre 23 August 2004.

¹⁷² *Peace and Good Behaviour Act 1982* (Qld) s 4(2).

¹⁷³ See para 4.19-4.21 of this Discussion Paper.

¹⁷⁴ See for example, *Protection Orders Act 2001* (ACT); *Justices Act 1959* (Tas); *Restraining Orders Act 1997* (WA). The *Justices Act* (NT) and the *Magistrates' Court Act 1989* (Vic) do not specify any grounds for complaint.

reasonable fear of property damage may be too restrictive as a ground for complaint and may limit the opportunities of a complainant for obtaining an order. The reasonable likelihood of property damage by the defendant may be a more practical test.

The potential risks of net-widening

4.71 Widening the scope of the legislation might lead to unintended and/or undesirable consequences.

4.72 Expanded grounds for making an order might impact adversely on sections of the community who are already disadvantaged - for example, some Indigenous people and people who are homeless or have a disability - if a peace and good behaviour order based on conduct such as merely “loitering” in a place could be used by others, who consider their presence undesirable, as a means of removing them from public view. The possibility of a criminal conviction for failing to comply with the order could constitute a further risk for such people, since people under a disadvantage may, for a variety of reasons, be less likely to abide by the terms of an order.¹⁷⁵

4.73 It is also possible that widening the grounds on which an order may be made might encourage applications that are frivolous or trivial in nature. This could result in an unnecessary burden on court time and resources, and could also undermine the credibility of the Act as a mechanism for preventing behaviour that is seriously threatening, intimidating or violent. An application that was brought as a result of a trivial dispute might also impact unfairly on the reputation of the defendant. Moreover, a formal court order with the consequence of criminal conviction for failure to comply might not be the most appropriate way of dealing with conduct that is neither violent nor threatening.

CALL FOR SUBMISSIONS

4.74 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld):

- | |
|---|
| <p>4-1 Are the grounds for obtaining a peace and good behaviour order appropriate?</p> <p>4-2 If no to 4-1, should the grounds be more limited, or should they be expanded?</p> |
|---|

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See for example Victorian Law Reform Commission, Consultation Paper, *Review of Family Violence Laws* (November 2004) at para 4.36.

- 4-3** If the grounds should be more limited, how and why should they be limited?
- 4-4** If the grounds were more limited, what alternative protection would be available to a complainant in circumstances outside a relationship covered by the *Domestic and Family Violence Protection Act 1989* (Qld)¹⁷⁶ who wished to restrain actual or threatened violence?
- 4-5** If the grounds for obtaining an order in circumstances outside a relationship covered by the *Domestic and Family Violence Protection Act 1989* (Qld)¹⁷⁷ should be expanded, how and why should they be expanded?
- 4-6** Should it be necessary for the complainant to show:
- (a) actual violence on the part of the defendant and, if so, should violence be defined by reference to particular offences or types of offence;
 - (b) threatened violence on the part of the defendant;
 - (c) actual apprehension or fear;
 - (d) likelihood of damage or injury?
- 4-7** Should there be particular grounds for obtaining an order in a specific situation - for example, in the workplace?
- 4-8** Is there a risk that unintended and/or undesirable consequences would flow from expanding the grounds for obtaining an order and, if so, what are those risks?
- 4-9** If there is a risk of unintended and/or undesirable consequences flowing from expansion of the grounds for obtaining an order, can those risks be minimised and, if so, how?

176

Domestic and Family Violence Protection Act 1989 (Qld) ss 11A (Relationships that are domestic relationships for this Act), 12 (What is a spousal relationship and who is a spouse), 12A (What is an intimate personal relationship), 12B (Meaning of "family relationship" and "relative") and 12C (What is an informal carer relationship).

177

Ibid.

Chapter 5

Making an application

INTRODUCTION

5.1 The Commission's terms of reference require it to consider, in its review of the *Peace and Good Behaviour Act 1982* (Qld), whether the procedure for obtaining an order under the Act provides an appropriate, easily accessible and effective mechanism for protection of the community from breaches of the peace and to have regard, in particular, to the complexity of that procedure.¹⁷⁸

5.2 The procedure established by the Act involves a two step process.

5.3 The first step is the making of an application. To do this, a person (the complainant) makes a complaint before a justice of the peace,¹⁷⁹ who may issue a summons or warrant for the person against whom the complaint is made (the defendant) to appear or be brought before a magistrate.¹⁸⁰ The second step is the hearing before a magistrate.

5.4 This Chapter considers issues relating to the making of a complaint. Issues relating to the hearing before the magistrate are discussed in Chapter 7.

THE PROVISIONS OF THE *PEACE AND GOOD BEHAVIOUR ACT 1982* (QLD)

5.5 The making of a complaint before a justice of the peace is a formal process.

5.6 The complaint must be made in writing, in the approved form, and must be made on oath.¹⁸¹

178 The terms of reference are set out in full in Appendix 1 to this Discussion Paper.

179 For a discussion of the grounds on which a complaint may be made, see Chapter 4 of this Discussion Paper.

180 Alternatively, a justice of the peace before whom a complaint is made may order, with the complainant's consent, that the matter be submitted to mediation rather than to a Magistrates Court if the justice of the peace considers that the matter would be better resolved in this way: *Peace and Good Behaviour Act 1982* (Qld) s 4(3). Subsection 4(3) of the Act was recently amended to apply to complaints made pursuant to both subsections 4(1) and 4(2) of the Act: see *Justice and Other Legislation Amendment Act 2004* (Qld) s 66. The amendment commenced on 3 December 2004. Mediation is discussed in Chapter 6 of this Discussion Paper.

181 *Peace and Good Behaviour Act 1982* (Qld) s 4(4), *Peace and Good Behaviour Regulation 1999* (Qld) s 9.

5.7 Once the complaint has been made, the justice of the peace may make, or cause to be made, inquiries about the allegation in the complaint.¹⁸² If the justice of the peace is satisfied that there are grounds for the complaint¹⁸³ and that it is reasonable in the circumstances for the complainant to be in fear of the defendant,¹⁸⁴ or fearful that the defendant will destroy or damage any property of the complainant,¹⁸⁵ the justice of the peace may issue a summons requiring the defendant to appear or a warrant requiring that the defendant be apprehended and brought before a Magistrates Court.¹⁸⁶

5.8 After the justice of the peace has issued the summons or warrant, the complainant must file the complaint, together with the required number of copies of the summons or warrant, with the nearest clerk of the court in the Magistrates Court for the district in which the complaint is made.¹⁸⁷

LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS

5.9 The legislation in some other Australian jurisdictions is similar to the *Peace and Good Behaviour Act 1982* (Qld), in that it requires an applicant to make a complaint to a justice of the peace in order to initiate the process. However, in other jurisdictions, the application may be filed directly in the court. Nonetheless, in most jurisdictions there is a two step process of some kind.

5.10 In some jurisdictions the procedure to be followed depends on the identity of the applicant.

5.11 There are also differences in the degree of formality required to make an application.

Australian Capital Territory

5.12 An application for a protection order is made to the Magistrates Court. The application must be in the approved form.¹⁸⁸

182 *Peace and Good Behaviour Act 1982* (Qld) s 5.

183 The grounds for making a complaint are discussed in Chapter 4 of this Discussion Paper.

184 For a complaint made pursuant to the *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

185 For a complaint made pursuant to the *Peace and Good Behaviour Act 1982* (Qld) s 4(2).

186 *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

187 *Peace and Good Behaviour Regulation 1999* (Qld) s 4(2). If the justice of the peace decides not to issue a summons or a warrant, the justice of the peace must as soon as practicable note on the complaint that he or she is not satisfied about the matters alleged in the complaint or that it is reasonable in the circumstances for the complainant to be in fear of the defendant, and send the complaint to the nearest clerk of the court in the Magistrates Court for the district in which the complaint was made: *Peace and Good Behaviour Regulation 1999* (Qld) s 5.

188 *Protection Orders Act 2001* (ACT) s 11(1); *Court Procedures Act 2004* (ACT) s 8(2), Forms 2, 3.

5.13 Before the application is heard, a preliminary conference is usually conducted by the registrar of the court.¹⁸⁹

5.14 The objects of a preliminary conference are to find out whether the matter may be settled by consent before the hearing of the application and, if not, to work out and limit the issues to be decided at the hearing and to ensure that the parties are taking the necessary steps to allow the application to be heard quickly.¹⁹⁰ The preliminary conference must try to identify facts agreed on, issues not agreed on, and also any unusual or urgent factors that require special attention.¹⁹¹

New South Wales

5.15 A complaint for an apprehended violence order may be made orally or in writing before a justice of the peace, and must be substantiated on oath.¹⁹²

5.16 However, if the complaint is for an apprehended personal violence order, only an authorised justice (a magistrate, a justice of the peace employed in the Attorney-General's Department or an employee of the Attorney-General's Department who is authorised for the purpose) may issue a summons for the defendant to appear in court or a warrant for the arrest of the defendant.¹⁹³

5.17 Unless the complaint is made by a police officer, an authorised justice has a discretion to refuse to issue a summons or warrant.¹⁹⁴ However, there is a presumption against the exercise of the discretion if the complaint includes allegations of a personal violence offence,¹⁹⁵ an offence of stalking or intimidation,¹⁹⁶ or certain kinds of harassment.¹⁹⁷ The grounds on which an authorised justice may exercise the discretion are that the authorised justice is satisfied that the complaint is frivolous, vexatious, without substance or has no reasonable prospect of success.¹⁹⁸ In deciding whether or not to exercise the

189 *Protection Orders Act 2001* (ACT) s 18(1), (2). A preliminary conference need not be held if the application is for an emergency order, or the registrar is satisfied that the conference would not achieve its objects: *Protection Orders Regulation 2002* (ACT) s 7. The preliminary conference process is further discussed at para 6.9-6.10 of this Discussion Paper.

190 *Protection Orders Regulation 2002* (ACT) s 6(1).

191 *Protection Orders Regulation 2002* (ACT) s 6(2).

192 *Crimes Act 1900* (NSW) s 562C(1).

193 *Crimes Act 1900* (NSW) ss 562AJ(1), 562A(1) (definition of "authorised justice").

194 *Crimes Act 1900* (NSW) s 562AK(1). However, the New South Wales Law Reform Commission has recommended that this subsection be amended to permit an authorised justice to refuse to issue process in relation to complaints made by police officers: New South Wales Law Reform Commission, Report, *Apprehended Violence Orders* (R 103, October 2003) Recommendation 15 at 107.

195 For what constitutes a personal violence offence, see note 141 of this Discussion Paper.

196 For what constitutes the offence of stalking or intimidation, see para 4.38 of this Discussion Paper.

197 *Crimes Act 1900* (NSW) s 562AK(4).

198 *Crimes Act 1900* (NSW) s 562AK(3).

discretion, the authorised justice must take into account, in addition to any other factors the authorised justice considers relevant:¹⁹⁹

- the nature of the allegations;
- whether the matter is amenable to mediation or other alternative dispute resolution;
- whether the parties have previously attempted to resolve the matter by mediation or other means;
- the availability and accessibility of mediation or other alternative dispute resolution services;
- the willingness and capacity of each party to resolve the matter otherwise than through a complaint for an apprehended violence order;
- the relative bargaining power of the parties; and
- whether the complaint is in the nature of a cross-application.

5.18 There is no corresponding discretion where the complaint is made by a police officer. In such a situation, the authorised justice must issue either a summons or a warrant.²⁰⁰ Further, if it appears to the authorised justice that the personal safety of the person for whose protection the order is sought will be put at risk if the defendant is not arrested for the purpose of being brought before the court, the authorised justice must issue a warrant for the arrest of the defendant.²⁰¹

5.19 A police officer may also make a telephone application to an authorised justice for an interim apprehended personal violence order.²⁰² A telephone application may be made if:²⁰³

- an incident occurs involving the person against whom the order is sought to be made and the person who would be protected by the order; and
- it is not practicable to make an immediate complaint for an interim order to a court because of the time at which, or the place at which, the incident occurs; and

¹⁹⁹ *Crimes Act 1900* (NSW) s 562AK(5).

²⁰⁰ *Crimes Act 1900* (NSW) s 562AJ(2).

²⁰¹ *Crimes Act 1900* (NSW) s 562AJ(4).

²⁰² *Crimes Act 1900* (NSW) s 562H(1), (1A).

²⁰³ *Crimes Act 1900* (NSW) s 562H(2).

- the police officer attending the incident has good reason to believe that an order is necessary to ensure the safety of the person who would be protected by the order or to prevent substantial damage to any property of that person.

5.20 A police officer attending the incident concerned must, in certain circumstances, make a telephone application if the officer suspects or believes an offence of abuse of a child or young person under the age of 16 years has recently been or is being committed, is imminent, or is likely to be committed.²⁰⁴

Northern Territory

5.21 A complaint for an order is made to a justice of the peace.²⁰⁵ It is not necessary for the complaint to be in writing.²⁰⁶

5.22 The justice of the peace may issue a summons for the defendant to appear in court,²⁰⁷ or a warrant for the apprehension of the defendant.²⁰⁸ However, a warrant can be issued in the first instance only where the complaint is made on oath, and where the matter of the complaint is substantiated to the satisfaction of the justice of the peace.²⁰⁹

South Australia

5.23 A written complaint must be filed in the Magistrates Court. It is not necessary for the complaint to be made on oath.²¹⁰ Once a complaint has been filed, the court is generally required to issue a summons for the appearance of the defendant.²¹¹

5.24 However, the procedure to be followed after the filing of the complaint depends on whether the complaint is made by the complainant personally or by a member of the police force. There is also provision for an application to be made by telephone.²¹²

204 *Crimes Act 1900* (NSW) s 562H(2A), (2B).

205 *Justices Act* (NT) ss 99(1), 49(1).

206 *Justices Act* (NT) s 50(2).

207 *Justices Act* (NT) s 57(1).

208 *Justices Act* (NT) s 58(2)(b).

209 *Justices Act* (NT) ss 50(3)(b), 58(1).

210 *Summary Procedure Act 1921* (SA) s 49.

211 *Summary Procedure Act 1921* (SA) s 57(1).

212 *Summary Procedure Act 1921* (SA) s 99B(1).

Where the complaint is made by the complainant personally

5.25 Where the complaint is made by the complainant personally, the court cannot issue a summons for the appearance of the defendant, but must dismiss the complaint, unless the complaint is supported by oral evidence.²¹³

5.26 The court has a further power to dismiss the complaint in certain circumstances where the complaint is made by the complainant personally,²¹⁴ including where the court considers that the complaint is frivolous, vexatious, without substance or has no reasonable prospect of success.²¹⁵ In deciding whether to exercise this power, the court must consider whether it might be appropriate and practicable for the parties to attempt to resolve the matter through mediation or by some other means.²¹⁶ The court must also take into account whether the complaint is in the nature of a cross-application,²¹⁷ together with any other matters that the court considers relevant.²¹⁸

5.27 However, there is a presumption against the court's exercise of its discretion to dismiss the complaint in circumstances where the complaint discloses an offence involving personal violence or an offence of stalking.²¹⁹

Where the complaint is made by a member of the police force

5.28 Where the complaint is made by a member of the police force, there is no requirement that the complaint be supported by oral evidence, and the court has no discretion at this stage to dismiss the complaint.²²⁰

Where the complaint is made by telephone

5.29 In an emergency situation, a complaint may be made to the court by telephone.

5.30 The complaint may be made by a member of the police force who establishes his or her identity and official position in a manner acceptable to the court, or a person introduced by a member of the police force who establishes his or her identity and official position in a manner acceptable to the court.²²¹

213 *Summary Procedure Act 1921* (SA) s 99CA(1), (2)(a).

214 *Summary Procedure Act 1921* (SA) s 99CA(2)(b).

215 *Summary Procedure Act 1921* (SA) s 99CA(2)(d).

216 *Summary Procedure Act 1921* (SA) s 99CA(2)(c)(i).

217 *Summary Procedure Act 1921* (SA) s 99CA(2)(c)(ii).

218 *Summary Procedure Act 1921* (SA) s 99CA(2)(c)(iii).

219 *Summary Procedure Act 1921* (SA) s 99CA(2)(e).

220 *Summary Procedure Act 1921* (SA) s 99CA(1).

221 *Summary Procedure Act 1921* (SA) s 99B(1)(a).

Tasmania

5.31 An application for a restraint order must be made on oath²²² in the prescribed form,²²³ and must be filed with the clerk of petty sessions for the district.²²⁴

5.32 The application must specify details of the order sought.²²⁵

5.33 However, the application may be produced to a justice of the peace before it is filed and the justice of the peace may, if of the opinion that it is a case of urgency and there is sufficient cause to do so, issue a warrant for the apprehension of the person against whom the restraint order is sought.²²⁶ If the application has not been filed at the time the warrant is issued, it must be filed as soon as practicable after the issue of the warrant,²²⁷ and must state that the warrant has been issued.²²⁸

5.34 If a police officer has reasonable grounds for believing that a person has intimidated another person, and that the intimidation is likely to continue and give rise to an assault, and it is not practicable to immediately apply for a restraint order because of the time and place at which the intimidation giving rise to the application occurred, the police officer may make a telephone application to a magistrate for an interim restraint order against the person.²²⁹

Victoria

5.35 An application for a peace and good behaviour order must be made in writing to the Magistrates' Court, and supported by evidence on oath or by affidavit.²³⁰

5.36 There is provision for referral of an application to a pre-hearing conference²³¹ or, with the consent of the parties, to mediation.²³²

222 *Justices (Restraint Orders) Rules 2003* (Tas) r 4(1)(b).

223 *Justices Act 1959* (Tas) s 106N(1).

224 *Justices (Restraint Orders) Rules 2003* (Tas) r 4(1)(c), *Justices Rules 2003* (Tas) r 3 (definition of "clerk").

225 *Justices (Restraint Orders) Rules 2003* (Tas) r 4(1)(a).

226 *Justices Act 1959* (Tas) s 106C(1).

227 *Justices Act 1959* (Tas) s 106C(2).

228 *Justices (Restraint Orders) Rules 2003* (Tas) r 4(3).

229 *Justices Act 1959* (Tas) s 106DA(2).

230 *Magistrates' Court Act 1989* (Vic) s 126A(1), (2).

231 *Magistrates' Court Act 1989* (Vic) s 107, *Magistrates' Court Civil Procedure Rules 1999* (Vic) r 22.

232 *Magistrates' Court Act 1989* (Vic) s 108.

5.37 Alternatively, if the behaviour complained of consists of stalking, a complaint may be made to the Magistrates' Court or, if the aggrieved person or the defendant is under the age of 17 years at the time the complaint is made,²³³ to the Children's Court for an intervention order under domestic violence legislation.²³⁴ The complaint must be served on the defendant.²³⁵ The registrar may issue a summons under that legislation for the defendant to appear²³⁶ or, in some situations, a warrant for the defendant's arrest.²³⁷ If the complainant seeks a warrant to issue in the first instance for the arrest of the defendant, the complaint must be in writing and on oath.²³⁸

5.38 A member of the police force may make a telephone or facsimile application for an interim intervention order under the domestic violence legislation if the complaint is made outside normal registry working hours or the distance from the nearest court makes it impracticable to make the complaint in person.²³⁹ Before making such a complaint, the police officer must complete a form of complaint setting out the grounds on which the order is sought.²⁴⁰

Western Australia

5.39 An application for a violence restraining order or a misconduct restraining order is to be made, in the prescribed form, to a court of petty sessions or, if the respondent is a child, to the Children's Court.²⁴¹

5.40 If the application is for a misconduct restraining order, the clerk or registrar of the relevant court is to fix a hearing and summons the respondent to the hearing.²⁴²

5.41 If the application is for a violence restraining order, the applicant must elect whether he or she wishes to have a preliminary hearing in the absence of the respondent, or to proceed directly to a defended hearing.²⁴³

233 *Crimes (Family Violence) Act 1987* (Vic) s 3A(1).

234 A complaint for an intervention order to restrain stalking behaviour may be made under the domestic violence legislation even though there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

235 *Crimes (Family Violence) Act 1987* (Vic) s 11(2).

236 *Crimes (Family Violence) Act 1987* (Vic) s 9(1)(a).

237 *Crimes (Family Violence) Act 1987* (Vic) s 9(1)(b).

238 *Crimes (Family Violence) Act 1987* (Vic) s 10.

239 *Crimes (Family Violence) Act 1987* (Vic) s 8(4).

240 *Crimes (Family Violence) Act 1987* (Vic) s 8(5).

241 *Restraining Orders Act 1997* (WA) ss 25(3), 38(4).

242 *Restraining Orders Act 1997* (WA) ss 3 (definition of "clerk"), 39.

243 *Restraining Orders Act 1997* (WA) s 26(1).

5.42 Where an applicant for a violence restraining order wishes to proceed directly to a defended hearing, the clerk or registrar is to fix a hearing and to summons the respondent to attend.²⁴⁴ Alternatively, if the applicant wishes to have the first hearing in the absence of the respondent, the clerk or registrar of the relevant court is to fix a hearing for that purpose.²⁴⁵

5.43 An application for a violence restraining order may be made by telephone or other electronic means to a magistrate authorised by the Chief Stipendiary Magistrate to hear such applications.²⁴⁶ The Chief Stipendiary Magistrate is to ensure that, as far as practicable, there is at least one such authorised magistrate available at all times.²⁴⁷

5.44 The application may be made by an authorised person²⁴⁸ or by the person seeking to be protected if he or she is introduced to the authorised magistrate by an authorised person.²⁴⁹ However, an authorised person is not to make a telephone application or introduce a person to make an application unless the authorised person reasonably believes that:²⁵⁰

- it would not be practical for an application to be made in person because of:
 - the time when, or the location at which, the behaviour complained of occurred, is occurring or is likely to occur; or
 - the urgency with which the order is required; or
- there is some other factor that justifies making the order as a matter of urgency and without requiring the applicant to appear in person before a court.

244 *Restraining Orders Act 1997 (WA)* ss 3 (definition of “clerk”), 26(3).

245 *Restraining Orders Act 1997 (WA)* ss 3 (definition of “clerk”), 26(2).

246 *Restraining Orders Act 1997 (WA)* ss 17(1)(a), 19. There is also capacity for a police officer to make a 24-72 hour order to ensure the safety of a person, if the officer reasonably believes that the case meets the same criteria as are required for a telephone hearing and that an act of domestic and family violence has occurred or will occur: *Restraining Orders Act 1997 (WA)* ss 30A(1), 30F(1). A police officer may not make an order if a telephone application has been dismissed in relation to the same facts: *Restraining Orders Act 1997 (WA)* s 30A(3).

247 *Restraining Orders Act 1997 (WA)* s 17(1)(b).

248 An “authorised person” is defined by the Act as “a police officer or a person who is, or who is in a class of persons that is, prescribed for the purposes of this definition”: *Restraining Orders Act 1997 (WA)* s 3 (definition of “authorised person”). There are presently no persons or classes of persons prescribed under the regulations made under the Act.

249 *Restraining Orders Act 1997 (WA)* s 18(1).

250 *Restraining Orders Act 1997 (WA)* ss 18(3), 20(1).

ISSUES FOR CONSIDERATION

5.45 A comparison of the existing Queensland provisions in relation to making a complaint for a peace and good behaviour order and the equivalent legislation in other Australian jurisdictions gives rise to a number of issues.

5.46 One such issue is whether the mechanism for making an application under the *Peace and Good Behaviour Act 1982* (Qld) is sufficiently accessible to provide an effective remedy for a person subjected to behaviour that would constitute grounds for obtaining an order.

5.47 The ability of a complainant to make an application may be affected by the degree of formality required. In Queensland, a person who is seeking a remedy under the Act must make a complaint in writing and on oath.²⁵¹ In the Australian Capital Territory, South Australia and Western Australia, the application is required to be made in writing in a prescribed form, but need not be on oath. In the Northern Territory, it is not necessary for an application to be in writing or on oath unless the applicant is seeking the issue of a warrant in the first instance.

5.48 The Queensland legislation also seems to require that a complaint be made in person. There is no provision, as in some other jurisdictions, for the making of an application by telephone or by other electronic means in situations where it is impossible or difficult for the applicant to be physically present because of factors such as the time when the application is sought, the distance involved or the urgency of the situation.²⁵²

5.49 It has been suggested to the Commission that the process of having to make an initial complaint to a justice of the peace and then subsequently file the complaint in court may be an obstacle for some people. While a two step process potentially promotes a more efficient system by preventing the filing of inappropriate applications, it may also restrict the ability of some people who have a meritorious claim to make a complaint.²⁵³

251

Peace and Good Behaviour Act 1982 (Qld) s 4(4). An application for a protection order under Queensland domestic violence legislation is made by completing a form available from Magistrates Courts or police stations: <<http://www.justice.qld.gov.au/courts/dv/victim.htm>> accessed on 16 March 2005. There is no requirement for the application to be made on oath. Once the application form has been lodged at a Magistrates Court, the clerk of the court may issue a summons directing the respondent to appear at the time and place set out in the summons: *Domestic and Family Violence Protection Act 1989* (Qld) s 47(1).

252

Under Queensland domestic violence legislation, a police officer may, and in certain circumstances must, make an application for a temporary protection order by telephone or other electronic means: *Domestic and Family Violence Protection Act 1989* (Qld) s 54(1).

253

Information provided by Legal Aid Queensland 8 September 2004. On the other hand, however, neither the Caxton Legal Centre nor the Queensland Police Service considered the present procedure to be overly complex.

The process is cumbersome because a complaint has to be made by the Applicant and a summons has to be issued by a Justice of the Peace if the Justice is satisfied that the complaint is substantiated. There is no application as of right (contra domestic violence applications). It is difficult for applicants to negotiate this process unrepresented. Legal Aid grants are limited and the police do not assist in investigating the complaint. There is the potential for applications with merit never to get to court because the applicants lack the ability to draft the complaint.

5.50 The legislation in some Australian jurisdictions includes a mechanism to assess applications in order to identify complaints that are unlikely to be substantiated or that lack merit. In South Australia, the screening process is carried out within the court system after the application has been filed in the court. In New South Wales, as in Queensland, this function is conferred on justices of the peace.

5.51 At the time the *Peace and Good Behaviour Act 1982* (Qld) was introduced, it was envisaged that complaints for the issue of a summons or a warrant under the Act would not generally be handled by justices of the peace in the community:²⁵⁴

... most of the referrals by police, clergy or social workers will go to clerks of the court. Other than in very small townships and remote areas, the clerks of the court, who are obviously justices of the peace, will be the vehicle for the first step in the chain of procedures. They will be well briefed and able to cope with the procedures.

5.52 However, the power conferred by the Act is not specifically limited, as in the New South Wales legislation, to justices of the peace employed within the court system. Although it would appear that the power is rarely, if ever, exercised by a justice of the peace in the community,²⁵⁵ that possibility is left open by the *Peace and Good Behaviour Act 1982* (Qld).²⁵⁶

5.53 Even where the power is exercised by justices of the peace who are court officers, it has been suggested that there is sometimes a lack of awareness of the requirements of the Act and that summonses are issued without sufficient investigation or where the grounds for complaint under the Act have not been made out.²⁵⁷

254 Hon SS Doumany MLA, Minister for Justice and Attorney-General, Second Reading Debate, *Queensland Parliamentary Debates*, Legislative Assembly, 10 November 1982, 2141-2142.

255 Information provided by the Registrar, Justices of the Peace Branch, Department of Justice and Attorney-General, 13 August 2004.

256 In Queensland a summons or warrant may be issued by a person who is a justice of the peace (qualified) or a justice of the peace (magistrates court): *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(3), (4)(c). For a discussion of the categories of justice of the peace in Queensland and their functions and powers, see Queensland Law Reform Commission, Report, *The Role of Justices of the Peace in Queensland* (R 54, 1999).

257 Information provided by the Chief Magistrate, Judge MP Irwin, 25 August 2004.

5.54 In some jurisdictions the procedure for making an application depends on the person who is making the application or on the grounds for the application. This may perhaps suggest that an application made by, for example, a police officer, is regarded as having greater authenticity, or that the seriousness of some kinds of behaviour demands particular attention.

5.55 The New South Wales Law Reform Commission has expressed concern at the distinction made in the New South Wales legislation between police and private applications:²⁵⁸

... [it] implies that complaints brought privately are necessarily of a less serious nature. That is not always the case. Indeed, concern over the lack of police involvement in serious instances of sexual assault and stalking in non-domestic relationships was conveyed to the Commission in submissions and during consultations. Considering that only a small percentage of AVPO complaints are initiated by police, there is a likelihood that a number of private APVO complaints are made on the basis of very serious allegations.

... The nature of the subject matter of the complaint should determine the appropriate legal response, not whether or not the complainant is a police officer.

CALL FOR SUBMISSIONS

5.56 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the procedure for commencing a proceeding for an order under the *Peace and Good Behaviour Act 1982* (Qld):

- 5-1 Does the existing procedure for making a complaint under the *Peace and Good Behaviour Act 1982* (Qld) provide an appropriate, easily accessible and effective mechanism for protection of the community from breaches of the peace?**
- 5-2 Should the procedure for commencing a proceeding for an order under the *Peace and Good Behaviour Act 1982* (Qld) generally require a complaint to be made in writing? (But see 5-12 below in relation to telephone applications)**
- 5-3 Should it be necessary for a complaint to be made on oath?**
- 5-4 Should justices of the peace continue to have a role in the process of commencing a proceeding?**

²⁵⁸

New South Wales Law Reform Commission, Report, *Apprehended Violence Orders* (R 103, October 2003) at para 5.21-5.22.

- 5-5** If yes to 5-4, should the *Peace and Good Behaviour Act 1982* (Qld) restrict the power to issue a summons or a warrant to certain justices of the peace (for example, court employed justices of the peace) who are authorised for that purpose under the Act?
- 5-6** If yes to 5-5, who are the justices of the peace who should be authorised by the *Peace and Good Behaviour Act 1982* (Qld) to issue a summons or a warrant for a complaint made under the Act?
- 5-7** If no to 5-4, what kind of procedure should replace the making of a complaint to a justice of the peace?
- 5-8** Is it necessary or desirable for the application process to include a mechanism for assessing applications prior to hearing to identify applications (including cross-applications) that are unmeritorious or have little chance of success?
- 5-9** If yes to 5-8, should the *Peace and Good Behaviour Act 1982* (Qld) specify factors that must be taken into account in deciding whether to issue a summons or a warrant?
- 5-10** If yes to 5-9, what should those factors be?
- 5-11** Should the procedure for commencing a proceeding depend on:
- (a) the person making the application;
 - (b) the person against whom the order is sought - for example, where the application is made against a child, or a person with a disability;
 - (c) the nature of the allegations?
- 5-12** Should the Act provide for applications to be made by telephone or by other electronic means?
- 5-13** If yes to 5-12:
- (a) who should be able to make the application;
 - (b) to whom should the application be made;
 - (c) in what circumstances should such an application be able to be made?

Chapter 6

The role of mediation

WHAT IS MEDIATION?

6.1 Mediation is an informal method of attempting to resolve disputes without resort to court action. It is one of a wide range of processes, referred to as alternative dispute resolution, which may be utilised to resolve a dispute prior to determination by a court.²⁵⁹ It has been described as:²⁶⁰

... a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.

6.2 The mediator is a neutral third party and has no power to impose a decision on the parties.

6.3 There are a number of advantages in resolving disputes by mediation. For example, it is likely to be less expensive and less formal than a court proceeding.²⁶¹ Because participation is voluntary and the outcome is reached by negotiation, it is likely to result in agreement.²⁶² It may also be more likely that a solution that is agreed between the parties rather than imposed by a court will be kept, even though it is not legally binding. It also allows solutions to be reached that may be outside the scope of a court order. The non-adversarial nature of a mediation may be more appropriate in a situation where there is an ongoing relationship between the parties.²⁶³

Mediation ... is invariably less confrontational, is often simpler and thus cheaper and has the added benefit of being able to be decided by whatever means the parties to the mediation agree between them.

259 For example, see the range of procedures defined in National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) at 4-10.

260 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) at 9.

261 The Queensland Government has established Dispute Resolution Centres around the State so that the members of the community can access mediation services. Mediation through these Dispute Resolution Centres is free of charge in most cases: Department of Justice and Attorney-General, *All about mediation* (Factsheet no. 16) <<http://www.justice.qld.gov.au/mediation/about/factsheet16.htm>> accessed on 16 March 2005 and <<http://www.justice.qld.gov.au/mediation/home.htm>> accessed on 16 March 2005.

262 The Queensland Dispute Resolution Centre estimates that agreement is reached in between 80 and 90 per cent of mediations: <<http://www.justice.qld.gov.au/mediation/about/factsheet16.htm>> accessed on 16 March 2005.

263 <<http://www.mylawyer.com/glossary.htm>> accessed on 16 March 2005.

6.4 Even though true mediation is essentially voluntary, its advantages have led to its adoption in the litigation process as a sometimes compulsory step aimed at diverting disputes from the court system.²⁶⁴

MEDIATION UNDER THE *PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)*

6.5 The *Peace and Good Behaviour Act 1982* (Qld) provides that a justice of the peace to whom a complaint is made may, if the justice of the peace considers that the matter would be better resolved by mediation than by proceedings in the Magistrates Court, order the complainant to submit the matter to mediation under the *Dispute Resolution Centres Act 1990* (Qld).²⁶⁵ A referral to mediation may be made whether the basis of the complaint is a threat by the defendant to engage in certain conduct,²⁶⁶ or intentional conduct of the defendant towards the complainant.²⁶⁷ However, the power to refer the matter to mediation is dependent on the consent of the complainant.

6.6 If the justice of the peace orders the complainant to submit the matter to mediation, the complainant must, as soon as practicable, file with the nearest dispute resolution centre the complaint and an application for mediation in the approved form.²⁶⁸

OTHER DISPUTE RESOLUTION PROCESSES

6.7 There are other legislative provisions that incorporate alternative dispute resolution processes into the procedures in the Magistrates Courts.²⁶⁹ However, these provisions do not apply to matters under the *Peace and Good Behaviour Act 1982* (Qld).²⁷⁰

6.8 For example, parties to a damages or compensation suit filed in the Magistrates Court must generally participate in either mediation²⁷¹ or case

²⁶⁴ See for example *Supreme Court of Queensland Act 1991* (Qld) ss 102, 103.

²⁶⁵ *Peace and Good Behaviour Act 1982* (Qld) s 4(3). The *Peace and Good Behaviour Act 1982* (Qld) was recently amended by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66. The amendments, which commenced on 3 December 2004, extended the power of a justice of the peace to refer a complaint to mediation pursuant to s 4(3).

²⁶⁶ *Peace and Good Behaviour Act 1982* (Qld) s 4(1). See para 4.6 of this Discussion Paper.

²⁶⁷ *Peace and Good Behaviour Act 1982* (Qld) s 4(2). See para 4.10 of this Discussion Paper.

²⁶⁸ *Peace and Good Behaviour Regulation 1999* (Qld) s 6.

²⁶⁹ *Magistrates Courts Act 1921* (Qld) Part 5 - ADR Processes; *Uniform Civil Procedure Rules 1999* (Qld) Chapter 9 Part 4.

²⁷⁰ *Peace and Good Behaviour Act 1982* (Qld) s 8; *Magistrates Courts Act 1921* (Qld) s 4.

²⁷¹ Mediation is defined as "a process ... under which the parties use a mediator to help them resolve their disputes by negotiated agreement without adjudication": *Magistrates Courts Act 1921* (Qld) s 23.

appraisal²⁷² in relation to the claim before the court.²⁷³ The cost of these processes is borne by the parties to the action. Further, in some cases a registrar may conduct a directions conference with a view to early resolution of the matter without resort to adjudication of the matter.²⁷⁴

LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS

Australian Capital Territory

6.9 In the Australian Capital Territory, while there is no express reference to mediation, before an application for a protection order is heard, a preliminary conference may be conducted by the registrar of the court.²⁷⁵ A preliminary conference, like mediation, may assist parties to achieve a negotiated settlement. However, in contrast to mediation, a conference also enables the court to better manage the progress of an application.

6.10 The objects of a preliminary conference are, amongst other things,²⁷⁶ to find out whether the matter may be settled by consent before the hearing of the application.²⁷⁷ The preliminary conference must try to identify facts agreed on, issues not agreed on, and also any unusual or urgent factors that require special attention.²⁷⁸ Anything said or done by the parties at the preliminary conference is generally inadmissible as evidence at the hearing of the application.²⁷⁹

New South Wales

6.11 In New South Wales, an authorised justice²⁸⁰ to whom a complaint is made has a discretion, provided that the complaint was not made by a police officer, to refuse to issue a summons or warrant.²⁸¹ The discretion may be exercised if the authorised justice is satisfied of the existence of certain

272 Case appraisal is defined as “a process ... under which a case appraiser provisionally decides a dispute”: *Magistrates Courts Act 1921* (Qld) s 24(1).

273 Note, similar provisions apply in relation to the Supreme and District Courts of Queensland.

274 See *Magistrates Courts Act 1921* (Qld) s 16 and *Uniform Civil Procedure Rules 1999* (Qld) Chapter 13 Part 9 rr 523, 524.

275 *Protection Orders Act 2001* (ACT) s 18(1), (2). A preliminary conference need not be held if the application is for an emergency order, or the registrar is satisfied that the conference would not achieve its objects: *Protection Orders Regulation 2002* (ACT) s 7.

276 Other objects are to limit the issues to be decided at the hearing and to ensure that the parties are taking the necessary steps to allow the matter to be heard quickly: *Protection Orders Regulation 2002* (ACT) s 6(1).

277 *Protection Orders Regulation 2002* (ACT) s 6(1).

278 *Protection Orders Regulation 2002* (ACT) s 6(2).

279 *Protection Orders Regulation 2002* (ACT) s 9.

280 See para 5.16 of this Discussion Paper.

281 *Crimes Act 1900* (NSW) s 562AK(1).

circumstances.²⁸² Otherwise, in deciding whether or not to exercise the discretion, the authorised justice must take particular factors into account. Included in these factors are whether the parties have previously attempted to resolve the matter by mediation or other means,²⁸³ the availability and accessibility of mediation or other alternative dispute resolution services,²⁸⁴ and the willingness and capacity of each party to resolve the matter otherwise than through a complaint for an order.²⁸⁵

6.12 The New South Wales Law Reform Commission has recommended that the role of mediation in resolving a complaint for an order should be strengthened. In the view of that Commission, where the authorised justice is satisfied that the complaint may more appropriately be dealt with by mediation or another form of alternative dispute resolution, that should in itself be a circumstance warranting the exercise of the discretion to refuse to issue a summons or warrant.²⁸⁶ The New South Wales Commission favours the policy that other avenues of dispute resolution should be encouraged, except in cases of serious violence.²⁸⁷ It considers, however, that matters should not be referred to mediation where there is a history of, or allegations of, personal violence, or conduct amounting to serious harassment, or where there has been a previous failed attempt at mediation.²⁸⁸

South Australia

6.13 In South Australia, the court, in considering whether to dismiss a complaint made in certain circumstances by the complainant personally, must consider whether it might be appropriate and practicable for the parties to attempt to resolve the matter through mediation or by some other means.²⁸⁹

282 *Crimes Act 1900* (NSW) s 562AK(3).

283 *Crimes Act 1900* (NSW) s 562AK(5)(c).

284 *Crimes Act 1900* (NSW) s 562AK(5)(d).

285 *Crimes Act 1900* (NSW) s 562AK(5)(e).

286 New South Wales Law Reform Commission, Report, *Apprehended Violence Orders* (R 103, October 2003) Recommendation 16 at 107.

287 *Id* at para 2.73.

288 *Id* at para 5.51. See also Recommendation 17 at 115-116.

289 *Summary Procedure Act 1921* (SA) s 99CA(2)(c)(i).

Victoria

6.14 In Victoria, the Magistrates Court may, with the consent of the parties, refer a proceeding to mediation.²⁹⁰ The court may also refer a proceeding for a pre-hearing conference.²⁹¹

ISSUES FOR CONSIDERATION

6.15 A community legal service informed the Commission that enquiries to the service about peace and good behaviour orders most often arise in the contexts of neighbourhood disputes, or disputes between ex-flatmates or co-tenants or between co-workers or former co-workers.²⁹² Some of these disputes may be considered to involve trivial matters that do not merit the diversion of court resources.

6.16 The New South Wales Law Reform Commission noted:²⁹³

It has been suggested that the increasing popularity of [apprehended personal violence orders] as a way of dealing with friction between neighbours and colleagues has done a disservice to people who genuinely fear personal violence or abuse ...

6.17 That Commission referred to a 1999 survey of New South Wales Magistrates in which 71 per cent of Magistrates surveyed considered that apprehended personal violence orders were an ineffective way of dealing with personal violence or harassment, largely because of their belief that APVOs were increasingly being used unmeritoriously in response to “trivial” matters.²⁹⁴ The Commission accepted that, while most applications would be justified.²⁹⁵

... it would be fair to say that at least some matters may have been either at the trivial end of the spectrum, or may have been better dealt with through other means of dispute resolution.

6.18 The New South Wales Commission considered that diverting such cases away from the court system had the advantage of relieving the strain on court time and resources. It also expressed the view that the grant of an order

290 *Magistrates' Court Act 1989* (Vic) s 108. However, the Courts Legislation (Judicial Appointments and Other Amendments) Bill 2004 (Vic) cl 16 proposes to amend the *Magistrates' Court Act 1989* (Vic) s 108(1) to allow the court to refer a proceeding to mediation with or without the consent of the parties.

291 *Magistrates' Court Act 1989* (Vic) s 107.

292 Information provided by Caxton Legal Centre 23 August 2004.

293 New South Wales Law Reform Commission, Report, *Apprehended Violence Orders* (R 103, October 2003) at para 5.1.

294 *Ibid.*

295 *Id* at para 5.16. See note 262 of this Discussion Paper.

may not always be the best way of getting to the heart of and resolving disputes, particularly when the parties need to live or work in close proximity.²⁹⁶

6.19 The Chief Magistrate of Queensland also supported an increased role for mediation in resolving the kind of dispute covered by the *Peace and Good Behaviour Act 1982* (Qld), suggesting that, subject to the availability in the area of a government provided mediation service, a complainant should be unable to file a complaint without a certification that mediation had been attempted in good faith. The Chief Magistrate proposed as an alternative option that the complaint be able to be filed, and for a magistrate to then refer it to mediation before a hearing commences.²⁹⁷

6.20 However, mediation may not be appropriate in all cases. As the New South Wales Commission suggested, a complaint might involve a serious allegation of threatening or violent conduct. An attempt at mediation might be inappropriate in such a situation or in a situation where there is an imbalance in the relationship between the parties, perhaps because one of the parties is disadvantaged by age, disability or linguistic or cultural factors.

6.21 In some circumstances, a requirement to undertake mediation might make the process unnecessarily complex and stressful for applicants. Attendance at compulsory mediation would add an additional layer to the formality of the application process. It may also delay the determination of a matter in circumstances where the need for an order may be immediate.

6.22 A further factor to be taken into account is that true mediation relies on the willing participation of both parties. Under the terms of the *Peace and Good Behaviour Act 1982* (Qld), only the consent of the complainant is required for the matter to be referred to mediation. A community legal centre queried how a justice of the peace could be satisfied that a matter would be better resolved by mediation in the absence of the defendant.²⁹⁸

6.23 Even if compulsory attendance by applicants at mediation is not desirable, consideration should be given to whether it may be useful for the application process to include a mechanism to identify those applications that should be diverted from the court system to mediation.²⁹⁹ It may also be useful for courts to have a general power to refer applications to mediation at any time prior to final determination.

296 Id at para 5.17.

297 Information provided by the Chief Magistrate, Judge MP Irwin, 25 August 2004.

298 Information provided by Caxton Legal Centre 23 August 2004.

299 At present, a justice of the peace to whom a complaint is made may refer a matter to mediation if the justice of the peace considers that the matter would be better resolved by mediation than by court proceedings: *Peace and Good Behaviour Act 1982* (Qld) s 4(3). In this regard, the question of whether the dispute is appropriate for referral to mediation is relevant to the exercise of the discretion of the justice of the peace to issue a summons or warrant.

6.24 If mediation is to have a continued or increased role in resolving applications under the *Peace and Good Behaviour Act 1982* (Qld) consideration needs to be given to who should conduct the mediation. Currently, matters may be referred to the Dispute Resolution Centres of Queensland for mediation.³⁰⁰ The mediation is therefore conducted externally to the court.

6.25 There is also the question of cost. Any increase in the referral of peace and good behaviour applications to a government funded mediation service may have funding and resource implications for that service. Referral to a government provided mediation service may or may not be cost neutral to the parties, but in any case, such a service must be appropriately funded to manage the work. As noted earlier,³⁰¹ parties to a damages or compensation suit must bear the cost of alternative dispute resolution processes.

6.26 There may be other processes that could be utilised by the court to achieve early resolution of applications under the *Peace and Good Behaviour Act 1982* (Qld) and that may also enable the court to better manage the progress of those applications. For example, the adoption of a model similar to that which operates in the Australian Capital Territory, where a preliminary conference is generally held between the parties and the registrar of the court, may assist in resolving the matter prior to hearing or, alternatively, may enable the court to deal with preliminary issues and ensure parties are better prepared for hearing.

6.27 The introduction of compulsory mediation, or another alternative dispute resolution process, for all peace and good behaviour applications may mean that applications are managed without regard to whether or not such a process is appropriate and/or suitable in the circumstances of each case. It may be more desirable for the court to have a discretion to utilise a range of processes, including mediation and preliminary conferences, in appropriate cases.

6.28 Further, not all matters referred to a dispute resolution process will end in an agreed outcome between the parties. If a matter is not able to be resolved as a result of the parties' participation in a dispute resolution process, it may be that the matter should be referred to the court for hearing. Presently, any failure by the parties to reach an agreed outcome at mediation is not covered by the *Peace and Good Behaviour Act 1982* (Qld).

300 *Peace and Good Behaviour Act 1982* (Qld) s 4(3). The Dispute Resolution Centres of Queensland provide mediation services in a wide range of disputes, including fencing, pets, privacy, workplace disputes, noise and trees: Department of Justice and Attorney-General, *All about mediation* (Factsheet no 16) <<http://www.justice.qld.gov.au/mediation/about/factsheet16.htm>> accessed on 16 March 2005.

301 See para 6.8 of this Discussion Paper.

CALL FOR SUBMISSIONS

6.29 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the role of mediation in resolving disputes under the *Peace and Good Behaviour Act 1982* (Qld):

- 6-1 Is the present provision in the *Peace and Good Behaviour Act 1982* (Qld) relating to referral to mediation adequate or appropriate to promote the effective resolution of disputes?**
- 6-2 If no to 6-1, how could the present situation be improved?**
- 6-3 Should it be necessary for a complainant to demonstrate, in all cases, that mediation has been attempted prior to making an application?**
- 6-4 If no to 6-3, should there be a discretion to refer an application to mediation prior to hearing?**
- 6-5 If yes to 6-4, should there be legislative guidelines as to how the discretion should be exercised?**
- 6-6 If yes to 6-5, what should those guidelines be?**
- 6-7 Who should conduct the mediation?**
- 6-8 Should the parties pay for mediation?**
- 6-9 Should the court conduct preliminary conferences between the parties prior to the hearing of a matter?**
- 6-10 If yes to 6-9, should preliminary conferences be conducted in all cases?**
- 6-11 If no to 6-9, what cases should be exempt from preliminary conferences?**
- 6-12 How should the matter of the complaint be dealt with if it is not resolved by way of mediation or preliminary conference, that is, should the matter be referred to the court for hearing?**

Chapter 7

How an application is dealt with

INTRODUCTION

7.1 Once a justice of the peace has issued a summons or warrant on a complaint made under the *Peace and Good Behaviour Act 1982* (Qld), the complainant must file the complaint together with the required number of copies of the summons or warrant in the Magistrates Court.³⁰² A summons issued under the Act must be served on the defendant in accordance with the provisions of the *Justices Act 1886* (Qld), together with a copy of the complaint.³⁰³

7.2 After the defendant has been served with the summons or apprehended pursuant to the warrant, the matter proceeds to a hearing.

THE HEARING OF A COMPLAINT

The procedure at the hearing

7.3 The *Peace and Good Behaviour Act 1982* (Qld) provides that the court is to “hear and determine the matter of the complaint”.³⁰⁴ The procedure followed at the hearing is governed partly by the Act itself, and also by the relevant provisions of the *Justices Act 1886* (Qld), which are brought into operation by section 8 of the *Peace and Good Behaviour Act 1982* (Qld). Section 8 is to the effect that the provisions of and procedures under the *Justices Act 1886* (Qld) that are applicable to the summary prosecution of an offence apply to the hearing of a complaint “as if such complaint were a complaint in respect of such an offence.”³⁰⁵

7.4 If a defendant who has been served with a summons does not appear at the time and place appointed by the summons, the hearing may proceed in the defendant’s absence.³⁰⁶ However, if the defendant appears, either in response to the summons or by virtue of a warrant, and the complainant does not appear either in person or by a legal representative, the court is to dismiss

302 See para 5.8 and note 187 of this Discussion Paper.

303 *Justices Act 1886* (Qld) ss 54(1A), 56(1); *Peace and Good Behaviour Regulation 1999* (Qld) s 7.

304 *Peace and Good Behaviour Act 1982* (Qld) s 6(1).

305 *Peace and Good Behaviour Act 1982* (Qld) s 8.

306 *Peace and Good Behaviour Act 1982* (Qld) s 7(1)(b).

the complaint unless for some reason the court considers it proper to adjourn the hearing.³⁰⁷

7.5 Where the defendant appears, evidence including, but not limited to, evidence that the complaint “is made from malice or vexation only”, may be given by or on behalf of the defendant.³⁰⁸

7.6 The hearing of the complaint is held in open court, unless “the interests of public morality require that all or any persons should be excluded”.³⁰⁹ However, where a party giving evidence or another witness is a “special witness”,³¹⁰ the court may exclude persons and may make orders about the conditions under which the witness is to give evidence.³¹¹

The court’s decision

7.7 The court’s decision is to be made “upon a consideration of the evidence” given at the hearing.³¹²

7.8 Having heard the evidence, the court may either dismiss the complaint or, if it is satisfied that the matter of the complaint is substantiated, make an order requiring the defendant to keep the peace and be of good behaviour.³¹³

The standard of proof

7.9 The *Peace and Good Behaviour Act 1982* (Qld) does not directly address the question of the standard of proof needed to persuade the court to make an order.

7.10 On one view, the reference in the Act to the provisions of the *Justices Act 1886* (Qld) applicable in the prosecution of an offence could indicate that the criminal standard of proof should apply. This would mean that the court would have to be satisfied beyond a reasonable doubt that the grounds of complaint had been made out.

7.11 However, several factors have led the Queensland Court of Appeal to conclude that the procedure under the *Peace and Good Behaviour Act 1982*

307 *Justices Act 1886* (Qld) s 141.

308 *Peace and Good Behaviour Act 1982* (Qld) s 6(2). For an explanation of the historical reason for the inclusion of this provision, see *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45 per McPherson JA at 50-51.

309 *Justices Act 1886* (Qld) s 70(1), (2).

310 A “special witness” is a child under the age of 16 years, or a person who would, as a result of certain factors, be disadvantaged as a witness or would be likely to suffer severe emotional trauma: *Evidence Act 1977* (Qld) s 21A(1).

311 *Evidence Act 1977* (Qld) s 21A(2).

312 *Peace and Good Behaviour Act 1982* (Qld) s 6(3).

313 *Peace and Good Behaviour Act 1982* (Qld) s 6(3).

(Qld) was not intended to require proof beyond reasonable doubt.³¹⁴ For example, historically, a proceeding to bind a person over to keep the peace, from which the existing procedure is derived, was commenced and conducted in such a way that it could not have been regarded as criminal in character.³¹⁵ Nor is it necessary under the Act that the behaviour complained of amount to a criminal offence.³¹⁶ Further, there is a resemblance between a proceeding under the Act and a civil proceeding for an injunction restraining acts of a similar nature that would lead to an incongruous result if a higher standard of proof applied in one than in the other.³¹⁷

7.12 Nonetheless, in weighing the evidence, the court must take into consideration the gravity of the complainant's allegations and the extent to which a finding might adversely affect the defendant. The more serious the nature of the complaint, the higher the standard of proof that will be needed, even though it stops short of that required to secure a criminal conviction.³¹⁸

LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS

7.13 The legislation in some of the other Australian jurisdictions prescribes in far greater detail than the *Peace and Good Behaviour Act 1982* (Qld) the way in which an application for an order restraining certain types of behaviour should be dealt with.

Australian Capital Territory

Before the hearing

7.14 Before the application is heard, a preliminary conference is usually conducted by the registrar of the court.³¹⁹ The objects of a preliminary conference are to find out whether the matter may be settled by consent before the hearing of the application and, if not, to work out and limit the issues to be decided at the hearing and to ensure that the parties are taking the necessary steps to allow the application to be heard quickly.³²⁰ The preliminary

314 *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45 per McPherson JA and per Shepherdson J (Fitzgerald P not deciding).

315 Id per McPherson JA at 50.

316 Id per McPherson JA at 52 and per Shepherdson J at 55.

317 Id per McPherson JA at 52.

318 Id per Fitzgerald P at 49, per McPherson JA at 52 and per Shepherdson J at 55. See also *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Rejtek v McElroy* (1965) 112 CLR 517.

319 *Protection Orders Act 2001* (ACT) s 18(1), (2). A preliminary conference need not be held if the application is for an emergency order, or the registrar is satisfied that the conference would not achieve its objects: *Protection Orders Regulation 2002* (ACT) s 7.

320 *Protection Orders Regulation 2002* (ACT) s 6(1).

conference must try to identify facts agreed on, issues not agreed on and also any unusual or urgent factors that require special attention.³²¹

7.15 Anything said or done by the parties at the preliminary conference is generally inadmissible as evidence at the hearing of the application.³²²

Consent orders

7.16 The court may make a protection order with the consent of the parties to the proceeding.³²³ It is not necessary for the parties to have attended before the court, or for any of the grounds for making an order to have been made out, or for there to have been proof or admission of guilt.³²⁴

7.17 However, the court may not make a consent order of a kind that may not be made under the Act,³²⁵ or for a period longer than permitted by the Act.³²⁶

7.18 On an application for a consent order, if a party to the proceeding is a person with a legal disability who is not separately represented by someone else and it appears to the court that the person should have separate representation, the court is not to make a consent order.³²⁷

7.19 If either or both of the aggrieved person and the respondent are before the court when a consent order is made, before making the order the court must explain, in language likely to be understood by the aggrieved person or the respondent, certain things about the operation of the order.³²⁸

Interim orders

7.20 If the court is satisfied that it is necessary to ensure the safety of an aggrieved person until the application for a final order is decided, the court may make an interim order.³²⁹ The interim order has effect until it is revoked, or the

321 *Protection Orders Regulation 2002* (ACT) s 6(2).

322 *Protection Orders Regulation 2002* (ACT) s 9.

323 *Protection Orders Act 2001* (ACT) s 29(1).

324 *Protection Orders Act 2001* (ACT) s 29(2).

325 For a discussion of the kind of orders that can be made under the Act, see Chapter 8 of this Discussion Paper.

326 *Protection Orders Act 2001* (ACT) s 29(4).

327 *Protection Orders Act 2001* (ACT) s 30.

328 *Protection Orders Act 2001* (ACT) ss 24(3), 25(3).

329 *Protection Orders Act 2001* (ACT) s 49. Note, the Domestic Violence and Protection Orders Amendment Bill 2005 (ACT) cl 27 proposes amendments to s 49 of the *Protection Orders Act 2001* (ACT) which will extend the power to make an interim order to include orders to ensure the safety of the aggrieved person or the child of an aggrieved person, or to prevent substantial damage to the property of an aggrieved person or the child of an aggrieved person.

application for a final order is dismissed, or, if a final order is made, the order takes effect.³³⁰

Contested applications

7.21 Where the application is contested, the aggrieved person must satisfy the court on the balance of probabilities of the grounds for making the order.³³¹

7.22 If the court makes an order, and either or both of the aggrieved person and the respondent are before the court when the order is made, the court must explain, in language likely to be understood by the aggrieved person or the respondent, certain things about the operation of the order.³³²

New South Wales

7.23 The court may, if it considers it necessary or appropriate in the circumstances, make an interim apprehended personal violence order,³³³ whether or not the defendant is present at the proceedings or has been given notice of the proceedings.³³⁴ The evidence of the person seeking the order may be given by affidavit if the person is unable, for any good reason, to be present and the court is satisfied that the matter is urgent.³³⁵

7.24 If an interim order is made, the court must summon the defendant to appear at a further hearing of the matter as soon as practicable. At the further hearing, the court may, whether or not the defendant appears, revoke the interim order or confirm the interim order by making an apprehended personal violence order.³³⁶ An interim order that is confirmed by the court has effect until the apprehended personal violence order comes into operation.³³⁷ An interim order may also be made with the consent of the parties.³³⁸

7.25 If the complainant and the defendant agree, the court may make an apprehended personal violence order without being satisfied as to the grounds for making an order,³³⁹ and whether or not the defendant admits to any or all of

330 *Protection Orders Act 2001* (ACT) ss 53, 55.

331 *Protection Orders Act 2001* (ACT) s 19.

332 *Protection Orders Act 2001* (ACT) ss 24(2), 25(2).

333 *Crimes Act 1900* (NSW) s 562BB(1), (1A).

334 *Crimes Act 1900* (NSW) s 562BB(2).

335 *Crimes Act 1900* (NSW) s 562BB(3).

336 *Crimes Act 1900* (NSW) s 562BB(4).

337 *Crimes Act 1900* (NSW) s 562BB(5).

338 *Crimes Act 1900* (NSW) s 562BBA.

339 *Crimes Act 1900* (NSW) ss 562BA(1), 562BBA(2).

the particulars of the complaint.³⁴⁰ Where the parties agree to the making of the order, the court may conduct a hearing into the particulars of the complaint only in certain limited circumstances.³⁴¹

7.26 Where the hearing for an apprehended personal violence order is contested, the court may not make an order unless it is satisfied on the balance of probabilities that the grounds for making an order have been made out.³⁴²

7.27 The legislation contains a number of provisions for protecting a complainant or for assisting a complainant to give evidence.

7.28 For example, a proceeding in relation to the protection of a child under the age of 16 years is to be heard in closed court unless the court makes a direction to the contrary and, in such a situation, the court may order any person (other than a person directly interested in the proceeding) to leave the place where the hearing takes place during the examination of any witness.³⁴³ A child under the age of 16 years should not be required to give direct evidence about a matter unless the court is of the opinion that, in the absence of the child's evidence, there will be insufficient evidence about the matter.³⁴⁴

7.29 A complainant or a defendant who gives evidence is entitled to the presence of a support person,³⁴⁵ who may be with the person as an interpreter, for the purpose of assisting the person with any difficulty in giving evidence associated with a disability, or for the purpose of providing the person with other support.³⁴⁶

7.30 If the court makes an order, and if either the person to be protected by the order or the defendant is present when the order is made, the court must explain certain things about the operation of the order.³⁴⁷ The court must also cause a written explanation of the matters required to be explained to be given to the defendant and to the protected person.³⁴⁸ As far as is reasonably practicable, an explanation is to be given in a language that is likely to be readily understood by the person given the explanation.³⁴⁹

340 *Crimes Act 1900* (NSW) ss 562BA(2), 562BBA(2).

341 *Crimes Act 1900* (NSW) ss 562BA(3), 562BBA(2).

342 *Crimes Act 1900* (NSW) s 562AI(1).

343 *Crimes Act 1900* (NSW) s 562NA(1), (2).

344 *Crimes Act 1900* (NSW) s 562NA(3).

345 *Crimes Act 1900* (NSW) s 562ND(2). For who may act as a support person see s 562ND(3)(a).

346 *Crimes Act 1900* (NSW) s 562ND(3)(b).

347 *Crimes Act 1900* (NSW) s 562GC(1).

348 *Crimes Act 1900* (NSW) s 562GC(3).

349 *Crimes Act 1900* (NSW) s 562GC(4).

7.31 Where an application has been made by telephone,³⁵⁰ the authorised justice to whom the application is made may, if satisfied that there are reasonable grounds, make an interim order.³⁵¹ An interim telephone order contains standard terms stating that the defendant must not engage in particular conduct towards the person protected by the order.³⁵² The police officer making the telephone application may, if he or she has good reason to believe that the safety of the protected person is in imminent danger, request the imposition of specified additional prohibitions or restrictions on the behaviour of the person against whom the order is sought.³⁵³

7.32 The interim order is taken to be a complaint for an order, and the order is to contain a summons for the appearance of the defendant at the subsequent hearing of the complaint.³⁵⁴

Northern Territory

7.33 If a defendant does not appear in obedience to a summons, the court may issue a warrant and adjourn the hearing until the defendant is apprehended³⁵⁵ or, upon proof of service of the summons on the defendant, may proceed to hear and determine the complaint.³⁵⁶ It is not necessary for the complainant to give oral evidence at an ex parte hearing.³⁵⁷

7.34 If the defendant appears, either in obedience to a summons or by virtue of a warrant, but the complainant does not appear in person or by legal representation, the court must dismiss the complaint unless for some reason it thinks it proper to adjourn the proceeding.³⁵⁸

7.35 Where both parties appear before the court, the court is to proceed to hear and determine the matter of the complaint.³⁵⁹ If the defendant does not admit the truth of the complaint, the court proceeds to hear the evidence adduced by each of the parties³⁶⁰ and to either make an order or dismiss the

350 *Crimes Act 1900* (NSW) s 562H(1), (1A), (2).

351 *Crimes Act 1900* (NSW) s 562H(3).

352 *Crimes Act 1900* (NSW) s 562H(4).

353 *Crimes Act 1900* (NSW) s 562H(5).

354 *Crimes Act 1900* (NSW) s 562H(3), (5A).

355 *Justices Act* (NT) ss 99(1), 62(a).

356 *Justices Act* (NT) s 62(b).

357 *Justices Act* (NT) s 62AB(1).

358 *Justices Act* (NT) s 63(1).

359 *Justices Act* (NT) s 64.

360 *Justices Act* (NT) s 68(1). Generally, evidence is to be given on oath, subject to any particular rules with respect to the giving of evidence by Indigenous witnesses or children: *Justices Act* (NT) s 68(2).

complaint.³⁶¹ However, if the defendant admits the truth of the complaint, and does not show sufficient cause why an order should not be made against him or her, the court is to make an order accordingly.³⁶²

South Australia

7.36 The hearing of a complaint generally takes place in two stages - a preliminary hearing at which an interim order may be made, and a hearing for the confirmation of an interim order. There is also provision for hearing an application by telephone.

The preliminary hearing

7.37 At a preliminary hearing, an interim restraining order may be made in the absence of the defendant, and despite the fact that the defendant was not summoned to appear at the hearing of the complaint. However, if the court makes an order, it must summon the defendant to appear to show cause why the order should not be confirmed.³⁶³

7.38 If the complaint was made by a member of the police force, the interim order may be made on the basis of evidence received in the form of an affidavit.³⁶⁴ Otherwise, the complaint must be supported by oral evidence.³⁶⁵

7.39 An interim restraining order continues in force until the conclusion of the hearing to confirm the order.³⁶⁶

The confirmation hearing

7.40 If the defendant appears, either in response to the summons or by virtue of a warrant, and the complainant does not appear either in person or by a legal representative, the court is to dismiss the complaint unless for some reason the court considers it proper to adjourn the hearing.³⁶⁷

7.41 If a defendant who was required by summons to appear at the hearing of the complaint fails to appear in obedience to the summons, a restraining order may be made in the defendant's absence.³⁶⁸

361 *Justices Act (NT)* s 69.

362 *Justices Act (NT)* s 67(2).

363 *Summary Procedure Act 1921 (SA)* s 99C(2).

364 *Summary Procedure Act 1921 (SA)* s 99C(3), (3a).

365 *Summary Procedure Act 1921 (SA)* ss 99C(3a), 99CA(2)(a).

366 *Summary Procedure Act 1921 (SA)* s 99C(6)(a).

367 *Summary Procedure Act 1921 (SA)* s 63(1).

368 *Summary Procedure Act 1921 (SA)* s 99C(1).

7.42 At the hearing for the confirmation of the interim order, a person who at the previous hearing gave evidence in support of the complaint by affidavit must, if the defendant requires, appear personally to give oral evidence of the matters referred to in the affidavit.³⁶⁹ If the person does not appear personally to give evidence in response to such a requirement, the court may not rely on the evidence contained in the affidavit for the purpose of confirming the order.³⁷⁰

7.43 After the conclusion of the hearing to confirm the interim order, the interim order will no longer be effective unless the court confirms the order:³⁷¹

- on the failure of the defendant to appear at the hearing in obedience to the summons; or
- having considered any evidence given by or on behalf of the defendant; or
- with the consent of the defendant.

7.44 The court may confirm the order in an amended form.³⁷²

Telephone hearings

7.45 A court hearing a telephone application must question the complainant and any other available witnesses by telephone and satisfy itself, as far as practicable, that the complaint is genuine and that the case is of sufficient urgency to justify making a restraining order without requiring the personal attendance of the complainant.³⁷³

7.46 If the court is not satisfied that it is an appropriate case for making an order without requiring the personal attendance of the complainant, the court may adjourn the hearing of the complaint.³⁷⁴

7.47 If the court makes an order, there must be a subsequent hearing, to which the defendant must be summoned to show cause why the order should not be confirmed.³⁷⁵

7.48 A restraining order made on the hearing of a telephone application continues in force until the conclusion of the hearing to confirm the order.³⁷⁶

369 *Summary Procedure Act 1921* (SA) s 99C(3)(a).

370 *Summary Procedure Act 1921* (SA) s 99C(3)(b).

371 *Summary Procedure Act 1921* (SA) s 99C(6)(b).

372 *Summary Procedure Act 1921* (SA) s 99C(7).

373 *Summary Procedure Act 1921* (SA) s 99B(1)(b).

374 *Summary Procedure Act 1921* (SA) s 99B(1)(d).

375 *Summary Procedure Act 1921* (SA) s 99B(1)(c).

376 *Summary Procedure Act 1921* (SA) s 99B(5)(a).

However, the order will no longer be effective after the conclusion of the hearing unless the court confirms the order:³⁷⁷

- on the failure of the defendant to appear at the hearing in obedience to the summons; or
- having considered any evidence given by or on behalf of the defendant; or
- with the consent of the defendant.

7.49 The court may confirm the order in an amended form.³⁷⁸

Tasmania

7.50 Once an application for a restraint order has been filed in the court, the court may, if it considers there is sufficient cause to do so, make an interim order at any stage of the proceedings. It is not necessary for the court to be satisfied of the grounds for making an order. An interim order may also be varied at any stage of the proceedings.³⁷⁹

7.51 An interim order is to be expressed to operate for a period not exceeding 60 days.³⁸⁰ However, if the court considers that the period for which an interim order is expressed to have effect will expire before the conclusion of the proceedings, the interim order may be extended until a restraint order is served on the person against whom it is sought, or the proceedings are otherwise terminated.³⁸¹

7.52 An interim order may be made, varied or extended in the absence of the person against whom a restraint order is sought, whether or not a copy of the application for the restraint order has been served upon the person.³⁸²

7.53 The hearing of an application for a restraint order is generally to be held in open court,³⁸³ and the grounds of complaint must be proved on the balance of probabilities.³⁸⁴

377 *Summary Procedure Act 1921* (SA) s 99B(5)(b).

378 *Summary Procedure Act 1921* (SA) s 99B(5a).

379 *Justices Act 1959* (Tas) s 106D(1).

380 *Justices Act 1959* (Tas) s 106D(2).

381 *Justices Act 1959* (Tas) s 106D(3).

382 *Justices Act 1959* (Tas) s 106D(4).

383 *Justices Act 1959* (Tas) s 106E(1)(a)(i).

384 *Justices Act 1959* (Tas) s 106B(1).

7.54 However, the court may, with the consent of the parties, make an order in accordance with the terms consented to by the parties.³⁸⁵

7.55 Where the respondent does not appear, the court may, if satisfied of service of the application or of reasonable attempts to serve the application on the respondent, proceed in the absence of the respondent and either issue a warrant for the apprehension of the respondent or make the order sought or such other order as the court considers necessary.³⁸⁶

7.56 At the hearing of a contested application, the evidence of certain categories of witness may, unless the court considers that the evidence ought to be tested by cross-examination, be given in documentary form.³⁸⁷ Other witnesses may also give evidence by affidavit, and are not required to attend the hearing unless the court or a party to the proceeding requires.³⁸⁸ A party who requires a person who has made an affidavit to attend the hearing must give the person notice in writing and, if the person fails to attend, the court may refuse to allow the affidavit to be used, impose conditions on the use of the affidavit, or adjourn the proceeding until the person attends for cross-examination.³⁸⁹

7.57 If the application is made by telephone, a magistrate may make an interim restraint order if the magistrate considers there is sufficient cause to do so. It is not necessary for the magistrate on the hearing of a telephone application to be satisfied of the existence of any of the grounds for making an order.³⁹⁰ A copy of the interim order is to be served on the respondent personally as soon as practicable after it is made.³⁹¹ The order operates for a period, not exceeding five working days, specified in the order.³⁹² Before the order expires, a police officer must either make an application for a restraint order or report to the magistrate who made the interim telephone order the reasons why an application for a restraint order is not being made.³⁹³

385 *Justices Act 1959* (Tas) s 106E(3).

386 *Justices Act 1959* (Tas) s 106E(2).

387 *Justices Act 1959* (Tas) s 106E(1B), (1D).

388 *Justices (Restraint Orders) Rules 2003* (Tas) r 8(1), (2).

389 *Justices (Restraint Orders) Rules 2003* (Tas) r 8(3).

390 *Justices Act 1959* (Tas) s 106DA(4).

391 *Justices Act 1959* (Tas) s 106DA(12).

392 *Justices Act 1959* (Tas) s 106DA(13).

393 *Justices Act 1959* (Tas) s 106DA(14).

Victoria

7.58 On the hearing of an application under the *Magistrates' Court Act 1989* (Vic) for a peace and good behaviour order, the parties to the proceeding and any other witnesses may be called and examined and cross-examined as in any other proceeding before the court.³⁹⁴

7.59 All proceedings in the Magistrates Court are to be conducted in open court except where otherwise provided, although the court has a discretion, in certain circumstances, to close proceedings to the public.³⁹⁵

7.60 Where the basis of the complaint is behaviour that constitutes stalking, and the complaint is made under domestic violence legislation,³⁹⁶ the court may make an intervention order if it is satisfied on the balance of probabilities that the grounds for the complaint have been made out.³⁹⁷

7.61 Even though a copy of the complaint has not been served on the defendant, the court may make an interim intervention order to ensure the safety of the aggrieved person or to preserve the aggrieved person's property pending the hearing and determination of the complaint.³⁹⁸ The complaint must be supported by oral evidence unless it is made by electronic means.³⁹⁹ If the complainant is a person other than the aggrieved person,⁴⁰⁰ the court may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary.⁴⁰¹

7.62 An interim intervention order made in the absence of the defendant operates only until the time specified in the order or the further order of the court.⁴⁰²

394 *Magistrates' Court Act 1989* (Vic) s 126A(3).

395 *Magistrates' Court Act 1989* (Vic) ss 125(1), 126.

396 A complaint for an intervention order to restrain stalking behaviour may be made under the domestic violence legislation even though there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

397 *Crimes Act 1958* (Vic) s 21A(5).

398 *Crimes (Family Violence) Act 1987* (Vic) s 8(1).

399 *Crimes (Family Violence) Act 1987* (Vic) s 8(2).

400 For who can make a complaint see para 3.22 of this Discussion Paper.

401 *Crimes (Family Violence) Act 1987* (Vic) s 13A(2)(b).

402 *Crimes (Family Violence) Act 1987* (Vic) s 8(3).

7.63 A court that hears a complaint made by electronic means is not bound by the rules of evidence.⁴⁰³ On a complaint made by telephone, the court may, if practicable, hear the defendant or the aggrieved person or both.⁴⁰⁴

7.64 If the parties to a proceeding consent to the making of an intervention order, the court may make the order without being satisfied as to the grounds for making the order and whether or not the defendant admits to any or all of the particulars in the complaint.⁴⁰⁵ However, before making a consent order, the court may conduct a hearing into the particulars of the complaint if it is of the opinion that the interests of justice require it to do so.⁴⁰⁶

7.65 If a summons has been served on the defendant and the defendant fails to appear for the hearing, the court may proceed to hear and determine the matter in the defendant's absence, or may adjourn the matter and issue a warrant to arrest the defendant to bring him or her before the court if it is satisfied it is appropriate to do so.⁴⁰⁷

7.66 Before making an intervention order, the court must, if the defendant is before the court, explain certain things about the order to the defendant.⁴⁰⁸

Western Australia

7.67 The procedure for hearing an application for a restraining order depends on whether the order sought is a violence restraining order or a misconduct restraining order.

Violence restraining order

7.68 Where an applicant for a violence restraining order has elected to have a preliminary hearing in the absence of the respondent, and a hearing has been fixed for that purpose,⁴⁰⁹ the court may accept affidavits of evidence in support of matters alleged in the application and may determine the application on that evidence.⁴¹⁰ If the applicant has filed an affidavit, the court is to hear the matter even if the applicant does not attend.⁴¹¹ At the hearing, the court may dismiss

403 *Crimes (Family Violence) Act 1987* (Vic) s 8(6).

404 *Crimes (Family Violence) Act 1987* (Vic) s 8(7).

405 *Crimes (Family Violence) Act 1987* (Vic) s 14(1).

406 *Crimes (Family Violence) Act 1987* (Vic) s 14(2).

407 *Crimes (Family Violence) Act 1987* (Vic) s 12.

408 *Crimes (Family Violence) Act 1987* (Vic) s 15.

409 *Restraining Orders Act 1997* (WA) s 26(2).

410 *Restraining Orders Act 1997* (WA) s 28(1).

411 *Restraining Orders Act 1997* (WA) s 27(3). However, if an applicant does not attend the hearing and has not filed an affidavit, the court, if satisfied that the applicant was notified of the hearing, must dismiss the application, or otherwise adjourn the hearing: *Restraining Orders Act 1997* (WA) s 27(2).

the application, discontinue the application at the request of the applicant, make a violence restraining order, or adjourn the matter to a further hearing (a mention hearing) to which the respondent is to be summoned.⁴¹²

7.69 An interim order made at a preliminary hearing held in the absence of the respondent is to be served on the respondent,⁴¹³ who must endorse a copy of the order and return it to the court.⁴¹⁴ If a respondent indicates on the endorsed copy that he or she does not object to the interim order becoming final, or fails to return the endorsed copy to the court, the interim order becomes a final order with the same terms as the interim order.⁴¹⁵ However, if the respondent objects to the interim order becoming final, the matter must proceed to a hearing for a final order.⁴¹⁶

7.70 In the case of a telephone application for a violence restraining order, the hearing is to be conducted in the absence of the respondent.⁴¹⁷ However, if the authorised magistrate hearing the application considers it necessary to do so, and it will not unreasonably delay the hearing, the authorised magistrate may communicate with, in addition to the applicant, the respondent and any other person.⁴¹⁸

7.71 An authorised magistrate hearing a telephone application may dismiss the application, or make a violence restraining order, or adjourn the matter to a further hearing (a mention hearing) to which the respondent is to be summoned.⁴¹⁹

7.72 At a mention hearing, if the applicant does not attend, the court may dismiss the application or adjourn the mention hearing.⁴²⁰ If the respondent does not attend, the court may adjourn the mention hearing or proceed to hear the matter in the respondent's absence.⁴²¹ At a hearing held in the absence of the respondent, the court may adjourn the mention hearing, order a further hearing to which the respondent is to be summoned, dismiss the application, or make a restraining order.⁴²²

412 *Restraining Orders Act 1997 (WA)* s 29(1), (2).

413 *Restraining Orders Act 1997 (WA)* s 30.

414 *Restraining Orders Act 1997 (WA)* s 31.

415 *Restraining Orders Act 1997 (WA)* s 32(1), (2).

416 *Restraining Orders Act 1997 (WA)* s 33(1).

417 *Restraining Orders Act 1997 (WA)* s 21(2).

418 *Restraining Orders Act 1997 (WA)* s 21(3).

419 *Restraining Orders Act 1997 (WA)* s 23(1), (2).

420 *Restraining Orders Act 1997 (WA)* s 40(1).

421 *Restraining Orders Act 1997 (WA)* s 40(2).

422 *Restraining Orders Act 1997 (WA)* s 40(3).

7.73 If both parties are in attendance, and the respondent consents to a final order being made, the court may make the order by consent without being satisfied that there are grounds for making the order.⁴²³ A consent order is not an admission by the respondent of any or all of the matters alleged in the application.⁴²⁴ However, if the respondent does not consent to the making of a final order, the court must order a further hearing to which the respondent is to be summoned.⁴²⁵

7.74 At a hearing for a final order, if the applicant does not attend, the court may either dismiss the application or adjourn the hearing.⁴²⁶ If the respondent does not attend, the court may adjourn the hearing or hear the matter in the absence of the respondent.⁴²⁷

7.75 If the respondent does not attend a final order hearing and an interim order is in force in respect of the matter, the court is to make a final order in the same terms as the interim order unless any new ground or matter is raised by the applicant.⁴²⁸

7.76 At a hearing held in the absence of the respondent, the court may receive as evidence any record of evidence given (including any affidavit filed) at a prior hearing in relation to the matter unless the person who gave the evidence is available to be cross-examined on that evidence.⁴²⁹

Misconduct restraining order

7.77 If an applicant makes an application for a misconduct restraining order, the court must arrange a hearing to which the respondent must be summoned.⁴³⁰

7.78 A hearing for a misconduct restraining order cannot be held in the absence of the respondent. If the respondent does not attend, the hearing is to be adjourned.⁴³¹

423 *Restraining Orders Act 1997 (WA)* s 41(1).

424 *Restraining Orders Act 1997 (WA)* s 41(2).

425 *Restraining Orders Act 1997 (WA)* s 41(4).

426 *Restraining Orders Act 1997 (WA)* s 42(1).

427 *Restraining Orders Act 1997 (WA)* s 42(2).

428 *Restraining Orders Act 1997 (WA)* s 42(3).

429 *Restraining Orders Act 1997 (WA)* s 42(4).

430 *Restraining Orders Act 1997 (WA)* s 39.

431 *Restraining Orders Act 1997 (WA)* s 42(2)(b).

ISSUES FOR CONSIDERATION

7.79 The *Peace and Good Behaviour Act 1982* (Qld) does not deal with a number of issues covered by the legislation in other jurisdictions.

Interim orders

7.80 In the majority of the other jurisdictions, there is provision for the court to make an interim order pending the hearing and determination of the application for a restraint order. Generally, an interim order can be made in the absence of the person against whom the order is sought and it is not necessary for the court to be satisfied of the grounds for making an order.

7.81 The lack of an equivalent provision in the Queensland legislation means that the court is powerless to protect a person who makes a complaint before the complaint is finally disposed of by the making of an order.

7.82 Temporary protection orders are available under Queensland domestic violence legislation.⁴³²

Standard of proof

7.83 There is no specific reference in the Act to the standard of proof required to support a complaint made under the Act. This omission has led to some uncertainty.

7.84 The Court of Appeal has held that it is not necessary for a complaint to be proved to the criminal standard of beyond a reasonable doubt.⁴³³ As a result, the civil standard of the balance of probabilities applies, taking into account the seriousness of the allegations made against the defendant and of the potential harm to the defendant if an order is made.⁴³⁴

7.85 The Court of Appeal decision is consistent with the legislation in other jurisdictions.

Consent orders

7.86 Under the Queensland Act, an order can be made only after a consideration of evidence in support of the complaint. There is no provision for the defendant to agree to the making of an order without the need for proof of the grounds for complaint. Consequently, even if the defendant consents to the making of a peace and good behaviour order, the court cannot make an order

⁴³² *Domestic and Family Violence Protection Act 1989* (Qld) s 39A.

⁴³³ *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45. This position is also consistent with the situation under Queensland domestic violence legislation, which provides that, if a court is to be satisfied of a matter, it need be satisfied only on the balance of probabilities: *Domestic and Family Violence Protection Act 1989* (Qld) s 9.

⁴³⁴ See para 7.12 of this Discussion Paper.

unless the complainant gives evidence and the court considers that the evidence meets the required standard of proof.

7.87 In contrast, the legislation in most of the other Australian jurisdictions allows the court to make an order with the agreement of the parties. In South Australia, an order can be made by consent only after the complainant's evidence has been considered at a preliminary hearing and an interim order made. In the Australian Capital Territory, New South Wales, Tasmania, Victoria and Western Australia, it is not necessary for the grounds of the complaint to have been made out, or for the person against whom the order is sought to admit to the alleged conduct. In New South Wales and Victoria, however, there is provision for the court to enquire into the particulars of the complaint if the court is of the opinion that the interests of justice require it to conduct a hearing.

7.88 In the Australian Capital Territory, there are restrictions on the court's ability to make a consent order if one of the parties is under a legal disability.

7.89 There is some difference between the jurisdictions as to the terms that can be included in a consent order. In Tasmania, the court may make an order in accordance with the terms consented to by the parties. In the Australian Capital Territory, however, the court is limited to an order of a kind that could be made under the Act and for a period that is no longer than permitted by the Act.

7.90 In Queensland, a court may make a domestic violence protection order by consent, provided that the order includes only matters that may be dealt with under the domestic violence legislation.⁴³⁵

The way evidence is given

7.91 The *Peace and Good Behaviour Act 1982* (Qld) does not specify how evidence is to be given at a hearing of a complaint for an order under the Act.

7.92 Generally, it is necessary for evidence in a proceeding to be given orally by a witness. In the absence of any provision to the contrary in the *Peace and Good Behaviour Act 1982* (Qld), evidence in support of a complaint for a peace and good behaviour order would therefore ordinarily have to be given by the witness in person.⁴³⁶

7.93 In some jurisdictions, the legislation provides for evidence in support of an application to be given by affidavit, particularly if the person against whom the order is sought is not present at the hearing.

7.94 There are provisions in New South Wales that are intended to protect the person seeking the order while he or she is giving evidence, or to assist the

⁴³⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 33(1), (2).

⁴³⁶ But see, for example, ss 92(2) and 93A of the *Evidence Act 1977* (Qld), which permit the admission of documentary evidence in certain circumstances.

person to give evidence. In certain circumstances, evidence may be given in a closed court. There are no equivalent provisions in the *Peace and Good Behaviour Act 1982* (Qld). However, the *Evidence Act 1977* (Qld) contains detailed provisions relating to the giving of evidence by vulnerable witnesses.

7.95 In Victoria, the legislation provides that, in certain circumstances, the court, in hearing an application, need not be bound by the rules of evidence.

Orders made by electronic means

7.96 Several jurisdictions provide for an order to be made by telephone or by other electronic means. The grounds on which such an order may be made vary between jurisdictions as do the mechanisms for confirming the order.

7.97 Under Queensland domestic violence legislation, a magistrate to whom an application is made by telephone or other electronic means may make a temporary order if it appears to the magistrate that, because of distance, time or other circumstance of the case, it is not practicable for an application to be made to the court and to be heard and decided quickly.⁴³⁷ However, the *Peace and Good Behaviour Act 1982* (Qld) does not make provision for an order to be made by telephone or other electronic means.

CALL FOR SUBMISSIONS

7.98 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the way a complaint for an order under the *Peace and Good Behaviour Act 1982* (Qld) is dealt with:

Interim orders

7-1 Should the *Peace and Good Behaviour Act 1982* (Qld) provide for interim orders to protect a person until the complaint is determined?

7-2 If yes to 7-1, what should be the basis of a grant of an interim order?

Standard of proof

7-3 Should the *Peace and Good Behaviour Act 1982* (Qld) specify the standard of proof that should apply to the hearing of a complaint under the Act?

437

Domestic and Family Violence Protection Act 1989 (Qld) s 39G(1).

7-4 If yes to 7-3, should proof be required to the civil standard of the balance of probabilities or to the higher criminal standard of beyond a reasonable doubt?

Consent orders

7-5 Should the *Peace and Good Behaviour Act 1982* (Qld) provide for the making of consent orders?

7-6 If yes to 7-5:

- (a) should it be necessary for the grounds of complaint to be made out;
- (b) should it be necessary for the person against whom the order is sought to admit to some or all of the alleged behaviour;
- (c) should the court be able to enquire into the particulars of the complaint and, if so, in what circumstances?

7-7 If yes to 7-5, should there be any restrictions and, if so, what, on the court's ability to make a consent order?

The way evidence is given

7-8 Should it be possible for evidence at the hearing of a complaint under the *Peace and Good Behaviour Act 1982* (Qld) to be made by affidavit and, if so, in what circumstances?

7-9 Should the *Peace and Good Behaviour Act 1982* (Qld) include provisions to protect a person who is giving evidence or to assist the person to give evidence?

7-10 If yes to 7-9, what protections should be included and when should they apply?

7-11 Should the *Peace and Good Behaviour Act 1982* (Qld) provide that the court may be closed for all or part of the hearing of an application?

7-12 Should the *Peace and Good Behaviour Act 1982* (Qld) provide that the court, in hearing an application, need not be bound by the rules of evidence?

Orders made by electronic means

7-13 Should the *Peace and Good Behaviour Act 1982* (Qld) provide for an order to be made by telephone or other electronic means?

7-14 If yes to 7-13, should the grounds for the making of an order have to be proved?

7-15 If no to 7-14, in what circumstances should an order be able to be made?

7-16 If yes to 7-13, should the order have to be confirmed at a subsequent hearing?

Chapter 8

The terms of the order

INTRODUCTION

8.1 In considering whether the *Peace and Good Behaviour Act 1982* (Qld) provides an “effective mechanism for protection of the community from breaches of the peace”, one of the issues to be taken into account is the nature of the terms that the court is able to include when it makes an order.

8.2 The effectiveness of an order may depend on the extent to which it is possible to prevent the behaviour giving rise to the complaint by imposing conditions on the perpetrator of the conduct in relation to the victim or the victim’s property.

THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)

8.3 The *Peace and Good Behaviour Act 1982* (Qld) does not specify any particular limitations or restrictions that a court may include in the order.

8.4 The Act merely provides that the court may order “that the defendant shall keep the peace and be of good behaviour for such time, specified in the order, as the Court thinks fit,”⁴³⁸ and that the order may contain “such other stipulations or conditions” as the court considers appropriate.⁴³⁹

LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS

8.5 While the legislation in some Australian jurisdictions is expressed in general terms similar to the provisions of the *Peace and Good Behaviour Act 1982* (Qld), in others it provides more detailed guidance to the court in fashioning the terms of an order.

Australian Capital Territory

8.6 The *Protection Orders Act 2001* (ACT) grants the court a range of powers to restrict the behaviour of a person who is the subject of an application for a protection order.

438 *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

439 *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

8.7 Where the court makes an interim order during the course of a proceeding,⁴⁴⁰ the court may prohibit the respondent from being on premises where the aggrieved person lives or works.⁴⁴¹ Additional restrictions may be imposed only if the court is satisfied that it is necessary to do so to ensure the safety of the aggrieved person⁴⁴² or, in the case of a workplace order, an employee.⁴⁴³

8.8 If the person against whom an interim personal protection order is made is the holder of a firearms licence, the order will generally have the effect of suspending the licence for the duration of the order.⁴⁴⁴

8.9 In making a final personal protection order (including a workplace order), the court has a broad power to impose the conditions or prohibitions it considers necessary or desirable in the circumstances of a particular application.⁴⁴⁵ In addition, the legislation specifies certain conduct that the court may prohibit and identifies conduct that may be made subject to particular conditions.

8.10 As part of a final personal protection order other than a workplace order, the court may:⁴⁴⁶

- prohibit the respondent from being on premises where the aggrieved person lives;
- prohibit the respondent from being on premises where the aggrieved person works;
- prohibit the respondent from being on premises where the aggrieved person is likely to be;
- prohibit the respondent from being in a particular place;

440 *Protection Orders Act 2001* (ACT) s 48.

441 *Protection Orders Act 2001* (ACT) s 51(1). However, if the respondent is a child, the interim order may prohibit the child from being on premises where the child normally receives care (including education) or protection only if the court is satisfied that adequate alternative arrangements have been made for the child's care (including education) and safety: *Protection Orders Act 2001* (ACT) s 51(2).

442 *Protection Orders Act 2001* (ACT) s 51(3).

443 *Protection Orders Act 2001* (ACT) s 51(4). In relation to a workplace order, the "aggrieved person" is the employer of the person against whom the behaviour is directed: *Protection Orders Act 2001* (ACT) Dictionary (definition of "aggrieved person"). See para 3.9-3.10 of this Discussion Paper.

Note, the *Domestic Violence and Protection Orders Amendment Bill 2005* (ACT) cl 24 proposes an amendment to the *Protection Orders Act 2001* (ACT) which broadens the definition of "aggrieved person" for workplace orders.

444 *Protection Orders Act 2001* (ACT) s 57(1), (2). But see s 57(3).

445 *Protection Orders Act 2001* (ACT) ss 42(1), 47(1).

446 *Protection Orders Act 2001* (ACT) s 42(2), (3).

- prohibit the respondent from being within a particular distance from the aggrieved person;
- prohibit the respondent from contacting, harassing, threatening or intimidating the aggrieved person;
- prohibit the respondent from damaging the aggrieved person's property;
- prohibit the respondent from taking possession of, or require the return of, particular personal property of the aggrieved person;
- prohibit the respondent from doing any of the above in relation to a child of the aggrieved person;
- prohibit the respondent from causing another person to do any of the above;
- state the conditions on which the respondent may:
 - be on particular premises;
 - be in a particular place; or
 - approach or contact a particular person.

8.11 Similarly, a final workplace order may:⁴⁴⁷

- prohibit the respondent from entering the workplace;
- prohibit the respondent from being within a particular distance from the workplace;
- prohibit the respondent from contacting, harassing, threatening or intimidating an employee at the workplace;
- prohibit the respondent from damaging property in the workplace;
- prohibit the respondent from causing another person to do any of the above;
- state the conditions on which the respondent may enter or approach the workplace, or approach or contact an employee.

447

Protection Orders Act 2001 (ACT) s 47(2).

8.12 In addition, a final personal protection order (including a workplace order) will generally have the effect of cancelling any firearms licence held by the respondent.⁴⁴⁸

8.13 If a personal protection order or a workplace order is made with the consent of the parties, the consent order may contain a condition or a prohibition that could have been included if the application had been contested. However, in the case of a consent order it is not necessary for the court to consider whether the condition or prohibition is necessary or desirable.⁴⁴⁹

New South Wales

8.14 Unless the court makes an order to the contrary, an apprehended violence order is taken to specify that the defendant is prohibited from engaging in conduct that intimidates the protected person or a person with whom he or she has a domestic relationship, and from stalking the protected person.⁴⁵⁰

8.15 In making an apprehended personal violence order, the court also has a general power to impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court.⁴⁵¹

8.16 In addition, the court may:⁴⁵²

- prohibit or restrict approaches by the defendant to the protected person;
- prohibit or restrict access by the defendant:
 - to any premises occupied by the protected person from time to time or to any specified premises occupied by the protected person;
 - to any place where the protected person works from time to time or to any specified place of work of the protected person;
 - to any specified premises or place frequented by the protected person;

whether or not the defendant has a legal or equitable interest in the premises or place;

448 *Protection Orders Act 2001* (ACT) s 38(1), (2). But see s 38(3).

449 *Protection Orders Act 2001* (ACT) ss 42(4), 47(3).

450 *Crimes Act 1900* (NSW) s 562BC.

451 *Crimes Act 1900* (NSW) s 562AI(4).

452 *Crimes Act 1900* (NSW) s 562D(1).

- prohibit or restrict the possession of all or any specified firearms by the defendant;
- prohibit or restrict specified behaviour by the defendant that might affect the protected person.

Northern Territory

8.17 There is no provision in the legislation for the imposition of particular conditions or restrictions.⁴⁵³

South Australia

8.18 The court may impose such restraints on the defendant as are necessary or desirable to prevent the defendant acting in the apprehended manner.⁴⁵⁴

8.19 In particular, the order may restrain the defendant from entering premises, or limit the defendant's access to premises.⁴⁵⁵

8.20 If the defendant has possession of a weapon or article (other than a firearm) that has been used, or that there is some reason to believe might be used, by the defendant to threaten or injure a person or to damage property, the court may order the confiscation and disposal of the weapon or article.⁴⁵⁶ However, any weapon or article confiscated under a restraining order that is subject to confirmation must be returned to the defendant if the order is not confirmed.⁴⁵⁷

8.21 A restraining order must, if the defendant has possession of a firearm, include an order that the firearm be confiscated and disposed of or dealt with as directed by the court.⁴⁵⁸ If the defendant has a licence or permit to be in possession of a firearm, the court must order that the licence or permit be cancelled.⁴⁵⁹ A defendant's future ability to hold or obtain a licence or permit is to be restricted, and a defendant is to be prohibited from possessing a firearm in the course of employment.⁴⁶⁰ There are also provisions relating to the return of

453 *Justices Act (NT) s 99.*

454 *Summary Procedure Act 1921 (SA) s 99(3).*

455 *Summary Procedure Act 1921 (SA) s 99(4).*

456 *Summary Procedure Act 1921 (SA) s 99(3a)(a).*

457 *Summary Procedure Act 1921 (SA) s 99(3b).*

458 *Summary Procedure Act 1921 (SA) s 99D(1)(a).*

459 *Summary Procedure Act 1921 (SA) s 99D(1)(b).*

460 *Summary Procedure Act 1921 (SA) s 99D(1)(c), (d).*

a firearm if an order subject to confirmation is not confirmed, and to the lapse of orders affecting the defendant's ability to hold or obtain a licence or permit.⁴⁶¹

Tasmania

8.22 The court may make an order imposing such restraints upon the person against whom the order is made as are necessary or desirable to prevent the person acting in a manner that constitutes grounds for an order.⁴⁶²

8.23 More specifically, a restraint order may include one or more of the following:⁴⁶³

- an order directing the person against whom the order is made to vacate premises, restraining the person from entering premises or limiting the person's access to premises;
- an order prohibiting or restricting the possession by the person against whom the order is made of all or any firearms specified in the order or directing the forfeiture or disposal of any firearms in the person's possession;
- an order prohibiting the person against whom the order is made from stalking the person for whose benefit the order is made;
- an order prohibiting the person against whom the order is made from causing another person to engage in any conduct restrained by the order.

8.24 In determining the nature of the orders to be included in a restraint order, the court must consider the protection and welfare of the person for whose benefit the order is sought to be of paramount importance.⁴⁶⁴

Victoria

8.25 There is no provision for the inclusion of conditions in a peace and good behaviour order.⁴⁶⁵

461 *Summary Procedure Act 1921* (SA) s 99D(2).

462 *Justices Act 1959* (Tas) s 106B(1).

463 *Justices Act 1959* (Tas) s 106B(4B).

464 *Justices Act 1959* (Tas) s 106B(4A).

465 *Magistrates' Court Act 1989* (Vic) s 126A.

8.26 However, if the behaviour complained of consists of stalking, and an order is made under domestic violence legislation,⁴⁶⁶ the court may impose any restrictions or prohibitions on the person against whom the order is made that appear necessary or desirable in the circumstances.⁴⁶⁷

8.27 In addition, an order may do all or any of the following:⁴⁶⁸

- prohibit or restrict approaches by the defendant to the aggrieved person, including prohibiting the defendant from approaching within a specified distance from the aggrieved person;
- prohibit or restrict access by the defendant to premises in which the aggrieved person lives or works, or that the aggrieved person frequents;
- prohibit or restrict the defendant from being in a locality specified in the order;
- prohibit the defendant from contacting, harassing, threatening, or intimidating the aggrieved person;
- prohibit the defendant from damaging property of the aggrieved person;
- prohibit the defendant from causing another person to engage in conduct restrained by the court;
- direct the defendant to participate in prescribed counselling;
- revoke any licence, permit or other authority to possess, carry or use firearms.

Western Australia

Violence restraining order

8.28 A violence restraining order may impose such restraints as the court considers appropriate to prevent the respondent committing an act of abuse⁴⁶⁹ against the person seeking to be protected, or if the person seeking to be protected is a child, exposing that child to an act of abuse committed by the respondent, or to prevent the respondent behaving in a manner that could

466 A complaint for an intervention order to restrain stalking behaviour may be made under the domestic violence legislation even though there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

467 *Crimes (Family Violence) Act 1987* (Vic) s 4(2).

468 *Crimes (Family Violence) Act 1987* (Vic) s 5(1).

469 See para 4.54 and note 156 of this Discussion Paper.

reasonably be expected to cause the applicant to fear that the respondent will commit such an act.⁴⁷⁰

8.29 The respondent may be restrained, absolutely or on such terms as the court considers appropriate, from doing all or any of the following:⁴⁷¹

- being on or near premises where the person seeking to be protected lives or works;
- being on or near specified premises or in a specified locality or place;
- approaching within a specified distance of the person seeking to be protected;
- communicating, or attempting to communicate, (by whatever means) with the person seeking to be protected;
- preventing the person seeking to be protected from obtaining and using personal property reasonably needed by the person;
- causing or allowing another person to engage in any conduct referred to above.

8.30 Unless the court orders otherwise, every violence restraining order includes a restraint prohibiting the respondent from being in possession of a firearm or a firearms licence and from obtaining a firearms licence.⁴⁷² The respondent must give up possession of all firearms and firearms licences held by the respondent.⁴⁷³ However, the court may allow the respondent to have possession of a firearm and, if necessary, a firearms licence relating to it, if the court is satisfied that:⁴⁷⁴

- the respondent cannot carry on the respondent's usual occupation unless the respondent is permitted to have possession of a firearm;
- the behaviour in relation to which the order was sought did not involve the use, or threatened use, of a firearm; and
- the safety of any person, or their perception of their safety, is not likely to be adversely affected by the respondent's possession of a firearm.

470 *Restraining Orders Act 1997 (WA)* s 13(1).

471 *Restraining Orders Act 1997 (WA)* s 13(2), (3).

472 *Restraining Orders Act 1997 (WA)* s 14(1).

473 *Restraining Orders Act 1997 (WA)* s 14(2).

474 *Restraining Orders Act 1997 (WA)* s 14(5).

8.31 If the court permits the respondent to have possession of a firearm, the court may impose such conditions as it thinks fit on the possession.⁴⁷⁵ The court must also make the possession subject to such further conditions as the applicant or the person seeking to be protected requests, unless the court considers the requested conditions to be unreasonable.⁴⁷⁶

Misconduct restraining order

8.32 A misconduct restraining order may impose such restraints as the court considers appropriate to prevent the respondent:⁴⁷⁷

- behaving in a manner that could reasonably be expected to be intimidating or offensive to the person seeking to be protected and that would, in fact, intimidate or offend the person seeking to be protected;
- causing damage to property owned by or in the possession of the person seeking to be protected; or
- behaving in a manner that is, or is likely to lead to, a breach of the peace.

8.33 For the purposes of preventing a breach of the peace, the restrictions that the court may impose on the respondent include:⁴⁷⁸

- being on or near specified premises or in a specified locality or place;
- engaging in behaviour of a specified kind, either at all or in a specified place, at a specified time or in a specified manner;
- being in possession of a firearm or firearms licence, or applying for a firearms licence.

8.34 In relation to the other identified kinds of behaviour, the conditions that the court may impose include restraining the respondent from doing all or any of the following:⁴⁷⁹

- being on or near premises where the person seeking to be protected lives or works;
- being on or near specified premises or in a specified premises or in a specified locality or place;

475 *Restraining Orders Act 1997 (WA)* s 14(5).

476 *Restraining Orders Act 1997 (WA)* s 14(6).

477 *Restraining Orders Act 1997 (WA)* s 36(1).

478 *Restraining Orders Act 1997 (WA)* s 36(3).

479 *Restraining Orders Act 1997 (WA)* s 36(2).

- approaching within a certain distance of the person seeking to be protected;
- communicating, or attempting to communicate, (by whatever means) with the person seeking to be protected;
- being in possession of a firearm or firearms licence, or applying for a firearms licence;
- causing or allowing another person to engage in any of the conduct referred to above.

8.35 A restraint may be imposed on the respondent absolutely or on such terms as the court considers appropriate.⁴⁸⁰

8.36 The conditions imposed by a violence restraining order in relation to the possession of a firearm or of a firearms licence also apply to a misconduct restraining order that contains such restraints.⁴⁸¹

ISSUES FOR CONSIDERATION

8.37 The use of conditions as part of a peace and good behaviour order may provide an effective tool for limiting the likelihood of certain kinds of behaviour by restricting the activities of the person against whom the order is made.

8.38 As noted earlier in this chapter, the *Peace and Good Behaviour Act 1982* (Qld) does not prescribe particular conditions for inclusion in an order. On one hand, it may be that the generality of the existing provision allows flexibility in the making of orders. On the other hand, however, the absence of a list of specified conditions that may be imposed when an order is made under the Act may also create some problems.

8.39 The more generally an order is expressed, the more difficult it will be for a complainant to demonstrate that a defendant is in breach of an order and to have the order enforced. It will also be more difficult for a defendant to understand with any degree of certainty whether particular conduct is prohibited and whether, by engaging in that conduct, he or she might be at risk of conviction for a criminal offence as a result of breaching the order. Clarity in the conditions of an order may also assist police in the conduct of their duties in relation to peace and good behaviour matters.

8.40 The lack of guidance to the court in imposing conditions may also lead to different approaches being adopted to the making of orders.

480 *Restraining Orders Act 1997* (WA) s 36(4).

481 *Restraining Orders Act 1997* (WA) s 36(6). See para 8.30-8.31 of this Discussion Paper.

8.41 Inclusion of a list of conditions for the court to consider may therefore result in greater certainty for both complainant and defendant, and in greater consistency in the determination of complaints.

8.42 The situation under the *Peace and Good Behaviour Act 1982* (Qld) is in marked contrast to that in a number of other Australian jurisdictions and under Queensland domestic violence legislation.

8.43 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that, if a court makes a domestic violence order, the respondent must be of good behaviour and must comply with any other conditions stated in the order.⁴⁸² The court may impose conditions on the respondent that the court considers necessary in the circumstances, and desirable in the interests of both the person seeking the order and the person against whom the order is sought.⁴⁸³ Those conditions include, for example,⁴⁸⁴

- prohibiting the respondent from remaining at premises, entering or attempting to enter premises, or approaching within a stated distance of premises;
- prohibiting the respondent from approaching or attempting to approach a person, including stating in the order a distance within which an approach is prohibited;
- prohibiting contact or attempted contact with a person.

8.44 If the court is satisfied that the respondent has used, or threatened to use, a thing (for example a crossbow or spear gun, or a cricket or baseball bat) as a weapon, and is likely to use the thing again or to carry out the threat, the court may prohibit the respondent from possessing the thing, or a thing of the same type, for the duration of the order.⁴⁸⁵

8.45 If a protection order is made against a respondent who holds a licence under the *Weapons Act 1990* (Qld), the licence is revoked.⁴⁸⁶ A temporary order under the *Domestic and Family Violence Protection Act 1989* (Qld) has the effect of suspending a licence while the order is in force.⁴⁸⁷

482 *Domestic and Family Violence Protection Act 1989* (Qld) ss 17, 22.

483 *Domestic and Family Violence Protection Act 1989* (Qld) s 25(2).

484 *Domestic and Family Violence Protection Act 1989* (Qld) s 25(3).

485 *Domestic and Family Violence Protection Act 1989* (Qld) s 26.

486 *Weapons Act 1990* (Qld) s 28A.

487 *Weapons Act 1990* (Qld) s 27A.

CALL FOR SUBMISSIONS

8.46 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the conditions that may be imposed by an order made under the *Peace and Good Behaviour Act 1982* (Qld):

- 8-1 Should the *Peace and Good Behaviour Act 1982* (Qld) be amended to include specific provisions that can be included in an order?**
- 8-2 If yes to 8-1, what conditions should be included?**
- 8-3 Are there any conditions that should be imposed automatically when an order is made and, if so, what are those conditions?**
- 8-4 If a condition is automatically imposed by the making of an order, should the court have a discretion to order that the condition does not apply?**
- 8-5 If yes to 8-4, in what circumstances should the court be able to exercise the discretion?**
- 8-6 Should the complainant be able to seek specific conditions to be included in the order?**
- 8-7 If yes to 8-6, should the court have a discretion to refuse to include a condition sought by the complainant and, if so, on what grounds?**
- 8-8 Should the parties to an application be able to agree to the conditions to be included in an order?**
- 8-9 If yes to 8-8, should the court have to be satisfied that the conditions agreed by the parties are necessary or desirable?**

Chapter 9

Enforcement of orders

INTRODUCTION

9.1 If an order restraining a person from engaging in certain behaviour is to be effective, there must be an appropriate mechanism for enforcing the order against the person whose conduct is restrained by it. An order that cannot be enforced will be of little use to the person to whom it was granted, and may even encourage the perpetrator of the conduct complained of to believe that he or she can continue to engage in that conduct with impunity.

THE *PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)*

9.2 The *Peace and Good Behaviour Act 1982* (Qld) provides that a copy of an order made under the Act is to be served on the defendant in the same way as a summons may be served under the *Justices Act 1886* (Qld). Accordingly, a peace and good behaviour order may be served personally or by registered post.⁴⁸⁸

9.3 It is an offence to contravene or to fail to comply with an order made under the Act. The maximum penalty for each contravention or failure to comply is currently \$7500 or imprisonment for one year.⁴⁸⁹

9.4 If a person is convicted of the offence, the court may make a further order requiring the offender to keep the peace and be of good behaviour.⁴⁹⁰

LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS

Australian Capital Territory

9.5 If the court makes an order, including a consent order, and either or both of the aggrieved person and the respondent are before the court when the order is made, the court must explain, in language likely to be understood by the aggrieved person or the respondent, certain things about the operation of the order. The matters that must be explained by the court include the purpose,

488 *Peace and Good Behaviour Act 1982* (Qld) s 7(2); *Justices Act 1886* (Qld) s 56(1).

489 *Peace and Good Behaviour Act 1982* (Qld) s 10(1); *Penalties and Sentences Act 1992* (Qld) s 5.

490 *Peace and Good Behaviour Act 1982* (Qld) s 11.

terms and effect of the order, and the consequences that may follow if the respondent fails to comply with the order.⁴⁹¹

9.6 If the person against whom the order was made was present when the order was made, or was personally served with a copy of the order, the person commits an offence if the person contravenes the order.⁴⁹²

New South Wales

9.7 A court that makes an order must explain to the defendant and the protected person, if either of them is present at the time the order is made, the effect of the order and the consequences that may follow from a breach of the order.⁴⁹³ The court must also cause a written explanation of the matters required to be explained to be given to the defendant and the protected person.⁴⁹⁴

9.8 A defendant who was in court when the order was made, or who was served with the order or a copy of the order, commits an offence if he or she knowingly contravenes a prohibition or restriction specified in the order.⁴⁹⁵

9.9 If the act that constitutes the offence was an act of violence against a person, and the defendant was aged 18 years or over at the time of the offence, the defendant must, if convicted, be sentenced to a term of imprisonment not exceeding two years, unless the court otherwise orders.⁴⁹⁶ Where the court does not impose a term of imprisonment, it must give reasons for not doing so.⁴⁹⁷

9.10 A person believed on reasonable grounds by a member of the Police Force to have committed the offence of contravening an order may be arrested without warrant and detained before being brought as soon as practicable before a court to be dealt with for the offence.⁴⁹⁸

9.11 A police officer who believes on reasonable grounds that a person has committed the offence of contravening an order must, if that or another police officer decides not to initiate or proceed with criminal proceedings in respect of the offence, make a written record of the reasons for the decision.⁴⁹⁹ Similarly,

491 *Protection Orders Act 2001* (ACT) ss 24(2), (3), 25(2), (3).

492 *Protection Orders Act 2001* (ACT) s 34(1), (2).

493 *Crimes Act 1900* (NSW) s 562GC(1).

494 *Crimes Act 1900* (NSW) s 562GC(3).

495 *Crimes Act 1900* (NSW) s 562I(1), (2).

496 *Crimes Act 1900* (NSW) s 562I(1), (2A).

497 *Crimes Act 1900* (NSW) s 562I(2C).

498 *Crimes Act 1900* (NSW) s 562I(3), (4).

499 *Crimes Act 1900* (NSW) s 562I(6)(a)(i), (b).

if a decision is made not to initiate or proceed with criminal proceedings against a person in respect of whom an alleged breach of an order has been reported, and a police officer believes on reasonable grounds that the person has not committed the offence of contravening an order, the officer must make a written record of the reasons for the decision.⁵⁰⁰

Northern Territory

9.12 When the court makes an order that a defendant keep the peace or be of good behaviour, it may require the defendant to enter into a recognizance. It may also order that, in default of compliance with the order, the defendant be imprisoned for any period not exceeding six months. The recognizance may be forfeited if the defendant fails to comply with the order.⁵⁰¹

South Australia

9.13 A restraining order is not binding on the defendant until it has been served on the defendant personally.⁵⁰²

9.14 If a restraining order has been made, a copy of the order must be forwarded to the Commissioner of Police and, if the complainant is not a member of the police force, to the complainant.⁵⁰³

9.15 A member of the police force who has reason to believe that a person is subject to a restraining order that has not been served on the person may require the person to remain at a particular place for a period that is the lesser of two hours or the time necessary for the order to be served on the person.⁵⁰⁴ If the person refuses or fails to comply with the requirement or the member of the police force has reasonable grounds to believe that the requirement will not be complied with, the member of the police force may, without warrant, arrest the person and detain him or her in custody for the specified period.⁵⁰⁵

9.16 If a person contravenes or fails to comply with a restraining order that has been served on the person, the person is guilty of an offence, for which the penalty is a period of imprisonment.⁵⁰⁶

500 *Crimes Act 1900* (NSW) s 562I(6)(a)(ii), (b).

501 *Justices Act* (NT) s 99(3).

502 *Summary Procedure Act 1921* (SA) s 99E(1).

503 *Summary Procedure Act 1921* (SA) s 99G(1).

504 *Summary Procedure Act 1921* (SA) s 99E(3)(a). If the order is subject to confirmation, the person may be required to remain at the place for the lesser of two hours or the time necessary for the service on the person of the summons to appear before the court to show cause why the order should not be confirmed.

505 *Summary Procedure Act 1921* (SA) s 99E(3)(b).

506 *Summary Procedure Act 1921* (SA) ss 99E(1), 99I(1).

9.17 A member of the police force who has reason to suspect that a person has committed the offence of contravening or failing to comply with an order may arrest the person without warrant and detain him or her.⁵⁰⁷ The person must be brought before the court as soon as practicable.⁵⁰⁸

Tasmania

9.18 If the respondent is present when an order is made, the order takes effect on the making of the order. Otherwise, the order takes effect when the respondent is served personally with the order or a copy of the order.⁵⁰⁹

9.19 A respondent who contravenes or fails to comply with an order commits an offence and is liable on conviction to a fine not exceeding \$1000 or to imprisonment for a period not exceeding six months.⁵¹⁰

9.20 Where a police officer has reasonable cause to suspect that a person has committed the offence of contravening or failing to comply with an order, the police officer may, without warrant, arrest and detain the person, and may, for the purpose of arresting and detaining such a person, enter, by force if necessary, any premises on which the police officer has reasonable cause to believe that person is present and search those premises for that person.⁵¹¹

Victoria

9.21 The court may order that a defendant who does not comply with an order to keep the peace or be of good behaviour be imprisoned until he or she does comply with the order, or for 12 months, whichever is the shorter.⁵¹²

9.22 If the behaviour complained of consists of stalking, and the court proposes to make an order under domestic violence legislation,⁵¹³ the court must, before making the order, explain to a defendant who is present in court the purpose, terms and effect of the proposed order and the consequences that may follow if the defendant fails to comply with the terms of the proposed order.⁵¹⁴

507 *Summary Procedure Act 1921* (SA) s 99I(2).

508 *Summary Procedure Act 1921* (SA) s 99I(3).

509 *Justices Act 1959* (Tas) s 106EA.

510 *Justices Act 1959* (Tas) s 106I(1); *Penalty Units and Other Penalties Act 1987* (Tas) s 4.

511 *Justices Act 1959* (Tas) s 106I(2).

512 *Magistrates' Court Act 1989* (Vic) s 126A(4).

513 A complaint for an intervention order to restrain stalking behaviour may be made under the domestic violence legislation even though there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

514 *Crimes (Family Violence) Act 1987* (Vic) s 15(a), (b), (c), (d).

9.23 The defendant must be personally served with a copy of the order.⁵¹⁵ However, if it appears to the court that it is not reasonably practicable to serve a copy of an order personally, the court may make an order for service by alternative means.⁵¹⁶

9.24 If a person against whom an order has been made and who has been served with a copy of the order or given an explanation of the order contravenes the order in any respect, the person is guilty of an offence. The penalty for a first offence is a fine not exceeding \$24 540 or imprisonment for a term of not more than two years or both and, for a subsequent offence, imprisonment for a term not exceeding five years.⁵¹⁷

Western Australia

9.25 A restraining order must generally be served personally on the person against whom it is made.⁵¹⁸ However, there is provision for an order to be served, in certain circumstances, by post⁵¹⁹ or orally.⁵²⁰ Oral service may be effected face to face or by telephone, radio, video conference or any other similar method.⁵²¹ A person who serves an order orally is to inform the person being served of the fact that the order has been made, the general nature of the restraints imposed by the order, the duration of the order, and where a written copy of the order and a document explaining the order can be obtained.⁵²² A restraining order is taken to have been served if the respondent is present in court when the order is made.⁵²³

9.26 Breach of a restraining order is an offence.⁵²⁴ For breach of a violence restraining order the penalty is a maximum fine of \$6000 or a term of imprisonment not exceeding two years, or both.⁵²⁵ The maximum penalty for breach of a misconduct restraining order is \$1000.⁵²⁶ It is taken to be an

515 *Crimes (Family Violence) Act 1987* (Vic) s 17(1)(b).

516 *Crimes (Family Violence) Act 1987* (Vic) s 17(2).

517 *Crimes (Family Violence) Act 1987* (Vic) s 22(1); *Monetary Units Act 2004* (Vic) s 11(1)(b); Victoria Government Gazette, 17 June 2004, 1683.

518 *Restraining Orders Act 1997* (WA) s 55(1).

519 *Restraining Orders Act 1997* (WA) s 55(3).

520 *Restraining Orders Act 1997* (WA) s 55(2).

521 *Restraining Orders Act 1997* (WA) s 55(6).

522 *Restraining Orders Act 1997* (WA) s 55(5).

523 *Restraining Orders Act 1997* (WA) s 55(3a).

524 *Restraining Orders Act 1997* (WA) s 61.

525 *Restraining Orders Act 1997* (WA) s 61(1), (2a); *Sentencing Act 1995* (WA) s 9(2).

526 *Restraining Orders Act 1997* (WA) s 61(2); *Sentencing Act 1995* (WA) s 9(2).

aggravating factor if, in committing an offence, a child with whom the offender is in a family and domestic relationship is exposed to an act of abuse.⁵²⁷

ISSUES FOR CONSIDERATION

Explaining the order

9.27 In some cases where a person against whom a peace and good behaviour order has been made is in breach of that order, the reason for the breach may be that the person does not understand the implications of the order. Similarly, a person in whose favour an order has been made will be unable to enforce the order if the person does not understand the effect of the order. Ensuring that both parties to an application for an order understand what the grant of an order will mean may help secure compliance.

9.28 The effect of an explanation might also have a wider effect in relation to compliance. The New South Wales Law Reform Commission was told:⁵²⁸

... the public humiliation of having a Magistrate explain to the defendant in open court the conditions of the [apprehended violence order] and the consequences of breaching those conditions, may be more effective in bringing about a change in behaviour than actually making the [order] and serving a copy on the defendant.

9.29 The legislation in a number of Australian jurisdictions contains provisions about explaining an order and the consequences of non-compliance. In the Australian Capital Territory, New South Wales and Victoria, a court that makes an order must, if the person against whom the order is made is present in court, explain the terms of the order to the person. In the Australian Capital Territory and New South Wales, an explanation must also be given to the person who sought the order, if that person is present. In the Australian Capital Territory, the explanation is to be made in a way that the person to whom it is given is likely to understand. In New South Wales, a written explanation must be given to the person who sought the order and the person against whom the order is made.

9.30 Under Queensland domestic violence legislation, the court has a duty to ensure that a person seeking a protection order and the respondent, if they

527 *Restraining Orders Act 1997 (WA)* s 61(4). The term "act of abuse" is explained at para 4.54 of this Discussion Paper.

528 New South Wales Law Reform Commission, Report, *Apprehended Violence Orders* (R 103, October 2003) note 80 at 65 (Submission from the Multicultural Disability Advocacy Association).

are present in court, understand the purpose, terms and effect of a proposed order.⁵²⁹

Service of the order

9.31 The legislation in a number of jurisdictions requires that an order be served on the defendant personally. However, in Queensland, service may also be made by post.⁵³⁰

9.32 A requirement for personal service may create problems if the defendant cannot be located, or deliberately avoids service. On the other hand, where service is effected by post, it may not be possible to know whether the defendant has received a copy of the order.

The role of the police

9.33 In New South Wales, South Australia and Tasmania, the legislation confers specific powers on police officers in relation to suspected or alleged breaches of orders. These powers include arrest without warrant and detention.

9.34 Although there is no corresponding provision in the *Peace and Good Behaviour Act 1982* (Qld), the Queensland Police Service's Operational Procedures Manual states that officers identifying breaches of orders made under the Act may institute proceedings by complaint and summons under the *Justices Act 1886* (Qld), under the *Police Powers and Responsibilities Act 2000* (Qld) (including arrest without warrant) or, in the case of a child, under the *Juvenile Justice Act 1992* (Qld). The Manual states:⁵³¹

Officers should when deciding the method of proceedings, amongst other things, consider the safety and welfare of the complainant and whether there would be a continuation or repetition of the commission of another offence if such action decided would not be taken.

9.35 However, information provided to the Commission by the Acting Commissioner of Police suggests that, although quantitative data are not available, the frequency of prosecution proceedings commenced by the Queensland Police Service for offences under the Act is very low.⁵³²

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Domestic and Family Violence Protection Act 1989 (Qld) s 50(1), (2). The process that the court adopts to ensure that an aggrieved person or a respondent understands the relevant matters may include using the services of, or help from, other people to the extent that the court considers appropriate: *Domestic and Family Violence Protection Act 1989* (Qld) s 50(3).

530

The position under the *Peace and Good Behaviour Act 1982* (Qld) is consistent with Queensland domestic violence legislation: see *Domestic and Family Violence Protection Act 1989* (Qld) s 85.

531

Queensland Police Service, *Operational Procedures Manual* Part 2 Section 13.4.1.

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Information provided by the Acting Commissioner, Queensland Police Service, 6 September 2004.

9.36 This information is consistent with other anecdotal material provided to the Commission.⁵³³ Legal Aid Queensland noted:⁵³⁴

Even when a Peace and Good Behaviour Order is obtained it will often not stop the breaches of the peace. In most instances, Applicants are left to try and take action themselves against the Respondent for breach of order. ... Many people who are the victim of conduct which falls within the ambit of the Act are vulnerable and disadvantaged people such as the elderly, children, mentally ill, intellectually impaired, disabled or linguistically disadvantaged. They lack the capacity to collect evidence. In many cases, even when the alleged breach is extremely serious, the police decline to ... charge the respondent with Breach of a Peace and Good Behaviour Order.

...

Breach of a Peace and Good Behaviour Order must be one of very few examples where an individual ... is left with the responsibility of taking legal proceedings to have a perpetrator held accountable for an offence against them.

9.37 Under Queensland domestic violence legislation, a complaint for an offence against the legislation is to be laid by a police officer.⁵³⁵

9.38 The Queensland Police Service has informed the Commission that, in view of the level of involvement of police officers in enforcement of domestic violence legislation, it does not support any increased involvement of officers in the enforcement of the *Peace and Good Behaviour Act 1982* (Qld).⁵³⁶

CALL FOR SUBMISSIONS

9.39 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the enforcement of orders under the *Peace and Good Behaviour Act 1982* (Qld).

9-1 Should the *Peace and Good Behaviour Act 1982* (Qld) require a court that makes an order under the Act to ensure that the person seeking the order and/or the person against whom the order is sought, if they are present in court, understand the effect of the order?

⁵³³ Information provided by the Chief Magistrate, Judge MP Irwin, 25 August 2004 and by Caxton Legal Centre 23 August 2004.

⁵³⁴ Information provided by Legal Aid Queensland 8 September 2004.

⁵³⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 83(2).

⁵³⁶ Information provided by the Acting Commissioner, Queensland Police Service, 6 September 2004.

- 9-2** Is the provision for service of an order under the *Peace and Good Behaviour Act 1982* (Qld) adequate?
- 9-3** If no to 9-2, how should service of a peace and good behaviour order be effected?
- 9-4** Should the *Peace and Good Behaviour Act 1982* (Qld) contain specific provisions relating to the obligations and powers of police officers in enforcing orders made under the Act?
- 9-5** If yes to 9-4, what should those provisions be?
- 9-6** Should there be specific provisions relating to a failure by a police officer to act in the enforcement of an order without a reasonable excuse?
- 9-7** Is there a need for the *Peace and Good Behaviour Act 1982* (Qld) to provide for prosecution of a breach of an order by a police officer?
- 9-8** Should there be proof of service before a person can be proved to be in breach of an order?
- 9-9** Should a breach of a peace and good behaviour order constitute an offence under the *Peace and Good Behaviour Act 1982* (Qld)?
- 9-10** If yes to 9-9, should there be a separate offence, which attracts a more serious penalty, for a breach of an order in aggravated circumstances?
- 9-11** If yes to 9-10, what would amount to a circumstance of aggravation, for example, repeated breaches of an order, or use of violence?

Chapter 10

Miscellaneous issues

COSTS

10.1 The Commission's terms of reference require it to consider whether the costs of filing a complaint are a deterrent to seeking an order.⁵³⁷

10.2 The fee for filing a complaint under the *Peace and Good Behaviour Act 1982* (Qld) is set by the *Justices Regulation 2004* (Qld).⁵³⁸ The fee is currently \$62.00.⁵³⁹ The Commission has been advised by the Magistrates Court Registry that an additional fee of \$2.30 also applies.

10.3 A community legal centre told the Commission that, in its view, the main deterrents to obtaining an order were not costs, but other factors such as the length of time it takes to obtain an order, fear of reprisal by the defendant, and lack of confidence in enforcement.⁵⁴⁰ Legal Aid Queensland, on the other hand, considered that the cost of filing a complaint did sometimes deter people from taking action under the Act.⁵⁴¹

It is very often already vulnerable people in disadvantaged circumstances who are targeted by perpetrators of the type of conduct falling within the ambit of the Act.

10.4 Legal Aid Queensland therefore proposed that consideration be given to removing the filing fee or that, if the filing fee were not removed, there should be provision for exemption or waiver of the filing fee in appropriate circumstances.

537 The terms of reference are set out in full in Appendix 1 to this Discussion Paper.

538 The *Justices Regulation 2004* (Qld) is made under the *Justices Act 1886* (Qld): *Justices Act 1886* (Qld) s 266(2)(a). The "provisions of and proceedings and procedures" for the summary prosecution of an offence under the *Justices Act 1886* (Qld) apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld): *Peace and Good Behaviour Act 1982* (Qld) s 8.

539 *Justices Regulation 2004* (Qld) Schedule 3 Item 1.

540 Information provided by Caxton Legal Centre 23 August 2004.

541 Information provided by Legal Aid Queensland 8 September 2004.

10.5 Section 266(1) of the *Justices Act 1886* (Qld) provides that the Governor in Council may make regulations for the purposes of the Act. This power includes the making of regulations for the reduction, waiver or refund of fees.⁵⁴² However, no such regulation has been made to date.⁵⁴³

10.6 The Acting Commissioner of Police, while unable to comment on this question, raised a related issue - that of the power of the court to award costs against a complainant if a complaint is dismissed.⁵⁴⁴ The Acting Commissioner noted that the potential liability for costs might deter some people who are legitimate victims of breaches of the peace from applying for an order, and considered that it might be appropriate to include a provision similar to that in Queensland's domestic violence legislation.⁵⁴⁵ That legislation provides that costs may not be awarded against an unsuccessful applicant for a protection order unless the court dismisses the application as malicious, deliberately false, frivolous or vexatious.⁵⁴⁶

WHO CAN BE PROTECTED BY AN ORDER

Peace and Good Behaviour Act 1982 (Qld)

10.7 The *Peace and Good Behaviour Act 1982* (Qld) provides that the court may make an order that a defendant keep the peace and be of good behaviour for the period of time specified in the order.⁵⁴⁷ The order may contain such other stipulations or conditions as the court thinks fit.⁵⁴⁸ The Act makes no specific provision about the persons who can be protected by an order.

Legislation in other Australian jurisdictions

10.8 In most jurisdictions, an order may only be made to protect the person making the application, or on whose behalf the application is made.

542 *Justices Act 1886* (Qld) s 266(3)(d).

543 Note, the *Uniform Civil Procedure Rules 1999* (Qld) r 971 specifically provides that an individual may apply for an exemption from payment of filing fees. However, the *Uniform Civil Procedure Rules 1999* (Qld) do not apply to matters under the *Peace and Good Behaviour Act 1982* (Qld): see the *Peace and Good Behaviour Act 1982* (Qld) s 8 and the *Magistrates Court Act 1921* (Qld) s 4.

544 *Justices Act 1886* (Qld) s 158(1). The "provisions of and proceedings and procedures" for the summary prosecution of an offence under the *Justices Act 1886* (Qld) apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld): *Peace and Good Behaviour Act 1982* (Qld) s 8.

545 Information provided by the Acting Commission, Queensland Police Service, 6 September 2004.

546 *Domestic and Family Violence Protection Act 1989* (Qld) s 61.

547 *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

548 *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

10.9 However, in New South Wales, the power of the court extends to making an order for the protection of a person who has a domestic relationship with the person for whose protection the order was sought.⁵⁴⁹

DURATION AND VARIATION OF ORDERS

10.10 The *Peace and Good Behaviour Act 1982* (Qld) does not specify any particular limitations or restrictions in relation to the duration of the order.

10.11 The Act merely provides that the court may order “that the defendant shall keep the peace and be of good behaviour for such time, specified in the order, as the Court thinks fit,”⁵⁵⁰ and that the order may contain “such other stipulations or conditions” as the court considers appropriate.⁵⁵¹

10.12 On the conviction of a person for a breach of a peace and good behaviour order, the court may make a further order that the offender shall keep the peace and be of good behaviour for such time, specified in the order, as the court thinks fit.⁵⁵²

10.13 The *Domestic and Family Violence Protection Act 1989* (Qld) specifies that a protection order may continue for a period no longer than two years.⁵⁵³ However, if the court is satisfied that there are special reasons for doing so, the court may order that a protection order continue for a period longer than two years.⁵⁵⁴ An order continues in force for the period ordered by the court unless it is revoked or varied.⁵⁵⁵

Legislation in other Australian jurisdictions

Australian Capital Territory

10.14 A personal protection order remains in force for one year or a shorter period if stated in the order.⁵⁵⁶ A domestic violence order remains in force for two years or a shorter period if stated in the order.⁵⁵⁷ An application to extend

549 *Crimes Act 1900* (NSW) s 562BD(1).

550 *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

551 *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

552 *Peace and Good Behaviour Act 1982* (Qld) s 11.

553 *Domestic and Family Violence Protection Act 1989* (Qld) s 34A(1).

554 *Domestic and Family Violence Protection Act 1989* (Qld) s 34A(2).

555 *Domestic and Family Violence Protection Act 1989* (Qld) s 34A(3). See also *Domestic and Family Violence Protection Act 1989* (Qld) ss 35, 36.

556 *Protection Orders Act 2001* (ACT) s 36.

557 *Protection Orders Act 2001* (ACT) s 35.

an order may be made prior to the expiration of the original order.⁵⁵⁸ A magistrate may extend the order only if satisfied that a protection order is still necessary to protect the aggrieved person.⁵⁵⁹ However, an extension of the original order may be made by consent.⁵⁶⁰

New South Wales

10.15 An apprehended personal violence order remains in force for such period as is specified in the order and which is necessary in the opinion of the court for the protection of the protected person.⁵⁶¹ If the court fails to specify a period of operation, the order remains in force for a period of six months.⁵⁶²

10.16 An application may be made at any time to vary the terms of the order and/or the operational period of the order.⁵⁶³ Generally, an order shall not be varied without notice of the application being served on the defendant.⁵⁶⁴ However, in certain limited circumstances, an order may be extended by the court, without notice to the defendant.⁵⁶⁵

Northern Territory

10.17 There is no provision in the legislation for the imposition of particular conditions or restrictions.⁵⁶⁶

South Australia

10.18 A restraining order may impose such restraints on the defendant as are necessary or desirable to prevent the defendant acting in the apprehended manner.⁵⁶⁷ There are no particular limitations or restrictions included in the legislation in relation to the duration of the order. An application may be made to vary or revoke an order.⁵⁶⁸

558 *Protection Orders Act 2001* (ACT) s 37.

559 *Protection Orders Act 2001* (ACT) s 37(3).

560 *Protection Orders Act 2001* (ACT) s 37(5).

561 *Crimes Act 1900* (NSW) s 562E(1), (2).

562 *Crimes Act 1900* (NSW) s 562E(3).

563 *Crimes Act 1900* (NSW) s 562F(1), (4).

564 *Crimes Act 1900* (NSW) s 562F(6).

565 *Crimes Act 1900* (NSW) s 562F(8). For example, if the applicant lodged the application no later than 21 days prior to the expiration of the order.

566 *Justices Act* (NT) s 99.

567 *Summary Procedure Act 1921* (SA) s 99(3).

568 *Summary Procedure Act 1921* (SA) s 99F.

Tasmania

10.19 A restraint order shall remain in force for such period as the court considers necessary to protect the person for whose benefit the order is made or until an order is made revoking the restraint order.⁵⁶⁹

10.20 An application may be made to vary, revoke or extend an order.⁵⁷⁰ An order may be extended for such period as the court considers necessary to protect the person for whose benefit the order is made or until an order is made revoking the restraint order.⁵⁷¹

Victoria

10.21 There is no provision for the maximum duration of a peace and good behaviour order.⁵⁷²

10.22 If the behaviour complained of consists of stalking, and an order is made under domestic violence legislation,⁵⁷³ the court may specify the period for which an intervention order is to remain in force.⁵⁷⁴ An intervention order remains in force unless it is revoked, reversed, or set aside on appeal.⁵⁷⁵ The court may vary, revoke or extend an order on application.⁵⁷⁶

Western Australia

10.23 A violence restraining order made at a final order hearing, or an interim order (other than a telephone order) that becomes a final order by consent, remains in force for the period specified in the order, or if no period is specified, two years.⁵⁷⁷ A telephone order that becomes a final order by consent remains in force for no longer than three months or such shorter period as is specified in the order.⁵⁷⁸ An order may be cancelled or varied by application.⁵⁷⁹

569 *Justices Act 1959* (Tas) s 106B(6).

570 *Justices Act 1959* (Tas) s 106G.

571 *Justices Act 1959* (Tas) s 106G(5).

572 *Magistrates' Court Act 1989* (Vic) s 126A.

573 A complaint for an intervention order to restrain stalking behaviour may be made under the domestic violence legislation even though there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

574 *Crimes (Family Violence) Act 1987* (Vic) s 6(1).

575 *Crimes (Family Violence) Act 1987* (Vic) s 6(2).

576 *Crimes (Family Violence) Act 1987* (Vic) s 16.

577 *Restraining Orders Act 1997* (WA) s 16(5)(a), (c).

578 *Restraining Orders Act 1997* (WA) s 16(5)(b).

579 *Restraining Orders Act 1997* (WA) s 16(5), Part 5.

10.24 A misconduct restraining order remains in force for the period specified in the order or, if no period is specified, one year.⁵⁸⁰ An order may be cancelled or varied by application.⁵⁸¹

10.25 A restraining order may not be made against a child who is under 10 years of age⁵⁸² and a restraining order that is a final order made against a child is generally to have a duration of six months or less.⁵⁸³

RELATIONSHIP TO *DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)*

10.26 In some circumstances, it may be desirable for the court to treat an application for a domestic violence protection order as an application for a peace and good behaviour order. This might be the case, for example, where it becomes apparent that an applicant for a domestic violence protection order is not within a relationship covered by the *Domestic and Family Violence Protection Act 1989* (Qld). Similarly, it may be that an applicant for a peace and good behaviour order would be more adequately protected by the provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) because of the nature of the relationship that exists between the parties. In New South Wales, legislation provides that an application for an apprehended domestic violence order must be treated as an application for an apprehended personal violence order where the parties are not in a domestic relationship.⁵⁸⁴

CALL FOR SUBMISSIONS

10.27 The Commission is interested in receiving submissions in response to the following questions, or on any other issues, not dealt with in the preceding chapters of this discussion paper, that respondents consider relevant to the operation of the *Peace and Good Behaviour Act 1982* (Qld):

Costs

10-1 Is the cost of filing a complaint a deterrent to seeking a remedy under the *Peace and Good Behaviour Act 1982* (Qld)?

⁵⁸⁰ *Restraining Orders Act 1997* (WA) s 37.

⁵⁸¹ *Restraining Orders Act 1997* (WA) Part 5.

⁵⁸² *Restraining Orders Act 1997* (WA) s 50.

⁵⁸³ *Restraining Orders Act 1997* (WA) s 50A.

⁵⁸⁴ *Crimes Act 1900* (NSW) s 562AD(2).

10-2 Would removing the filing fee encourage people to make unmeritorious complaints?

10-3 If yes to 10-1, should there be a provision for the fee to be waived in appropriate circumstances?

10-4 If a complaint made under the *Peace and Good Behaviour Act 1982* (Qld) is dismissed, should the court be able to award costs against the complainant?

Persons protected by the order

10-5 Should the *Peace and Good Behaviour Act 1982* (Qld) specify who can be protected by an order?

10-6 If yes to 10-5, who should those persons be:

- (a) the complainant;
- (b) the person on whose behalf a complaint is made;
- (c) a person in a domestic relationship with the complainant;
- (d) other?

Duration and variation of orders

10-7 Should the *Peace and Good Behaviour Act 1982* (Qld) specify a maximum period of time during which an order remains in force?

10-8 If yes to 10-7, what should the maximum period of time be?

10-9 Should a different maximum period of time apply in the case of orders made against a child?

10-10 If yes to 10-9, what should the maximum period of time be?

10-11 Should the court have the power to extend the duration of an order?

10-12 Should the court have the power to vary the duration of an order?

10-13 Should the court have the power to vary the terms of an order?

10-14 Should the court have the power to revoke an order?

Relationship to Domestic and Family Violence Protection Act 1989 (Qld)

10-15 Where the parties are not in a relationship covered by the *Domestic and Family Violence Protection Act 1989 (Qld)*, should an application for a domestic violence protection order be able to be treated as an application for a peace and good behaviour order?

10-16 Where the parties are in a relationship covered by the *Domestic and Family Violence Protection Act 1989 (Qld)*, should an application for a peace and good behaviour order be able to be treated as an application for a domestic violence protection order?

10-17 If yes to either 10-15 or 10-16 or both, when should this occur and who should have the power to treat the application in that way?

Appendix 1

Terms of reference

A REVIEW OF THE *PEACE AND GOOD BEHAVIOUR ACT 1982*

1. I, ROD WELFORD, Attorney-General and Minister for Justice refer the *Peace and Good Behaviour Act 1982* (the Act) to the Queensland Law Reform Commission (the Commission) for review pursuant to section 10 of the *Law Reform Commission Act 1968*, including but not limited to:
 - whether the Act provides an appropriate, easily accessible and effective mechanism for protection of the community from breaches of the peace;
 - if the Commission considers the Act does not provide an appropriate, easily accessible and effective mechanism:
 - (a) what amendments should be made to make it appropriate, easily accessible and effective; or
 - (b) should a new mechanism be established.
2. In undertaking this reference I ask the Commission to have regard to:
 - the procedure in the Act for a complainant to seek a Peace and Good Behaviour order from the Magistrates Court which requires:
 - a complaint made to a justice of the peace about threatened conduct;
 - the justice of the peace issuing a summons for the defendant's appearance in court or a warrant of apprehension if the justice of the peace is satisfied that it is reasonable for the complainant to be in fear of the defendant; and
 - the Magistrate making an order on the appearance of the defendant in response to the summons or warrant;
 - the grounds for obtaining a summons, warrant and an order which require:
 - (a) the defendant to have threatened to assault or to do bodily injury to the complainant or to any person under the care of the complainant (which includes the defendant getting another person to threaten the complainant); or
 - (b) the defendant to have threatened to destroy or damage any property of the complainant (which includes the defendant getting another person to threaten the complainant); and
 - (c) the complainant to be in fear of the defendant;

- a proposed additional basis for obtaining a summons, warrant and order which would permit a complainant to apply for an order where the defendant's conduct causes the complainant apprehension or fear of personal violence or violence against property but the defendant's conduct falls short of an actual threat;
 - the protection provided against domestic violence by the *Domestic and Family Violence Protection Act 1989* and the expansion of that Act's jurisdiction in 2002 to cover many persons who might have otherwise sought an order under the Act;
 - issues that have been raised about the effectiveness of the Act in addressing the needs of the community in terms of protecting individuals against breaches of the peace. In particular that:
 - the ambit of conduct covered by the Act is not appropriate being either too wide or too restrictive;
 - the process to obtain an order is complex;
 - the filing fee prevents many people from seeking orders;
 - it is difficult to enforce orders which means that the orders are ineffectual.
3. In performing its functions under this reference, the Commission is asked to prepare, if relevant, draft legislation based on the Commission's recommendations.
4. The Commission is to report to the Attorney-General and Minister for Justice by 31 July 2005.⁵⁸⁵

Dated the 7th day of July 2004.

Rod Welford MP
Attorney-General and Minister for Justice

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In his letter of 16 March 2005, the Attorney-General agreed to extend the deadline for the final report to 31 December 2005.