



**A review of the
*Peace and Good Behaviour Act 1982***

Report
Volume 1

Queensland
Law Reform Commission

**A review of the *Peace and Good
Behaviour Act 1982***

Volume 1

Report No 63
December 2007

The short citation for this Report is QLRC R 63.
Published by the Queensland Law Reform Commission, December 2007.
Copyright is retained by the Queensland Law Reform Commission.

ISBN: 978 0 7242 7754 4

To: The Honourable Kerry Shine MP
Attorney-General and Minister for Justice and Minister Assisting the
Premier in Western Queensland

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld),
the Commission is pleased to present its Report on *A Review of the Peace and
Good Behaviour Act 1982*.

The Honourable Justice R G Atkinson
Chairperson

Mr J K Bond SC
Member

Dr H A Douglas
Member

Mr B J Herd
Member

Mr G W O'Grady
Member

COMMISSION MEMBERS

Chairperson: **The Hon Justice R G Atkinson**

Part-time members: **Mr J K Bond SC**
Dr H A Douglas
Mr B J Herd
Mr G W O'Grady

SECRETARIAT

Director: **Ms C E Riethmuller**

Principal Legal Officer: **Mrs C A Green**

Legal Officers: **Ms M T Collier**
Ms P L Rogers

Secretary: **Mrs S Pickett**
Mrs J Manthey

Administrative Officer: **Ms K Giles**

Address: 7th Floor, 50 Ann Street, Brisbane, Qld 4000
Postal address: PO Box 13312, George Street Post Shop, Qld 4003
Telephone: (07) 3247 4544
Facsimile: (07) 3247 9045
Email: LawReform.Commission@justice.qld.gov.au
Website: <http://www qlrc qld gov au>

Previous Queensland Law Reform Commission publication in this reference:

A Review of the Peace and Good Behaviour Act 1982, Discussion Paper
(WP 59, March 2005)

Table of contents

CHAPTER 1	1
INTRODUCTION	1
TERMS OF REFERENCE.....	2
THE DISCUSSION PAPER.....	2
THE CONSULTATION PROCESS	3
Prior to publication of the Discussion Paper	3
After the release of the Discussion Paper.....	3
SUBMISSIONS.....	4
THE COMMISSION'S APPROACH	4
THE STRUCTURE OF THIS REPORT.....	4
Terminology.....	7
Child	7
Young person.....	7
Civil restraining order legislation.....	8
CHAPTER 2	10
THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD): HISTORY AND CONTEXT.....	10
INTRODUCTION.....	11
HISTORICAL BACKGROUND	11
Origins of the <i>Peace and Good Behaviour Act 1982 (Qld)</i>	11
Relationship with domestic violence legislation	12
OVERVIEW OF THE CURRENT ACT	13
Who can apply for an order.....	14
Grounds for obtaining an order	14
The procedure for obtaining an order	15
The nature of the proceeding	16
Breach of an order	17
THE DEVELOPMENT OF SIMILAR LEGISLATION IN OTHER JURISDICTIONS.....	17
The ACT	18
New South Wales.....	18
The Northern Territory.....	20
South Australia	21
Tasmania.....	21
Victoria	21
Western Australia	22
CHAPTER 3	23
DEVELOPING A NEW MECHANISM: KEY POLICY ISSUES AND FEATURES.....	23
INTRODUCTION.....	24
THE DEVELOPMENT OF NEW LEGISLATION.....	24
The proposed Personal Protection Bill 2007	25
Key features of the proposed Personal Protection Bill 2007	26
The scope of the proposed Personal Protection Bill 2007	28
Children in family relationships	28
Children generally	31
Workplace protection orders	32

Orders made on behalf of the general public.....	33
The role of police.....	35
RESOURCE ISSUES	37
Queensland Police Service	37
The Magistrates Court.....	38
The Dispute Resolution Centres	39
RECOMMENDATIONS	39
 CHAPTER 4	 41
PERSONAL PROTECTION ORDERS.....	41
INTRODUCTION	42
THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD).....	42
THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)	43
THE POSITION IN OTHER JURISDICTIONS	45
SUBMISSIONS.....	46
THE COMMISSION'S VIEW	47
Power to make personal protection orders	49
Who can be protected by a personal protection order.....	50
Other provisions for personal protection orders.....	50
RECOMMENDATIONS	51
 CHAPTER 5	 54
GROUNDS FOR OBTAINING A PERSONAL PROTECTION ORDER	54
INTRODUCTION	55
COMMON LAW BREACH OF THE PEACE	57
THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD).....	58
Grounds for the issue of a summons or warrant.....	59
Threatening behaviour	59
Behaviour that causes fear of damage to property.....	59
Grounds for obtaining an order	60
THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)	60
THE POSITION IN OTHER JURISDICTIONS	61
THE APPROPRIATENESS OF THE EXISTING GROUNDS	62
Submissions	63
The Commission's view	64
GROUNDS OF PERSONAL VIOLENCE	65
Wilful injury to the person.....	65
The Peace and Good Behaviour Act 1982 (Qld)	65
The Domestic and Family Violence Protection Act 1989 (Qld).....	66
The position in other jurisdictions.....	67
Submissions	67
The Commission's view	70
Wilful damage to property	71
The Peace and Good Behaviour Act 1982 (Qld)	71
The Domestic and Family Violence Protection Act 1989 (Qld).....	71
The position in other jurisdictions.....	72
Submissions	72
The Commission's view	73
Harassment or intimidation	74
The Peace and Good Behaviour Act 1982 (Qld)	74
The Domestic and Family Violence Protection Act 1989 (Qld).....	74
The Criminal Code (Qld).....	75

The position in other jurisdictions.....	75
Submissions.....	77
Harassment or intimidation arising in neighbourhood disputes.....	78
The potential consequences of harassment or intimidation	79
Harassment or intimidation caused by excessive noise.....	80
The Commission's view	80
Interference with enjoyment of property.....	81
Submissions.....	81
The Commission's view	83
Indecent behaviour.....	83
A REQUIREMENT OF FEAR OR LIKELIHOOD OF FUTURE CONDUCT.....	84
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	84
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	85
The position in other jurisdictions.....	86
Submissions	86
The Commission's view	88
GROUNDS FOR INCLUDING A NAMED PERSON IN AN ORDER.....	89
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	89
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	90
The position in other jurisdictions.....	90
Submissions	91
The Commission's view	91
PERSONAL VIOLENCE COMMITTED BY A THIRD PARTY	92
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	92
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	92
The Commission's view	92
PERSONAL VIOLENCE AGAINST A THIRD PARTY	93
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	93
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	93
Submissions	93
The Commission's view	94
THE POTENTIAL RISKS OF NET-WIDENING/UNINTENDED CONSEQUENCES	94
Submissions	95
The Commission's view	97
RECOMMENDATIONS	99
CHAPTER 6	102
WHO MAY APPLY FOR A PERSONAL PROTECTION ORDER	102
INTRODUCTION	103
THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD).....	104
THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)	105
APPLICATIONS MADE BY AN AGGRIEVED PERSON	107
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	107
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	107
The position in other jurisdictions.....	107
The Commission's view	108
APPLICATIONS MADE ON BEHALF OF AGGRIEVED PERSONS	108
Applications on behalf of aggrieved persons who may require or desire assistance	109
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	109
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	109
The position in other jurisdictions: New South Wales.....	109
Applications on behalf of adults without legal capacity to apply	110

The <i>Peace and Good Behaviour Act 1982</i> (Qld)	111
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	111
The position in other jurisdictions.....	111
Applications on behalf of children	113
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	113
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	113
The position in other jurisdictions.....	114
Submissions	114
The Commission's view	120
Applications on behalf of aggrieved persons who may require or desire assistance	120
Applications on behalf of persons without legal capacity to apply.....	121
Applications on behalf of adults without legal capacity to apply.....	121
Applications on behalf of children.....	123
APPLICATIONS BY, OR ON BEHALF OF, YOUNG PERSONS	124
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	124
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	125
The position in other jurisdictions.....	125
Submissions	126
The Commission's view	129
APPLICATIONS BY POLICE	130
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	130
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	131
The position in other jurisdictions.....	132
Submissions	132
The Commission's view	134
APPLICATIONS BY SOME OTHER PERSON WITH THE LEAVE OF THE COURT	135
The position in other jurisdictions.....	135
Submissions	135
The Commission's view	136
JOINT APPLICATIONS	136
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	136
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	137
Submissions	137
The Commission's view	138
RECOMMENDATIONS	138
CHAPTER 7	142
CONDITIONS OF A PERSONAL PROTECTION ORDER.....	142
INTRODUCTION	143
THE GENERALITY OF THE CURRENT ORDER	143
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	143
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	144
The position in other jurisdictions.....	144
Submissions	144
The Commission's view	145
A STANDARD CONDITION	146
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	146
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	146
The position in other jurisdictions.....	146
Submissions	147
The Commission's view	148

DISCRETIONARY CONDITIONS	148
Conditions required to be necessary and appropriate	148
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	148
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	148
The position in other jurisdictions.....	149
The Commission's view	149
Specific conditions	149
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	149
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).	150
The position in other jurisdictions.....	151
Submissions.....	152
The Commission's view	153
The general approach to the inclusion of examples of specific conditions	153
Specific conditions based on the scheme under the <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	153
Other examples of specific conditions	155
Restricting access to premises	156
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	156
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	156
The position in other jurisdictions.....	158
The Commission's view	158
Factors to consider when imposing discretionary conditions.....	159
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	159
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	160
The Commission's view	160
Conditions sought by the applicant	160
Submissions.....	160
The Commission's view	161
Conditions agreed to by the parties	161
Submissions.....	161
The Commission's view	161
Special conditions relating to weapons.....	162
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	162
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	162
The <i>Weapons Act 1990</i> (Qld)	164
Peace and good behaviour orders	165
Domestic violence orders	165
The position in other jurisdictions.....	166
The ACT.....	167
New South Wales	167
South Australia	167
Tasmania	168
Victoria	169
Western Australia	169
Submissions.....	171
The Commission's view	171
Special condition about holding a weapons licence or possessing a weapon .	171
Special condition for a thing that has been used as a weapon	172
Other provisions when a condition about a weapon or a thing is imposed	172
RECOMMENDATIONS	174

CHAPTER 8	180
WORKPLACE PROTECTION ORDERS	180
INTRODUCTION	181
POWER TO MAKE WORKPLACE PROTECTION ORDERS	181
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	181
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	182
The position in other jurisdictions.....	182
Submissions	183
The Commission's view	185
GROUNDS FOR OBTAINING A WORKPLACE PROTECTION ORDER	186
The position in other jurisdictions.....	186
Submissions	186
The Commission's view	186
WHO MAY APPLY FOR A WORKPLACE PROTECTION ORDER	189
The position in other jurisdictions.....	190
Submissions	191
The Commission's view	192
CONDITIONS OF A WORKPLACE PROTECTION ORDER	194
The position in other jurisdictions.....	194
Submissions	195
The Commission's view	196
APPLICATION OF OTHER PROVISIONS TO WORKPLACE PROTECTION ORDERS	198
RECOMMENDATIONS	198
CHAPTER 9	204
APPLICATIONS	204
INTRODUCTION	205
THE USUAL PROCEDURE FOR INITIATING AN APPLICATION.....	205
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	205
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	206
The position in other jurisdictions.....	207
Submissions	208
The Commission's view	209
FORMAL REQUIREMENTS	209
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	209
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	210
The position in other jurisdictions.....	210
Submissions	210
The requirement of writing	211
The requirement of an oath.....	211
The application form	212
The Commission's view	213
The requirement of writing	213
The requirement of an oath.....	213
The application form	213
THE ROLE OF JUSTICES OF THE PEACE IN THE APPLICATION PROCESS.....	214
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	214
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	216
The position in other jurisdictions – New South Wales.....	216
Submissions	216
The Commission's view	218

SCREENING OF APPLICATIONS FOR UNSUBSTANTIATED OR UNMERITORIOUS COMPLAINTS	219
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	219
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	219
The position in other jurisdictions.....	219
New South Wales	220
South Australia.....	221
Submissions	222
The Commission's view	223
APPLICATIONS MADE BY TELEPHONE OR OTHER ELECTRONIC MEANS.....	223
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	224
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	224
The position in other jurisdictions.....	225
New South Wales	225
South Australia.....	226
Tasmania	226
Victoria	227
Western Australia.....	227
Submissions	228
Applications made by telephone or other electronic means	228
Who may make an application.....	229
Who should hear the application	229
The circumstances in which an application may be made	229
The Commission's view	230
PROCEDURES FOR MAKING AN APPLICATION BY TELEPHONE OR OTHER ELECTRONIC MEANS	233
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	233
Making an application by telephone etc.....	233
Duties of a magistrate	233
Duties of a police officer.....	234
Setting a date for hearing after a temporary protection order is made	234
Proof of temporary protection order.....	234
Submissions	235
The Commission's view	235
NOTICES TO APPEAR.....	238
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	238
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	238
The <i>Police Powers and Responsibilities Act 2000</i> (Qld).....	239
The Commission's view	240
RECOMMENDATIONS	242
CHAPTER 10	249
MEDIATION AND OTHER DISPUTE RESOLUTION MECHANISMS	249
INTRODUCTION	250
WHAT IS MEDIATION?	250
MEDIATION UNDER THE <i>PEACE AND GOOD BEHAVIOUR ACT 1982</i> (QLD)	251
THE <i>JUSTICES ACT 1886</i> (QLD).....	251
THE <i>DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989</i> (QLD)	252
DISPUTE RESOLUTION PROCESSES IN OTHER CONTEXTS.....	252
THE POSITION IN OTHER AUSTRALIAN JURISDICTIONS	254
ACT	254
New South Wales.....	254

Northern Territory	255
South Australia	256
Victoria	256
ISSUES RAISED BY THE CURRENT MECHANISM FOR REFERRAL TO MEDIATION	257
Submissions	257
The Commission's view	259
ISSUES FOR CONSIDERATION.....	260
MANDATORY OR DISCRETIONARY REFERRAL	260
Submissions	262
Mediation as a mandatory step in the application process	262
Referral to mediation at the court's discretion	263
Consent of the parties to referral	265
Voluntariness	265
Appropriateness of matters for mediation	265
The Commission's view	266
An express power to refer matters to mediation	266
Mediation at the court's discretion	266
Consent of the parties to referral	267
Voluntariness	267
Mediation where one of the parties is a child.....	267
CRITERIA FOR REFERRAL TO DISPUTE RESOLUTION	268
Legislative criteria as to exercise of the discretion	268
Pre-mediation assessment	269
Submissions	270
Legislative criteria as to the exercise of the discretion to refer.....	270
Pre-mediation assessment	271
The Commission's view	271
TIMING OF REFERRAL.....	273
Submissions	274
The Commission's view	274
WHO SHOULD CONDUCT THE MEDIATION?	274
Submissions	276
The Commission's view	277
THE COST OF MEDIATION	279
Submissions	280
The Commission's view	281
PRELIMINARY CONFERENCES	281
Submissions	282
The Commission's view	284
PROCEDURES FOLLOWING DISPUTE RESOLUTION PROCESSES.....	286
<i>The Peace and Good Behaviour Act 1982 (Qld)</i>	286
The position in other jurisdictions – New South Wales, Northern Territory and Victoria ..	286
Submissions	287
The Commission's view	288
RECOMMENDATIONS	290
CHAPTER 11	296
HEARINGS AND EVIDENCE.....	296
INTRODUCTION	297
THE PROCEDURE AT THE HEARING	297
ISSUES FOR CONSIDERATION.....	298
THE APPEARANCE OR NON-APPEARANCE OF THE PARTIES	299

The appearance of the respondent.....	299
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	299
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	300
The non-appearance of the respondent.....	300
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	300
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	301
The Commission's view	302
EXPLAINING THE CONSEQUENCES OF THE APPLICATION.....	303
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	303
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	303
The position in other jurisdictions.....	304
The Commission's view	304
THE STANDARD OF PROOF.....	306
Submissions	306
The Commission's view	307
REQUIRING WITNESSES TO ATTEND AND GIVE EVIDENCE	307
The Commission's view	310
EVIDENCE PROVISIONS.....	310
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	311
Application of the rules of evidence	311
The way in which evidence is given.....	311
Malicious or vexatious complaint	311
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	311
Application of the rules of evidence	311
The way in which evidence is given.....	312
The position in other jurisdictions.....	312
Application of the rules of evidence	312
The way in which evidence is given.....	312
Submissions	314
Application of the rules of evidence	314
The way in which evidence is given.....	315
The Commission's view	315
VULNERABLE WITNESSES, INCLUDING CHILDREN.....	316
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	317
Support for witnesses when giving evidence.....	317
When children may give evidence	318
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	318
Support for witnesses when giving evidence.....	318
When children may give evidence	318
The position in other jurisdictions.....	319
Support for witnesses when giving evidence.....	319
New South Wales	319
Victoria	320
Western Australia	320
When children may give evidence	321
Submissions	321
The Commission's view	323
WITHDRAWAL OF AN APPLICATION.....	324
The position in Queensland	324
The Commission's view	325
RECOMMENDATIONS	325

CHAPTER 12	330
POWERS TO MAKE INTERIM ORDERS AND CONSENT ORDERS ETC	330
INTRODUCTION	331
INTERIM PROTECTION ORDERS.....	331
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	332
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	332
The commission of an act of domestic violence	333
Danger of personal injury or substantial property damage.....	334
The evidence required to support a temporary protection order	334
The form of a temporary protection order	334
Matters that must be stated in a temporary protection order.....	334
A temporary protection order as a summons.....	335
The position in other jurisdictions.....	335
Submissions	336
The availability of interim orders	337
The basis of a grant of an interim order	337
The evidence required to grant an interim order.....	338
The Commission's view	338
When the court may make an interim protection order.....	338
The evidence required to support an interim protection order.....	340
The form of an interim protection order	340
Matters that must be stated in an interim protection order	341
An interim protection order as a summons	341
CONSENT ORDERS	341
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	341
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	341
The position in other jurisdictions.....	342
Issues for consideration	343
Submissions	344
The power to make consent orders	344
The grounds of the application.....	344
Admissions by the respondent to the alleged behaviour	345
Enquiries by the court into the particulars of the application	345
Restrictions on the court's ability to make an order	346
Authorisation of a registrar to make a consent order.....	346
The Commission's view	346
The power to make consent orders	346
The grounds of the application.....	347
Admissions by the respondent to the alleged behaviour	347
Consent order may only include matters dealt with under the Personal Protection Bill 2007	347
Enquiries by the court into the particulars of the application	348
Court's power to make other protection orders on the application	348
Authorisation of a registrar to make a consent order.....	348
PROTECTION ORDERS MADE IN CRIMINAL PROCEEDINGS	350
The <i>Penalties and Sentences Act 1992</i> (Qld).....	350
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	351
The <i>Criminal Code</i> (Qld)	351
The position in other jurisdictions.....	352
Issues for consideration	353
The Commission's view	353
RECOMMENDATIONS	354

CHAPTER 13	362
DURATION OF PROTECTION ORDERS.....	362
INTRODUCTION	363
WHEN A PROTECTION ORDER COMMENCES	363
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	363
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	363
The Commission's view	364
DURATION OF FINAL PROTECTION ORDERS	364
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	364
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	364
The position in other jurisdictions.....	365
Submissions	366
The Commission's view	367
DURATION OF INTERIM PROTECTION ORDERS.....	369
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	369
The position in other jurisdictions.....	370
The Commission's view	372
DURATION OF PROTECTION ORDERS MADE BY CONSENT	375
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	375
The position in other jurisdictions.....	375
Submissions	375
The Commission's view	376
RECOMMENDATIONS	376
CHAPTER 14	379
THE CONSEQUENCES OF GRANTING AND BREACHING AN ORDER	379
INTRODUCTION	380
EXPLAINING THE ORDER.....	380
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	381
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	381
The position in other jurisdictions.....	382
Submissions	383
The Commission's view	383
Court to explain matters about the order to the parties	384
Registrar to give a written explanation to the parties.....	385
Use of other persons to explain order.....	385
Explanation not to affect the validity of the order.....	386
BREACH OF AN ORDER	386
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	386
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	386
The position in other jurisdictions.....	387
New South Wales	387
The Northern Territory	388
South Australia.....	388
Tasmania	388
Victoria	389
Western Australia.....	389
Submissions	390
The Commission's view	391
Liability for breach.....	391
Penalty	392
The power to make a further order	393

Aiding and abetting a breach	393
DEFENCES TO A BREACH OF AN ORDER	394
Consent as a defence to breach	394
Other defences	394
The Commission's view	395
PROSECUTION OF OFFENCES	396
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	396
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	396
The Commission's view	396
THE ROLE OF THE POLICE IN ENFORCEMENT OF ORDERS	396
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	397
The position in other jurisdictions	397
Submissions	398
The Commission's view	401
RECOMMENDATIONS	402
 CHAPTER 15	407
VARYING AND SETTING ASIDE PROTECTION ORDERS	407
INTRODUCTION	408
POWER TO VARY AND SET ASIDE	408
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	409
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	409
Variation of orders	410
Revocation of orders	411
The position in other jurisdictions	412
Issues for consideration	415
Submissions	415
Variation of the conditions of an order	415
Variation of the duration of an order	416
Setting aside an order	416
The Commission's view	416
The power of the court to vary or set aside an existing order	416
The grounds for varying or setting aside an existing order	417
Factors to which the court must have regard in considering an application to vary or set aside an order	418
The time from when variation or setting aside takes effect	419
WHO MAY APPLY TO VARY OR SET ASIDE AN EXISTING ORDER	419
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	419
The position in other jurisdictions	420
The Commission's view	421
PROCEDURAL PROVISIONS FOR VARIATION AND SETTING ASIDE	422
<i>Domestic and Family Violence Protection Act 1989</i> (Qld)	422
The Commission's view	423
RECOMMENDATIONS	423
 CHAPTER 16	427
APPEALS	427
INTRODUCTION	428
THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)	428
THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)	429
THE POSITION IN OTHER JURISDICTIONS	431
Stay of the operation of the order	432

Appeal of refusal to make an interim order	432
Appeal of an award for costs.....	433
THE COMMISSION'S VIEW	433
Specific appeals provisions.....	435
Decisions appealed against	436
Powers on appeal	437
Entitlement to appear	437
Stay on the operation of the order	438
SELECTED ISSUES FOR CONSIDERATION	439
The refusal to make an interim protection order	439
Right to appeal award for costs.....	440
RECOMMENDATIONS	441
 CHAPTER 17	445
INTERJURISDICTIONAL RECOGNITION OF ORDERS	445
INTRODUCTION	446
THE <i>PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)</i>	446
THE <i>DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)</i>	447
THE POSITION IN OTHER JURISDICTIONS	449
Notification of registration to the respondent	450
Notification of registration to other persons or entities.....	450
Variation of a registered corresponding order.....	451
Effect of variation or revocation of the order in the original jurisdiction	451
THE COMMISSION'S VIEW	452
Procedure for registration, including notice of application	453
Notification of registration to the respondent	455
Enforceability of a registered corresponding order	457
Period of registration	458
Notification of registration to other persons or entities.....	458
Variation of a registered corresponding order.....	458
Effect of variation or revocation of the order in the original jurisdiction	460
RECOMMENDATIONS	461
 CHAPTER 18	466
PUBLICATION OF PROCEEDINGS.....	466
INTRODUCTION	467
THE <i>PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)</i>	468
THE <i>DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)</i>	469
THE POSITION IN OTHER JURISDICTIONS	471
Prohibition on publication of identity – ACT, New South Wales and Victoria	471
Prohibition on publication of other information – Victoria, Western Australia	473
Power to order non-publication – New South Wales and Tasmania	474
RESTRICTING THE PUBLICATION OF PROCEEDINGS	475
The Commission's view	477
CRITERIA FOR THE EXERCISE OF DISCRETION	478
The Commission's view	480
THE INFORMATION CAPABLE OF BEING RESTRICTED	481
The Commission's view	482
APPLICATIONS	483
The Commission's view	483
OFFENCE AND PENALTY	484
The Commission's view	485

EXCUSE OR EXCEPTIONS	485
The Commission's view	485
RECOMMENDATIONS	486
 CHAPTER 19	489
SERVICE OF DOCUMENTS.....	489
INTRODUCTION	490
THE <i>PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)</i>	490
THE <i>JUSTICES ACT 1886 (QLD)</i>	491
THE <i>DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)</i>	493
The original application and summons	493
Orders	494
Applications to vary or set aside	495
Notices of appeal	495
Manner and proof of service	495
THE POSITION IN OTHER JURISDICTIONS	497
The original application and summons	497
Orders	498
Applications to vary or set aside	500
Notices of appeal	500
SUBMISSIONS.....	500
THE COMMISSION'S VIEW	502
Who should be served	502
Who must effect service.....	505
Manner of service.....	507
Proof of service	508
NOTIFICATION OF APPLICATIONS INVOLVING CHILDREN	509
The <i>Peace and Good Behaviour Act 1982 (Qld)</i>	509
The <i>Domestic and Family Violence Protection Act 1989 (Qld)</i>	509
The <i>Child Protection Act 1999 (Qld)</i>	510
The Commission's view	510
RECOMMENDATIONS	513

Chapter 1

Introduction

TERMS OF REFERENCE.....	2
THE DISCUSSION PAPER.....	2
THE CONSULTATION PROCESS	3
Prior to publication of the Discussion Paper	3
After the release of the Discussion Paper.....	3
SUBMISSIONS.....	4
THE COMMISSION'S APPROACH	4
THE STRUCTURE OF THIS REPORT.....	4
Terminology.....	7

TERMS OF REFERENCE

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

1.2 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.²

1.3 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.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 seeking an order; and
- the enforcement of orders made under the Act.

1.5 If the Commission considers 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 complete terms of reference are reproduced in Appendix 1 of this Report.

THE DISCUSSION PAPER

1.7 In March 2005, the Commission published a Discussion Paper for the purpose of public consultation.⁴ The Discussion Paper provided a summary of the provisions of the *Peace and Good Behaviour Act 1982* (Qld), as well as the

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

² The provisions of the Act are discussed in Chapter 2 of this Report.

³ *Peace and Good Behaviour Act 1982* (Qld) ss 4, 6. The terms of reference are set out in Appendix 1 to this Report.

⁴ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005).

provisions of comparable legislation in other Australian jurisdictions, and raised a number of questions for consideration.

1.8 The Discussion Paper was widely distributed to relevant organisations and interested individuals. In addition, the Discussion Paper was made available on the Commission's Home Page on the internet.⁵

THE CONSULTATION PROCESS

Prior to publication of the Discussion Paper

1.9 In preparing the Discussion Paper, the Commission sought preliminary information and advice from a number of individuals and organisations with experience of the operation of the *Peace and Good Behaviour Act 1982* (Qld), including the Chief Magistrate of Queensland, the Commissioner of the Queensland Police Service, the Dispute Resolution Branch of the Department of Justice and Attorney-General, the Justices of the Peace Branch of the Department of Justice and Attorney-General, Legal Aid Queensland, Caxton Legal Centre Inc and private organisations representing Queensland justices of the peace.

After the release of the Discussion Paper

1.10 The release of the Discussion Paper was accompanied by a call for submissions, which was published in *The Courier-Mail*, in the *Alternative Law Journal*, in various publications of peak bodies with an interest in this area of the law, and on the Queensland government website 'ConsultQld'.⁶

1.11 In order to facilitate the consultation process, the Commission sought comments and submissions from a number of key organisations and individuals, including the Chief Magistrate of Queensland, the Magistrates Court Branch of the Department of Justice and Attorney-General, the Dispute Resolution Branch of the Department of Justice and Attorney-General, the Queensland Police Service, the Department of Child Safety, Legal Aid Queensland, community legal services, disability advocacy services, service providers for people affected by domestic violence, tenancy advice and advocacy organisations, and peak representative bodies for employers and employees. The Commission also met with some of these organisations and individuals in person.

1.12 As part of the process of preparing this Report, the Commission has sought and received additional information and advice about specific issues arising in the review from a number of organisations and individuals with

⁵ <<http://www.qlrc.qld.gov.au/publications.htm>>.

⁶ <<http://www.getinvolved.qld.gov.au/consultqld/>>.

experience in the operation of the Act and other relevant matters, including the Chief Magistrate of Queensland, the Magistrates Court Branch of the Department of Justice and Attorney-General and Mr JS Gordon, magistrate. The Commission is grateful for the assistance provided by these organisations and individuals.

SUBMISSIONS

1.13 The Commission received 32 submissions from interested organisations and individuals. The Commission is grateful to these organisations and individuals for their participation in the review and for their contribution to the recommendations made by the Commission in this Report. A list of submissions is set out in Appendix 2 of this Report.

THE COMMISSION'S APPROACH

1.14 In this review, the Commission has considered whether the *Peace and Good Behaviour Act 1982* (Qld) provides adequate protection for people in the community.

1.15 The significant majority of submissions received by the Commission in relation to the review expressed the view that the current *Peace and Good Behaviour Act 1982* (Qld) does not provide an appropriate, accessible and effective mechanism for the protection of the community from certain forms of violence. In particular, many submissions indicated that the existing grounds for obtaining an order are too restrictive, the procedure for seeking an order is too complex, the existing mechanism for referral to mediation is inadequate, and there is inadequate provision for prosecution of breaches.

1.16 The Commission is of the view that the *Peace and Good Behaviour Act 1982* (Qld) does not provide an appropriate, easily accessible and effective mechanism for protecting the community. Given the shortcomings of the current Act, the Commission considers that a new legislative mechanism – the ‘Personal Protection Act’ – should be established in its place.⁷ Appendix 4 of this Report contains the proposed Personal Protection Bill 2007 which reflects the Commission’s recommendations in this Report.

THE STRUCTURE OF THIS REPORT

1.17 Chapter 2 outlines the current provisions of the *Peace and Good Behaviour Act 1982* (Qld) and its historical background. It also gives an overview of the relationship of the *Peace and Good Behaviour Act 1982* (Qld)

⁷

See Chapter 3 of this Report which discusses the Commission’s general approach to the development of the Personal Protection Bill 2007 as a new legislative mechanism for the protection of members of the community from certain forms of violence.

with the *Domestic and Family Violence Protection Act 1989* (Qld) and the development of similar legislation in other Australian jurisdictions.

1.18 Chapter 3 discusses some of the key policy issues arising under the review. It sets out the Commission's general approach to the development of the Personal Protection Bill 2007 as a new legislative mechanism for the protection of members of the community from certain forms of violence. It also discusses some of the key features of the proposed Personal Protection Bill 2007, issues affecting the scope of the Bill and resource implications arising from the Commission's recommendations.

1.19 Chapter 4 considers the inclusion of a scheme for the making of personal protection orders under the proposed Personal Protection Bill 2007. It considers the court's power to make personal protection orders and who, other than the person for whose benefit an order is sought, can be protected by a personal protection order. The following three chapters consider other aspects of the Commission's proposed scheme for making personal protection orders.

1.20 Chapter 5 examines the appropriateness of the ambit of the current grounds for obtaining a peace and good behaviour order, and the grounds for obtaining a personal protection order under the Personal Protection Bill 2007, including harassment and intimidation. It also considers the grounds on which a person, other than the person for whose benefit a personal protection order is made, can also be protected by the order.

1.21 Chapter 6 discusses eligibility to make an application for a personal protection order. It considers whether specific provision should be made in the Personal Protection Bill 2007 allowing applications to be made on behalf of certain classes of people, namely, adults with, or without, capacity and children. It also considers who should be entitled to bring an application on another person's behalf. The role of police in making an application for a personal protection order is also considered.

1.22 Chapter 7 examines the generality of a peace and good behaviour order and discusses the conditions that may be imposed in a personal protection order under the Personal Protection Bill 2007. It considers the inclusion of a standard condition and the court's discretion to impose specific conditions in a personal protection order.

1.23 Chapter 8 discusses the inclusion of a scheme in the Personal Protection Bill 2007 for the making of a workplace protection order; a specific kind of order which allows an employer to apply for an order to protect employees in the workplace. It considers the court's power to make a workplace protection order, the grounds for making a workplace protection order, who may apply for, and what conditions may be imposed in, a workplace protection order.

1.24 The remaining chapters of the Report examine other aspects of the proposed Personal Protection Bill 2007 which apply in relation to both personal protection orders and workplace protection orders.

1.25 Chapter 9 examines the procedures for making an application under the *Peace and Good Behaviour Act 1982* (Qld) and the proposed new Personal Protection Bill 2007, including applications made in circumstances of urgency. It discusses the role of justices of the peace in the application process, the screening of applications for unmeritorious complaints and the ability for police applicants to initiate proceedings by issuing a notice to appear.

1.26 Chapter 10 examines the role of mediation in resolving disputes the subject of proceedings under the *Peace and Good Behaviour Act 1982* (Qld) and the proposed new Personal Protection Bill 2007. It also considers the role of preliminary conferences.

1.27 Chapter 11 considers the procedures for hearing applications under the proposed new Personal Protection Bill 2007. It deals with the court's powers on the appearance or non-appearance of the parties, explaining the consequences of making an application to the parties and the withdrawal of applications. This chapter also examines the standard of proof, the application of the rules of evidence and the way in which evidence is given in proceedings under the Bill. It also deals with measures to support vulnerable witnesses.

1.28 Chapter 12 examines the court's power to make interim protection orders in a range of circumstances, including ex parte orders and orders made on application by telephone or some other form of electronic communication. It also discusses consent orders and orders made on a court's own initiative in sentencing proceedings.

1.29 Chapter 13 examines the duration of protection orders.

1.30 Chapter 14 discusses the consequences of granting and breaching a protection order, including the offence of breaching an order or conditions of an order. The role of police in the enforcement of orders, including the prosecution of breaches, is also considered.

1.31 Chapter 15 deals with the inclusion of provisions in the Personal Protection Bill 2007 for the variation and setting aside of a protection order.

1.32 Chapter 16 examines the right of appeal against certain orders or decisions made in proceedings under the Personal Protection Bill 2007.

1.33 Chapter 17 examines the inclusion of a scheme under the Personal Protection Bill 2007 for the recognition of an order, made in another Australian State or Territory or in New Zealand, which has the same or similar effect as a protection order made under the Personal Protection Bill 2007.

1.34 Chapter 18 considers the court's power to restrict publication or other dissemination of proceedings under the Personal Protection Bill 2007 to the public or a section of the public.

1.35 Chapter 19 considers requirements for the service of documents.

1.36 Chapter 20 discusses several miscellaneous issues, including joint respondents, children as respondents, informing the Adult Guardian of concerns, entitlement to appear, provisions about warrants, the application of the *Bail Act 1980* (Qld), notification of the Commissioner of Police about applications and orders, the relationship between applications made under the Personal Protection Bill 2007 and the *Domestic and Family Violence Protection Act 1989* (Qld), the jurisdiction of the court, costs and filing fees.

1.37 In examining the scope of the *Peace and Good Behaviour Act 1982* (Qld), the Report includes information about the relevant provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) and the *Justices Act 1886* (Qld). The Report also discusses similar provisions in the relevant restraining order legislation in other Australian jurisdictions.

1.38 Appendix 1 of the Report sets out the Commission's terms of reference for the review. Appendix 2 includes a list of the submissions received by the Commission in relation to the review.

1.39 The Report also includes, in Appendix 4, draft legislation prepared by the Office of the Queensland Parliamentary Counsel for implementing the Commission's recommendations. The Commission would like to thank Ms Sandra Lawson, Senior Assistant Parliamentary Counsel, for her expertise and assistance in the preparation of the draft legislation.

1.40 Appendix 3 is a comparative table which identifies, in relation to each substantive provision of the draft legislation in Appendix 4, the recommendation/s in this Report to which that provision gives effect.

1.41 Unless otherwise specified, the law is stated in this Report as at 3 December 2007.

Terminology

Child

1.42 In this Report, the term 'child' is used to refer to a person who is under 18 years, and includes a young person.

Young person

1.43 The term 'young person' is used in this Report to refer to an older child.

Civil restraining order legislation

1.44 In this Report, the term ‘civil restraining order legislation’ is used to refer to the legislation in other Australian States and Territories, set out below, to the extent it provides similar coverage to the proposed new Personal Protection Bill 2007.

1.45 In the Northern Territory, significant amendments have been made to the civil restraining order legislation which introduce a new, and more comprehensive, restraining order scheme. While the new legislation has not yet commenced, the Commission has included discussion of the new provisions throughout the Report.

1.46 Amending legislation has also been enacted in New South Wales, but has not yet commenced. Where relevant, changes introduced by the new legislation are noted throughout the Report.

1.47 For a more detailed discussion of the legislation in other jurisdictions, see paragraphs 2.33–2.55 in Chapter 2 of this Report.

Jurisdiction	Statute	Coverage	Currency
ACT	<i>Domestic Violence and Protection Orders Act 2001 (ACT)</i> ⁸	Covers personal violence for which a ‘personal protection order’ may be made.	In force.
New South Wales	<i>Crimes Act 1900 (NSW) pt 15A</i> ⁹	Covers personal violence, including intimidation and stalking, for which an ‘apprehended personal violence order’ may be made.	In force, but is to be repealed and replaced (see below).
	<i>Crimes (Domestic and Personal Violence) Act 2007 (NSW)</i>	Repeals and replaces pt 15A of the <i>Crimes Act 1900 (NSW)</i> . Continues to provide for the making of ‘apprehended personal violence orders’.	Assented to on 7 December 2007 but has not yet commenced.
Northern Territory	<i>Justices Act (NT) pt IV div 7</i>	Empowers the Court of Summary Jurisdiction to order the defendant, upon complaint, to enter into a recognizance to keep the peace or be of good behaviour.	In force, but is to be repealed and replaced (see below).

⁸

Also see *Domestic Violence and Protection Orders Regulation 2002 (ACT)*.

⁹

Also see *Crimes (General) Regulation 2005 (NSW)*.

Jurisdiction	Statute	Coverage	Currency
	<i>Justices Act (NT) pt IVA</i>	Replaces pt IV div 7 of the <i>Justices Act (NT)</i> . ¹⁰ Covers personal violence by introducing a scheme for the making of 'personal violence restraining orders'.	Assented to on 12 December 2007 but has not yet commenced.
South Australia	<i>Summary Procedure Act 1921 (SA) pt 4 div 7</i> ¹¹	Covers personal violence, including intimidating or offensive behaviour (for which a 'restraining order' may be made).	In force.
Tasmania	<i>Justices Act 1959 (Tas) pt XA</i> ¹²	Covers personal violence, including stalking (for which a 'restraint order' may be made).	In force.
Victoria	<i>Magistrates' Court Act 1989 (Vic) s 126A</i>	Empowers the Magistrates' Court to make an order, upon application, to bind a person to keep the peace or be of good behaviour.	In force.
	<i>Crimes (Family Violence) Act 1987 (Vic)</i> ¹³	Covers stalking for which an 'intervention order' may be made, even if there is no family relationship between the parties. ¹⁴	In force.
Western Australia	<i>Restraining Orders Act 1997 (WA)</i> ¹⁵	Covers both personal violence and other misconduct, such as behaviour that is or may lead to a breach of the peace, for which a 'violence restraining order' or a 'misconduct restraining order' may be made.	In force.

¹⁰ *Justices Act (NT) pt IV div 7* is repealed and replaced with a new pt IVA by the *Domestic and Family Violence Act (NT)* s 145.

¹¹ Also see *Summary Procedure (Restraining Orders) Regulations 2006 (SA)*.

¹² Also see *Justices (Restraint Orders) Rules 2003 (Tas)*.

¹³ Also see *Crimes (Family Violence) Regulations 2005 (Vic)*; *Magistrates' Court (Family Violence) Rules 2000 (Vic)*.

¹⁴ By virtue of s 21A(5) of the *Crimes Act 1958 (Vic)*.

¹⁵ Also see *Restraining Orders Regulations 1997 (WA)*.

Chapter 2

The *Peace and Good Behaviour Act 1982* (Qld): history and context

INTRODUCTION	11
HISTORICAL BACKGROUND	11
Origins of the <i>Peace and Good Behaviour Act 1982</i> (Qld)	11
Relationship with domestic violence legislation	12
OVERVIEW OF THE CURRENT ACT	13
Who can apply for an order.....	14
Grounds for obtaining an order	14
The procedure for obtaining an order	15
The nature of the proceeding	16
Breach of an order	17
THE DEVELOPMENT OF SIMILAR LEGISLATION IN OTHER JURISDICTIONS.....	17
The ACT	18
New South Wales.....	18
The Northern Territory.....	20
South Australia	21
Tasmania.....	21
Victoria	21
Western Australia	22

INTRODUCTION

2.1 This chapter provides an overview of the *Peace and Good Behaviour Act 1982* (Qld). The first part of the chapter gives a brief history of the development of the Act, including an overview of its relationship with the *Domestic and Family Violence Protection Act 1989* (Qld). The second part of the chapter is an overview of the content of the *Peace and Good Behaviour Act 1982* (Qld). It outlines the scope and provisions of the Act as it currently operates. The final part of the chapter outlines the development of similar legislation in other Australian jurisdictions to provide a context in which to consider the reform of the legislation in Queensland.

HISTORICAL BACKGROUND

Origins of the *Peace and Good Behaviour Act 1982* (Qld)

2.2 The historical origins of the power to make ‘peace and good behaviour’ orders are somewhat obscure, and have been traced back at least 700 years.¹⁶ 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 to violence’, and a power granted by a 14th century statute¹⁷ to bind a person over ‘to be of good behaviour generally’ – but that by the time of colonial settlement in Australia in the 19th 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.¹⁸ Australian courts have recognised both the common law¹⁹ and legislative²⁰ bases for the power.

2.3 In Queensland, the power was first given statutory recognition by the *Justices Act 1886* (Qld).²¹ However, the relevant provisions of that Act were repealed in 1964.²²

¹⁶ See Law Commission (England and Wales), *Binding Over*, Report No 222 (1994) [2.1].

¹⁷ 34 Edw III c 1 (1361).

¹⁸ *R v Wright, Ex parte Klar* (1971) 1 SASR 103, 106–8 (Bray CJ).

¹⁹ See, for example, *Carr v Werry* [1979] 1 NSWLR 144, 146 (Lee J).

²⁰ See, for example, *O’Kane v Sellheim* (1882) QLJ 85, 87–8 (Lilley CJ).

²¹ *Justices Act 1886* (Qld) ss 198 (Complaint praying for surety of the peace), 199 (Complaint praying for surety for the good behaviour).

²² 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 (Mr Patrick Hanlon).

2.4 In introducing the Peace and Good Behaviour Bill 1982 (Qld) into the Queensland Parliament, the then Minister for Justice and Attorney-General, the Honourable Samuel Doumany, observed.²³

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.

Relationship with domestic violence legislation

2.5 When the *Peace and Good Behaviour Act 1982* (Qld) 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'.²⁴

2.6 The parliamentary debate that accompanied the introduction of the Peace and Good Behaviour Bill 1982 (Qld) demonstrated a growing public awareness of domestic violence.²⁵ 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 *Peace and Good Behaviour Act 1982* (Qld) was generally ineffective in helping domestic violence victims.²⁶ 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'.²⁷

2.7 The task force was therefore of the view that the relief provided by the *Peace and Good Behaviour Act 1982* (Qld) 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).²⁸ Instead, the task force recommended the introduction of separate legislation to deal specifically with domestic violence.²⁹ As a result of the work of the task force, the *Domestic*

²³ See the Second Reading Speech of the Peace and Good Behaviour Bill 1982 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1982, 840 (Hon Samuel Doumany, Minister for Justice and Attorney-General).

²⁴ Ibid 841.

²⁵ See for example: Queensland, *Parliamentary Debates*, Legislative Assembly, 10 November 1982, 2138 (Mr Ian Prentice), 2140 (Ms Beryce Nelson), 2144 (Dr John Lockwood).

²⁶ Queensland Domestic Violence Task Force, *Beyond These Walls*, Report (1988) 157.

²⁷ Ibid 160.

²⁸ Ibid.

²⁹ Ibid 160 ff 173–7, rec 24.

Violence (Family Protection) Act 1989 (Qld) was enacted.³⁰ 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.³¹ The Act applies if a ‘domestic relationship’ exists between the two persons.³² A ‘domestic relationship’ includes a spousal relationship, an intimate personal relationship, a family relationship, and an informal care relationship.³³

2.8 Although the current *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 *Domestic and Family Violence Protection Act 1989* (Qld). Anecdotal information supplied to the Commission from community legal services indicates that, currently, the *Peace and Good Behaviour Act 1982* (Qld) is more often used in neighbour disputes and in disputes between former flatmates, co-workers or former co-workers where there have been threats of, or actual, violence.³⁴

OVERVIEW OF THE CURRENT ACT

2.9 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.³⁵ 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,³⁶ and may impose such other conditions as it thinks fit.³⁷

2.10 In the financial year to 30 June 2007, approximately 540 applications for peace and good behaviour orders were received by the Magistrates Courts throughout Queensland, with approximately 100 of these proceeding to hearing.³⁸ The Caxton Legal Centre Inc observed from its own data, covering an earlier period, that although it had directly advised only a small number of

³⁰ See the Second Reading Speech of the Domestic Violence (Family Protection) Bill 1989 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 15 March 1989, 3797–8 (Hon Craig Sherrin, Minister for Family Services).

³¹ *Domestic Violence Legislation Amendment Act 2002* (Qld) ss 9, 11.

³² *Domestic and Family Violence Protection Act 1989* (Qld) ss 11, 11A, 20(1).

³³ *Domestic and Family Violence Protection Act 1989* (Qld) s 11A. See also *Domestic and Family Violence Protection Act 1989* (Qld) ss 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*), 12C (What is an informal care relationship), 12D(2) (Children as applicants and respondents generally).

³⁴ Information provided to the Commission by Caxton Legal Centre Inc, 23 August 2004; Submissions 19, 22.

³⁵ *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

³⁶ *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

³⁷ *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

³⁸ Information provided by the Chief Magistrate, Judge MP Irwin, 30 October 2007.

clients in relation to orders under the Act, this represented only a fraction of the occasions on which advice has been given about such orders, because the majority of advice would be related to separate substantive issues, and would be entered into the Centre's database as advices about those substantive issues.³⁹

Who can apply for an order

2.11 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 a particular 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 property.⁴⁰

2.12 A complainant may also complain about the conduct of the defendant in relation to a person under the complainant's care or charge.⁴¹

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

Grounds for obtaining an order

2.14 A complainant may make a complaint that the defendant has made certain threats and that the complainant is in fear of the defendant.⁴²

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

2.16 The substance of the threat must be to:

- assault or do any bodily injury to the complainant or to a person under the complainant's care or charge;⁴³

³⁹ Information provided by Caxton Legal Centre Inc, 23 August 2004.

⁴⁰ *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).

⁴¹ *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).

⁴² *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

⁴³ *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(a).

- procure another person to assault or do any bodily injury to the complainant or to a person under the complainant's care or charge;⁴⁴
- destroy or damage any property of the complainant;⁴⁵ or
- procure another person to destroy or damage any property of the complainant.⁴⁶

2.17 The complainant must also be in fear of the defendant.⁴⁷

2.18 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.⁴⁸

The procedure for obtaining an order

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

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

2.21 If satisfied the complaint is substantiated and that the complainant's fear is reasonable, the justice of the peace may issue a summons requiring the defendant to appear before a Magistrates Court or a warrant requiring that the defendant be apprehended and brought before a Magistrates Court.⁴⁹

2.22 However, if the justice of the peace considers that the matter would be better resolved by mediation than by proceedings before a Magistrates Court, the justice may, with the complainant's consent, submit the matter to mediation.⁵⁰ 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.

2.23 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,⁵¹ or make an order that the defendant keep the peace and be of

⁴⁴ *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(b).

⁴⁵ *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(c).

⁴⁶ *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(d).

⁴⁷ *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

⁴⁸ *Peace and Good Behaviour Act 1982* (Qld) s 4(2). The grounds for making a complaint pursuant to this section of the Act were amended by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66(3).

⁴⁹ *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

⁵⁰ *Peace and Good Behaviour Act 1982* (Qld) s 4(3). This section was amended in 2004 to apply to complaints made pursuant to both s 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). Mediation is discussed in Chapter 10 of this Report.

⁵¹ *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(a).

good behaviour for such time, specified in the order, as the court thinks fit.⁵² The order may also contain any other conditions that the court thinks appropriate.⁵³

2.24 If the defendant does not appear in court to answer the complaint and proof of service of the summons is made, the court may nonetheless proceed and may, in the absence of the defendant, make an order against him or her.⁵⁴

The nature of the proceeding

2.25 A relevant issue in relation to the procedure for obtaining a peace and good behaviour order is whether the hearing of an application for an order is civil or criminal in nature. No specific provision appears in the *Peace and Good Behaviour Act 1982* (Qld).

2.26 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.⁵⁵ However, in a civil proceeding, the standard of proof is merely on the balance of probabilities – that is, more likely than not.⁵⁶

2.27 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’⁵⁷ – it is difficult to characterise the proceeding as criminal.⁵⁸ 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).⁵⁹

2.28 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:⁶⁰

⁵² *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

⁵³ *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

⁵⁴ *Peace and Good Behaviour Act 1982* (Qld) s 7(1)(b).

⁵⁵ *Brown v The King* (1913) 17 CLR 570, 584–5 (Barton ACJ), 595 (Isaacs and Powers JJ); *Woolmington v DPP* [1935] AC 462, 481.

⁵⁶ See generally, *Halbury's Laws of England* (4th ed, 2002) Vol 17(1) [426]; *Brown v The King* (1913) 17 CLR 570, 584–5 (Barton ACJ); 595 (Isaacs and Powers JJ).

⁵⁷ *Ex parte Davis* (1871) 35 JP 551, 551–2 (Blackburn J).

⁵⁸ *Laidlaw v Hulett; Ex parte Hulett* [1998] 2 Qd R 45, 52 (McPherson JA).

⁵⁹ *Peace and Good Behaviour Act 1982* (Qld) s 8.

⁶⁰ *Laidlaw v Hulett; Ex parte Hulett* [1998] 2 Qd R 45, 51 (McPherson JA). See also at 49 (Fitzgerald P).

The appellant naturally enough placed much stress on s. 8 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 s. 8 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.

2.29 Accordingly, although the hearing may be ‘analogous to a criminal proceeding’,⁶¹ the criminal standard of proof does not apply.⁶²

2.30 Nonetheless, 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 to do violence to a person or a person’s property may have for the defendant.⁶³

Breach of an order

2.31 Although the hearing of an application for a peace and good behaviour order is not characterised as a criminal proceeding,⁶⁴ 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 \$7500 or imprisonment for one year.⁶⁵

2.32 A person convicted of the offence may, upon conviction, be made subject to a further order for such time as the court thinks fit.⁶⁶

THE DEVELOPMENT OF SIMILAR LEGISLATION IN OTHER JURISDICTIONS

2.33 The other Australian jurisdictions have developed legislation which empowers a court to make a restraining order, on a civil application, in relation to both personal violence and domestic violence. In some jurisdictions, restraining orders for personal violence are dealt with in separate legislation. In others, the same legislation provides for both personal violence and domestic violence. Throughout this Report, the legislation of other jurisdictions which

⁶¹ Ibid 53 (Shepherdson J).

⁶² Ibid 51 (McPherson JA), 55 (Shepherdson J), (Fitzgerald P not deciding).

⁶³ Ibid 49 (Fitzgerald P), 52 (McPherson JA), 55 (Shepherdson J). See also *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Rejek v McElroy* (1965) 112 CLR 517.

⁶⁴ *Laidlaw v Hulett; Ex parte Hulett* [1998] 2 Qd R 45.

⁶⁵ *Peace and Good Behaviour Act 1982* (Qld) s 10; *Penalties and Sentences Act 1992* (Qld) s 5(1)(b).

⁶⁶ *Peace and Good Behaviour Act 1982* (Qld) s 11.

deals with restraining orders for personal violence is collectively referred to as ‘civil restraining order legislation’.⁶⁷

The ACT

2.34 In the ACT, one piece of legislation – the *Domestic Violence and Protection Orders Act 2001* (ACT) – deals with both personal violence, for which a ‘personal protection order’ may be made, and domestic violence, for which a ‘domestic violence order’ may be made.⁶⁸

2.35 That legislation was enacted to consolidate the general restraining order provisions of the *Magistrates Court Act 1930* (ACT) and the provisions of the *Domestic Violence Act 1986* (ACT) and, primarily, to clarify and simplify the procedural rules that applied in relation to general restraining orders and domestic violence orders.⁶⁹

2.36 In 2005, the legislation was renamed from the *Protection Orders Act 2001* (ACT)⁷⁰ to acknowledge the difference between domestic violence orders and personal protection orders and to give ‘greater recognition to domestic violence as a particular form of interpersonal violence that requires a higher level of protective response’.⁷¹ The amending legislation also expanded the definitions of ‘domestic violence’ and ‘relative’ to increase the protection available for certain kinds of behaviour and in relation to particular relationships.⁷²

New South Wales

2.37 Similarly, in New South Wales, personal violence and domestic violence are both dealt with under the same legislation. Recent amendments to the legislation have been made, but have not yet commenced.

2.38 At present, part 15A of the *Crimes Act 1900* (NSW) deals with personal violence, including intimidation and stalking, for which an ‘apprehended personal violence order’ may be made, and domestic violence, for which an ‘apprehended domestic violence order’ may be made.⁷³

⁶⁷ See para 1.44 of this Report.

⁶⁸ Also see *Domestic Violence and Protection Orders Regulation 2002* (ACT).

⁶⁹ Explanatory Memorandum, Protection Orders Bill 2001 (ACT) 1.

⁷⁰ *Domestic Violence and Protection Orders Amendment Act 2005* (ACT) s 4.

⁷¹ Explanatory Statement, Domestic Violence and Protection Orders Amendment Bill 2005 (ACT) 2.

⁷² *Domestic Violence and Protection Orders Amendment Act 2005* (ACT) ss 8, 9. Also see Explanatory Statement, Domestic Violence and Protection Orders Amendment Bill 2005 (ACT) 2.

⁷³ Also see *Crimes (General) Regulation 2005* (NSW).

2.39 An apprehended domestic violence order is only available if there is a 'domestic relationship' between the parties.⁷⁴

2.40 Following a review by the New South Wales Law Reform Commission,⁷⁵ part 15A was amended in early 2007 to 'offer greater protection to victims of domestic and personal violence' and to 'recognise the gravity of domestic violence and how it may differ from other violent crimes'.⁷⁶ In its Report, the New South Wales Law Reform Commission considered whether apprehended violence orders should be located in separate legislation. It recommended that the apprehended violence order provisions should, for the time being, remain in the *Crimes Act 1900* (NSW) but that this question should later be revisited.⁷⁷ It expressed concern about 'the danger that separate domestic violence legislation could create the impression that domestic violence is no longer a crime':⁷⁸

... the core policy objective of AVO legislation should be to protect against actual or threatened domestic and personal violence. The Commission also notes that many of the issues raised in support of separate legislation, such as greater clarity, could be addressed administratively by better education and training programs on the nature and purpose of AVOs in general and Part 15A in particular, and clearer statements of legislative policy. [notes omitted]

2.41 In late 2007, however, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) was enacted to repeal part 15A of the *Crimes Act 1900* (NSW) and replace it with a separate, stand-alone Act.⁷⁹ The provision of separate legislation is intended to give 'full recognition' to the seriousness of domestic violence and to make it 'easier for women and children to obtain apprehended

⁷⁴

Note that a person who is in a 'domestic relationship' with the other person includes a person who 'is living or has lived in the same household as the other person' or 'as a long-term resident in the same residential facility as the other person': *Crimes Act 1900* (NSW) s 562B(d), (e). The latter category excludes certain correctional and detention centres: *Crimes Act 1900* (NSW) s 562B(e). Depending on the circumstances, these provisions may capture persons such as housemates (including co-tenants and boarders): see generally New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [4.26], [4.37]. Section 562B(d), (e) of the *Crimes Act 1900* (NSW) is replicated in s 5(d), (e) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). See para 2.41 of this Report.

Note that the *Domestic and Family Violence Protection Act 1989* (Qld) does not expressly include persons who reside, or have resided, in the same household in the definition of a 'domestic relationship'. Section 11A of the Act defines a 'domestic relationship'. See para 2.7 of this Report.

⁷⁵

Crimes Amendment (Apprehended Violence) Act 2006 (NSW) s 3 sch 1; New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003).

⁷⁶

See the Second Reading Speech of the *Crimes Amendment (Apprehended Violence) Bill 2006* (NSW), New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 September 2006, 1591 (Mr Neville Newell, Parliamentary Secretary).

⁷⁷

New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [2.40] rec 1.

⁷⁸

Ibid [2.31], [2.39].

⁷⁹

Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 103, sch 2.7 [3].

violence orders'.⁸⁰ The new legislation, which has not yet commenced,⁸¹ continues to cover both personal violence and domestic violence, and remains similar to the current scheme under the *Crimes Act 1900* (NSW).

The Northern Territory

2.42 In the Northern Territory, separate legislation governs personal violence and domestic violence.

2.43 Personal violence is dealt with under the *Justices Act* (NT). At present, part IV, division 7 of the *Justices Act* (NT) empowers the Court of Summary Jurisdiction to order a defendant, upon complaint, to enter into a recognizance to keep the peace or be of good behaviour.

2.44 However, those provisions have recently been repealed, and replaced with a new part IVA of the *Justices Act* (NT).⁸² The amendments, made by the *Domestic and Family Violence Act* (NT), have not yet commenced.⁸³ The new part IVA introduces a scheme for the making of 'personal violence restraining orders'. The new provisions are more detailed than the present recognizance provisions contained in part IV, division 7 of the *Justices Act* (NT).

2.45 Domestic violence is dealt with under separate legislation. At present, the *Domestic Violence Act* (NT) provides for the making of a restraining order where the parties are in a 'domestic relationship'.⁸⁴ That legislation has been repealed and replaced by the recently enacted *Domestic and Family Violence Act* (NT).⁸⁵ The new legislation, which has not yet commenced, provides a

⁸⁰ See the Second Reading Speech of the Crimes (Domestic and Personal Violence) Bill 2007 (NSW): New South Wales, *Parliamentary Debates*, Legislative Council, 29 November 2007, 4652 (Hon Tony Kelly on behalf of Hon John Hatzistergos, Attorney-General and Minister for Justice).

⁸¹ The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) was assented to on 7 December 2007 and will commence on a date to be proclaimed.

⁸² *Domestic and Family Violence Act* (NT) s 145 repeals and replaces the *Justices Act* (NT) pt IV div 7.

⁸³ The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed.

⁸⁴ Also see, generally, *Domestic Violence Regulations* (NT). Note that a person in a 'domestic relationship' includes a person who ordinarily or regularly resides, or has resided, with the other person or with a relative of the other person: *Domestic Violence Act* (NT) s 3(2)(c) (definition of 'domestic relationship'). This may potentially include housemates, including co-tenants and other persons who share a residence but are not otherwise in a 'domestic relationship'. Section 3(2)(c) of the *Domestic Violence Act* (NT) is replicated in s 9(d) of the *Domestic and Family Violence Act* (NT). See para 2.45 of this Report.

Note that the *Domestic and Family Violence Protection Act 1989* (Qld) does not expressly include persons who reside, or have resided, in the same household in the definition of a 'domestic relationship'. Section 11A of the Act defines a 'domestic relationship'. See para 2.7 of this Report.

⁸⁵ *Domestic and Family Violence Act* (NT) s 128, sch 1 repeals the *Domestic Violence Act* (NT).

more comprehensive scheme for ‘domestic violence orders’ and expands the range of relationships covered by the legislation.⁸⁶

South Australia

2.46 In South Australia, part 4, division 7 of the *Summary Procedure Act 1921* (SA) deals with personal violence, including intimidating or offensive behaviour, by providing for the making of general ‘restraining orders’.⁸⁷

2.47 Domestic violence, committed against a family member, is dealt with under the *Domestic Violence Act 1994* (SA).

Tasmania

2.48 Similarly, in Tasmania, personal violence and domestic violence are governed by separate legislation. Part XA of the *Justices Act 1959* (Tas) provides for the making of ‘restraint orders’ in relation to personal violence, including stalking.⁸⁸ Domestic violence, including stalking of a person’s spouse or partner, is dealt with under the *Family Violence Act 2004* (Tas). The *Family Violence Act 2004* (Tas) was introduced, after a public consultation process, to give special priority to domestic violence within the criminal justice system.⁸⁹

Victoria

2.49 In Victoria, personal violence and domestic violence are generally dealt with separately.

2.50 Personal violence is covered under two pieces of legislation. Section 126A of the *Magistrates’ Court Act 1989* (Vic) empowers the Magistrates’ Court to make an order, upon application, to bind a person to keep the peace or be of good behaviour. Where the behaviour complained of consists of stalking, however, an ‘intervention order’ may be made under the *Crimes (Family Violence) Act 1987* (Vic) even though there is no family relationship between the parties.⁹⁰

⁸⁶ See also the Second Reading Speech of the Domestic and Family Violence Bill 2007 (NT): Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007 (Mr Sydney Stirling, Minister for Justice and Attorney-General). The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed.

⁸⁷ Also see *Summary Procedure (Restraining Orders) Regulations 2006* (SA).

⁸⁸ Also see *Justices (Restraint Orders) Rules 2003* (Tas).

⁸⁹ See the Second Reading Speech of the Family Violence Bill 2004 (Tas): Tasmania, *Parliamentary Debates*, Legislative Council, 25 November 2004 (Mr Douglas Parkinson, Deputy Leader of the Government in the Legislative Council); Department of Justice and Industrial Relations, Tasmania, *Safe at Home: A Criminal Justice Framework for Responding to Family Violence*, Options Paper (2003) 7–8.

⁹⁰ By virtue of *Crimes Act 1958* (Vic) s 21A(5).

2.51 Domestic violence committed against a ‘family member’ is dealt with under the *Crimes (Family Violence) Act 1987* (Vic).⁹¹

2.52 The Victorian Law Reform Commission has recently recommended that the *Crimes (Family Violence) Act 1987* (Vic) be repealed and a new family violence statute enacted along with separate legislation to deal with general intervention orders:⁹²

It is apparent that the multiple function of the legislation is having an adverse impact on the capacity of police, courts and legal service agencies to provide remedies for family violence victims.

Western Australia

2.53 In Western Australia, personal violence and domestic violence are provided for in one statute – the *Restraining Orders Act 1997* (WA).⁹³ That Act provides for the making of a ‘violence restraining order’ in respect of personal violence, such as assault or personal injury.⁹⁴ Other misconduct, such as behaviour that is intimidating or offensive or a breach of the peace, is covered by the making of a ‘misconduct restraining order’.⁹⁵

2.54 The *Restraining Orders Act 1997* (WA) also provides for the making of a ‘violence restraining order’ where the parties are in a ‘family and domestic relationship’.⁹⁶

2.55 Following a review of the legislation in 2004, the division of the grounds for a violence restraining order into acts of personal violence and acts of domestic and family violence was introduced to give greater recognition to the seriousness of domestic violence. The amendments also expanded the definition of domestic and family violence.⁹⁷

91 Also see *Magistrates' Court (Family Violence) Rules 2000* (Vic). Note also that an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to behaviour committed by a person against a ‘family member’, including a person ‘who is or has been ordinarily a member of the household of that person’: *Crimes (Family Violence) Act 1987* (Vic) s 3 (definition of ‘family member’, (c)). It has been held, however, that this definition does not embrace ‘persons whose sole relationship is that of sharing a house’: *Kingsland v McIndoe* [1989] VR 273, 278 (Gobbo J).

92 Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006) [3.77], rec 1.

93 Also see *Restraining Orders Regulations 1997* (WA).

94 *Restraining Orders Act 1997* (WA) ss 3 (definition of ‘act of abuse’), 6(2), 11A.

95 *Restraining Orders Act 1997* (WA) s 34.

96 *Restraining Orders Act 1997* (WA) ss 3 (definition of ‘act of abuse’), 6(1), 11A. Note that a person in a ‘domestic relationship’ includes a person under 18 years of age who ordinarily resides, or has resided, with the other person, or regularly resides or stays, or has resided or stayed, with the other person: *Restraining Orders Act 1997* (WA) s 4(1) (definition of ‘family and domestic relationship’, (d)).

97 The amendments were made by the *Acts Amendment (Family and Domestic Violence) Act 2004* (WA). See the Second Reading Speech of the Acts Amendment (Domestic Violence) Bill 2004 (WA): Western Australia, Parliamentary Debates, Legislative Assembly, 2 June 2004, 3304–6 (Hon James McGinty, Attorney General); and Western Australian Department of Justice, *Report on a Review of Legislation Relating to Domestic Violence*, Final Report (2004) 20.

Chapter 3

Developing a new mechanism: key policy issues and features

INTRODUCTION	24
THE DEVELOPMENT OF NEW LEGISLATION	24
The proposed Personal Protection Bill 2007	25
Key features of the proposed Personal Protection Bill 2007	26
The scope of the proposed Personal Protection Bill 2007	28
The role of police	35
RESOURCE ISSUES	37
Queensland Police Service	37
The Magistrates Court	38
The Dispute Resolution Centres	39
RECOMMENDATIONS	39

INTRODUCTION

3.1 This chapter provides an overview of some of the significant policy issues for the Commission's review of the *Peace and Good Behaviour Act 1982* (Qld). It sets out the Commission's general approach to the development of a new legislative mechanism for the personal protection of members of the community. The chapter outlines some of the features proposed for the new legislation which distinguish it from the current *Peace and Good Behaviour Act 1982* (Qld). It also outlines some of the issues affecting the scope of the proposed new legislation. The chapter concludes with a discussion of some of the resource issues raised by the Commission's recommendations.

THE DEVELOPMENT OF NEW LEGISLATION

3.2 The Commission recognises that the legislative remedy provided by the *Peace and Good Behaviour Act 1982* (Qld) represents only one part of the prevention of interpersonal violence. The Act is directed at situations in which violence has already occurred or been threatened, with the aim of preventing further acts of violence between the parties involved. It does not address the underlying causes of violent behaviour. It is, however, an important part of the community's overall commitment to violence prevention and an important remedy for people experiencing violence. It is against this background that the Commission has undertaken its review of the *Peace and Good Behaviour Act 1982* (Qld).

3.3 The Commission's terms of reference require it to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an 'appropriate, easily accessible and effective mechanism for protection of the community from breaches of the peace'.⁹⁸ If the Commission is of the view that the Act does not provide an effective mechanism, it is required to consider whether this could be achieved by changes to the existing Act or by establishing a new mechanism.

3.4 The Commission is required to have regard to the process of obtaining a peace and good behaviour order, including the filing fee, the ambit of the conduct covered by the Act, and the enforcement of orders obtained under the Act. The terms of reference also direct the Commission to have regard to the protection provided against domestic violence under the *Domestic and Family Violence Protection Act 1989* (Qld).

3.5 Feedback to the Commission in response to its Discussion Paper has been that the current *Peace and Good Behaviour Act 1982* (Qld) is ineffective in providing an accessible protective mechanism for people in the community. In particular, many submissions indicated that the existing grounds for obtaining an order are too restrictive, the procedure for seeking an order is too complex, the existing mechanism for referral to mediation is inadequate in resolving

98

The terms of reference are set out in Appendix 1 to this Report.

disputes, and there is inadequate provision for prosecution of breaches. Those submissions are discussed in the following chapters of this Report in the context of the particular issues raised.

The proposed Personal Protection Bill 2007

3.6 The Commission is of the view that the *Peace and Good Behaviour Act 1982* (Qld) is inadequate and ineffective and that a new mechanism should be established. A substantial number of submissions also expressed the view that the current mechanism is ineffective.⁹⁹ The Commission therefore considers that the *Peace and Good Behaviour Act 1982* (Qld) should be repealed and replaced with new legislation. The Commission considers the new Act should be called the ‘Personal Protection Act’ to better reflect the purpose of the legislation. Appendix 4 of this Report contains the proposed Personal Protection Bill 2007 which reflects the Commission’s recommendations in this Report.

3.7 The Commission also considers that there should be no gaps in the coverage provided by the proposed Personal Protection Bill 2007 and the *Domestic and Family Violence Protection Act 1989* (Qld) for people in need of protection. The proposed Bill should therefore cover those persons who are not in a ‘domestic relationship’ under the *Domestic and Family Violence Protection Act 1989* (Qld) and so fall outside the coverage of that Act.¹⁰⁰ The Personal Protection Bill 2007 should provide that a protection order cannot be made under the Bill against a person if a ‘domestic relationship’ under the *Domestic and Family Violence Protection Act 1989* (Qld) exists between that person and an aggrieved person for the order.

3.8 In light of the need for the legislation to provide an effective and accessible mechanism for protection, the Commission also considers that the Personal Protection Bill 2007 should generally provide for more detailed and comprehensive procedures and mechanisms, generally similar to those contained in the *Domestic and Family Violence Protection Act 1989* (Qld). Similar procedures and mechanisms would be appropriate given that, together, the domestic violence legislation and the proposed Bill would provide protective mechanisms for members of the community from domestic and other violence.¹⁰¹

⁹⁹ See, for example, Submissions 5, 8, 12, 13, 14, 15, 22.

¹⁰⁰ The *Domestic and Family Violence Protection Act 1989* (Qld) provides for protection orders to be made if domestic violence has been committed against another person and a ‘domestic relationship’ exists between the two persons: *Domestic and Family Violence Protection Act 1989* (Qld) ss 11, 11A, 20(1)(a). A ‘domestic relationship’ under that Act means a spousal relationship, an intimate personal relationship, a family relationship, and an informal care relationship: *Domestic and Family Violence Protection Act 1989* (Qld) s 11A. See para 2.7 of this Report.

¹⁰¹ Note, for example, that the Commission has recommended the inclusion of grounds for the making of a protection order similar to those provided for under the *Domestic and Family Violence Protection Act 1989* (Qld), with the exception of indecent behaviour which the Commission has not recommended. See para 5.66, 5.81, 5.110, 5.113 of this Report.

3.9 Generally, the Commission has taken the view throughout this Report that, where appropriate, the provisions of, and procedures in proceedings under, the Personal Protection Bill 2007 should be consistent with the provisions of, and procedures in proceedings under, the *Domestic and Family Violence Protection Act 1989* (Qld). The Commission has taken this general approach in order to provide people who are in need of protection with a more uniform framework for obtaining a protective order, regardless of their particular relationship with the person against whom the order is sought.

3.10 Nevertheless, the Commission has recommended simplified procedures where appropriate to avoid unnecessary complexity and has departed from its general approach when required in light of the contextual differences between domestic violence and other types of violence.

Key features of the proposed Personal Protection Bill 2007

3.11 The Commission's Report contains a number of recommendations for the inclusion of new features in its proposed Personal Protection Bill 2007 which address the inadequacies of the existing *Peace and Good Behaviour Act 1982* (Qld).

3.12 Whereas the existing *Peace and Good Behaviour Act 1982* (Qld) provides for the making of orders to keep the peace and be of good behaviour, the Commission has recommended that the proposed Personal Protection Bill 2007 provide for the making of two types of 'protection orders': personal protection orders, to restrain conduct toward particular persons, and workplace protection orders, to restrain conduct where it is directed at a workplace.¹⁰² Workplace protection orders are discussed later in this chapter.¹⁰²

3.13 The Commission has also recommended that the grounds for obtaining a protection order should be sufficiently wide to provide for more appropriate and effective protection.¹⁰³ The proposed grounds are similar to those provided under the domestic violence legislation.¹⁰⁴

3.14 In addition, the Commission has recommended a more simplified process for making an application to the court, which no longer involves the screening of an application before a summons is issued as is currently required when a justice of the peace takes a complaint under the *Peace and Good Behaviour Act 1982* (Qld).¹⁰⁵

¹⁰² See para 3.43–3.46 of this Report. See also Chapter 8 of this Report.

¹⁰³ See Chapter 5 of this Report. In relation to the grounds for obtaining a workplace protection order, see Chapter 8 of this Report.

¹⁰⁴ See note 101 of this Report.

¹⁰⁵ *Peace and Good Behaviour Act 1982* (Qld) s 4(2A), (3). See Chapter 9 of this Report.

3.15 Other features of the Commission's proposed Personal Protection Bill 2007, that are not dealt with under the existing *Peace and Good Behaviour Act 1982* (Qld), include:

- provision for specific classes of people who may apply for an order on their own, or another person's, behalf;¹⁰⁶
- removal of the filing fee for applications;¹⁰⁷
- use of mediation and preliminary conferences;¹⁰⁸
- the ability to make interim (temporary) orders and consent orders;¹⁰⁹
- specification of particular conditions the court may impose when it makes an order;¹¹⁰
- the ability to apply to the court to vary or set aside an order that has been made;¹¹¹
- the ability for similar orders made in other jurisdictions to be registered, and have effect, in Queensland;¹¹² and
- removal of the burden on a person protected by an order to prosecute breaches of the order on his or her own.¹¹³

3.16 The Commission considers the proposed provisions will improve the effectiveness of the legislation in meeting the needs of the community. The *Domestic and Family Violence Protection Act 1989* (Qld) contains similar provisions to some of those the Commission has recommended. The Commission's recommendations are discussed in detail in the following chapters of the Report.

3.17 The Commission has also made recommendations about the role of police under the proposed Bill. The Commission's approach to police involvement under the Personal Protection Bill 2007 is discussed later in this chapter.¹¹⁴

¹⁰⁶ See Chapter 6 and, in relation to workplace protection orders, Chapter 8 of this Report.

¹⁰⁷ See Chapter 20 of this Report.

¹⁰⁸ See Chapter 10 of this Report.

¹⁰⁹ See Chapter 12 of this Report.

¹¹⁰ See Chapter 7 and, in relation to workplace protection orders, Chapter 8 of this Report.

¹¹¹ See Chapter 15 of this Report.

¹¹² See Chapter 17 of this Report.

¹¹³ See Chapter 14 of this Report.

¹¹⁴ See para 3.55–3.62 of this Report.

The scope of the proposed Personal Protection Bill 2007

3.18 The Commission has considered a number of issues which impact on the scope of its proposed Personal Protection Bill 2007. In particular, the Commission has considered whether violent or harassing behaviour in certain contexts should be covered by the proposed Bill.

Children in family relationships

3.19 The *Peace and Good Behaviour Act 1982* (Qld) is of general application. Anyone who is in fear of violence or property damage may apply for an order. As mentioned earlier, there is no requirement under the Act for there to be a relationship of a particular kind between the parties.¹¹⁵

3.20 In contrast, the *Domestic and Family Violence Protection Act 1989* (Qld) provides for the making of domestic violence orders in respect of people who are in a ‘domestic relationship’ with each other.¹¹⁶ A ‘domestic relationship’ includes a ‘family relationship’.¹¹⁷ However, a child cannot currently be named as an aggrieved or a respondent in a domestic violence order where the child and the other party named in the order are in a ‘family relationship’.¹¹⁸ A person who falls into this category is effectively excluded from the operation of the *Domestic and Family Violence Protection Act 1989* (Qld).

3.21 As mentioned earlier, the Commission considers that the proposed Personal Protection Bill 2007 should generally cover those persons who fall outside the scope of the *Domestic and Family Violence Protection Act 1989* (Qld).¹¹⁹

3.22 This raises the issue of whether the proposed Bill should, or should not, enable a child to be named as the aggrieved person or the respondent in an order if a ‘family relationship’ – as that term is used under the *Domestic and Family Violence Protection Act 1989* (Qld) – exists between the child and the other party named in the order.

3.23 At present, the coverage provided by the *Peace and Good Behaviour Act 1982* (Qld) is sufficiently wide to include children in a family relationship with

¹¹⁵ See para 2.11 of this Report.

¹¹⁶ See note 100 of this Report.

¹¹⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 11A(1)(c). A ‘family relationship’ is one between two persons if one of them is the relative of the other: *Domestic and Family Violence Protection Act 1989* (Qld) s 12B(1). A ‘relative’ is defined in that Act to mean ‘someone who is ordinarily understood to be or to have been connected to the person by blood or marriage’: *Domestic and Family Violence Protection Act 1989* (Qld) s 12B(2).

¹¹⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(2). Note that a child is defined under the *Domestic and Family Violence Protection Act 1989* (Qld) as an individual under 18 years: *Domestic and Family Violence Protection Act 1989* (Qld) s 3 (definition of ‘child’).

¹¹⁹ See para 3.7 of this Report.

the other party named in the order. Such children will also be covered by the Personal Protection Bill 2007, unless the Bill excludes them.

3.24 However, if the Personal Protection Bill 2007 specifies that a child cannot be named as an aggrieved person or a respondent in an order if a family relationship exists between the child and the other party named in the order, it will create a legislative gap in respect of such children which does not, at present, exist.

3.25 In its submission on this issue, the Department of Child Safety expressed concern about the application of the *Peace and Good Behaviour Act 1982* (Qld) to children generally, as either applicants or respondents, and considered that research into ‘the full range of social policy implications’ is required before including children in a legislative scheme that may involve the criminal justice system.¹²⁰

3.26 The Department also explained that children in family relationships are excluded from the coverage of the *Domestic and Family Violence Protection Act 1989* (Qld) ‘because that type of matter is considered to be a child protection issue and is dealt with under child protection legislation’.¹²¹

3.27 The Department of Child Safety submitted that the same rationale should apply to the *Peace and Good Behaviour Act 1982* (Qld) so that it ‘should only cover situations involving non-dependant relationships outside of family’.¹²² It expressed concern that including such children under the *Peace and Good Behaviour Act 1982* (Qld) could involve the risk of exploitation by parents or other adults in seeking orders against other family members, and would make child respondents vulnerable to entering the criminal justice system.

3.28 The Commission also received submissions from a number of community legal services in relation to whether the peace and good behaviour legislation should enable children to be named as an aggrieved person or a respondent for an order, in situations where the child is in a family relationship with the other party to the order.

3.29 For example, the Logan Youth Legal Service observed:¹²³

We have contact from time to time with young people who are seeking protection from an adult who is the young person’s parent or another primary carer. An older cohort of young people who have experienced abuse by a parent or carer attempt to live independently to protect themselves from family

¹²⁰ Submission 29. This is discussed at para 6.58–6.60, 6.102–6.103, 20.16–20.18 of this Report.

¹²¹ Submission 29. Also see the Second Reading Speech of the Domestic Violence Legislation Amendment Bill 2002 (Qld), which expanded the scope of the relationships covered by the then *Domestic Violence (Family Protection) Act 1989* (Qld); Queensland, *Parliamentary Debates*, Legislative Assembly, 1 November 2002, 3339 (Hon Judith Spence, Minister for Families).

¹²² Submission 29.

¹²³ Submission 18.

violence or sexual abuse. These young people make the self-protective choice to leave an abusive home, frequently with the support of their existing social networks and other supportive adults in their local community. It is often not appropriate for the Department of Child Safety to take such young people into care because the young people are no longer subject to the immediate risk of harm that existed in the family home. For these young people, whose circumstances do not bring them within the responsibility of the Department, there is a lack of legal support to protect them from intimidation and harassment by abusive parents.

...

[I]t is extremely important that a civil protection order be available to young people who for legitimate reasons do not fall within the scope of the child protection system. Domestic violence protection orders are not available to a young person seeking protection from a parent. It appears that it was the intention of Parliament when domestic violence legislation was enacted that young people be protected via child protection legislation instead. The older cohort of young people whose circumstances mean that child protection is not an appropriate solution remain very vulnerable.

3.30 The Women's Legal Service observed:¹²⁴

[T]he opportunity for young people to gain protection under the [Peace and Good Behaviour Act 1982 (Qld)] should sit along side any other avenues of protection available to them, such as those available under the child protection system. This will minimise the risk that some fall through the gaps.

3.31 The Commission also received a submission from the Youth Advocacy Centre Inc that the *Peace and Good Behaviour Act 1982* (Qld) should not enable a parent to apply for a peace and good behaviour order against his or her child on the basis that issues of family conflict are most appropriately dealt with under the *Child Protection Act 1999* (Qld).¹²⁵

3.32 The Commission recognises that situations of violence, intimidation, harassment, or property damage may arise between a child and a person who is in a family relationship with the child and that it is important for a protective mechanism to be available in those circumstances. The Commission considers it is therefore undesirable that there be a legislative gap in the availability of protection orders in relation to such children.

3.33 The Commission notes, however, that personal violence between adults in family relationships is regarded as domestic violence and, as such, is covered by the *Domestic and Family Violence Protection Act 1989* (Qld). That Act is specifically designed to deal with family and intimate personal relationships. As such, the Commission considers that if a protection order scheme is to be available in respect of children in family relationships, the appropriate legislation to provide such a mechanism is the *Domestic and Family Violence Protection Act 1989* (Qld).

¹²⁴ Submission 8.

¹²⁵ Submission 11.

3.34 The Commission also acknowledges that situations involving violence between a child and a person who is in a family relationship with the child may more appropriately be dealt with through the involvement of the Department of Child Safety. Given concerns that this will not always be the case, the Commission agrees with the suggestion of the Department of Child Safety that further research should be conducted as to the best approach to deal with these matters.

3.35 In particular, the Commission considers that the Department of Communities should examine, as a matter of priority, whether the coverage of the *Domestic and Family Violence Protection Act 1989* (Qld) should be extended to include a child in a family relationship as an aggrieved and a respondent.¹²⁶

3.36 In light of the concerns raised by the Department of Child Safety, and the Commission's view that children in family relationships would more appropriately be covered by the *Domestic and Family Violence Protection Act 1989* (Qld), the Commission considers that, while it would create a legislative gap, it is not appropriate for the Personal Protection Bill 2007 to cover children in 'family relationships', as defined under the domestic violence legislation.¹²⁷ Given the undesirability of such a legislative gap, the Commission considers, as noted above, that the inclusion of children in family relationships in the domestic violence legislation should be examined as a matter of priority.¹²⁸

3.37 In the following chapters of this Report, the Commission's recommendations relating to children as protected persons or respondents apply in respect of children who are not in a family relationship with the other party.

Children generally

3.38 Under the *Peace and Good Behaviour Act 1982* (Qld) it is unclear whether a complaint for a peace and good behaviour order could be made by, for or against a child. In this Report, the Commission has made various recommendations to clarify the application of the proposed Personal Protection Bill 2007 to children as aggrieved persons and respondents generally.

3.39 The Commission has recommended that the Personal Protection Bill 2007 should enable a 'parent' to make an application for a personal protection order on behalf of a child. The Commission has recommended that the Bill include a definition of 'parent' modelled on the definition in section 10 of the *Education (General Provisions) Act 2006* (Qld) to clarify that a person with parental responsibility for a child is entitled to make an application for the child.

¹²⁶ The Department of Communities is responsible for administering the *Domestic and Family Violence Act 1989* (Qld).

¹²⁷ See note 117 of this Report.

¹²⁸ See para 3.35 of this Report.

It would also clarify that if the child is in the guardianship of the Chief Executive of the Department of Child Safety, the Chief Executive is to be regarded as the child's 'parent'. The Commission has also recommended that others may seek leave of the court to apply for a child.¹²⁹

3.40 The Commission has also recommended that a provision be included in the proposed Bill to enable a young person, who has the capacity to understand the nature and consequences of a personal protection order, to make an application, or to authorise another person to make an application, with the leave of the court.¹³⁰

3.41 The Commission has also recommended that the Personal Protection Bill 2007 provide that a respondent to a protection order must be at least 10 years of age.¹³¹

3.42 In light of these recommendations clarifying the application of the Personal Protection Bill 2007 to children, the Commission has also made recommendations for the service of documents on children in a discreet manner and for notice of applications involving children to be given to one or both of the child's parents, unless the court otherwise orders.¹³²

Workplace protection orders

3.43 The Commission's terms of reference require it to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an 'appropriate, easily accessible and effective mechanism for protection of the community from breaches of the peace', having regard to various matters, including the ambit of conduct covered by the Act.¹³³

3.44 The current grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) are not limited in terms of the situation in which the behaviour complained of occurs. However, there is no provision in the *Peace and Good Behaviour Act 1982* (Qld) for a specific type of order for the workplace.

3.45 The ACT civil restraining order legislation enables a court to make a specific type of personal protection order in relation to the workplace.¹³⁴ This type of order is known under the legislation as a 'workplace order'. The focus of such an order is on the relationship of the violence to an employee in his or her

¹²⁹ See para 6.76–6.80 of this Report.

¹³⁰ See para 6.104–6.107 of this Report.

¹³¹ See para 20.34 of this Report.

¹³² See para 19.70, 19.81–19.84 of this Report.

¹³³ The terms of reference are set out in Appendix 1 to this Report.

¹³⁴ *Domestic Violence and Protection Orders Act 2001* (ACT) pt 5 div 5.3.

capacity as an employee in a particular workplace.¹³⁵ The employer is the aggrieved person for the purpose of making an application.¹³⁶

3.46 In this Report, the Commission has recommended that the proposed Personal Protection Bill 2007 provide for a specific category of protection order based on the workplace.¹³⁷ This would allow an employer to apply for an order to protect property at the workplace or to protect the employer and any employees at the workplace who are identified in the order.¹³⁸

Orders made on behalf of the general public

3.47 The *Peace and Good Behaviour Act 1982* (Qld) is limited in its application to a complaint made by a person (the complainant) about the conduct of another person (the defendant) towards the complainant or the complainant's property, or towards a person under the complainant's care or charge.¹³⁹ It does not allow a complaint to be made on behalf of the general public.

3.48 Queensland Transport, in response to the Discussion Paper, raised the issue of whether the *Peace and Good Behaviour Act 1982* (Qld) could potentially be used as mechanism to enable police or authorised officers of government departments or other entities to apply on behalf of the general public for orders to restrain individuals from engaging in 'anti-social behaviour'¹⁴⁰ on and around public transport or in other public places:¹⁴¹

For example, if youths were regularly causing a nuisance at a particular railway station an order might prohibit them from loitering or using a particular station at any time or between specified times.

3.49 However, no other submissions received by the Commission in response to the Discussion Paper considered that the operation of the current *Peace and Good Behaviour Act 1982* (Qld) should be expanded in this way. In particular, some submissions specifically cautioned against an expansion of the grounds for an order to include behaviour such as loitering that is not directed at a particular person and that may unfairly target vulnerable people, such as

¹³⁵ *Domestic Violence and Protection Orders Act 2001* (ACT) s 44.

¹³⁶ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 11(2), 42A.

¹³⁷ Workplace orders are discussed in Chapter 8 of this Report.

¹³⁸ See para 8.21–8.22 of this Report.

¹³⁹ *Peace and Good Behaviour Act 1982* (Qld) s 4(1), (2). Eligibility to apply for an order under the Act is limited to a complainant who is the subject of the relevant behaviour, or who applies on behalf of someone in the complainant's care or charge against whom the relevant behaviour is directed.

¹⁴⁰ In its submission, Queensland Transport suggested that 'the problems of anti-social behaviour for public transport include, but are not necessarily restricted to, problems of violence, threatened violence, intimidation, nuisance, harassment, and other actions that might cause alarm and distress': submission 9.

¹⁴¹ Submission 9.

persons experiencing homelessness.¹⁴² The Townsville Community Legal Service Inc commented, for example, that:¹⁴³

... the Act should never become a tool for privately controlling public space, nor should its role usurp police powers.

3.50 The Commission notes that the protective mechanism proposed under Personal Protection Bill 2007, like the current mechanism available under the *Peace and Good Behaviour Act 1982* (Qld), is in the nature of a private remedy. The Bill deals with conduct occurring between persons in private situations.

3.51 Queensland Transport's proposal raises a number of substantive and complex issues which the Commission has not otherwise considered necessary to examine as part of the review, including the conferral of quasi-police powers on authorised officers of government departments or other entities and the general rights of occupiers.

3.52 The proposal also overlaps with some aspects of the laws relating to public order and public space.¹⁴⁴ The object of such legislation is to preserve order in public places in the interests of the amenity and security of citizens, so that they may exercise, without undue disturbance, the rights and freedoms involved in the use and enjoyment of such places.¹⁴⁵ This necessarily involves striking an appropriate balance between the competing rights, freedoms and interests of persons to use and enjoy public places.¹⁴⁶ The Commission similarly considers it important that the Bill does not have unintended and/or undesirable consequences, and, in particular, that widening the grounds for making an order does not adversely impact on the rights, freedoms and interests of persons to use and enjoy public places.

3.53 An additional consideration raised by the proposal is whether there should be amendments to existing mechanisms for dealing with anti-social behaviour or the development of an additional mechanism. This is also a complex issue, and one which requires comprehensive consultation in relation to matters outside the parameters of this review.

¹⁴² Submissions 8, 14, 14A, 15, 32. Another submission also commented that people experiencing homelessness 'often come to view particular public spaces as their 'home' in light of the fact that they have no private space to retreat to. An order prohibiting them from approaching such places could have serious implications for them': submission 32.

¹⁴³ Submission 14.

¹⁴⁴ The Commission notes, in particular, the police powers to give move-on directions and to deal with breaches of the peace under the *Police Powers and Responsibilities Act 2000* (Qld) ss 48, 50. Police officers and other authorised persons are also given move-on powers in relation to public passenger vehicles under the *Transport Operations (Passenger Transport) Act 1994* (Qld) ss 143AG, 143AHA. Also note the offence of public nuisance under the *Summary Offences Act 2005* (Qld) s 6.

¹⁴⁵ *Coleman v Power* (2004) 220 CLR 1, [32] (Gleeson CJ).

¹⁴⁶ Ibid.

3.54 The Commission therefore considers that, in view of the ambit of the current Act and the complexity of the issues raised by the proposal, the issue of whether the Personal Protection Bill 2007 should allow applications to be made on behalf of the general public for orders restraining anti-social behaviour is outside the scope of this review.

The role of police

3.55 In considering the need for the *Peace and Good Behaviour Act 1982* (Qld) to provide an effective and accessible mechanism for protection, the Commission's terms of reference require it to have regard to the complexity of the process of obtaining an order and the difficulty of enforcing an order.¹⁴⁷

3.56 Feedback to the Commission from legal advice and advocacy services has been that the *Peace and Good Behaviour Act 1982* (Qld) is ineffective in providing an accessible protective mechanism, especially because it does not provide for police support.¹⁴⁸ There are no provisions in the Act allowing a police officer to bring an application¹⁴⁹ and there are no provisions mandating a role for police enforcement of breaches¹⁵⁰ so that a complainant is generally left to obtain and enforce an order without assistance.

3.57 In contrast, the *Domestic and Family Violence Protection Act 1989* (Qld) provides that police are empowered to, and in some cases must, seek orders to protect victims of domestic violence,¹⁵¹ and provides that a complaint for an offence against that Act must be laid by a police officer.¹⁵²

3.58 To improve the effectiveness and accessibility of the legislation, the Commission has made a number of recommendations throughout this Report about the role of police under the proposed Personal Protection Bill 2007 that are broadly consistent with the position under the *Domestic and Family Violence Protection Act 1989* (Qld). The Commission has recommended that:

¹⁴⁷ The terms of reference are set out in Appendix 1 to this Report.

¹⁴⁸ For example, submissions 5, 13, 14, 15.

¹⁴⁹ Section 4 of the *Peace and Good Behaviour Act 1982* (Qld) enables a person to bring an application on behalf of another only if the other is under the person's 'care or charge'. See para 6.27 of this Report.

¹⁵⁰ Note that the Queensland Police Service's Operational Procedures Manual states that officers identifying breaches of orders made under the *Peace and Good Behaviour Act 1982* (Qld) may institute proceedings by complaint and summons under the *Justices Act 1886* (Qld), by proceedings under the *Police Powers and Responsibilities Act 2000* (Qld) (including arrest without warrant) or, in the case of a child, by proceedings under the *Juvenile Justice Act 1992* (Qld): Queensland Police Service, *Operational Procedures Manual* [13.4.1]. However, the Commission understands that prosecution proceedings are infrequently commenced by the Queensland Police Service for offences under the Act: Information provided by the Acting Commissioner, Queensland Police Service, 6 September 2004, by the Chief Magistrate of Queensland, Judge MP Irwin, 25 August 2004, and by Caxton Legal Centre Inc, 23 August 2004. See para 14.77–14.78 of this Report.

¹⁵¹ *Domestic and Family Violence Protection Act 1989* (Qld) ss 14(1)(c), 67, 71.

¹⁵² *Domestic and Family Violence Protection Act 1989* (Qld) s 83(2).

- police be empowered, and in some circumstances required, to apply for a protection order under the Bill;¹⁵³
- police be empowered to make an application to a magistrate for an interim protection order;¹⁵⁴
- police may use a streamlined process for making applications, based on the process for initiating proceedings under the *Domestic and Family Violence Protection Act 1989* (Qld), by issuing a notice in the form of a ‘notice to appear’ under the *Police Powers and Responsibilities Act 2000* (Qld);¹⁵⁵
- police may in some circumstances be required to effect service of applications and orders made under the Bill;¹⁵⁶ and
- police be responsible for the enforcement of protection orders.¹⁵⁷

3.59 Given the significance of protection orders in preventing the escalation of disputes into violent crime, the involvement of police in making applications and enforcing protection orders made under the Bill is consistent with the important role of the Queensland Police Service in community policing and crime prevention.

3.60 The Commission has recommended that these provisions be included in the Personal Protection Bill 2007 rather than added to the *Police Powers and Responsibilities Act 2000* (Qld). The Commission notes that, generally, police powers and responsibilities for investigating offences and enforcing the law are to be consolidated under the *Police Powers and Responsibilities Act 2000* (Qld).¹⁵⁸ However, that Act does allow police powers and responsibilities to be included in other legislation in some circumstances.¹⁵⁹ The Commission considers that the provisions conferring a role on police under the proposed Personal Protection Bill 2007 are sufficiently connected to the Bill’s general procedural provisions as to necessitate their inclusion in the Bill, rather than in the *Police Powers and Responsibilities Act 2000* (Qld).

¹⁵³ See para 6.125–6.126 of this Report.

¹⁵⁴ See para 9.114 of this Report.

¹⁵⁵ See para 9.165 of this Report.

¹⁵⁶ See para 19.59–19.61 of this Report.

¹⁵⁷ See para 14.97 of this Report.

¹⁵⁸ *Police Powers and Responsibilities Act 2000* (Qld) ss 5(a), 11.

¹⁵⁹ Section 11 of the *Police Powers and Responsibilities Act 2000* (Qld) provides that, to the extent of any inconsistency, that Act prevails over the provision in another Act conferring a power or imposing a responsibility on a police officer unless the provision expressly provides otherwise. Section 12 of the *Police Powers and Responsibilities Act 2000* (Qld) provides that an Act listed in sch 1 of the *Police Powers and Responsibilities Act 2000* (Qld) is not affected by that Act, although, a police officer may give effect to a provision in an Act listed in sch 1 by exercising a power or performing a responsibility under the *Police Powers and Responsibilities Act 2000* (Qld).

3.61 In making these recommendations, the Commission has considered that the general powers of police under legislation such as the *Police Powers and Responsibilities Act 2000* (Qld) are generally sufficient to facilitate the Commission's proposed role for police without the need for any additional specific powers to be included in the proposed Bill.¹⁶⁰ The Commission has not, therefore, recommended the inclusion of any provisions in the Personal Protection Bill 2007 similar to those contained in the *Domestic and Family Violence Protection Act 1989* (Qld) which confer particular functions and powers on police for that Act, primarily, in relation to investigating circumstances of domestic violence and taking persons into custody.¹⁶¹

3.62 The Commission considers, however, that the Queensland Police Service should review existing police powers under the *Police Powers and Responsibilities Act 2000* (Qld), such as powers of entry and detention, to ensure they are sufficient for the administration and enforcement of the proposed Personal Protection Bill 2007.

RESOURCE ISSUES

3.63 In this Report, the Commission has recommended a comprehensive scheme for the proposed Personal Protection Bill 2007. Implementation of the Commission's recommended approach will confer new responsibilities on various entities and will require increased resources. The Commission considers that such an increase is necessary to ensure the proposed Bill provides an effective mechanism for the protection of the community and should not prevent the implementation of its recommended reforms.

3.64 Many of the Commission's recommendations relate to the conferral of responsibilities on the Queensland Police Service, the Magistrates Court of Queensland and the Dispute Resolution Branch of the Department of Justice and Attorney-General under the proposed Personal Protection Bill 2007. Adding to existing responsibilities under other legislation will obviously have resource implications for these bodies.

Queensland Police Service

3.65 In relation to the role of police under the Bill, the Commission has recommended that the Personal Protection Bill 2007 provide for police involvement in making applications, enforcing orders when there has been a breach, and in effecting service of documents under the Bill.¹⁶² Many of these recommendations are generally modelled on similar provisions contained in the

¹⁶⁰ For example, *Police Powers and Responsibilities Act 2000* (Qld) ch 2 pt 6 (Breaches of the peace, riots and prevention of offences), ch 2 pt 5 (Directions to move on), and s 609 (Entry of place to prevent offence, injury or domestic violence).

¹⁶¹ *Domestic and Family Violence Protection Act 1989* (Qld) pt 6.

¹⁶² See para 3.58 of this Report.

Domestic and Family Violence Protection Act 1989 (Qld). The Commission has also recommended that the police maintain a database of orders made under the Bill.¹⁶³

3.66 The Commission acknowledges that increased involvement of police officers in the administration and enforcement of the Personal Protection Bill 2007 is likely to have significant resource implications by adding to existing responsibilities under the *Domestic and Family Violence Protection Act 1989* (Qld). Nonetheless, the Commission is of the view that increased police involvement under the proposed Bill is essential in order to ensure the effective personal protection of members of the community.

3.67 The Commission is also of the view that existing procedures under the *Domestic and Family Violence Protection Act 1989* (Qld), for example, in relation to service of documents by police, could be adapted. In relation to service, the Commission is also aware that police officers are often called upon to effect service of documents under the existing *Peace and Good Behaviour Act 1982* (Qld)¹⁶⁴ so that formalisation of this function may not necessarily have a far-reaching impact on police resources.

The Magistrates Court

3.68 The Commission has also made a number of recommendations about the role of magistrates and registrars of the Magistrates Court of Queensland. The Commission acknowledges these recommendations may increase the workload of the Magistrates Court in relation to matters under the Personal Protection Bill 2007. Nonetheless, the Commission is of the view that these recommendations are necessary to provide an appropriate, easily accessible and effective mechanism for the personal protection of members of the community.

3.69 The Commission also acknowledges that the imposition of responsibilities on registrars of the Magistrates Court of Queensland may raise resource and training issues and is of the view that necessary resources should be made available, for example, to enable registrars of the court to exercise jurisdiction to make consent orders.¹⁶⁵ The Commission also notes that conferral of jurisdiction on the registrars of the court is likely to expedite the determination of contested matters by magistrates.

3.70 The Commission is also of the view that existing procedures under the *Domestic and Family Violence Protection Act 1989* (Qld), for example, in relation to service of documents, could usefully be adapted under the proposed Personal Protection Bill 2007.

¹⁶³ See para 20.115 of this Report.

¹⁶⁴ Submission 28.

¹⁶⁵ See para 12.90 of this Report.

The Dispute Resolution Centres

3.71 The Commission has also recommended that matters under the Personal Protection Bill 2007 ordered to mediation should be conducted, free of charge, by the Dispute Resolution Centres.¹⁶⁶ The Commission has also recommended that a mediator to whom a matter under the proposed Bill is referred be required to provide a written mediation report to the court and to provide to the court a copy of any mediation agreement reached after the mediation.¹⁶⁷

3.72 The Commission acknowledges these recommendations may have resource implications for the Dispute Resolution Branch of the Department of Justice and Attorney-General but is of the view that these measures are necessary in providing an effective and easily accessible mechanism under the proposed Personal Protection Bill 2007 for referring matters to mediation. The Commission is of the view that the Dispute Resolution Branch is best placed to provide mediation services for matters under the proposed Bill and that, if necessary, resources should be made available to enable it to do so.

RECOMMENDATIONS

3.73 The Commission makes the following recommendations:

The Personal Protection Bill 2007

3-1 The Peace and Good Behaviour Act 1982 (Qld) should be repealed and replaced with the Personal Protection Bill 2007 containing such provisions as recommended by the Commission in this Report.¹⁶⁸

See Personal Protection Bill 2007 cl 120.

Protection order cannot be made if domestic relationship exists

3-2 The Personal Protection Bill 2007 should provide that a court may not make a protection order against a person if a 'domestic relationship' under *the Domestic and Family Violence Protection Act 1989* (Qld) exists between that person and an aggrieved person for the order.¹⁶⁹

See Personal Protection Bill 2007 cl 27(2), 33(2).

¹⁶⁶ See para 10.144 of this Report.

¹⁶⁷ See para 10.181 of this Report.

¹⁶⁸ See para 3.6 of this Report.

¹⁶⁹ See para 3.7, 3.36 of this Report.

Children in family relationships

- 3-3 The Department of Communities should examine, as a matter of priority, whether the *Domestic and Family Violence Protection Act 1989* (Qld) should be amended to cover a child in a ‘family relationship’, as defined by that Act, as an aggrieved and a respondent.¹⁷⁰

The role of the police

- 3-4 The Queensland Police Service should review existing police powers under the *Police Powers and Responsibilities Act 2000* (Qld), such as powers of entry and detention, to ensure they are sufficient to enable police to meet their administration and enforcement responsibilities under the Personal Protection Bill 2007.¹⁷¹

¹⁷⁰ See para 3.35–3.36 of this Report.

¹⁷¹ See para 3.62 of this Report.

Chapter 4

Personal protection orders

INTRODUCTION	42
THE <i>PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)</i>	42
THE <i>DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)</i>	43
THE POSITION IN OTHER JURISDICTIONS	45
SUBMISSIONS.....	46
THE COMMISSION'S VIEW	47
Power to make personal protection orders	49
Who can be protected by a personal protection order.....	50
Other provisions for personal protection orders.....	50
RECOMMENDATIONS	51

INTRODUCTION

4.1 The Commission's terms of reference require it to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an 'appropriate, easily accessible and effective mechanism for protection of the community from breaches of the peace'.¹⁷² Breaches of the peace, at common law, encompass violence or fear of violence to a person, and damage to a person's property which occurs in the person's presence.¹⁷³

4.2 The protective mechanism provided by the *Peace and Good Behaviour Act 1982* (Qld) against such conduct is to provide for a Magistrates Court to make an order requiring a defendant to 'keep the peace and be of good behaviour' and to comply with other conditions the court may stipulate.¹⁷⁴ Such an order can be sought by making a complaint, to a justice of the peace, on the basis of particular conduct which has put the complainant in fear of the defendant.¹⁷⁵

4.3 This chapter considers the provision of a scheme in the Commission's proposed Personal Protection Bill 2007 for the making of personal protection orders for the benefit of aggrieved persons and other named persons.

THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)

4.4 As mentioned in Chapter 2 of this Report, the *Peace and Good Behaviour Act 1982* (Qld) was introduced to provide a preventive remedy in respect of actual or threatened breaches of the peace.¹⁷⁶

4.5 The Act provides for an order to be made on a complaint requiring the defendant to keep the peace and be of good behaviour and to comply with other conditions the court may stipulate in the order, breach of which is a criminal offence.¹⁷⁷

4.6 A complaint for a peace and good behaviour order can be made on the basis of a threat of assault or bodily injury, or of destruction or damage of a

¹⁷² The terms of reference are set out in Appendix 1 to this Report.

¹⁷³ *R v Howell* [1982] QB 416, 426–7 (Watkins LJ). See para 5.8–5.10 of this Report.

¹⁷⁴ *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b), (4).

¹⁷⁵ *Peace and Good Behaviour Act 1982* (Qld) s 4. See para 2.14–2.18 of this Report.

¹⁷⁶ See the Second Reading Speech of the Peace and Good Behaviour Bill 1982 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1982, 840 (Hon Samuel Doumany, Minister for Justice and Attorney-General). See para 2.4 of this Report.

¹⁷⁷ *Peace and Good Behaviour Act 1982* (Qld) ss 6(3)(b), (4), 10, 12.

person's property, which puts the complainant in fear of the defendant.¹⁷⁸

4.7 The *Peace and Good Behaviour Act 1982* (Qld) makes no specific provision about the persons who can be protected by a peace and good behaviour order.

THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)

4.8 As outlined in Chapter 2 of this Report, the *Domestic Violence (Family Protection) Act 1989* (Qld), later amended and renamed the *Domestic and Family Violence Protection Act 1989* (Qld), was enacted as a result of a domestic violence task force appointed by the Queensland Government.¹⁷⁹ The task force had recommended that legislation be introduced to allow the court to make protection orders to 'restrain a person from carrying out in the future ... a range of violent or abusive behaviours' in the context of spousal relationships.¹⁸⁰ The Act was later amended to extend this protection order scheme to other 'domestic relationships'.¹⁸¹

4.9 The *Domestic and Family Violence Protection Act 1989* (Qld) currently empowers the court to make a protection order, on application, to protect an aggrieved against domestic violence experienced within a domestic relationship.¹⁸² A protection order requires that the respondent not commit domestic violence again.¹⁸³ The court is also empowered to impose a range of specific conditions in the order.¹⁸⁴ Breach of the order is a criminal offence.¹⁸⁵

4.10 The *Domestic and Family Violence Protection Act 1989* (Qld) specifies that, as well as the aggrieved, a relative or associate of the aggrieved person may be protected by a domestic violence order. Section 15 of the Act provides:

¹⁷⁸ *Peace and Good Behaviour Act 1982* (Qld) s 4(1). A complaint can also be made on the basis of intentional conduct of the defendant toward the complainant which causes the complainant to fear that the defendant will destroy or damage property of the complainant: *Peace and Good Behaviour Act 1982* (Qld) s 4(2). An overview of the current Act is set out in Chapter 2 of this Report.

¹⁷⁹ See para 2.7 of this Report.

¹⁸⁰ Queensland Domestic Violence Task Force, *Beyond These Walls*, Report (1988) 161.

¹⁸¹ *Domestic Violence Legislation Amendment Act 2002* (Qld). A 'domestic relationship' includes a spousal relationship, an intimate personal relationship, a family relationship and an informal care relationship: *Domestic and Family Violence Protection Act 1989* (Qld) s 11A.

¹⁸² *Domestic and Family Violence Protection Act 1989* (Qld) s 20. 'Domestic violence' is defined in s 11 of the Act. See para 5.20 of this Report. An aggrieved is the person for whose benefit a domestic violence order is in force or may be made: *Domestic and Family Violence Protection Act 1989* (Qld) s 12F(1).

¹⁸³ *Domestic and Family Violence Protection Act 1989* (Qld) s 22(a). A protection order also requires the respondent to 'be of good behaviour towards the aggrieved': s 22(a).

¹⁸⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 25.

¹⁸⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 80(1).

15 Who can a domestic violence order protect?

- (1) As well as the aggrieved, a relative or associate of the aggrieved may be protected by the domestic violence order.
- (2) A relative or associate is protected by being specifically named in the domestic violence order under section 21(1).
- (3) The specifically named relative or associate is called a **named person**.
- (4) The name of the named person may be specified in the domestic violence order at the time it is made or at a later time.
- (5) An **associate** means either of the following persons if it is reasonable to regard the person as an associate—
 - (a) a person whom an aggrieved regards as an associate;
 - (b) a person who regards himself or herself as an associate of the aggrieved.

Examples of persons who could be associates—

- 1 a person who works at the same place as the aggrieved
- 2 a person who resides at the same place as the aggrieved
- 3 a person who belongs to the same church, club or other type of association as the aggrieved

4.11 A ‘relative’ is defined in section 12B of the Act as ‘someone who is ordinarily understood to be or to have been connected to the person by blood or marriage’.¹⁸⁶ The court may make an order to protect a relative or associate of

¹⁸⁶

Domestic and Family Violence Protection Act 1989 (Qld) s 12B(2). Section 12B provides:

12B Meaning of family relationship and relative

- (1) A **family relationship** exists between 2 persons if 1 of them is the relative of the other.

- (2) A **relative**, of a person, is someone who is ordinarily understood to be or to have been connected to the person by blood or marriage.

Example of subsection (2)—

A person’s spouse, child (including an individual 18 years or over), stepchild, parent, step-parent, sibling, grandparent, aunt, nephew, cousin, half-brother, mother-in-law or aunt-in-law is the person’s relative.

- (3) For deciding if someone is related by marriage, any 2 persons who are or were spouses of each other are considered to be or to have been married to each other.

- (4) A **relative** of a person (the **relevant person**) is also either of the following persons if it is or was reasonable to regard the person as a relative especially considering that for some people the concept of a relative may be wider than is ordinarily understood—

- (a) a person whom the relevant person regards or regarded as a relative;

- (b) a person who regards or regarded himself or herself as a relative of the relevant person.

the aggrieved person if it is satisfied that the respondent has committed, or is likely to commit, an act of domestic violence against the relative or associate.¹⁸⁷

4.12 The *Domestic and Family Violence Protection Act 1989* (Qld) provides a more detailed and comprehensive scheme for protection orders, in domestic violence situations, than the *Peace and Good Behaviour Act 1982* (Qld) provides for peace and good behaviour orders.

4.13 For example, the *Domestic and Family Violence Protection Act 1989* (Qld) includes provisions about when the court may make a protection order, who may apply for and who may be protected by an order, the specific conditions that may be imposed in an order, how the court may deal with any weapons in the respondent's possession, the court's power to make temporary orders and orders in terms agreed to by the parties, the variation and revocation of orders, the recognition of similar orders made in other jurisdictions and appeals against decisions of the court made under the Act.

THE POSITION IN OTHER JURISDICTIONS

4.14 Each of the other Australian jurisdictions make legislative provision for the making of civil restraining orders specifically to protect against forms of violence directed against a person or against a person's property. These orders are variously referred to as 'personal protection orders' in the ACT, 'apprehended personal violence orders' in New South Wales, 'personal violence restraining orders' in the Northern Territory, 'restraining orders' in South Australia, 'restraint orders' in Tasmania, 'peace and good behaviour orders' and

Examples of people who may have a wider concept of a relative—

- 1 *Aboriginal people*
 - 2 *Torres Strait Islanders*
 - 3 *members of certain communities with non-English speaking backgrounds*
 - 4 *people with particular religious beliefs*
- (5) In deciding if a person is a relative of someone else—
(a) a subsection of this section must not be used to limit another subsection of this section; and
(b) each subsection is to have effect even though, as a result, a person may be considered to be a relative who would not ordinarily be understood to be a relative.

187

Domestic and Family Violence Protection Act 1989 (Qld) s 21(1).

'intervention orders' in Victoria and 'violence restraining orders' or 'misconduct restraining orders' in Western Australia.¹⁸⁸

4.15 Generally, a civil restraining order may be made to protect only the person making the application, or on whose behalf the application is made.

4.16 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.¹⁸⁹

4.17 In addition, in the ACT, the court has power to make an interim personal protection order if it is necessary to ensure the safety of, or to prevent substantial damage to the property of, the aggrieved person or a child of the aggrieved person.¹⁹⁰ The court also has power to impose conditions in a personal protection order prohibiting the respondent from committing certain behaviour in relation to a child of the aggrieved person.¹⁹¹

SUBMISSIONS

4.18 A threshold issue, which was not specifically canvassed in the Discussion Paper, is whether the provision for a protective order under the *Peace and Good Behaviour Act 1982* (Qld) should continue, in some form, to be available.

4.19 As a whole, submissions to the Discussion Paper revealed support for the availability of peace and good behaviour orders, with changes to bolster the effectiveness and coverage of such orders. For example, many submissions considered the grounds for obtaining a peace and good behaviour order should be widened so that people in genuine need of protection are not overlooked.¹⁹²

¹⁸⁸ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 20(1), (3), 40(1)(b); *Crimes Act 1900* (NSW) ss 562I, 562K(1); *Justices Act* (NT) s 82, as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) s 99; *Justices Act 1959* (Tas) s 106B; *Crimes (Family Violence) Act 1987* (Vic) s 4(1); *Magistrates' Court Act 1989* (Vic) s 126A; *Restraining Orders Act 1997* (WA) ss 11A, 34.

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Sections 562I, 562K(1) of the *Crimes Act 1900* (NSW) are replicated in ss 10, 19(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

In the Northern Territory, the *Domestic and Family Violence Act* (NT) repeals pt IV div 7 of the *Justices Act* (NT) introducing a new pt IVA. The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed. Section 82 of the *Justices Act* (NT) is a new provision.

In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

¹⁸⁹ *Crimes Act 1900* (NSW) s 562ZX(1). This provision is replicated in s 38(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For details about the application of this legislation, see note 188 of this Report.

¹⁹⁰ *Domestic Violence and Protection Orders Act 2001* (ACT) s 49.

¹⁹¹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(2)(h)(i).

¹⁹² Submissions 5, 8, 12, 13, 14, 15, 19. See para 5.32–5.38 of this Report.

The Townsville Community Legal Service Inc considered that, in order to achieve 'equality of the law and equality of access to the law', it is necessary to implement 'a consistent scheme of protection for all citizens of Queensland regardless of contextual factors such as domestic and/or family relationship'.¹⁹³

4.20 In its Discussion Paper, the Commission specifically sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should specify who can be protected by an order and, if so, the classes of person who ought to be protected in the order, for example, the complainant, a person on whose behalf a complaint is made, a person in a domestic relationship with the complainant or any other person.¹⁹⁴

4.21 A number of community legal services considered the *Peace and Good Behaviour Act 1982* (Qld) should make specific provision for persons who can be protected by an order.¹⁹⁵ Caxton Legal Centre Inc and the Women's Legal Service suggested the adoption in the Act of a scheme similar to the scheme that applies in the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁹⁶ Consistent with the approach in that Act, the Women's Legal Service commented:¹⁹⁷

Whether other people should also be protected by the order will depend on the nature of the incident/s which led to the order being sought. If there is evidence that other people, for example, in the same house as the complainant, are affected by the behaviour, the order should specify that they are also to be protected by the order.

4.22 Two other community legal centres also considered that the persons who may be named as protected persons should include, in addition to the complainant, other family members or persons residing at the address of the complainant.¹⁹⁸

THE COMMISSION'S VIEW

4.23 While the *Peace and Good Behaviour Act 1982* (Qld) has been criticised as being ineffective in practice, the availability of a protective order under the legislation has itself been recognised as an important mechanism for the protection of members of the community from particular forms of actual or

¹⁹³ Submission 14.

¹⁹⁴ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 107 (Questions 10-5, 10-6).

¹⁹⁵ Submissions 5, 8, 14, 15, 19.

¹⁹⁶ Submissions 8, 19.

¹⁹⁷ Submission 8.

¹⁹⁸ Submissions 5, 8, 15.

threatened violent and abusive conduct which occur outside the context of a domestic relationship.¹⁹⁹

4.24 Such a mechanism for preventive protection from personal violence and property damage fills an important role. The *Domestic and Family Violence Protection Act 1989* (Qld) provides limited protection because it applies only in the context of 'domestic relationships'. The protection provided by the criminal law is also limited. This was noted by the New South Wales Law Reform Commission in describing the lack of protection in New South Wales prior to the introduction of its apprehended violence order legislation.²⁰⁰

The criminal law only operated after violence had occurred, and conviction could only be secured if the offence were proved beyond reasonable doubt. ... The criminal law also could not operate to prevent conduct, such as harassment, which did not amount to a crime.

4.25 As such, protection orders, in the context of domestic violence, have been described as 'a necessary complement to (but not a substitute for) the criminal law'.²⁰¹

Protection orders are capable of dealing with conduct which could not traditionally be reached by the criminal law or the law of torts, such as constant telephoning or verbal abuse or following in a car. At the same time, the criminal law is 'extended' because, once an order is made, breach constitutes a criminal offence.

4.26 In addition, the Law Commission of England and Wales noted that the powers of courts to 'bind over' to keep the peace and be of good behaviour 'exemplify the notion of preventive justice':²⁰²

binding over gives a person a warning for the future but does not, at least formally, give him a criminal record.

4.27 Submissions in response to the Commission's Discussion Paper also revealed a general consensus for the availability of an order to protect against a range of actual and threatened violent or harassing conduct directed against a person or a person's property.²⁰³

¹⁹⁹ Queensland Domestic Violence Task Force, *Beyond These Walls*, Report (1988) 156–60; S Currie, *A Report on Legislative Options for Non-Spousal Domestic Violence* (1996) 139, 157 rec 27.

²⁰⁰ The New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [1.17]. The New South Wales Law Reform Commission reported at [1.41] that the 'general consensus' in submissions to its review of the apprehended violence order legislation was that such orders are 'generally effective as a means of preventing violence, intimidation and harassment'.

²⁰¹ R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002) 88.

²⁰² The Law Commission (England and Wales), *Criminal Law Binding Over: The Issues*, Working Paper No 103 (1987) 110–11.

²⁰³ The grounds for obtaining a personal protection order are discussed in Chapter 5 of this Report.

Power to make personal protection orders

4.28 Earlier in this Report, the Commission has recommended that the *Peace and Good Behaviour Act 1982* (Qld), which it considers inadequate and ineffective, be repealed and replaced with the proposed Personal Protection Bill 2007.²⁰⁴ The Commission considers the Bill should provide a mechanism for the protection of members of the community from violent and harmful conduct by empowering the court to make protective orders in similar manner to the *Domestic and Family Violence Protection Act 1989* (Qld).

4.29 In particular, the Commission is of the view that the Bill should move away from the ‘peace and good behaviour order’ and instead provide a comprehensive scheme for making a ‘personal protection order’. The purpose of such an order is to protect an ‘aggrieved person’ from particular forms of personal violence, and to protect property of an ‘aggrieved person’ from damage, by restraining the respondent from engaging in specified conduct.²⁰⁵ The Commission intends that such orders would generally be available to people who fall outside the coverage of the *Domestic and Family Violence Protection Act 1989* (Qld).²⁰⁶ As with the current *Peace and Good Behaviour Act 1982* (Qld) and the *Domestic and Family Violence Protection Act 1989* (Qld), the Commission considers it appropriate for personal protection orders to be made by the Magistrates Court.²⁰⁷

4.30 The Commission therefore recommends that the Personal Protection Bill 2007 should make specific provision to empower the Magistrates Court to make personal protection orders in relation to particular conduct directed against an aggrieved person.²⁰⁸

204 See para 3.6 of this Report.

205 In Chapter 5 of this Report, the Commission has recommended that the grounds for making a personal protection order are that the person has committed ‘personal violence’ against another person and is likely to do so again if the order is not made. ‘Personal violence’ means:

- wilful injury;
- wilful damage to a person’s property;
- harassment or intimidation of a person;
- a threat to commit any of those acts.

See para 5.66, 5.81, 5.110, 5.113 of this Report.

206 See para 3.7, 3.36 of this Report.

207 The conferral of jurisdiction on the Magistrates Court is discussed in Chapter 20 of this Report. See para 20.150 of this Report.

208 In Chapter 12 of this Report, the Commission has also recommended the inclusion of provisions enabling a court in certain criminal matters to make a personal protection order on its own initiative. See para 12.109 of this Report.

Who can be protected by a personal protection order

4.31 The Commission also considers that the Personal Protection Bill 2007 should specify the persons who can be protected by a personal protection order. A personal protection order should protect an ‘aggrieved person’ for whose benefit the order is made and to whom the grounds for making the order relate.

4.32 In addition, a personal protection order made for the benefit of an aggrieved person should also be able to protect a person (a ‘named person’) who is a relative or associate of an aggrieved person, by naming the relative or associate in the order. This would enable the court to make provision for those persons who, by virtue of their relationship or association with an aggrieved person, may also be at risk. For example, in the context of a neighbourhood dispute, the family members of an aggrieved, if also affected, or likely to be affected, by the behaviour complained of, should be able to obtain protection by being named on the order.

4.33 The Commission is of the view that the Personal Protection Bill 2007 should include the following definition of ‘relative’:

relative of a person:

- (a) means the person’s spouse, child, grandchild, great-grandchild, parent, grandparent, great-grandparent, brother, sister, uncle, aunt, cousin, niece, nephew, parent-in-law, daughter-in-law, son-in-law, sister-in-law or brother-in-law;
- (b) for an Aboriginal person—includes a person who, under Aboriginal tradition, is regarded as a relative in paragraph (a);
- (c) for a Torres Strait Islander person—includes a person who, under Island custom, is regarded as a relative in paragraph (a); and
- (d) for a person with a parent who is not a natural parent—includes anyone who would be a relative in paragraph (a) if the parent were a natural parent.

4.34 The Commission is also of the view that the Personal Protection Bill 2007 should include a definition of ‘associate’ in terms similar to those set out in section 15(5) of the *Domestic and Family Violence Protection Act 1989* (Qld).

Other provisions for personal protection orders

4.35 As part of the scheme for making personal protection orders, the Personal Protection Bill 2007 should also include specific provision about the grounds on which a personal protection order can be made and on which a relative or associate (a ‘named person’) can be protected by an order, who may apply for a personal protection order, and the conditions that may be imposed in a personal protection order. The Bill should also include procedural provisions,

for example, about making and hearing applications. These matters are discussed in detail in some of the following chapters of this Report.

4.36 Chapter 5 examines the grounds for obtaining a personal protection order and for including a named person in an order. Chapter 6 considers who can apply for a personal protection order and Chapter 7 considers the conditions that may be imposed in a personal protection order. The Commission's recommendations about making an application are dealt with in Chapter 9 and the procedures for hearing an application are dealt with in Chapter 11.

4.37 Elsewhere in this Report, the Commission has also recommended that the Personal Protection Bill 2007 make specific provision for another type of protection order dealing with particular forms of violence in relation to a workplace.²⁰⁹ 'Workplace protection orders' are discussed in Chapter 8 of this Report.

4.38 The Commission has also made recommendations about other aspects of its proposed protection order scheme which are discussed throughout this Report.

RECOMMENDATIONS

4.39 The Commission makes the following recommendations:

Power to make personal protection orders

4-1 The Personal Protection Bill 2007 should provide a comprehensive scheme for making a 'personal protection order', in a similar manner to the scheme provided in the *Domestic and Family Violence Protection Act 1989* (Qld).²¹⁰

²⁰⁹

In Chapter 8 of this Report, the Commission has recommended that the grounds for making a workplace protection order are that the person has committed 'workplace violence' in relation to a workplace and is likely to do so again. 'Workplace violence' is any one of the following acts a person commits in relation to a workplace:

- wilful injury to an employer or employee, committed while the employer or employee is engaged in an activity relating to the workplace or because that person is an employer or employee in the workplace;
- harassment or intimidation of an employer or employee, committed while the employer or employee is engaged in an activity relating to the workplace or because that person is an employer or employee in the workplace;
- wilful damage to property in the workplace;
- a threat to commit any of those acts.

See para 8.30 of this Report.

²¹⁰

See para 4.28–4.29, 4.35 of this Report.

- 4-2 The Personal Protection Bill 2007 should make specific provision empowering the Magistrates Court to make ‘personal protection orders’ in relation to particular conduct directed against an aggrieved person.²¹¹

See Personal Protection Bill 2007 cl 27(1).

Who can be protected by a personal protection order

- 4-3 The Personal Protection Bill 2007 should specify that a personal protection order protects an ‘aggrieved person’ for whose benefit the order is made and to whom the grounds for making the order relate.²¹²

See Personal Protection Bill 2007 cl 9(1)(a).

- 4-4 The Personal Protection Bill 2007 should specify that, as well as the ‘aggrieved person’, a personal protection order may protect a person (a ‘named person’) who is a relative or associate of an aggrieved person, by naming the relative or associate in the order.²¹³

See Personal Protection Bill 2007 cl 9(1)(b), 28.

- 4-5 The Personal Protection Bill 2007 should include the following definition of ‘relative’:²¹⁴

relative of a person:

- (a) means the person’s spouse, child, grandchild, great-grandchild, parent, grandparent, great-grandparent, brother, sister, uncle, aunt, cousin, niece, nephew, parent-in-law, daughter-in-law, son-in-law, sister-in-law or brother-in-law; and
- (b) for an Aboriginal person—includes a person who, under Aboriginal tradition, is regarded as a relative mentioned in paragraph (a); and

²¹¹ See para 4.30 of this Report.

²¹² See para 4.31 of this Report.

²¹³ See para 4.32 of this Report.

²¹⁴ See para 4.33 of this Report.

- (c) for a Torres Strait Islander person—includes a person who, under Island custom, is regarded as a relative mentioned in paragraph (a); and
- (d) for a person with a parent who is not a natural parent—includes anyone who would be a relative mentioned in paragraph (a) if the parent were a natural parent.

See Personal Protection Bill 2007 cl 3, sch (dictionary).

- 4-6 The Personal Protection Bill 2007 should include a definition of 'associate' in terms similar to those set out in section 15(5) of the *Domestic and Family Violence Protection Act 1989* (Qld).²¹⁵

See Personal Protection Bill 2007 cl 3, sch (dictionary).

²¹⁵

See para 4.34 of this Report.

Chapter 5

Grounds for obtaining a personal protection order

INTRODUCTION	55
COMMON LAW BREACH OF THE PEACE	57
THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)	58
Grounds for the issue of a summons or warrant.....	59
Grounds for obtaining an order	60
THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)	60
THE POSITION IN OTHER JURISDICTIONS	61
THE APPROPRIATENESS OF THE EXISTING GROUNDS	62
Submissions	63
The Commission's view	64
GROUNDS OF PERSONAL VIOLENCE	65
Wilful injury to the person.....	65
Wilful damage to property	71
Harassment or intimidation	74
Interference with enjoyment of property.....	81
Indecent behaviour.....	83
A REQUIREMENT OF FEAR OR LIKELIHOOD OF FUTURE CONDUCT	84
The <i>Peace and Good Behaviour Act 1982 (Qld)</i>	84
The <i>Domestic and Family Violence Protection Act 1989 (Qld)</i>	85
The position in other jurisdictions.....	86
Submissions	86
The Commission's view	88
GROUNDS FOR INCLUDING A NAMED PERSON IN AN ORDER	89
The <i>Peace and Good Behaviour Act 1982 (Qld)</i>	89
The <i>Domestic and Family Violence Protection Act 1989 (Qld)</i>	90
The position in other jurisdictions.....	90
Submissions	91
The Commission's view	91
PERSONAL VIOLENCE COMMITTED BY A THIRD PARTY	92
The <i>Peace and Good Behaviour Act 1982 (Qld)</i>	92
The <i>Domestic and Family Violence Protection Act 1989 (Qld)</i>	92
The Commission's view	92
PERSONAL VIOLENCE AGAINST A THIRD PARTY	93
The <i>Peace and Good Behaviour Act 1982 (Qld)</i>	93
The <i>Domestic and Family Violence Protection Act 1989 (Qld)</i>	93
Submissions	93
The Commission's view	94
THE POTENTIAL RISKS OF NET-WIDENING/UNINTENDED CONSEQUENCES	94
Submissions	95
The Commission's view	97
RECOMMENDATIONS	99

INTRODUCTION

5.1 In Queensland, there are a number of legislative mechanisms which provide for the protection and safety of persons and their property. These mechanisms include the *Peace and Good Behaviour Act 1982* (Qld), the *Domestic and Family Violence Protection Act 1989* (Qld) and the *Criminal Code* (Qld).²¹⁶

5.2 One or more of these legislative mechanisms may apply in a particular circumstance. Their availability will depend on the specific requirements of the relevant legislation. The application of the *Peace and Good Behaviour Act 1982* (Qld) or the *Domestic and Family Violence Protection Act 1989* (Qld) requires proof, on the balance of probabilities, of the particular grounds for obtaining an order, whereas the prosecution of a criminal offence requires proof, beyond reasonable doubt, of the elements of the offence.²¹⁷

5.3 It may be, for example, that an act of actual or threatened violence, depending on the circumstances of the situation, may constitute the criminal offence of assault,²¹⁸ unlawful stalking²¹⁹ or wilful damage.²²⁰ It may also be

216 See also, for example, *Anti-Discrimination Act 1991* (Qld); *Child Protection Act 1999* (Qld); *Family Law Act 1975* (Cth); *Guardianship and Administration Act 2000* (Qld) ch 8.

217 See para 2.26–2.30 of this Report.

218 *Criminal Code* (Qld) s 246(1). Section 245 provides:

245 Definition of assault

A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an **assault**.

219 *Criminal Code* (Qld) s 359E(1). Section 359B provides:

359B What is unlawful stalking

Unlawful stalking is conduct—

- (a) intentionally directed at a person (the **stalked person**); and
- (b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and
- (c) consisting of 1 or more acts of the following, or a similar, type—
 - (i) following, loitering near, watching or approaching a person;
 - (ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;
 - (iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;
 - (iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;
 - (v) giving offensive material to a person, directly or indirectly;
 - (vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;
 - (vii) an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and
- (d) that—

that, whether or not the person who allegedly committed the act is charged with an offence,²²¹ the civil remedy of an order under the *Peace and Good Behaviour Act 1982* (Qld) or the *Domestic and Family Violence Protection Act 1989* (Qld) is available to restrain the person's behaviour.

5.4 The Commission's terms of reference for the review require it to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an 'appropriate, easily accessible and effective mechanism for protection of the community from breaches of the peace'.²²²

5.5 In particular, the Commission is required to consider the grounds specified in the Act and whether the ambit of conduct covered by the Act is inappropriate, being either too wide or too restrictive. The terms of reference also 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.

5.6 The Discussion Paper raised a number of issues in relation to the grounds for the grant of an order under the *Peace and Good Behaviour Act 1982* (Qld), including whether the ambit of conduct covered by the Act is inappropriate, being either too wide or too restrictive. The issues canvassed by the Discussion Paper and raised in submissions include the following:²²³

- the appropriateness of the current grounds for obtaining a peace and good behaviour order;
- whether behaviour that is neither violent nor overtly threatening but rather harassing or intimidating should be included in the grounds for obtaining an order;

-
- | | |
|------|--|
| (i) | would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or |
| (ii) | causes detriment, reasonably arising in all the circumstances, to the stalked person or another person. |

²²⁰ *Criminal Code* (Qld) s 469. Section 469 provides:

469 Wilful damage

Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence which, unless otherwise stated, is a misdemeanour, and the person is liable, if no other punishment is provided, to imprisonment for 5 years.

²²¹ There may be many reasons why the person who allegedly committed the act is not charged with the offence, even if the elements of an offence can be proved. This situation may arise, for example, if a victim is reluctant to bring criminal proceedings. Note, however, that special conditions on a person's release on bail may be imposed if necessary to prevent the person from committing an offence, endangering the safety or welfare of the public, or interfering with a witness: *Bail Act 1980* (Qld) s 11(2).

²²² The terms of reference are set out in Appendix 1 to this Report.

²²³ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) ch 4. Note that submissions on this issue are discussed in detail in this chapter.

- 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;
- damage to property of a person who is in the care or charge of the complainant;
- conduct that does not cause fear;
- actual property damage; and
- the potential risks of net-widening.

5.7 This chapter considers and compares various grounds on which people can seek similar remedies for their protection from unwanted behaviour. In particular, the chapter considers the similarities and differences between the grounds for obtaining a peace and good behaviour order and a domestic violence order and compares these with the grounds for obtaining a civil restraining order in other Australian jurisdictions. The chapter sets out the Commission's recommendations for the grounds for obtaining a personal protection order under its proposed Personal Protection Bill 2007. It also considers the grounds on which the court may include a 'named person' (a relative or associate of an aggrieved person for the order) in a personal protection order.

COMMON LAW BREACH OF THE PEACE

5.8 At common law, a breach of the peace involves some degree of physical assault or public violence.²²⁴ Historically, a justice of the peace could bind over a person to be of good behaviour or to keep the peace only if the applicant proved 'just cause to fear that another person will do him some bodily harm, as by killing or beating him or his wife or child'.²²⁵

5.9 The modern common law concept of a breach of the peace now includes, in addition to the element of violence or fear of violence, damage to a

²²⁴ D Greenberg, *Stroud's Judicial Dictionary of Words and Phrases* (7th ed, 2006) Vol 2, 1125–6 (definition of 'good behaviour').

²²⁵ *Halsbury's Laws of England* (4th ed, 2002) Vol 29(2) [782] n 2.

person's property, provided that the damage occurred in the person's presence.²²⁶

5.10 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 Bill 1982 (Qld) into Parliament:²²⁷

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.

THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)

5.11 Obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) 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.²²⁸ The second step is the hearing and determination of the matter in the Magistrates Court.²²⁹

226 *R v Howell* [1982] QB 416. Watkins LJ for the Court observed (at 426–7):

[K]eeping the peace in this country in the latter half of the 20th 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.

...

[T]here 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, unlawful assembly or other disturbance.

227 Queensland, *Parliamentary Debates*, Legislative Assembly, 14 September 1982, 841 (Hon Samuel Doumany, Minister for Justice and Attorney-General).

228 *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 10 of this Report.

Section 4 of the Act was 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).

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

Grounds for the issue of a summons or warrant

Threatening behaviour

5.12 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.²³⁰

5.13 The nature of the threat must be that the defendant will:²³¹

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

5.14 If the matter of the complaint is substantiated to the satisfaction of the justice of the peace, and if the justice of the peace considers that the complainant's fear is reasonable in the circumstances, the justice of the peace may issue a summons or warrant.²³²

Behaviour that causes fear of damage to property

5.15 The *Peace and Good Behaviour Act 1982* (Qld) 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.²³³

5.16 If the matter of the complaint is substantiated to the satisfaction of the justice of the peace, and if the justice of the peace considers that the complainant's fear is reasonable in the circumstances, the justice of the peace may issue a summons or warrant.²³⁴

²³⁰ *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

²³¹ *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(a)–(d).

²³² *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

²³³ *Peace and Good Behaviour Act 1982* (Qld) s 4(2). The grounds for making a complaint under this section were amended by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66.

²³⁴ *Peace and Good Behaviour Act 1982* (Qld) s 4(2A).

Grounds for obtaining an order

5.17 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’.²³⁵ The court, after having considered the evidence, may dismiss the complaint or make an order requiring the defendant to keep the peace and be of good behaviour.²³⁶

5.18 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, or the complainant’s property, 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,²³⁷ which may also be relevant to the Court’s discretion to either dismiss the complaint or make an order.²³⁸

THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)

5.19 The *Domestic and Family Violence Protection Act 1989* (Qld) enables a court to make an order to protect people who experience ‘domestic violence’ within a ‘domestic relationship’.²³⁹

5.20 ‘Domestic violence’ is defined in section 11 of the *Domestic and Family Violence Protection Act 1989* (Qld). That section provides:

11 What is domestic violence

(1) **Domestic violence** is any of the following acts that a person commits against another person if a domestic relationship exists between the 2 persons—

- (a) wilful injury;
- (b) wilful damage to the other person’s property;

Example of paragraph (b)—

wilfully injuring a de facto’s pet

- (c) intimidation or harassment of the other person;

²³⁵ *Peace and Good Behaviour Act 1982* (Qld) s 6(1).

²³⁶ *Peace and Good Behaviour Act 1982* (Qld) s 6(3).

²³⁷ *Laidlaw v Hulett; Ex parte Hulett* [1998] 2 Qd R 45, 50–51 (McPherson JA).

²³⁸ *Scheumack v Duncan* (Unreported, District Court of Queensland, Wall DCJ, 28 April 1997).

²³⁹ *Domestic and Family Violence Protection Act 1989* (Qld) ss 11, 11A, 20(1).

Examples of paragraph (c)—

- 1 following an estranged spouse when the spouse is out in public, either by car or on foot
 - 2 positioning oneself outside a relative's residence or place of work
 - 3 repeatedly telephoning an ex-boyfriend at home or work without consent (whether during the day or night)
 - 4 regularly threatening an aged parent with the withdrawal of informal care if the parent does not sign over the parent's fortnightly pension cheque
- (d) indecent behaviour to the other person without consent;
 - (e) a threat to commit an act mentioned in paragraphs (a) to (d).
- (2) The person committing the domestic violence need not personally commit the act or threaten to commit it.

5.21 A 'domestic relationship' is defined in section 11A of the *Domestic and Family Violence Protection Act 1989* (Qld) as a 'spousal relationship', an 'intimate personal relationship', a 'family relationship' or an 'informal care relationship'.²⁴⁰

5.22 Section 20 of the Act provides that a court may make an order against a person for the benefit of someone else (the other person) if the court is satisfied that:²⁴¹

- the person has committed an act of domestic violence against the other person and a domestic relationship exists between the two persons; and
- the person is likely to commit an act of domestic violence again or, if the act of domestic violence was a threat, is likely to carry out the threat.

5.23 A person who falls outside the scope of the categories of relationship covered by the *Domestic and Family Violence Protection Act 1989* (Qld) cannot seek recourse under that Act to restrain actual or threatened violence.

THE POSITION IN OTHER JURISDICTIONS

5.24 The civil restraining order legislation in a number of other jurisdictions allows for an order to be made in a wider range of circumstances than is possible under the *Peace and Good Behaviour Act 1982* (Qld).

²⁴⁰ See *Domestic and Family Violence Protection Act 1989* (Qld) ss 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*), 12C (What is an informal care relationship).

²⁴¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 20(1). A person who counsels or procures someone else to commit an act that, if done by the person, would be an act of domestic violence is taken to have committed the act: *Domestic and Family Violence Protection Act 1989* (Qld) s 20(2).

5.25 The legislation in other Australian States and Territories varies in the criteria that must be satisfied to obtain an order requiring a person to refrain from engaging in the conduct forming the basis of the complaint. While some jurisdictions have adhered to the common law concept of breach of the peace,²⁴² most other jurisdictions have adopted a wider approach, in some cases dispensing with the need for an allegation of actual or threatened violence,²⁴³ or for the person's conduct to cause fear on the part of the applicant.²⁴⁴

5.26 The relevant legislative provisions in other jurisdictions are considered as they arise throughout the chapter.

THE APPROPRIATENESS OF THE EXISTING GROUNDS

5.27 The existing grounds for the grant of an order under the *Peace and Good Behaviour Act 1982* (Qld) encompass a threat of violent behaviour or intentional behaviour by the defendant towards the complainant, or the complainant's property, and fear on the part of the complainant. The ambit of the conduct covered by the Act raises several issues.

5.28 The grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) do not include behaviour that is neither violent nor overtly threatening but rather harassing or intimidating.

5.29 Neither is there an express ground in the Act 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. Similarly, there is no express ground for obtaining an order based on actual violence to the complainant's property.

²⁴² *Magistrates' Court Act 1989* (Vic) s 126A; *Justices Act* (NT) pt IV div 7. For what constitutes a breach of the peace, see para 5.8–5.10 of this Report. In the Northern Territory, the *Domestic and Family Violence Act* (NT) repeals pt IV div 7 of the *Justices Act* (NT) introducing a new pt IVA which provides for the making of personal violence restraining orders. The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed.

²⁴³ *Crimes Act 1900* (NSW) s 562K(1); *Summary Procedure Act 1921* (SA) s 99(1); *Justices Act 1959* (Tas) s 106B(1)(c), (d); *Crimes (Family Violence) Act 1987* (Vic) s 4(1)(c); *Crimes Act 1958* (Vic) 21A(2), (5); *Restraining Orders Act 1997* (WA) ss 11A, 34. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Section 562K(1) is replicated in s 19(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

²⁴⁴ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 10, 40; *Justices Act* (NT) s 87(1), as amended by the *Domestic and Family Violence Act* (NT); *Justices Act 1959* (Tas) s 106B(1); *Magistrates' Court Act 1989* (Vic) s 126A; *Crimes (Family Violence) Act 1987* (Vic) s 4(1); *Restraining Orders Act 1997* (WA) ss 11A, 34. Section 87(1) of the *Justices Act* (NT) is a new provision. As to the amendment of the *Justices Act* (NT), see note 242 of this Report. For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 243 of this Report.

5.30 In addition, there is no provision under the *Peace and Good Behaviour Act 1982* (Qld) for a complainant to make a complaint based on the fear of damage or destruction to the property of a person in the complainant's care or charge.

5.31 Furthermore, an essential element of a complaint under the *Peace and Good Behaviour Act 1982* (Qld) is that the complainant be fearful of the defendant or of property damage resulting from the defendant's intentional conduct towards the complainant, and that such fear is reasonable in the circumstances. As a consequence, conduct that does not cause fear on the part of the complainant is not, at present, sufficient ground for a complaint under the Act.

Submissions

5.32 In its Discussion Paper, the Commission sought submissions on whether the grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) are appropriate.²⁴⁵

5.33 The majority of the submissions received by the Commission on this issue considered the existing grounds to be inappropriate, on the basis that they are too restrictive, and suggested the grounds should be broadened.²⁴⁶

5.34 Numerous submissions considered the restrictive nature of the grounds prevented people who are in genuine need of protection from accessing the remedy of a peace and good behaviour order.²⁴⁷ A number of submissions also provided examples of situations in which there have been gaps in the legislative mechanisms available for obtaining protection from unwanted behaviours.²⁴⁸ These examples included situations in which people have been subject to intimidation or harassment in the absence of a direct threat of physical violence,²⁴⁹ or to violence in the absence of an ongoing threat.²⁵⁰

5.35 Caxton Legal Centre Inc also observed:²⁵¹

²⁴⁵ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 37 (Question 4-1).

²⁴⁶ Submissions 5, 8, 12, 13, 14, 15, 19. Some submissions considered the legislation should include additional grounds: submissions 21, 26, 27, 28.

²⁴⁷ Submissions 5, 8, 13, 14, 15.

²⁴⁸ Submissions 4, 5, 13, 19.

²⁴⁹ Submissions 5, 13.

²⁵⁰ Submission 19.

²⁵¹ Ibid.

Currently, a complainant may bring a complaint under the Act based on threats made to the complainant's person (or a person under their care) or to the complainant's property. Section 4 of the Act requires that the complainant be in fear of the defendant.

Unfortunately, because of the somewhat restrictive nature of this definition, we see clients who are currently ineligible to obtain protection under the Act although they clearly need some form of protection order and appear to fall within the category of persons the Act was actually designed to assist.

5.36 Several submissions considered it desirable to base the grounds for obtaining a peace and good behaviour order on those applicable under the definition of 'domestic violence' in *Domestic and Family Violence Protection Act 1989* (Qld).²⁵²

5.37 Further, one community legal service considered that, in order to achieve 'equality before the law and equality of access to the law', it is necessary to implement 'a consistent scheme of protection for all citizens of Queensland regardless of contextual factors such as domestic and/or family relationship'.²⁵³

5.38 In contrast, the Queensland Public Tenants Association Inc expressed concern that an expansion of the ambit of the conduct may result in an inappropriate increase in the numbers of orders sought under the Act.²⁵⁴

The Commission's view

5.39 In the Commission's view, the existing grounds for obtaining a peace and good behaviour order are too narrow.

5.40 The Commission concurs with those submissions that suggested that the relative narrowness of the grounds sometimes prevents people, who are in genuine need of protection from unwanted behaviour, from obtaining a peace and good behaviour order.

5.41 The Commission considers the grounds for obtaining a personal protection order under its proposed Personal Protection Bill 2007 should be wider than the existing grounds for obtaining a peace and good behaviour order. In addition, the Commission is of the view that the grounds for obtaining a personal protection order should consist of two elements, consistent with the *Domestic and Family Violence Protection Act 1989* (Qld).

²⁵² Submissions 13, 14, 26. See *Domestic and Family Violence Protection Act 1989* (Qld) s 11 (What is domestic violence).

²⁵³ Submission 14.

²⁵⁴ Submission 6.

5.42 First, there should be a requirement to show that particular conduct – ‘personal violence’ – has been committed against a person (an ‘aggrieved person’). The Commission considers that, generally, this conduct should cover particular forms of violence similar to the types of violence covered by the *Domestic and Family Violence Protection Act 1989* (Qld). Additionally, the Personal Protection Bill 2007 should provide that ‘personal violence’ is a form of ‘prohibited conduct’ under the Bill.²⁵⁵

5.43 Second, there should be a requirement to show that there is a likelihood of personal violence being committed by the respondent against the aggrieved person again.

5.44 The particular forms of personal violence which should form grounds for a personal protection order, and the additional ‘likelihood’ requirement, are discussed in the following parts of this chapter.

5.45 It is also important that an expansion of the grounds, under the proposed Personal Protection Bill 2007, does not result in unintended or undesirable consequences. The Commission considers that this issue can be dealt with by clearly specifying the behaviour covered by the grounds for obtaining an order, in conjunction with the use of procedural safeguards to prevent the misuse of the legislation.

5.46 The relevant issues raised by a consideration of the appropriateness of the existing grounds for obtaining a peace and good behaviour order are dealt with as they arise in this chapter and elsewhere in this Report.

GROUNDS OF PERSONAL VIOLENCE

Wilful injury to the person

The Peace and Good Behaviour Act 1982 (Qld)

5.47 One of the grounds under the *Peace and Good Behaviour Act 1982* (Qld) that entitles a complainant to obtain a summons or warrant requiring the defendant to appear before a Magistrates 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.²⁵⁶

5.48 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

²⁵⁵ Note that the Commission has also recommended in para 8.33 of this Report that

²⁵⁶ *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(a).

encompasses situations where the defendant has committed an assault or caused bodily injury without any accompanying threat in relation to the future.²⁵⁷

5.49 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.²⁵⁸

The Domestic and Family Violence Protection Act 1989 (Qld)

5.50 An aggrieved may apply for a protection order under the *Domestic Violence and Family Protection Act 1989* (Qld) on the grounds that a person has committed an act of domestic violence and that the person is likely to commit an act of domestic violence again or to carry out a threat to commit domestic violence.²⁵⁹ An act of domestic violence under the *Domestic and Family Violence Protection Act 1989* (Qld) includes wilful injury, or a threat to commit wilful injury, against an aggrieved.²⁶⁰

5.51 The *Domestic and Family Violence Protection Act 1989* (Qld) does not define wilful injury. However, it has been held that the words ‘wilful injury’ should be given their ordinary meaning.²⁶¹

[T]he Act does not define ‘wilful injury’. Had the Legislature used an expression such as ‘actual bodily injury’ or ‘bodily harm’ that could have been an indication that more than a trivial or transient effect upon a spouse was required to bring the matter within the provisions of the Act. (see *Regina v Chan-Fook* (1994) 1 WLR 689; *The Queen v Scatchard* (1987) 27 A Crim R 136). In my opinion as the Legislature has chosen to use the expression ‘wilful injury’ and not those other well recognised terms, a transient effect of being struck is within the meaning of the term ‘wilful injury’ as used in the Act ... In my opinion the ordinary meaning of the words ‘wilful injury’ should be applied. Wilful is defined in the New Shorter Oxford English Dictionary as ‘of an action etc: done on purpose; deliberate, intentional.’ Injury is defined ... as ‘hurt or loss caused to or sustained by a person or thing; harm, detriment; damage, specially of the body; an instance of this’. It was submitted that the appellant’s wife having suffered ‘may be slight pain’ was not an injury. In my opinion the slap to the appellant’s wife whereby she suffered pain and the choking each amounted to wilful injuries.

257 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).

258 Information provided by Legal Aid Queensland, 8 September 2004; Submission 13.

259 *Domestic and Family Violence Protection Act 1989* (Qld) s 20(1).

260 *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(a), (e).

261 *Grainger v Grainger* [2001] QDC 016, [31] (Samios DCJ). Note that the Queensland Court of Appeal has held that physical pain is not an injury, although it may be a symptom of an injury: *R v Tamcelik; ex parte Ozcan* [1998] 1 Qd R 330.

5.52 For the purposes of the *Domestic and Family Violence Protection Act 1989* (Qld), it has been held that the term ‘injury’ encompasses physical injury and psychiatric injury.²⁶² However, mere distress or upset does not amount to an ‘injury’.²⁶³

The position in other jurisdictions

5.53 In the Northern Territory, South Australia, Tasmania, Victoria and Western Australia there is no express requirement of a threat to obtain an order under the civil restraining order legislation.²⁶⁴ 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.²⁶⁵ In the ACT, the grounds encompass actual violence to the aggrieved person or his or her property as well as the threat of such violence.²⁶⁶

Submissions

5.54 In its Discussion Paper, the Commission sought submissions on whether it should be necessary to show actual and/or threatened violence to obtain an order under the *Peace and Good Behaviour Act 1982* (Qld).²⁶⁷

5.55 The Commission received a number of submissions on whether an actual assault or bodily injury, in the absence of a specific threat, is a sufficient ground for obtaining a peace and good behaviour order. All of those submissions considered that it should be possible to obtain an order on the basis of an actual assault or bodily injury, without requiring a threat.²⁶⁸

5.56 The Citizens Advice Bureau and Gold Coast Legal Service expressed the view that the carrying out of an assault may itself constitute a threat to repeat the conduct such that the magistrate ought to draw an inference as to a future threat. This submission suggested the test for the grant of an order should revolve around whether the conduct gives rise to an apprehension of

262 *Dowse v Gorringe* [2004] QDC 477, [28]. In that case, McGill DCJ observed at [28] that not every variety of mental disturbance will amount to psychiatric injury. Furthermore, the concept of psychiatric injury is no wider under the Act than under the Queensland criminal compensation provisions.

263 Ibid.

264 *Justices Act* (NT) s 87(1), as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) s 99(1), (2); *Justices Act 1959* (Tas) s 106B(1); *Crimes (Family Violence) Act 1987* (Vic) s 4(1); *Crimes Act 1958* (Vic) s 21A(2), (5); *Restraining Orders Act 1997* (WA) ss 11A, 34. As to the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 243 of this Report. For the application of the *Justices Act* (NT), see note 242 of this Report.

265 Ibid. See also *Domestic and Family Violence Protection Act 1989* (Qld) s 20(1), which provides that a domestic violence 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.

266 *Domestic Violence and Protection Orders Act 2001* (ACT) ss 10, 40(1)(b).

267 Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 38 (Question 4-6).

268 Submissions 5, 12, 13, 14, 15, 19, 21, 25.

personal injury, or whether there is a likelihood that violence will occur in the future.²⁶⁹

5.57 Several submissions suggested that the inclusion of actual assault or injury as a ground for obtaining an order may address the situation where a person who has experienced actual violence wishes to prevent a recurrence of the conduct, rather than make a criminal complaint.²⁷⁰

5.58 One of these submissions, from a Queensland magistrate, made the following observation:²⁷¹

Threatened violence should be enough to form the basis of a complaint, but actual violence should also be a basis for an order, and specified to be so. A party may not wish to proceed with a complaint to a police officer about actual damage or injury, but simply wishes there not to be a repeat of an earlier actual incident (as distinct from a threatened incident). The Act should make clear that actual as well as threatened is included.

5.59 Caxton Legal Centre Inc similarly noted:²⁷²

A client who has been a victim of a one-off assault or damage to their property may continue to live in fear of the perpetrator of that assault or property damage, especially where both parties live nearby to one another, yet that person currently has no standing to apply for an order under the Act. While it would be normal for a victim of an assault or wilful damage to their property to seek to have the perpetrator charged under the criminal law, there may be times when the police decline to lay charges due to what may be perceived as a lack of cogent or admissible evidence, or the victim may for various personal reasons not wish to have the perpetrator charged with a criminal offence. This may occur, for example, where the perpetrator is a person with a mental illness and the victim is loathe to make that person's life any more difficult by complaining through the police.

Alternatively, and more commonly, the victim may not want to be engaged in the criminal justice system because of their own fear (particularly where the victim is simply too frightened to take action because of possible retaliation). In such circumstances, a victim may still continue to feel vulnerable to that other person, even where no further actual verbal threats are made against them, and this is likely to be exacerbated when combined with other inappropriate behaviours. While strange staring, oppressive silences, the making of peculiar sounds (for example, heavy breathing or growling), the speaking of inappropriate words (for example, 'boom'), or use of confronting gesticulations (for example, the shaking of a fist), or other anti-social communication generally should not in themselves be grounds to trigger legal interventions, ongoing interactions (so characterised) with a person who has previously been violent to a victim can be extremely frightening for a victim.

269 Submission 5.

270 Submissions 12A, 19, 21.

271 Submission 12A.

272 Submission 19.

5.60 Caxton Legal Centre Inc considered the grounds for obtaining a grant of an order should include actual assault or property damage, in circumstances where it is reasonable for the complainant to fear the person who assaulted him or her or damaged his or her property, thus demonstrating a propensity for violence.

5.61 The South West Brisbane Community Legal Centre Inc suggested that an assault within the context of on-going intimidating or harassing conduct would be better interpreted by the court as a basis for proving the likelihood of the conduct occurring again.²⁷³

5.62 The Queensland Police Service supported the inclusion of an additional ground where the 'intentional conduct of a defendant is directed at the complainant and as a consequence, causes the complainant to fear the defendant will assault them, or any person under their care or charge, or will do them bodily injury':²⁷⁴

Section 4(2) ... currently only applies to a complainant's fear that a defendant will destroy or damage their property that arises from the defendant's intentional conduct directed towards them. Section 4(1)(a) of the Peace and Good Behaviour Act provides grounds for making a complaint to a Justice of the Peace when a defendant has 'threatened' to assault or do any bodily harm to the complainant or to any person under their charge or care. This implies a direct verbal or written threat. Anecdotal evidence indicates that persons who are subjected to ongoing intentional conduct by a defendant, that does not include verbal or written threats, that gives rise to fear of assault or bodily injury only are subsequently making complaints to the police for the criminal offence of unlawful stalking under s 359E 'Punishment of unlawful stalking' of the Criminal Code. This offence is a crime. It is understood the complaints are made for the purpose of having restraining orders made under s 359F 'Court may restrain unlawful stalking' of that Code. It is anticipated the practice of making stalking complaints in such circumstances would be reduced if the Peace and Good Behaviour Act was amended to cover such conduct.

5.63 Similarly, Legal Aid Queensland observed that situations involving intimidation and harassment without any direct threats of physical violence may cause fear to the potential applicant and also pose a high risk of escalation into actual violence. Legal Aid Queensland further observed that the law in relation to stalking recognises that harm can be done without any threats of violence. In light of these matters, Legal Aid Queensland considered a peace and good behaviour order would be an appropriate remedy where such behaviour is occurring, independently of any criminal charges for stalking.²⁷⁵

²⁷³ Submission 15.

²⁷⁴ Submission 21.

²⁷⁵ Submission 13.

The Commission's view

5.64 The existing grounds of the *Peace and Good Behaviour Act 1982* (Qld) encompass threats of assault or bodily injury to the complainant or to a person under the care or charge of the complainant. In the Commission's view, the proposed Personal Protection Bill 2007 should also cover situations where the person against whom a protection order is sought has committed an act of personal violence without any accompanying threat in relation to the future. This would clarify that the grounds for obtaining a protection order include actual conduct, in addition to threatened conduct.

5.65 One of the grounds for obtaining a domestic violence order under the *Domestic and Family Violence Protection Act 1989* (Qld) is that of 'wilful injury'. This ground provides a wider basis for relief than the ground of assault or bodily injury.²⁷⁶

5.66 In order to ensure that an aggrieved person is protected against a range of conduct that may amount to an injury, and for consistency with the *Domestic and Family Violence Protection Act 1989* (Qld), the Commission considers that the grounds of 'personal violence' for obtaining a personal protection order should include wilful injury, or a threat to commit wilful injury, against an aggrieved person. The Commission has also recommended elsewhere in this Report that the relevant conduct for obtaining a workplace protection order is 'workplace violence'.²⁷⁷ Under the Personal Protection Bill 2007 proposed by the Commission, 'personal violence' and 'workplace violence' are each types of 'prohibited conduct'.

5.67 The Commission has also recommended in this Report that, for the purpose of deciding whether an act of personal violence is likely to happen again, the court may have regard to the person's past conduct.²⁷⁸ This would enable the court to make an order based on the occurrence of an act of personal violence in circumstances where an aggrieved person may have difficulty proving the likelihood of that type of conduct occurring again.

5.68 The Commission is of the view that the additional ground that the 'intentional conduct of a defendant is directed at the complainant and as a consequence, causes the complainant to fear the defendant will assault them, or any person under their care or charge, or will do them bodily injury', which was proposed by the Queensland Police Service, generally relates to the behaviour that would constitute an assault, harassment or intimidation. The grounds of 'personal violence' which the Commission has recommended be included in the Personal Protection Bill 2007 would cover assault and/or

²⁷⁶ See para 5.51–5.52 of this Report.

²⁷⁷ See para 8.30 of this Report.

²⁷⁸ See para 5.146 of this Report.

harassment or intimidation.²⁷⁹ It is therefore unnecessary to include the ground proposed by the Queensland Police Service in the Bill.

Wilful damage to property

The Peace and Good Behaviour Act 1982 (Qld)

5.69 The *Peace and Good Behaviour Act 1982 (Qld)* provides that 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 reasonably fear that the defendant will destroy or damage the complainant's property.²⁸⁰

5.70 The Act does not expressly enable a complainant to obtain relief based on actual violence to the complainant's property. However, actual property damage may give rise to a reasonable fear of additional or future damage to the complainant's property by the defendant.

5.71 A complaint under the Act would not be sustainable where a defendant had actually damaged a complainant's property without any accompanying fear, on the part of the complainant, of additional property damage. It may be that a complainant is not afraid of further property damage but may nevertheless 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, 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 more practical test may be the reasonable likelihood of property damage by the defendant.

The Domestic and Family Violence Protection Act 1989 (Qld)

5.72 An aggrieved may apply for a domestic violence order under the *Domestic Violence and Family Protection Act 1989 (Qld)* on the grounds that a person has committed an act of domestic violence and that the person is likely to commit an act of domestic violence again or, to carry out a threat to cause domestic violence.²⁸¹ An act of domestic violence under the *Domestic and Family Violence Protection Act 1989 (Qld)* includes wilful damage, or a threat to commit wilful damage, to the property of an aggrieved.²⁸²

²⁷⁹ See para 5.66, 5.110 of this Report.

²⁸⁰ *Peace and Good Behaviour Act 1982 (Qld)* s 4(2), (2A).

²⁸¹ *Domestic and Family Violence Protection Act 1989 (Qld)* ss 11, 20(1).

²⁸² *Domestic and Family Violence Protection Act 1989 (Qld)* s 11(1)(b), (e).

The position in other jurisdictions

5.73 The civil restraining order legislation in the ACT, Tasmania and Western Australia does not require reasonable fear of property damage to be established before an order may be obtained.²⁸³

Submissions

5.74 In its Discussion Paper, the Commission sought submissions on whether it should be necessary to show actual apprehension or fear to obtain an order under the *Peace and Good Behaviour Act 1982* (Qld).²⁸⁴ The Discussion Paper also specifically raised as an issue for consideration the absence of a ground of actual property damage under the Act.²⁸⁵

5.75 Three submissions received by the Commission addressed the issue of whether the complainant should be required to show reasonable fear of property damage.²⁸⁶

5.76 The South West Brisbane Community Legal Centre Inc suggested property damage, particularly in the context of continuing intimidating conduct, is ‘very likely to give rise to a reasonable expectation that the conduct will continue unless the defendant is restrained in some way’.²⁸⁷

5.77 The Women’s Legal Service considered that, in relation to property damage, a complainant should only be required to show a likelihood of harm or hardship as a result of the defendant’s behaviour.²⁸⁸

²⁸³ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 10, 40; *Justices Act 1959* (Tas) s 106B(1); *Restraining Orders Act 1997* (WA) ss 11A, 34.

In Victoria, see the *Crimes (Family Violence) Act 1987* (Vic) s 4(1)(a), (b). An intervention order can be made under that Act in relation to stalking, which may include, for example, a course of conduct involving interference with a person’s property ‘with the intention of causing physical or mental harm to the victim or to arouse apprehension or fear in the victim’: *Crimes Act 1958* (Vic) s 21A(2)(d), (5). For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 243 of this Report. The *Magistrates’ Court Act 1989* (Vic) does not specify any grounds for complaint.

In the Northern Territory, property damage is not a ground for the making of a personal violence restraining order under the *Justices Act* (NT). For the application of the *Justices Act* (NT), see note 242 of this Report.

²⁸⁴ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 38 (Question 4-6).

²⁸⁵ *Ibid* [4.68]–[4.70].

²⁸⁶ Submissions 8, 15, 19. In addition, two submissions commented generally that there should be no requirement of fear under the legislation (Submissions 12, 25) and two other submissions considered the grounds should mirror those under the *Domestic and Family Violence Protection Act 1989* (Qld) (Submissions 14, 25).

²⁸⁷ Submission 15.

²⁸⁸ Submission 8. This submission suggested that the grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) should cover the following behaviour, where that behaviour is, or is likely to be, ongoing: actual assault; bodily injury or damage to property; verbal abuse; intimidation or harassment; obsessive, unwanted attention or advances; offensive behaviour; stalking behaviour and loitering only in the context of intimidation or harassment.

5.78 Caxton Legal Centre Inc considered that, where damage to property has occurred, a complainant should be able to seek a peace and good behaviour order if the circumstances demonstrate that they have reasonable grounds to continue to be in fear of the person who has caused the damage, thus demonstrating a propensity for violence. This submission further considered that the requirement of fear be modified to cover situations which would cause fear in an objective bystander.²⁸⁹

The Commission's view

5.79 The Commission considers it desirable to clarify whether an aggrieved person is able to obtain relief under its proposed Personal Protection Bill 2007 based on actual violence to his or her property.

5.80 The requirement of reasonable fear of property damage on the part of an aggrieved person may restrict his or her opportunities for obtaining an order. This could occur where an aggrieved person is not afraid of further property damage, but apprehends the possibility of further damage occurring. In the Commission's view, the accessibility of the remedy of a personal protection order should not be dependent on the subjective response of the aggrieved person to damage to his or her property. The Commission also considers it desirable to enable an aggrieved person to obtain relief based on actual violence to his or her property.

5.81 In the Commission's view, the grounds of 'personal violence' for obtaining a personal protection order should include wilful damage, or a threat to commit wilful damage, to the property of an aggrieved person. This is consistent with the position under the *Domestic and Family Violence Protection Act 1989* (Qld). This is also consistent with the Commission's recommendation elsewhere in this Report that the requirement of fear should not apply in relation to behaviour directed at the aggrieved person.²⁹⁰

5.82 The Commission has also recommended in this Report that, for the purpose of deciding whether the person is likely to commit personal violence against the aggrieved person again, a court may have regard to past conduct of the person.²⁹¹

²⁸⁹ Submission 19.

²⁹⁰ See para 5.144 of this Report.

²⁹¹ See para 5.146 of this Report.

Harassment or intimidation

The Peace and Good Behaviour Act 1982 (Qld)

5.83 A person may be subjected to behaviour that 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).

5.84 In contrast, similar remedies in respect of certain behaviour of a harassing or intimidating nature are available under the Queensland domestic violence legislation and the criminal law.

The Domestic and Family Violence Protection Act 1989 (Qld)

5.85 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that an act of domestic violence includes intimidation or harassment committed by one person against another person if a domestic relationship exists between the two people.²⁹²

5.86 The *Domestic and Family Violence Protection Act 1989* (Qld) does not define ‘intimidation’ or ‘harassment’, but rather, provides various examples of the relevant behaviour. For example, the Act contemplates that certain kinds of behaviour – such as following a person or loitering outside a person’s home – may, in the circumstances of a particular situation, be harassing or intimidating even though no specific threat has been made.²⁹³

5.87 However, it has been held that, ordinarily, ‘intimidation’²⁹⁴ involves some threatening words or conduct that coerce, or influence the conduct of, another person, whereas ‘harassment’ involves the repetition of positive acts that distress, vex, trouble or worry another person.²⁹⁵ To amount to intimidation or harassment as a ground of domestic violence, the behaviour must also be ‘of some significance’.²⁹⁶ Whether conduct constitutes intimidation or harassment under the domestic violence legislation is to be considered in light of the

292 *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(c). Section 11 of the Act is set out at para 5.20 of this Report.

293 *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(c).

294 *R v Matthews* [1993] 2 Qd R 316, 318 (McPherson JA); *Bottoms v Rogers* [2006] QDC 080, [18] (McGill DCJ). A single incident can amount to intimidation: *Bottoms v Rogers* [2006] QDC 080. In *Dowse v Gorringe* [2004] QDC 477, [31]–[32], McGill DCJ held that it is necessary to prove that the person affected by the behaviour was in fact subjectively intimidated in order to show that there has been domestic violence by intimidation.

295 *Bottoms v Rogers* [2006] QDC 080, [18] (McGill DCJ); *Rogers v Rogers* [1995] QDC 375, 5 (Forde DCJ); *McLennan v McLennan* [2003] QDC 398, [12] (McGill DCJ). See also MJ Shanahan et al, *Carter's Criminal Law of Queensland* (Jan 2008) Explanation of How Domestic Violence is Dealt with Under this Act [410,095.5].

296 *Bottoms v Rogers* [2006] QDC 080, [18] (McGill DCJ).

particular circumstances in which it occurred.²⁹⁷ As McGill DCJ stated in *Bottoms v Rogers*:²⁹⁸

Essentially harmless encounters which occur fortuitously do not amount to harassment or intimidation even if the respondent finds them upsetting.

The Criminal Code (Qld)

5.88 The offence of stalking, while including acts or threats of violence that cause apprehension or fear, may also 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.²⁹⁹ 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. Consequently, in some circumstances, it could be less difficult to prove the elements of the criminal offence of unlawful stalking than to obtain a peace and good behaviour order.

The position in other jurisdictions

5.89 In the ACT, New South Wales, the Northern Territory, South Australia, Tasmania, Victoria and Western Australia, a restraining order can be obtained where the behaviour complained of is neither violent nor overtly threatening, but rather harassing and intimidating.³⁰⁰ The specific behaviour captured under the legislation varies to some extent between the particular jurisdictions and includes behaviour described as 'harassing or offensive',³⁰¹ 'harassment or

²⁹⁷ Ibid. See also *Rounsefell v Rounsefell* [1993] QDC 372 (Forno DCJ).

²⁹⁸ [2006] QDC 080, [19]. Also note that, similarly, in the context of criminal offences for offensive or disorderly language or behaviour in public places, the conduct must be of some seriousness, and is to be assessed objectively and in light of all the circumstances: see, for example, *Coleman v Power* (2004) 220 CLR 1, [14]–[15] (Gleeson CJ), [313] (Heydon J); *Connolly v Willis* [1984] 1 NSWLR 373, 378 (Wood J); and *Melser v Police* [1967] NZLR 437, 444 (Turner J).

²⁹⁹ *Criminal Code (Qld)* ss 359B, 359E(1). See note 219 of this Report.

³⁰⁰ *Domestic Violence and Protection Orders Act 2001* (ACT) s 10(1)(c); *Crimes Act 1900* (NSW) s 562K(1)(b); *Justices Act* (NT) ss 80, 87(1), as amended by the *Domestic and Family Violence Act* (NT), and *Criminal Code* (NT) s 189; *Summary Procedure Act 1921* (SA) s 99(1); *Justices Act 1959* (TAS) s 106B(1)(c)(i); *Crimes (Family Violence) Act 1987* (Vic) s 4(1)(c); *Crimes Act 1958* (Vic) s 21A(5); *Restraining Orders Act 1997* (WA) s 34(a)(i).

Section 562K(1)(b) of the *Crimes Act 1900* (NSW) is replicated in s 19(1)(b) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 243 of this Report. Sections 80, 87(1) of the *Justices Act* (NT) are new provisions. For the application of the legislation in the Northern Territory, see note 242 of this Report.

In South Australia, note the proposed new power of the court to make a restraining order on the basis of behaviour that caused or was likely to cause harassment, alarm or distress to one or more persons: *Statutes Amendment (Gangs) Bill 2007* (SA), introduced to the Legislative Council, 3 May 2007. In Western Australia, note the proposed amendment to s 6(2)(c) of the *Restraining Orders Act 1997* (WA) to additionally allow the court to make a 'violence restraining order' on the ground of pursuing a person with intent to intimidate the person: *Acts Amendment (Justice) Bill 2007* (WA) s 91(2), passed by the Legislative Assembly, 29 November 2007.

³⁰¹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 10(1)(c).

molestation,³⁰² ‘intimidation’,³⁰³ ‘intimidating or offensive’³⁰⁴ or ‘provocative or offensive’.³⁰⁵

5.90 In the ACT, South Australia, Tasmania and Western Australia, the relevant grounds for obtaining a protective order include offensive behaviour. Generally, behaviour is offensive when it is likely to cause offence in the mind of a reasonable person based on the prevailing community standards.³⁰⁶

5.91 In New South Wales, the Northern Territory, Tasmania and Victoria, the legislation also captures stalking.³⁰⁷

5.92 For example, section 21A(5) of the *Crimes Act 1958* (Vic) provides that a person who has been stalked may apply under the Victorian family violence legislation for an intervention order against the defendant, even though there is no family relationship between the defendant and the victim.³⁰⁸ A recent review by the Victorian Law Reform Commission of the family violence legislation in Victoria noted dissatisfaction with this provision. Initial consultations revealed a perception that the provision was being used in unintended ways – 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 as causing certain magistrates, court staff and police to treat people seeking family violence intervention orders less seriously and with greater scepticism and impatience.³⁰⁹

³⁰² *Crimes Act 1900* (NSW) s 562D(1)(a). This provision is replicated in s 7(1)(a) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 243 of this Report.

³⁰³ *Crimes Act 1900* (NSW) ss 562D, 562K(1)(b)(i). Sections 562D, 562K(1)(b)(i) of the *Crimes Act 1900* (NSW) are replicated in ss 7, 19(1)(b)(i) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 243 of this Report.

³⁰⁴ *Summary Procedure Act 1921* (SA) s 99(1); *Restraining Orders Act 1997* (WA) s 34(a)(i).

³⁰⁵ *Justices Act 1959* (Tas) s 106B(1)(c)(i).

³⁰⁶ *Spence v Loguch* (Unreported, New South Wales Supreme Court, Sully J, 12 November 1991); *Nelson v Mathieson* [2003] VSC 451, [11]–[14] (Nathan J); *Ross v Munns* (Unreported, Northern Territory Supreme Court, Thomas, Bailey and Priestley JJ, 11 June 1998), citing *Worcester v Smith* [1951] VLR 316 (O'Bryan J). See also Walsh T, ‘Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses’ (2005) 24(1) *The University of Queensland Law Journal* 123.

³⁰⁷ *Crimes Act 1900* (NSW) s 562K(1)(b)(ii); *Justices Act* (NT) ss 80, 87(1), as amended by the *Domestic and Family Violence Act* (NT), and *Criminal Code* (NT) s 189 (Unlawful stalking); *Justices Act 1959* (Tas) s 106B(1)(d); *Crimes Act 1958* (Vic) s 21A(5).

Section 562K(1)(b)(ii) of the *Crimes Act 1900* (NSW) is replicated in s 19(1)(b)(ii) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Also note s 8(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) which provides that the court may have regard to any pattern of violence in the person's behaviour in determining whether a person's conduct amounts to stalking. For the application of the legislation in New South Wales, see note 243 of this Report. Sections 80, 87(1) of the *Justices Act* (NT) are new provisions. For the application of the legislation in the Northern Territory, see note 242 of this Report.

³⁰⁸ *Crimes Act 1958* (Vic) s 21A(5).

³⁰⁹ Victorian Law Reform Commission, *Review of Family Violence Laws: Consultation Paper* (2004) [4.36]–[4.39]. Also see Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006) [3.74]–[3.77].

Submissions

5.93 In its Discussion Paper, the Commission sought submissions on how the existing grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) should be expanded.³¹⁰

5.94 Almost all of the submissions that addressed this issue generally supported the expansion of the grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) to include conduct that is neither violent nor overtly threatening, but rather harassing or intimidating.³¹¹ Only the Queensland Public Tenants Association Inc generally opposed the inclusion of harassing or intimidating behaviour as a ground for obtaining a grant of an order on the basis it would ‘open the floodgates’ to the making of frivolous or trivial applications.³¹²

5.95 A submission from an academic who researches in the area of homelessness and the law also expressed concern about the possible unintended impact of the legislation on marginalised people, such as those experiencing homelessness.³¹³ This submission suggested that the definition of ‘harassment and intimidation’ should be clarified so that it does not include behaviours associated with homelessness or other marginalised status.

5.96 The Chief Magistrate of Queensland expressed concern at the narrowness of the existing grounds under the *Peace and Good Behaviour Act 1982* (Qld), and supported the extension of the grounds to include harassing or intimidating behaviour.³¹⁴ The Chief Magistrate suggested a suitable model for such grounds might be the analogous provisions of the *Restraining Orders Act 1997* (WA).³¹⁵

5.97 The Citizens Advice Bureau and Gold Coast Legal Service also generally observed that it would be impractical for many people to deal with

³¹⁰ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 38 (Question 4-5).

³¹¹ Submissions 5, 8, 12, 13, 14, 15, 18, 19, 25, 26, 27, 28.

³¹² Submission 6.

³¹³ Submission 32.

³¹⁴ Submission 12A.

³¹⁵ *Restraining Orders Act 1997* (WA) ss 34–36. Section 34 of the *Restraining Orders Act 1997* (WA) provides that 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:

- 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.

harassing and intimidating behaviour through a civil action for private nuisance.³¹⁶

5.98 Several legal advice and advocacy services variously identified particular situations involving behaviour of a harassing or intimidating nature, in respect of which there is no remedy available under the *Peace and Good Behaviour Act 1982* (Qld), and which fall outside the ambit of the *Domestic and Family Violence Protection Act 1989* (Qld).³¹⁷

5.99 The Logan Youth Legal Service also suggested that the inclusion of harassing or intimidating behaviour as a basis for a peace and good behaviour order would likely benefit some young people, living independently of their families to avoid family violence or sexual abuse, and who are prevented from obtaining the protection of a domestic violence order or a child protection order.³¹⁸

5.100 Legal Aid Queensland expressed concern that some young people may be subject to harassment of a nature which falls outside the current grounds, but which is nevertheless experienced as distressing and intimidating conduct. Legal Aid Queensland therefore suggested expanding the grounds for an order to include conduct of a distressing or intimidating nature.³¹⁹

Harassment or intimidation arising in neighbourhood disputes

5.101 One of the scenarios frequently raised in the submissions received by the Commission related to the issue of harassing or intimidating conduct in the context of disputes between neighbours.

5.102 A Queensland magistrate suggested the inclusion of harassing, intimidating or offensive conduct as a basis for an order might discourage people from engaging in such behaviour:³²⁰

Examples of harassment which should be included are where neighbours deliberately play loud music or music with offensive lyrics, despite having been asked previously by neighbours not to do so. One example encountered recently involved allegations of one man exposing himself whilst standing on his own property. There are criminal offence provisions that would be likely to cover the scenarios I have described. However, if the aim of the PGB order is to try to modify behaviour that reduces the enjoyment of people living in

³¹⁶ Submission 5.

³¹⁷ Submissions 13, 15, 18, 19. The parties involved in such disputes included neighbours, flatmates, informal carers, relatives affected by domestic violence but ineligible or unwilling to apply for an order under the domestic violence legislation, people in workplace disputes and people affected by stalking behaviours where the conduct falls short of meeting all the elements of the offence of unlawful stalking or where there is a need or desire for intermediate protection before a stalking offence is charged or prosecuted.

³¹⁸ Submission 18.

³¹⁹ Submission 13.

³²⁰ Submission 12A.

communities, an order may be beneficial for some people in that it may influence future conduct. [original emphasis]

The potential consequences of harassment or intimidation

5.103 Caxton Legal Centre Inc observed that victims of harassing behaviour sometimes suffer severe and sustained consequences from relevant breaches of the peace:³²¹

In addition to the direct financial costs associated with property damage, indirect costs may include family disruption, health consequences, anxiety/nervous disorders, costs associated with installing security systems and, in extreme cases, relocation costs. There are other hidden consequences for the community due to the costs imposed on the justice, health and housing systems.

5.104 As an example, Caxton Legal Centre Inc provided the following case note:

After living in her unit for a substantial period of time, an elderly client attended for advice in relation to two young adult male (tenant) neighbours. Over a period of 12 months our client was subjected to constant excessive noise emanating from the nearby unit (including loud music, shouting/swearing, banging and hammering on the floor/walls, motor revving and blasting car-horn sounds), day and night, which caused her to have to sleep with the windows closed at all times; the tenants threw numerous buckets of water down onto her balcony and ‘someone’ emptied prawn shells into her bin. Other elderly unit occupiers indicated to our client that they were also concerned by the developments but did not wish to be involved in the matter. The police were called several times but said they could not help and advised her that she would have to take the matter to court herself. Body Corporate proceedings were initiated but did not lead to a practically useful outcome. The hostilities escalated so that she found she was being abused by the tenants whilst hanging out her washing or walking in the common areas. One tenant specifically yelled at her, ‘If you call the police one more time, you bitch, I will fix you for good, you slut’ – a statement she found particularly distressing and offensive. By the time the client attended for advice ..., she was sleeping in her car and was completely distraught. She was ultimately referred to us by a social worker. We prepared a complaint and supporting affidavit for her. When we later contacted her with a follow-up call to see how her case was progressing, she advised us that she had changed her mind because she was scared of reprisals and that she was especially scared because she did not think the police would respond (or respond quickly enough) if the conduct escalated in retaliation to her complaint. Instead she had put her home on the market and had sold it quickly. Given that she had lived in her home, apparently without any difficulties, for some 16 years, this was a most extreme response to an untenable situation. It was also a particularly stressful event in the life of an elderly person with no family of her own to assist her with her situation.

³²¹

Submission 19. See also, for example, *R v Ali* [2003] 2 Qd R 389, [23], [41].

Harassment or intimidation caused by excessive noise

5.105 Several submissions considered that harassment or intimidation based on excessive noise should be included in the grounds.³²²

The Commission's view

5.106 The existing provisions of the *Peace and Good Behaviour Act 1982* (Qld) do not apply in relation to behaviour that is harassing or intimidating but neither violent nor overtly threatening.

5.107 One of the major issues raised by submissions is the difficulty of obtaining legal protection in relation to behaviour that is harassing or intimidating but neither violent nor overtly threatening.

5.108 A person who is the subject of harassing or intimidating behaviour may experience significant and detrimental consequences. The submissions received by the Commission provided numerous examples of people who have been subject to various forms of harassing or intimidating behaviour, but who have been unable, for different reasons, to obtain the remedy of an order to restrain further unwanted behaviour.

5.109 Harassing or intimidating behaviour is included as a ground for obtaining an order under the *Domestic and Family Violence Protection Act 1989* (Qld). However, eligibility to obtain protection under the *Domestic and Family Violence Protection Act 1989* (Qld) is limited to persons who fall within the definition of 'domestic relationship' under that Act.³²³ Consequently, people who fall outside the categories of relationship covered by the *Domestic and Family Violence Protection Act 1989* (Qld), such as neighbours, work colleagues or people who cohabit but are not otherwise in a domestic relationship, cannot obtain a remedy under that Act.

5.110 The Commission considers that, in light of the apparent extent of the problem of intimidation or harassment in non-domestic violence situations, it is desirable to include harassment or intimidation in the grounds of 'personal violence' for obtaining a personal protection order under the proposed Personal Protection Bill 2007. This would give people who experience harassing or intimidating behaviour outside the context of a domestic relationship greater access to the remedy of a protection order.

³²² Submissions 12A, 17, 19.

³²³ *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*), 12C (What is an informal care relationship).

5.111 Further, the Commission considers that, similar to the *Domestic and Family Violence Protection Act 1989* (Qld), the Personal Protection Bill 2007 should include examples of the type of behaviour that would constitute harassment or intimidation.

5.112 One benefit of this approach is that the meaning of harassing or intimidating behaviour under the *Domestic and Family Violence Protection Act 1989* (Qld) has been considered on numerous occasions by the courts.³²⁴ This judicial consideration would assist in the interpretation of the proposed ground of harassing or intimidating behaviour under the Personal Protection Bill 2007.

5.113 The Commission further considers that the Personal Protection Bill 2007 should also include a threat to commit harassment or intimidation as a ground of ‘personal violence’ for making a personal protection order. This is consistent with the position under the *Domestic and Family Violence Protection Act 1989* (Qld).

Interference with enjoyment of property

5.114 At present, neither the *Peace and Good Behaviour Act 1982* (Qld) nor the *Domestic and Family Violence Protection Act 1989* (Qld) provides for an order to be sought on the basis of conduct that interferes with a person’s enjoyment of his or her property.

Submissions

5.115 Caxton Legal Centre Inc strongly supported the re-introduction of the previous version of section 4(2) of the *Peace and Good Behaviour Act 1982* (Qld) (as amended in 1997 and since repealed).³²⁵

5.116 Section 4(2) then enabled a complaint to be made to a justice of the peace on the basis that:

someone else is engaging in conduct that is adversely affecting, or likely to adversely affect, the complainant’s enjoyment of the complainant’s property.

5.117 Caxton Legal Centre Inc expressed the view that certain types of noise-making and other distressing behaviours which are undertaken maliciously and have the effect of interfering with a person’s enjoyment of their property should be grounds for some type of order:³²⁶

³²⁴ See para 5.87 of this Report.

³²⁵ Submission 19. The *Justice and Other Legislation (Miscellaneous Provisions) Act 1997* (Qld) s 48 inserted a new s 4(2) in the *Peace and Good Behaviour Act 1982* (Qld). Section 4(2) was repealed in 2004 by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66. The explanatory notes accompanying both of those changes do not provide any guidance as to why this provision was either introduced or removed.

³²⁶ Submission 19.

Noise complaints can be particularly difficult to deal with when the complainant demonstrates hypersensitivity to noise and a lack of flexibility in relation to the 'give and take' nature of normal neighbourhood coexistence. However, we have encountered cases where noise is used as part of an arsenal of harassing behaviours, ... in circumstances where one might objectively assume the *Peace and Good Behaviour Act* is the most suitable source of remedy for an affected party.

The powers provided to the Queensland Police Service to deal with noise complaints are quite limited and local councils, in our experience, are ill-equipped to monitor and enforce noise complaints involving neighbours. A perusal of the relevant sections of the [*Police Powers and Responsibilities Act 2000* (Qld)]³²⁷ demonstrates the difficulties encountered when noise becomes a source of conflict in a neighbourhood.

...

Our clients have complained that the police will decline to act upon a noise complaint and will not intervene where noise is being made by the members of a neighbouring household. It appears that this view is justified because of the limitations of section [576].

It would undoubtedly be difficult to include isolated noise complaints into the *Peace and Good Behaviour Act* regime. Amending the Act so that noise complaints that are linked with other harassing behaviours can form the basis for an application seems to make good sense, given our clients' experiences. The 1997 provision arguably would have covered such noise complaints because of the unrestrictive nature of that 1997 s. 4 definition. [note added]

5.118 Caxton Legal Centre Inc further considered that the previous version of section 4(2) provided 'a most useful extension to protect clients' based on the numbers of its clients who complained about harassment through noise. This submission also commented on other types of nuisance behaviour involved in neighbourhood disputes.³²⁸

The other type of behaviour which is most likely to impact on a client's ability to enjoy their property relates to private nuisance complaints involving the release of dust (or other particles) or water – for example, one elderly client complained of neighbours using spray paints which emitted strong fumes and caused small paint particles to mark her washing; another client complained of water being deliberately bucketed onto her balcony from another tenant living above her –

³²⁷

Chapter 19, pt 3 of the *Police Powers and Responsibilities Act 2000* (Qld) sets out police powers in relation to noise. Section 576 appears to limit police involvement to investigating certain types of excessive noise complaints, namely, complaints about noise that is clearly audible at or near the complainant's residential or commercial premises, and is emitted:

- by a musical instrument;
- by an appliance for electronically producing or amplifying music or other sounds;
- by a motor vehicle, other than a motor vehicle on a road;
- by a gathering of people for a meeting, party, celebration or similar occasion;
- by a motorbike being driven on a place that is not a road; or
- from a motor vehicle on a road or in a public place and that is emitted by an appliance for electronically producing or amplifying music or other sounds.

³²⁸

Submission 19.

wetting her washing and splashing her property; other clients have complained of dust from mowing and building construction. Unfortunately, private nuisance complaints can be difficult for clients to pursue, and are generally disproportionately (and prohibitively) expensive to run and almost invariably require legal advice and assistance. On balance, given the minor nature of many neighbourhood squabbles, it would be folly to allow mowing dust or dripping water alone to form the basis for an application under the Act. However, if the behaviour was persistent and was combined with other factors, it may be that it could form part of the basis for a complaint.

In our experience, the provisions of the noise abatement laws and the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) are inadequate for the purpose of providing practical remedies in relation to noise complaints, where the noise in conjunction with other behaviour is causing the complainant significant distress and fear.

The Commission's view

5.119 The Commission is unaware of the basis for the introduction or the repeal of the previous version of section 4(2) of the *Peace and Good Behaviour Act 1982* (Qld). That provision would seem to cover any behaviour that adversely affects a person's enjoyment of his or her property.

5.120 The purpose of the proposed Personal Protection Bill 2007 is not to capture nuisance behaviour generally, but rather to prohibit a respondent from engaging in certain types of conduct against a person protected by a protection order. In this Report, the Commission has proposed that the grounds of 'personal violence' for obtaining a personal protection order under the Personal Protection Bill 2007 should include actual violence and threats of violence towards aggrieved persons and/or their property, in addition to harassment or intimidation.³²⁹ In light of these recommendations, it is considered unnecessary to include a provision to the effect of the previous section 4(2) of the *Peace and Good Behaviour Act 1982* (Qld) in the Personal Protection Bill 2007.

Indecent behaviour

5.121 In this chapter, the Commission has made recommendations about the types of behaviour that should constitute grounds for a personal protection order. In particular, the Commission has recommended that the Personal Protection Bill 2007 include grounds for making an order based in part on the definition of 'domestic violence' in section 11 of the *Domestic and Family Violence Protection Act 1989* (Qld), namely:³³⁰

- wilful injury;³³¹

³²⁹ See para 5.66, 5.81, 5.110, 5.113 of this Report.

³³⁰ *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(a)–(c), (e).

³³¹ See para 5.66 of this Report.

- wilful property damage;³³²
- harassment or intimidation;³³³ and
- a threat to commit any of those acts.

5.122 Section 11 of the *Domestic and Family Violence Protection Act 1989* (Qld) also specifies, as an act of domestic violence, indecent behaviour without consent.³³⁴ However, the Commission does not consider the Personal Protection Bill 2007 should include indecent behaviour as a ground for making a personal protection order. To the extent such behaviour is not covered by the other grounds, it is likely to be a matter for the criminal law. The Commission has not therefore recommended that a ground of indecent behaviour be provided for in its proposed Bill.

A REQUIREMENT OF FEAR OR LIKELIHOOD OF FUTURE CONDUCT

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

5.123 At present, conduct that does not cause fear on the part of the complainant is not sufficient ground for a complaint under the *Peace and Good Behaviour Act 1982* (Qld).

5.124 Fear is an essential element of a complaint under the *Peace and Good Behaviour Act 1982* (Qld). A complaint can be made if, either, the complainant 'is in fear of the person complained against',³³⁵ or, the complainant has been caused to 'fear' that the defendant will destroy or damage the complainant's property.³³⁶ In addition, the complainant must show that his or her fear, in either case, is reasonable in the circumstances.³³⁷ 'Fear' may include various states of mind.³³⁸

332 See para 5.81 of this Report.

333 See para 5.110–5.113 of this Report.

334 *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(d). Note also, for example, that in the Northern Territory, a personal violence restraining order may be made on the basis of the commission, or likely commission, of a personal violence offence, including an offence under the *Criminal Code* (NT) relating to indecent behaviour: *Justices Act* (NT) ss 80, 87(1), as amended by the *Domestic and Family Violence Act* (NT), and *Criminal Code* (NT) pt v div 2 subdiv 2. For the application of the legislation in the Northern Territory, see note 242 of this Report.

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

336 *Peace and Good Behaviour Act 1982* (Qld) s 4(2). A similar provision operates in South Australia: *Summary Procedure Act 1921* (SA) s 99(1)(a). The requirement of fear in relation to property damage is considered at para 5.80 of this Report.

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

338 For example, the Compact Oxford English Dictionary (3rd ed, 2005) defines 'fear' as 'an unpleasant emotion caused by the threat of danger, pain, or harm' or 'the likelihood of something unwelcome happening'.

5.125 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.³³⁹

5.126 The need for a person to show that he or she is afraid of the defendant means that, unlike the civil restraining order legislation in a number of other jurisdictions, the *Peace and Good Behaviour Act 1982* (Qld) does not provide a remedy against behaviour that is harassing or offensive, but that does not cause fear. It is possible, for example, that a person who is subjected to behaviour that could constitute the offence of stalking,³⁴⁰ is not actually afraid of the person responsible, but wants a way to make the behaviour stop without resorting to a criminal prosecution. It is also possible that a person is not afraid because he or she does not comprehend the gravity of the situation.

5.127 The requirement for the complainant's fear to be reasonable in the circumstances further restricts the grounds for complaint and protects defendants from overly timorous complainants.

The *Domestic and Family Violence Protection Act 1989* (Qld)

5.128 There is no requirement of fear in the grounds for obtaining a domestic violence order under the *Domestic and Family Violence Protection Act 1989* (Qld). The court may make an order if satisfied that a person has committed an act of domestic violence against the other person (where a domestic relationship exists between the persons) and the person is likely to commit an act of domestic violence again, or if the act of domestic violence was a threat, is likely to carry out the threat.³⁴¹

5.129 It has been held that, for the *Domestic and Family Violence Protection Act 1989* (Qld), 'likely' means a 'real, significant likelihood' of the respondent committing an act of domestic violence in the future.³⁴²

5.130 In *McLennan v McLennan*, McGill DCJ held:³⁴³

'Likely' in my view does not in the statute mean more probable than not, but it must at least involve a real, not remote likelihood, something more probable than a mere chance or risk. The magistrate has also expressed himself in terms of the possibility of a recurrence of the particular domestic violence which had occurred in the past; in my opinion the statute is not so limited, and what has to be established is that the respondent spouse is likely to commit an act, that is any act, of domestic violence in the future.

³³⁹ *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

³⁴⁰ The offence of stalking is discussed at para 5.88 of this Report.

³⁴¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 20(1).

³⁴² *McLennan v McLennan* [2003] QDC 398, [19]–[20] (McGill DCJ). See also *Sheen v Fields Pty Ltd* (1984) 51 ALR 345, 348; *Goss v Swan* [1994] 1 Qd R 40, 41 (Derrington J).

³⁴³ [2003] QDC 398, [19]–[20].

The magistrate ought to have been considering whether the evidence indicated that there was some real, significant likelihood that the respondent spouse would commit an act of domestic violence in the future. [note omitted]

The position in other jurisdictions

5.131 In the ACT, the Northern Territory, Tasmania, Victoria and Western Australia, there is no requirement that the conduct complained of actually cause fear in order to obtain a civil restraining order.³⁴⁴

5.132 Those jurisdictions instead incorporate a requirement that the conduct is likely to happen again if the restraining order is not made.³⁴⁵

5.133 In addition, in the Northern Territory, in deciding whether to make a personal violence restraining order, the court must consider the safety and protection of the protected person and any affected child to be of paramount importance.³⁴⁶

Submissions

5.134 In its Discussion Paper, the Commission sought submissions on whether it should be necessary to show actual apprehension or fear to obtain an order under the *Peace and Good Behaviour Act 1982* (Qld).³⁴⁷

5.135 Numerous submissions received by the Commission in response to the Discussion Paper addressed the issue of whether the grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) should require a complainant to show fear.³⁴⁸

5.136 A number of community legal services considered there should be no requirement for the complainant to show actual apprehension or fear, since, in

³⁴⁴ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 10, 40; *Justices Act* (NT) s 87(1), as amended by the *Domestic and Family Violence Act* (NT); *Justices Act 1959* (Tas) s 106B(1); *Magistrates' Court Act 1989* (Vic) s 126A; *Crimes (Family Violence) Act 1987* (Vic) s 4(1); *Restraining Orders Act 1997* (WA) s 34. Section 87(1) of the *Justices Act* (NT) is a new provision. For the application of the *Justices Act* (NT), see note 242 of this Report.

³⁴⁵ *Domestic Violence and Protection Orders Act 2001* (ACT) s 40(1)(b); *Justices Act* (NT) s 87(1), as amended by the *Domestic and Family Violence Act* (NT); *Justices Act 1959* (Tas) s 106B(1)(a)–(c); *Crimes (Family Violence) Act 1987* (Vic) s 4(1); *Restraining Orders Act 1997* (WA) s 34(a). Note that an intervention order can be made against a person under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking, which involves a course of conduct engaged in ‘with the intention of causing physical or mental harm to the victim or of arousing apprehension of fear in the victim’: *Crimes Act 1958* (Vic) s 21A(2), (5).

³⁴⁶ *Justices Act* (NT) s 88, as amended by the *Domestic and Family Violence Act* (NT). Note, at para 7.89 of this Report, the Commission has recommended a similar requirement when the court imposes conditions in a personal protection order.

³⁴⁷ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 38 (Question 4-6).

³⁴⁸ Submissions 5, 8, 12A, 15, 19, 25.

many cases, the behaviour complained of may cause a complainant to feel harassed and intimidated rather than fearful.³⁴⁹

5.137 Caxton Legal Centre Inc 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.³⁵⁰ However, this submission observed that such conduct may not amount to a reasonable fear of property damage on the part of the complainant.³⁵¹

5.138 The South West Brisbane Community Legal Centre Inc observed that:³⁵²

It is often the case in neighbour disputes that there is no peace available to complainants in their own homes and that while fear is not necessarily present there is an apprehension of further conduct designed to intimidate and harass which leads to significant stress being suffered by the complainants.

5.139 Several submissions suggested that an objective assessment, based on the nature of the conduct in question, be substituted for the current requirement of fear.

5.140 A Queensland magistrate considered the requirement for the complainant to be in fear may be difficult to establish, in that the perception of fear is subjective.³⁵³ The magistrate suggested that, although there is a requirement at the earlier stage of making the complaint that the justice consider whether such fear is reasonable, 'it should be the actual conduct which justifies or does not justify an order, rather than an additional requirement of fear'.

5.141 Caxton Legal Centre Inc also commented that the requirement of genuine fear on the part of a complainant that a threat might be carried out can be 'unduly restrictive' and 'it would be preferable if the ground alternatively applied where the nature of the threat or behaviour in itself is serious enough to warrant concern based on an objective standard'.³⁵⁴ This submission suggested that it would be appropriate to extend the definition of the grounds to cover situations where the behaviour described in the complaint would cause fear in an objective bystander. In their view, this would enable a person, who is

³⁴⁹ Submissions 5, 8, 15, 19, 25.

³⁵⁰ Information provided by Caxton Legal Centre Inc, 23 August 2004.

³⁵¹ Submission 19.

³⁵² Submission 15.

³⁵³ Submission 12A.

³⁵⁴ Submission 19.

affected by behaviour which objectively would fall within the ambit of the Act and who is not in genuine ‘fear’, but is extremely irritated, worried and/or stressed by the behaviour, to make a *bona fide* complaint under the Act.

The Commission’s view

5.142 The *Peace and Good Behaviour Act 1982* (Qld) imposes both a subjective and an objective requirement of fear in relation to the grounds for obtaining an order. The subjective element relates to the complainant’s fear of the defendant (or of property damage). The objective element requires that the fear must be reasonable in the circumstances.

5.143 In the Commission’s view, the existing requirement of fear on the part of the complainant may be difficult to establish in some circumstances. The need for a person to show fear means that the *Peace and Good Behaviour Act 1982* (Qld) does not provide a remedy against behaviour that does not cause fear. For example, some conduct may cause annoyance or stress, rather than fear, to an affected person. Further, it is possible that the requirement of fear would restrict the ability of a person who cannot comprehend fear, but who is otherwise subjected to unwarranted behaviour, to obtain an order.

5.144 The Commission therefore considers that the element of fear should no longer be a requirement for obtaining an order. This would also avoid any ambiguity in what is meant by ‘fear’. The Commission recommends that the grounds for obtaining a personal protection order under the proposed Personal Protection Bill 2007 should instead include an objective element, namely, the likelihood of personal violence happening again.³⁵⁵

5.145 This is also the approach taken under the Queensland domestic violence legislation.³⁵⁶ In this Report, the Commission has made various recommendations about the grounds for obtaining a personal protection order under the Personal Protection Bill 2007³⁵⁷ based on similar grounds under the *Domestic and Family Violence Protection Act 1989* (Qld).³⁵⁸ In light of these recommendations, the Commission considers it would be advantageous to include in the grounds for obtaining a personal protection order under the Bill, a requirement that the person is likely to commit personal violence against the

³⁵⁵ Note at para 5.42–5.43, 5.66, 5.81, 5.110, 5.113 of this Report, the Commission has recommended that the grounds for making a personal protection order are that the person has committed ‘personal violence’ against another person and is likely to do so again. ‘Personal violence’ means:

- wilful injury;
- wilful damage to a person’s property;
- harassment or intimidation of a person; and
- a threat to commit any of those acts.

³⁵⁶ See para 5.22 of this Report.

³⁵⁷ See note 355 of this Report.

³⁵⁸ See *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(a)–(c), (e).

aggrieved person again (including, for example, that a threat of behaviour is likely to be carried out).

5.146 The Commission further considers that evidence of past conduct of the person is a factor that is relevant in determining the likelihood of the conduct happening again. The Commission is therefore of the view that the Personal Protection Bill 2007 should provide that, for the purpose of deciding whether the person is likely to commit personal violence against the other person again, the court may have regard to past conduct of the person. This would enable the court to make an order based on a past act or acts of personal violence in circumstances where the aggrieved person may otherwise have difficulty proving the likelihood of that type of conduct occurring again.

GROUNDS FOR INCLUDING A NAMED PERSON IN AN ORDER

5.147 This chapter has, so far, dealt with the grounds on which a personal protection order can be made to protect an ‘aggrieved person’. The Commission has recommended that the court may make a personal protection order against a person if it satisfied that:³⁵⁹

- the person has committed personal violence against another person; and
- the person is likely to commit personal violence against the other person again.

5.148 In Chapter 4 of this Report, the Commission has recommended that, as well as the aggrieved person for whose benefit a personal protection order is made, a ‘named person’ (a relative or associate of the aggrieved person) may also be protected by the order.³⁶⁰

5.149 This section of the chapter considers the grounds on which the court may include a named person in a personal protection order that is made for the benefit of an aggrieved person.

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

5.150 The *Peace and Good Behaviour Act 1982* (Qld) makes no specific provision about the persons who can be protected by a peace and good behaviour order.

³⁵⁹ See note 355 of this Report.

³⁶⁰ See para 4.32 of this Report.

The *Domestic and Family Violence Protection Act 1989* (Qld)

5.151 Section 15 of the *Domestic and Family Violence Protection Act 1989* (Qld) specifies that, as well as the aggrieved, a relative or associate of the aggrieved may be protected by a domestic violence order.³⁶¹

5.152 Section 21(1) of the Act provides that the court may make an order to protect a relative or associate of the aggrieved in an order if it is satisfied that the respondent has committed, or is likely to commit, a particular act of domestic violence against the relative or associate. Section 21(1) provides:³⁶²

21 Power of court to make orders to protect relatives or associates of aggrieved against violence etc.

- (1) The court may include the name of a relative or associate of an aggrieved in a domestic violence order made for the benefit of the aggrieved if the court is satisfied that the respondent has committed, or is likely to commit, any of the following acts against the relative or associate—
 - (a) wilful injury;
 - (b) wilful damage to property of the relative or associate;
 - (c) intimidation or harassment;
 - (d) a threat to commit an act mentioned in paragraphs (a) to (c).

The position in other jurisdictions

5.153 In most of the other Australian jurisdictions, a civil restraining order may be made to protect only the person making the application, or on whose behalf the application is made.

5.154 However, in New South Wales, if a court makes an apprehended violence order, it may also protect a person who has a domestic relationship with the person for whose benefit the order is made.³⁶³

5.155 In addition, in the ACT, the court has power to make an interim protection order if it is necessary to ensure the safety of, or to prevent

³⁶¹ Section 15 of the *Domestic and Family Violence Protection Act 1989* (Qld) includes a definition of who is an 'associate' and is set out at para 4.10 of this Report. Section 12B(2)–(5) of the *Domestic and Family Violence Protection Act 1989* (Qld) defines who is a 'relative' and is set out at note 186 of this Report.

³⁶² *Domestic and Family Violence Protection Act 1989* (Qld) s 3, sch (definition of 'associated domestic violence') provides that an act mentioned in s 21(1) is 'associated domestic violence'.

³⁶³ *Crimes Act 1900* (NSW) s 562ZX(1). That provision is replicated in s 38(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Also note s 38(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) which provides that if the court makes an order protecting a person 18 years or older, the court must include any child of the protected person with whom he or she has a domestic relationship as a person protected under the order 'unless the court is satisfied there are good reasons for not doing so'. For the application of the legislation in New South Wales, see note 243 of this Report.

substantial damage to the property of, the aggrieved person or a child of the aggrieved person.³⁶⁴ The court may also impose in a protection order, conditions prohibiting the respondent from committing certain behaviour, including prohibited behaviour committed in relation to a child of the aggrieved person.³⁶⁵

Submissions

5.156 In its Discussion Paper, the Commission sought submissions on whether provision should be made for particular persons to be protected in the order.³⁶⁶

5.157 Caxton Legal Centre Inc and the Women's Legal Service suggested the adoption of a scheme similar to that which applies in the *Domestic and Family Violence Protection Act 1989* (Qld).³⁶⁷ Consistent with the approach in that Act, the Women's Legal Service commented:³⁶⁸

Whether other people should also be protected by the order will depend on the nature of the incident/s which led to the order being sought. If there is evidence that other people, for example, in the same house as the complainant, are affected by the behaviour, the order should specify that they are also to be protected by the order.

The Commission's view

5.158 The Commission considers that, once the grounds for obtaining a personal protection order for the benefit of an aggrieved person have been met, the court should be able to extend protection under the order to a relative or associate of the aggrieved person (a 'named person') if he or she has been, or is likely to be, affected by personal violence committed by the respondent.

5.159 Whether or not the named person has experienced personal violence, there may nevertheless be a risk that personal violence will be committed against him or her, on the basis of the respondent's behaviour toward the aggrieved person or another named person. The Commission considers a lower threshold is appropriate for the inclusion of a named person on an order, once the grounds for making the order have been met. The personal protection order is made for the benefit of the aggrieved person while a named person is included on the order as a secondary beneficiary of the order.

³⁶⁴ *Domestic Violence and Protection Orders Act 2001* (ACT) s 49.

³⁶⁵ *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(2)(h).

³⁶⁶ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 107 (Questions 10-5, 10-6).

³⁶⁷ Submissions 8, 19.

³⁶⁸ Submission 8.

5.160 The Commission therefore considers that a provision, generally similar to section 21 of the *Domestic and Family Violence Protection Act 1989* (Qld), should be included in the Personal Protection Bill 2007 to the effect that the court may include, in a personal protection order, the name of a relative or associate of the aggrieved person for the order if the court is satisfied:

- a respondent for the order has committed personal violence against the relative or associate; or
- a respondent for the order is likely to commit personal violence against the relative or associate.

PERSONAL VIOLENCE COMMITTED BY A THIRD PARTY

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

5.161 The grounds for obtaining relief under the *Peace and Good Behaviour Act 1982* (Qld) include that a person has threatened to procure another person to assault or do bodily injury to the complainant or to a person in the complainant's care or charge, or to destroy or damage the complainant's property.³⁶⁹

The *Domestic and Family Violence Protection Act 1989* (Qld)

5.162 Section 11(2) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that the person committing an act of domestic violence need not personally commit the act or threaten to commit it. In addition, section 20(2) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a person who counsels or procures someone else to commit an act that would, if done by the person, be an act of domestic violence, is taken to have committed the act. Therefore, a court may make a domestic violence order against a person who has not personally committed an act of domestic violence towards an aggrieved. This situation may arise, for example, where a person against whom an order is sought procures the services of a third party to harass or intimidate the aggrieved person.

The Commission's view

5.163 The Commission considers it desirable to include a provision in the Personal Protection Bill 2007 to the effect that a person who counsels or procures someone else to commit an act that would, if done by the person, be an act of 'personal violence', is taken to have committed the act.³⁷⁰ This would

³⁶⁹ *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(b), (d).

³⁷⁰ The Commission has made recommendations in this chapter about what should constitute 'personal violence' under the Personal Protection Bill 2007. See para 5.121 of this Report.

ensure that a court can make a personal protection order in relation to unwanted behaviour committed against an aggrieved person by a third party, on behalf of the respondent to the order. The Commission considers this provision should be generally modelled on section 20(2) of the *Domestic and Family Violence Protection Act 1989* (Qld).

PERSONAL VIOLENCE AGAINST A THIRD PARTY

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

5.164 At present, the *Peace and Good Behaviour Act 1982* (Qld) allows a person to make a complaint to a justice of the peace for a peace and good behaviour order on the basis of a threat of assault or bodily injury to a person in the complainant's care or charge.³⁷¹ There is no provision, however, for a complainant to make a complaint based on the fear of damage or destruction to the property of a person in the complainant's care or charge.³⁷²

The *Domestic and Family Violence Protection Act 1989* (Qld)

5.165 The *Domestic and Family Violence Protection Act 1989* (Qld) provides for someone, other than the person who is aggrieved by the domestic violence complained of, to make an application for a protection order on the aggrieved person's behalf.³⁷³ As noted above, 'domestic violence' includes both injury to a person and damage to a person's property.³⁷⁴

Submissions

5.166 In its Discussion Paper, the Commission sought submissions on how the grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) should be expanded, if at all.³⁷⁵ The current requirement under the Act that the complainant must show that he or she is personally in fear of the defendant, even though the complaint may concern conduct toward a person who is in the complainant's care or charge, was also specifically raised in the Discussion Paper.³⁷⁶

371 *Peace and Good Behaviour Act 1982* (Qld) s 4(1)(a)–(b).

372 In Chapter 6 of this Report, the Commission has recommended that there be no reference in the Personal Protection Bill 2007 to a person in the 'care or charge' of the complainant, and that the Bill clearly specify those persons who can apply for an order on behalf of another person. See para 6.63, 6.68 of this Report.

373 *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1)(b)–(d).

374 See para 5.20 of this Report.

375 Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 38 (Question 4-5).

376 *Ibid* [4.65], [4.67].

5.167 Caxton Legal Centre Inc observed:³⁷⁷

Given that our experience shows that *Peace and Good Behaviour Act* orders are often generated by neighbourhood disputes, with whole families being affected by the relevant conflict, it is appropriate that applications should be able to be made by complainants where a person in the care or charge of the complainant is affected by a threat, as is already the case. The expression 'care or charge' is not defined, although there is little doubt that this clearly covers children who are threatened by a defendant. We do not understand why the legislature did not provide for the complainant to be able to apply also to initiate proceedings where a charge's property is under threat. We submit that it would be logical for all the limbs of s.4 to apply equally to complainants in their own right and complainants acting on behalf of others.

The Commission's view

5.168 The existing eligibility provisions of the *Peace and Good Behaviour Act 1982* (Qld) provide that a complainant may apply for an order on behalf of another person in the 'care or charge' of the complainant in certain circumstances.

5.169 In this Report, the Commission has recommended that the eligibility provisions in the Personal Protection Bill 2007 should specify particular classes of persons who may apply for a personal protection order on behalf of an aggrieved person.³⁷⁸ The Commission has also recommended elsewhere in this Report that the grounds for obtaining a personal protection order should cover personal violence against a person, including wilful damage, or a threat to commit wilful damage, to the property of an aggrieved person.³⁷⁹

5.170 The effect of these recommendations is that the proposed grounds for obtaining a personal protection order cover personal violence committed against a person regardless of whether the person applies in person or is represented by a third party.

THE POTENTIAL RISKS OF NET-WIDENING/UNINTENDED CONSEQUENCES

5.171 The effect of some of the recommendations made by the Commission in this chapter is to include broader grounds for obtaining a personal protection order under its proposed Personal Protection Bill 2007 than are currently

³⁷⁷ Submission 19.

³⁷⁸ See para 6.63–6.80, 6.107, 6.125–6.126, 6.134 of this Report.

³⁷⁹ See para 5.81 of this Report. The Commission has recommended that the court may make a personal protection order against a person if it is satisfied that the person has committed personal violence against an aggrieved person (being wilful injury, wilful damage to property, harassment or intimidation, or a threat to commit any of those acts), and the person is likely to commit personal violence against the aggrieved person again. It has also recommended that the court may protect a relative or associate of an aggrieved person in a personal protection order if the person has committed, or is likely to commit, personal violence against the relative or associate. See para 5.42–5.43, 5.160 of this Report.

provided for in relation to an order under the *Peace and Good Behaviour Act 1982* (Qld).

5.172 The Commission does not intend that widening the scope of the Personal Protection Bill 2007 should have an adverse impact on sections of the community who are already disadvantaged – for example, some Indigenous people and people who are experiencing homelessness or have a disability. Nor does it intend that the proposed legislation would be used for complaints that are frivolous or trivial in nature.

5.173 In this section, the Commission considers particular measures taken under the Bill to ensure that the expansion of the grounds for obtaining an order does not result in unintended or undesirable consequences.

Submissions

5.174 In its Discussion Paper, the Commission sought submissions on whether there is a risk that unintended consequences might flow from expanding the grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld), and, if so, how that risk might be minimised.³⁸⁰

5.175 A number of submissions received in response to the Discussion Paper expressed concern that widening the scope of the legislation might lead to unintended and or undesirable consequences.³⁸¹ Several community legal services expressed particular concern that widening the grounds for making an order may adversely impact on marginalised sectors of the community, and emphasised the need for the provision of clear parameters about the type of conduct for which an order may be sought.³⁸²

5.176 In particular, a number of submissions that suggested including harassment or intimidation as an additional ground for a peace and good behaviour order also acknowledged the possibility that the inclusion of such grounds might cause unintended or undesirable consequences.³⁸³ Several of these submissions suggested this possibility might be avoided by the inclusion of some contextual factor, such as continuity of behaviour or behaviour specifically directed towards a person, as an element of harassing or intimidating behaviour.³⁸⁴

³⁸⁰ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 38 (Questions 4-8, 4-9).

³⁸¹ Submissions 5, 6, 8, 13, 14, 15.

³⁸² Submissions 14, 15.

³⁸³ Submissions 5, 8, 14, 15.

³⁸⁴ Submissions 14, 15.

5.177 For example, the Women's Legal Service considered that 'loitering' behaviour ought to be included as a ground for an order only if it were in the context of intimidating or harassing behaviour that is, or is likely to be, ongoing. This submission suggested that placing loitering behaviour in this context might guard against misuse of the legislation in relation to homeless persons or Indigenous people, particularly when they are routinely dealt with by the move-on powers of the police.³⁸⁵

5.178 Another community legal service commented:³⁸⁶

Perhaps the behaviour complained about should require an element of the personal, ie be specifically directed by the defendant towards the complainant and not as a result of being visible or loitering generally in an area. The court should always have discretion to determine if a matter is trivial or vexatious in nature and does not require a formal order or may be better referred to mediation.

5.179 As noted earlier, another submission also expressed concern about the possible impact of the legislation on people experiencing homelessness.³⁸⁷ This submission considered that 'harassment and intimidation' should be defined so that it does not include behaviours associated with homelessness or other marginalised status.³⁸⁸

5.180 The Queensland Public Tenants Association Inc cautioned against widening the grounds, particularly for behaviour that could be perceived as harassing or intimidating, as it might 'open the floodgates' to the making of trivial applications.³⁸⁹ In their view, people involved in neighbourhood disputes may too readily seek orders for behaviour that is merely annoying. This submission expressed concern that, in neighbourhood disputes, orders might be unfairly sought by people with mental health issues/intellectual disability who may more easily misinterpret the behaviour of other people as harassing or intimidating. Equally, the Queensland Public Tenants Association Inc suggested that, in neighbourhood disputes, orders might be unduly sought against people with an intellectual disability, in relation to harassing or intimidating behaviour. In relation to the latter scenario, this submission observed that a person with an intellectual disability, who might not be able to alter his or her behaviour, may be less likely to be able to comply with the terms of an order. Additionally, this submission perceived the risk that an order might be more easily made against someone in this situation when his or her behaviour could be dealt with in other ways.

³⁸⁵ Submission 8.

³⁸⁶ Submission 15.

³⁸⁷ Submission 32.

³⁸⁸ This submission also suggested that a provision be included in the legislation to the effect that the legislation 'is not intended to be applied in situations where a person who is homeless, suffering from mental illness or cognitive impairment, or otherwise marginalised is engaging in behaviours associated with that status': submission 32.

³⁸⁹ Submission 6.

5.181 Legal Aid Queensland, while acknowledging the possibility of unintended or undesirable consequences that might flow from broadening the grounds under the Act, also observed that the inclusion in the grounds of certain behaviour such as harassment and intimidation might provide an appropriate legislative remedy for people affected by such behaviour.³⁹⁰ In particular, this submission commented that patterns of intimidation and harassment between neighbours may cause extreme distress and pose a high risk of escalation into violence. Legal Aid Queensland further observed that, while it would be far preferable for such issues to be resolved in other ways than a court application, such situations are often intractable and involve the parties in close physical proximity, making violence a likely outcome.

5.182 The Citizens Advice Bureau and Gold Coast Legal Service considered that the power of the court to exercise its discretion whether to make an order would safeguard against the risks involved in widening the grounds for making an order.³⁹¹

5.183 The Townsville Community Legal Service Inc referred in its submission to the possibility that broadening the grounds for a peace and good behaviour order might enable private individuals, local councils and businesses to 'exploitatively' use the legislation to control public space to the detriment of vulnerable members of society.³⁹² This submission suggested that it would be inappropriate if the *Peace and Good Behaviour Act 1982* (Qld), including broadened grounds, in effect conferred 'police-like powers' on an individual, even though the existing Act possibly already conferred such powers.

5.184 The Townsville Community Legal Service Inc suggested that the grounds for an order under the *Peace and Good Behaviour Act 1982* (Qld) should be based on the definition of 'domestic violence' in the *Domestic and Family Violence Protection Act 1989* (Qld).³⁹³ This submission conceded that the adoption of grounds based on the model provided under the domestic violence legislation would likely result in some 'net-widening', but considered that the possibility of undesirable consequences might be avoided with the use of clear, broadly applicable grounds with an appropriate threshold test as well as an objective standard.

The Commission's view

5.185 In this chapter, the Commission has recommended grounds for obtaining a personal protection order under its proposed Personal Protection Bill 2007 which are broader than those currently provided for in relation to an order under the *Peace and Good Behaviour Act 1982* (Qld). In particular, the

³⁹⁰ Submission 13.

³⁹¹ Submission 5.

³⁹² Submission 14.

³⁹³ Ibid.

Commission has recommended the inclusion of harassment or intimidation as an additional ground of ‘personal violence’ for an order under the Bill.³⁹⁴

5.186 The Commission acknowledges the concerns raised in submissions about the possible unfair application of the legislation to marginalised persons in the community. It is important that the wider scope of the Personal Protection Bill 2007 does not have unintended or undesirable consequences and, in particular, that widening the grounds for making an order does not adversely impact on marginalised persons within the community. The Commission notes that the specific grounds it has recommended are based on the grounds for obtaining an order under the *Domestic and Family Violence Protection Act 1989* (Qld) and considers the scope of the grounds appropriate in providing a protective mechanism for members of the community who are not covered by the domestic violence legislation. The Commission also notes that the question whether behaviour amounts to ‘harassment or intimidation’, is to be determined in light of the particular circumstances in which the behaviour occurred.³⁹⁵ Conduct that does not, in the particular circumstances, amount to harassment or intimidation of another person will not be covered by the grounds.

5.187 In addition to clearly specified grounds, the Personal Protection Bill 2007 should also include specific safeguards to prevent the misuse of the legislation.

5.188 In this respect, the Commission considers that the Personal Protection Bill 2007 should provide that nothing in the Bill prevents a court from summarily dismissing an application made under the Bill if it is satisfied the application is malicious, false, frivolous or vexatious. The Commission considers this provision should apply in relation to all applications made under the Bill, including an application for a protection order, an application to vary or set aside a protection order or an application to register a corresponding order. This would cover applications relating to both personal protection orders and workplace protection orders.

5.189 It is considered that this safeguard, in conjunction with other safeguards the Commission has proposed for inclusion in the Personal Protection Bill 2007,³⁹⁶ would discourage the making of malicious, false, frivolous or vexatious applications.

5.190 The Commission also acknowledges the likely impact of widened grounds for obtaining an order on those who will be responsible for the administration and enforcement of the Personal Protection Bill 2007, namely,

³⁹⁴ See para 5.110 of this Report. Also note that the Commission has recommended the inclusion of a similar ground in relation to workplace protection orders: see para 8.30 of this Report.

³⁹⁵ See para 5.87 of this Report.

³⁹⁶ For example, the Commission has also recommended at para 20.175 of this Report that, if the court dismisses an application as malicious, false, frivolous or vexatious, the applicant may be ordered to pay the costs of the matter.

the Magistrates Court, the Queensland Police Service and other relevant bodies, for example, the Dispute Resolution Branch of the Department of Justice and Attorney-General. In particular, the Commission has noted the concerns expressed by the Queensland Police Service in relation to the potential resource implications for the Service.³⁹⁷ The Commission acknowledges the relevance of these resource implications but considers such matters ought not preclude the inclusion of wider, more appropriate grounds for obtaining an order under the Personal Protection Bill 2007. Protection from violence, threatened violence and harassing or intimidating behaviour, regardless of the relationship between the parties, is an overriding factor.

RECOMMENDATIONS

5.191 The Commission makes the following recommendations:

5-1 The Personal Protection Bill 2007 should provide that the court may make a personal protection order against a person if it is satisfied that:³⁹⁸

- (a) the person has committed personal violence against another person; and
- (b) the person is likely to commit personal violence against the other person again.

See Personal Protection Bill 2007 clI 7(2), 27(1).

5-2 The Personal Protection Bill 2007 should provide that ‘personal violence’ is any of the following acts committed by a person against another person:

- (a) wilful injury of the other person;³⁹⁹
- (b) wilful damage to the other person’s property;⁴⁰⁰
- (c) harassment or intimidation of the other person;⁴⁰¹

³⁹⁷ Submission 21. See also para 6.122–6.123 of this Report.

³⁹⁸ See para 5.41–5.43, 5.145 of this Report.

³⁹⁹ See para 5.66 of this Report.

⁴⁰⁰ See para 5.81 of this Report.

⁴⁰¹ See para 5.110 of this Report.

(d) a threat to commit any of those acts.⁴⁰²

For the purposes of the Personal Protection Bill 2007, ‘personal violence’ is a form of ‘prohibited conduct’.⁴⁰³

See Personal Protection Bill 2007 cl 6(1), (2).

5-3 The definition of ‘personal violence’ in the Personal Protection Bill 2007 should include examples of the type of conduct that would constitute harassment and intimidation.⁴⁰⁴

See Personal Protection Bill 2007 cl 6(2)(c).

5-4 The Personal Protection Bill 2007 should include a provision to the effect that, for the purpose of deciding whether a person is likely to commit personal violence against the other person again, the court may have regard to past conduct of the person.⁴⁰⁵

See Personal Protection Bill 2007 cl 27(3).

5-5 The Personal Protection Bill 2007 should include a provision, generally similar to section 21 of the *Domestic and Family Violence Protection Act 1989* (Qld), to the effect that the court may include, in a personal protection order, the name of a relative or associate of an aggrieved person for the order if the court is satisfied:⁴⁰⁶

- (a) a respondent for the order has committed personal violence against the relative or associate; or
- (b) a respondent for the order is likely to commit personal violence against the relative or associate.

See Personal Protection Bill 2007 cl 28.

⁴⁰² See para 5.66, 5.81, 5.113 of this Report.

⁴⁰³ See para 5.42 of this Report.

⁴⁰⁴ See para 5.111 of this Report.

⁴⁰⁵ See para 5.146 of this Report.

⁴⁰⁶ See para 5.160 of this Report.

- 5-6 The Personal Protection Bill 2007 should include a provision, modelled generally on section 20(2) of the *Domestic and Family Violence Protection Act 1989* (Qld), specifying that a person who counsels or procures someone else to commit an act that, if done by the person, would be an act of personal violence is taken to have committed the act.⁴⁰⁷

See Personal Protection Bill 2007 cl 6 (5).

- 5-7 The Personal Protection Bill 2007 should include a provision to the effect that nothing in the Bill prevents a court from summarily dismissing an application made under the Bill if the court is satisfied the application is malicious, false, frivolous or vexatious.⁴⁰⁸

See Personal Protection Bill 2007 cl 97.

407 See para 5.163 of this Report.

408 See para 5.188 of this Report.

Chapter 6

Who may apply for a personal protection order

INTRODUCTION	103
THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)	104
THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)	105
APPLICATIONS MADE BY AN AGGRIEVED PERSON	107
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	107
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	107
The position in other jurisdictions	107
The Commission's view	108
APPLICATIONS MADE ON BEHALF OF AGGRIEVED PERSONS	108
Applications on behalf of aggrieved persons who may require or desire assistance	109
Applications on behalf of adults without legal capacity to apply	110
Applications on behalf of children	113
Submissions	114
The Commission's view	120
APPLICATIONS BY, OR ON BEHALF OF, YOUNG PERSONS	124
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	124
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	125
The position in other jurisdictions	125
Submissions	126
The Commission's view	129
APPLICATIONS BY POLICE	130
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	130
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	131
The position in other jurisdictions	132
Submissions	132
The Commission's view	134
APPLICATIONS BY SOME OTHER PERSON WITH THE LEAVE OF THE COURT	135
The position in other jurisdictions	135
Submissions	135
The Commission's view	136
JOINT APPLICATIONS	136
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	136
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	137
Submissions	137
The Commission's view	138
RECOMMENDATIONS	138

INTRODUCTION

6.1 The Commission's terms of reference require it to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an 'appropriate, easily accessible' means of protecting the community against breaches of the peace.⁴⁰⁹ One factor that is relevant to the consideration of the accessibility of the mechanism created by the Act is the eligibility of persons to apply for a protection order.

6.2 The issue of eligibility raises the question of whether the Act should provide a more comprehensive list of persons who may make an application or for whom an application may be made.

6.3 This chapter deals with who can apply for a personal protection order under the Commission's proposed Personal Protection Bill 2007, and considers whether specific provision should be made in the Bill to identify those persons who may need an application made on their behalf, as well as the particular persons who may do so. It also considers comparable provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) and the civil restraining order legislation in other jurisdictions.

6.4 As mentioned earlier in this Report, unless otherwise stated, a reference to a child is a reference to a person who is under 18 years, and includes a young person. The term 'young person' is used in this Report to refer to an older child.⁴¹⁰

6.5 This chapter specifically considers applications for personal protection orders made:

- by an aggrieved person;
- on behalf of an aggrieved person who:
 - may require or desire assistance in making an application;
 - does not have capacity to make an application; or
 - is a child;
- by, or on behalf of, an aggrieved person who is a young person;
- by police; and
- by some other person with the leave of the court.

⁴⁰⁹ The terms of reference are set out in Appendix 1 to this Report.

⁴¹⁰ See para 1.42–1.43 of this Report.

6.6 This chapter also considers applications made jointly by or for more than one person.

6.7 Eligibility to apply for a workplace protection order is considered in Chapter 8 of this Report.

THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)

6.8 Section 4 of 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,⁴¹¹ or towards a person under the complainant's care or charge.⁴¹²

6.9 Eligibility to make a complaint under the Act 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.

6.10 The *Peace and Good Behaviour Act 1982* (Qld) does not define the expression 'care or charge'. However, when the Peace and Good Behaviour Bill 1982 was introduced into Parliament the then Minister for Justice and Attorney-General, in outlining the provisions of the Bill, spoke of its application to 'any person under the care or charge of the complainant, such as a child'.⁴¹³ It would seem that the words encompass situations involving responsibility for the protection or custody of another person, but are not confined to formal legal relationships:⁴¹⁴

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

6.11 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.

⁴¹¹ *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). The grounds for obtaining a peace and good behaviour order are discussed at para 5.11–5.18 of this Report.

⁴¹² *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).

⁴¹³ See the Second Reading Speech of the Peace and Good Behaviour Bill 1982 (Qld): *Queensland Parliamentary Debates*, 14 September 1982, 841 (Hon Samuel Doumany, Minister for Justice and Attorney-General).

⁴¹⁴ *Schtraks v Government of Israel and Others* [1964] AC 556, 610 (Lord Hodson). 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 the lawful care or charge of the child', and *Thompson v Grey* (1904) 24 NZLR 457, 465 (Stout CJ).

6.12 By analogy, it has been suggested that 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:⁴¹⁵

[I]n 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.

6.13 However, there is some authority to suggest that an employee is not under his or her employer's care or charge.⁴¹⁶ In the absence of a right by an employer to apply for a peace and good behaviour order on behalf of an employee, only the employee is eligible to apply on his or her own behalf for a peace and good behaviour order.⁴¹⁷

THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)

6.14 The eligibility scheme under the *Domestic and Family Violence Protection Act 1989* (Qld) is broader than the scheme provided for under the *Peace and Good Behaviour Act 1982* (Qld).

6.15 Section 14 of the *Domestic and Family Violence Protection Act 1989* (Qld) sets out four categories of people who are eligible to apply for a protection order:⁴¹⁸

⁴¹⁵ *SJ Mead on behalf of Telstra Corporation Limited v KC Ivory* (Unreported, District Court of Queensland, Wylie DCJ, 20 February 1998) [14].

⁴¹⁶ Ibid. See para 8.40 of this Report.

⁴¹⁷ Note that an employee is protected, to some extent, by the operation of laws specific to the workplace. See note 777 of this Report.

⁴¹⁸ Section 14 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides:

14 Who can apply for a protection order?

(1) An application for a protection order may be made only by—

- (a) an aggrieved; or
- (b) an authorised person mentioned in subsection (2); or
- (c) a police officer mentioned in subsection (3); or
- (d) a person acting under another Act for the aggrieved as mentioned in subsection (4).

(2) An **authorised person** means—

- (a) an adult authorised in writing by an aggrieved to appear on behalf of the aggrieved; or
- (b) an adult whom the court believes is authorised by an aggrieved to appear on behalf of the aggrieved even though the authority is not in writing.

- an aggrieved – a person affected by the relevant behaviour;
- an authorised person – an adult authorised in writing by an aggrieved to appear on his or her behalf or, in the absence of a written authorisation, or an adult whom the court believes has been authorised by an aggrieved to appear on his or her behalf even though the authority is not in writing;⁴¹⁹
- a person acting under another Act for an aggrieved;⁴²⁰ and
- a police officer, in specified circumstances.⁴²¹

6.16 Under this eligibility scheme, an application may be made by an aggrieved (including, in certain circumstances, a child⁴²²) or a third party on behalf of an adult who may require or desire assistance in making an application or an adult who does not have capacity to make an application.

6.17 Where relevant, specific provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) are considered in the discussion below.

Example of paragraph (b)—

A 19 year old man has a physical disability that results in him not being able to sign an authority. He alleges his uncle has threatened physical harm to him. The man orally authorises his grandfather to apply for a protection order against the uncle. The court may believe the grandfather is authorised to appear on behalf of the man after hearing evidence about the authorisation.

- (3) A police officer who—
 - (a) has investigated a matter under section 67; and
 - (b) has the reasonable beliefs mentioned in section 67(2);
 may apply for a protection order.
- (4) A person is acting under another Act for the aggrieved—
 - (a) if the person is a guardian for a personal matter of the aggrieved, or an administrator for a financial matter of the aggrieved, under the *Guardianship and Administration Act 2000*; or
 - (b) if the person is the adult guardian and considers the aggrieved does not have capacity to make an application for a protection order; or
 - (c) if the person is appointed as the aggrieved's attorney under an enduring power of attorney under the *Powers of Attorney Act 1998* and the person makes the application under the enduring power of attorney.
- (5) If a person may make an application for a protection order, the person may make other applications or bring other proceedings under this Act in relation to a domestic violence order made because of the application.

⁴¹⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1), (2). See note 418 of this Report.

⁴²⁰ *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1), (4). See note 418 of this Report.

⁴²¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1), (3). See note 418 of this Report.

⁴²² *Domestic and Family Violence Protection Act 1989* (Qld) s 12D.

APPLICATIONS MADE BY AN AGGRIEVED PERSON

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

6.18 The *Peace and Good Behaviour Act 1982* (Qld) allows a complainant to seek an order in relation to conduct directed toward the complainant or toward a person under the complainant's care or charge.⁴²³

The *Domestic and Family Violence Protection Act 1989* (Qld)

6.19 The *Domestic and Family Violence Protection Act 1989* (Qld) allows an aggrieved to apply for a protection order.⁴²⁴ The aggrieved is the person for whose benefit the order is sought or is made.⁴²⁵ The domestic violence legislation also allows other specified persons to apply for a protection order for an aggrieved.⁴²⁶

The position in other jurisdictions

6.20 Similarly, the civil restraining order legislation in the other Australian jurisdictions provides for an application to be made by the person sought to be protected by the order.⁴²⁷ Most of those jurisdictions also provide for other

423 *Peace and Good Behaviour Act 1982* (Qld) s 4(1), (2). See para 6.8 of this Report.

424 *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1)(a). See para 6.15 of this Report.

425 *Domestic and Family Violence Protection Act 1989* (Qld) s 12F(1). Note that under that Act, there can be only one aggrieved for a protection order, but that other persons may also be protected by the order: *Domestic and Family Violence Protection Act 1989* (Qld) ss 12F(2), 15. See para 6.137 of this Report.

426 See para 6.15 of this Report.

427 *Domestic Violence and Protection Orders Act 2001* (ACT) ss 11(2), 3, dictionary (definition of 'aggrieved person'); *Crimes Act 1900* (NSW) ss 562J(1), 562ZQ(2)(a); *Justices Act* (NT) s 82(a), as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) s 99A(b); *Justices Act 1959* (Tas) s 106B(2)(b); *Crimes (Family Violence) Act 1987* (Vic) s 3 (definition of 'aggrieved family member'), 7(1)(b); *Restraining Orders Act 1997* (WA) ss 25(1) (a), 38(1)(a).

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Sections 562J(1), 562ZQ(2)(a) of the *Crimes Act 1900* (NSW) are substantially replicated in s 18(1), 48(2)(a) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Section 82(a) of the *Justices Act* (NT) is a new provision, replacing s 99(1) of that Act under which a 'complainant' may seek a recognizance for a defendant to keep the peace or be of good behaviour. The *Domestic and Family Violence Act* (NT) repeals pt IV div 7 of the *Justices Act* (NT) introducing a new pt IVA. The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed.

Note that in Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

specified persons to make an application on behalf of the person for whose benefit the order is sought.⁴²⁸

The Commission's view

6.21 The Commission is of the view that the Personal Protection Bill 2007 should provide that an aggrieved person may apply for a personal protection order under the Bill. The Bill should provide that a person is an aggrieved person for a personal protection order if personal violence, constituting the ground on which the order is, or is sought to be, made, has been committed against the person.⁴²⁹ This is generally consistent with the position under the *Domestic and Family Violence Protection Act 1989* (Qld) and with the civil restraining order legislation in other jurisdictions. The Commission has also recommended that the Personal Protection Bill 2007 should provide that an application for a personal protection order may be made for more than one aggrieved person.⁴³⁰

APPLICATIONS MADE ON BEHALF OF AGGRIEVED PERSONS

6.22 The Commission recognises that an aggrieved person may require or desire assistance to bring an application for a personal protection order.

6.23 The Commission's general approach is that, in addition to allowing an aggrieved person to make an application, the Personal Protection Bill 2007 should make provision for a third party to apply on behalf of an aggrieved person. The Bill should also provide that if an application for a personal protection order is made by a person who is not an aggrieved person for the order, the application must be made for the aggrieved person.

⁴²⁸ *Domestic Violence and Protection Orders Act 2001* (ACT) s 11(3)–(5); *Crimes Act 1900* (NSW) s 562ZQ(2)(b); *Justices Act* (NT) s 82(b)–(c), as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) ss 99A(a), 99J(b); *Justices Act 1959* (Tas) s 106B(2)(a), (ba), (c); *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(a), (c), (d), (e); *Restraining Orders Act 1997* (WA) ss 25(1)(b), 38(1)(b), (2), (3).

Section 562ZQ(2)(b) is replicated in s 48(2)(b) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 427 of this Report. Section 82(b)–(c) of the *Justices Act* (NT) is a new provision. As to the application of the legislation in the Northern Territory, see note 427 of this Report. Also see note 427 of this Report for the application of the *Crimes (Family Violence) Act 1987* (Vic) to stalking.

⁴²⁹ The Commission has recommended at para 5.66, 5.81, 5.110, 5.113 of this Report that the Personal Protection Bill 2007 should provide that 'personal violence' is any of the following acts a person commits against another person:

- (a) wilful injury;
- (b) wilful damage to the person's property;
- (c) harassment or intimidation of the person;
- (d) a threat to commit any of those acts.

Note also that the Commission has recommended that the Personal Protection Bill 2007 should specify that a personal protection order protects an aggrieved person for whose benefit the order is made and to whom the grounds for making the order relate. See para 4.31 of this Report.

⁴³⁰ See para 6.142 of this Report.

6.24 This section of the chapter deals with applications on behalf of aggrieved persons who may require or desire assistance, applications on behalf of adults without legal capacity for the proceeding and who could not otherwise bring an application on their own, and applications on behalf of children. These categories are dealt with together, for ease of consideration, in light of the various eligibility schemes proposed in submissions. Applications for young people who have the capacity to make an application are dealt with in a separate section of the chapter, at paragraphs 6.81–6.107.

6.25 The Commission has also made recommendations, later in this chapter, about applications made on behalf of an aggrieved person by a police officer⁴³¹ or by some other person, who is not otherwise specified as an eligible applicant, with the leave of the court.⁴³²

Applications on behalf of aggrieved persons who may require or desire assistance

6.26 There may be circumstances in which it is convenient, desirable or necessary for an application for a personal protection order to be made for an aggrieved person by a third party.

The Peace and Good Behaviour Act 1982 (Qld)

6.27 The *Peace and Good Behaviour Act 1982 (Qld)* enables a complainant to apply for an order on his or her own behalf. It also enables the complainant to apply for an order on behalf of another person, but only in circumstances where the person is in the ‘care or charge’ of the complainant.⁴³³

The Domestic and Family Violence Protection Act 1989 (Qld)

6.28 The *Domestic and Family Violence Protection Act 1989 (Qld)* enables an authorised person to apply for a domestic violence order on behalf of an aggrieved. Section 14(2) of that Act provides that an ‘authorised person’ is an adult authorised in writing by the aggrieved to appear on his or her behalf or, in the absence of a written authorisation, an adult whom the court believes has been authorised by the aggrieved, for example, orally.⁴³⁴

The position in other jurisdictions: New South Wales

6.29 The New South Wales Law Reform Commission, in its recent review of the New South Wales legislation governing apprehended violence orders, considered whether, in order to alleviate barriers to access, legislative provision

⁴³¹ See para 6.125–6.129 of this Report.

⁴³² See para 6.134 of this Report.

⁴³³ *Peace and Good Behaviour Act 1982 (Qld)* s 4(1), (2).

⁴³⁴ See note 418 of this Report.

should be made for a person other than a police officer to apply for people in need of protection.⁴³⁵ Although the Commission did not support the general availability of third party applications for apprehended violence orders, it acknowledged that some people who are disadvantaged by their physical incapacity or lack of understanding may benefit from third party applications.⁴³⁶ Accordingly, the Commission recommended that authorised third parties be allowed to make applications on behalf of people with certain physical disabilities, in addition to people with an intellectual disability and people under Guardianship orders.⁴³⁷

6.30 The New South Wales Law Reform Commission also suggested that barriers to access faced by marginalised people may be alleviated in some cases by community education and the provision of adequate support services.⁴³⁸

Applications on behalf of adults without legal capacity to apply

6.31 All adults are presumed to have capacity.⁴³⁹ However, an adult may have capacity for some matters but not others.⁴⁴⁰ For example, an adult may have capacity to deal with simple day-to-day personal matters, but not to make decisions about complex legal matters.⁴⁴¹

6.32 An aggrieved person might lack the necessary capacity to make an application and participate in proceedings on his or her own behalf and may therefore need a third party to make the application. In civil litigation, for example, proceedings for a person under a legal incapacity are to be conducted on the person's behalf by a litigation guardian.⁴⁴²

⁴³⁵ New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [6.3].

⁴³⁶ Ibid [6.8].

⁴³⁷ Ibid [6.18]–[6.20], rec 18.

⁴³⁸ Ibid [3.63].

⁴³⁹ For example, see *Guardianship and Administration Act 2000* (Qld) ss 7(a), 11, sch 1 pt 1 cl 1.

⁴⁴⁰ Under Queensland's adult guardianship legislation, the definition of 'capacity' is tied to the decision that needs to be made as it refers specifically to having capacity 'for a matter': *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'capacity'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'capacity'). Note also that s 5(c)(ii) of the *Guardianship and Administration Act 2000* (Qld) provides that the Act acknowledges that 'the capacity of an adult with impaired capacity to make decisions may differ according to ... the type of decision to be made, including, for example, the complexity of the decision to be made'.

⁴⁴¹ For example, *Re FHW* [2005] QGAAT 50, [46] where the Guardianship and Administration Tribunal held: 'he has capacity for simple and complex personal matters and simple financial matters but he has impaired capacity for complex financial matters'.

⁴⁴² *Uniform Civil Procedure Rules 1999* (Qld) r 93(1)–(2). A person under a legal incapacity means a young person or 'a person who is not capable of making the decisions required of a litigant for conducting proceedings or who is deemed by an Act to be incapable of conducting proceedings': *Uniform Civil Procedure Rules 1999* (Qld) r 4, sch 4 (definition of 'person under a legal incapacity'); *Supreme Court of Queensland Act 1991* (Qld) s 2, sch 2 (definitions of 'person under a legal incapacity' and 'person with impaired capacity').

The Peace and Good Behaviour Act 1982 (Qld)

6.33 The *Peace and Good Behaviour Act 1982* (Qld) enables the complainant to apply for an order on behalf of another person, but only in circumstances where the person is in the 'care or charge' of the complainant.⁴⁴³ The lack of definition of the term 'care or charge' under the *Peace and Good Behaviour Act 1982* (Qld) may lead to uncertainty about the entitlement of certain persons to make a complaint for another person.⁴⁴⁴

The Domestic and Family Violence Protection Act 1989 (Qld)

6.34 Section 14 of the *Domestic and Family Violence Protection Act 1989* (Qld) relevantly provides that a person who may make an application for a protection order is a person acting for the aggrieved as a guardian or administrator under the *Guardianship and Administration Act 2000* (Qld), the Adult Guardian or an attorney appointed under an enduring power of attorney under the *Powers of Attorney Act 1998* (Qld).⁴⁴⁵

The position in other jurisdictions

6.35 The civil restraining order legislation in the ACT, the Northern Territory, South Australia, Tasmania, Victoria and Western Australia allows a third party to make an application on behalf of an adult with impaired capacity who is unable to apply on his or her own.⁴⁴⁶ The legislative formulation of who may apply as a third party for a person with a legal disability varies between jurisdictions. However, the range of persons entitled to apply for an adult with impaired capacity includes a police officer, an adult acting for the person whose protection is sought, a person appointed as a statutory advocate and a person appointed as a guardian under guardianship legislation.

6.36 In its recent Report on the legislation governing apprehended violence orders in 2003, the New South Wales Law Reform Commission considered whether provision should be made for applications to be made by third parties on behalf of a person with an intellectual disability. That Commission considered it important to allow for third party applications for such persons but

⁴⁴³ *Peace and Good Behaviour Act 1982* (Qld) s 4(1), (2).

⁴⁴⁴ See para 6.10–6.13 of this Report. 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: *Guardianship and Administration Act 2000* (Qld) s 174(2)(a). 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'.

⁴⁴⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1), (4). See note 418 of this Report.

⁴⁴⁶ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 11, 12; *Justices Act* (NT) s 82, as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) ss 99A, 99J; *Justices Act 1959* (Tas) s 106B(2), (3); *Crimes (Family Violence) Act 1987* (Vic) s 7(1); *Restraining Orders Act 1997* (WA) ss 25(1), (2), 38(1), (2). Section 82 of the *Justices Act* (NT) is a new provision. As to the application of the legislation in the Northern Territory, see note 427 of this Report. Also see note 427 of this Report for the application of the *Crimes (Family Violence) Act 1987* (Vic).

recognised the concern that such a provision could be used to interfere with a person's autonomy.⁴⁴⁷ It recommended that an authorised third party, such as an officially appointed guardian, should be allowed to make applications on behalf of a person with an intellectual disability.⁴⁴⁸

6.37 The Victorian Law Reform Commission considered similar issues in its recent review of the *Crimes (Family Violence) Act 1987* (Vic).⁴⁴⁹ It did not recommend a change to the existing provision in the Act to expand the scope of persons who may apply on behalf of an adult with impaired capacity. The Victorian Law Reform Commission noted that the Act provides that where the person in need of protection is subject to a guardianship order, the person's appointed guardian, or another person with leave, may apply.⁴⁵⁰ It additionally recommended that a person's guardian should be able to make an application for the person even if the person objects to the application.⁴⁵¹ The Victorian Law Reform Commission also noted the general obligation of police to apply wherever the safety, welfare or property of a family member may be at risk.⁴⁵²

6.38 In the ACT, a person with a legal disability may apply for a protection order in his or her own right.⁴⁵³ The court must give the person leave to make the application if the court is satisfied that the person understands the nature and consequences of applying for a protection order and will understand the

⁴⁴⁷ New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [6.14], [6.18].

⁴⁴⁸ Ibid [6.19], rec 18. The New South Wales Law Reform Commission also considered this issue in an earlier Report in which it recommended that apprehended violence orders involving people with an intellectual disability be the subject of further consideration by the police and the Department of Community Services: New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) [8.48] rec 35. In that Report, the New South Wales Law Reform Commission at [8.46] did not support the option of providing that if a complainant is a person with an intellectual disability, the application must be brought by police.

⁴⁴⁹ Victorian Law Reform Commission, *Review of Family Violence Laws*, Report No 185 (2006) [8.45]–[8.52].

⁴⁵⁰ Ibid [8.45]. See *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(e).

⁴⁵¹ Ibid [8.51]–[8.52], rec 80.

⁴⁵² Ibid [5.93]. See also, Victoria Police, *Code of Practice: For the Investigation of Family Violence* (2004) [5.3.2] <http://www.police.vic.gov.au/content.asp?Document_ID=674> at 25 February 2008.

⁴⁵³ *Domestic Violence and Protection Orders Act 2001* (ACT) s 12.

proceedings to make an application for certain orders by leave without the assistance of a next friend.⁴⁵⁴

Applications on behalf of children

6.39 An aggrieved person who is a child may also face difficulties in making an application for a personal protection order.

The Peace and Good Behaviour Act 1982 (Qld)

6.40 It is unclear under the *Peace and Good Behaviour Act 1982 (Qld)* whether a child could make a complaint on his or her own behalf. Generally, a litigation guardian is required to start or defend civil proceedings on behalf of a child.⁴⁵⁵ There is no provision in the *Peace and Good Behaviour Act 1982 (Qld)* for a child to make a complaint on his or her own behalf.

The Domestic and Family Violence Protection Act 1989 (Qld)

6.41 The *Domestic and Family Violence Protection Act 1989 (Qld)* provides that a child may be named as the aggrieved or the respondent in a domestic violence order.⁴⁵⁶ However, a child is unable to be named as an aggrieved or a respondent if the only relationship between the child and the other person named in the order is a family relationship.⁴⁵⁷ The reason for so limiting the application of the *Domestic and Family Violence Protection Act 1989 (Qld)* is

⁴⁵⁴ Section 12 of the *Domestic Violence and Protection Orders Act 2001 (ACT)* provides:

- (1) An aggrieved person with a legal disability (other than a child) may apply for a protection order—
 - (a) by a next friend; or
 - (b) in the person's own right with the Magistrates Court's leave.
 - ...
- (2) An aggrieved person who is a child may apply for—
 - (a) any protection order by a next friend; or
 - (b) a domestic violence order in the person's own right; or
 - (c) a personal protection order in the person's own right with the Magistrates Court's leave.
- (3) The Magistrates Court must give leave for an application under subsection (1)(b) or (2)(c) if satisfied that the aggrieved person—
 - (a) understands the consequences of applying for a protection order; and
 - (b) will understand the proceeding on the application.

⁴⁵⁵ *Uniform Civil Procedure Rules 1999 (Qld)* r 93.

⁴⁵⁶ *Domestic and Family Violence Protection Act 1989 (Qld)* s 12D(1). However, the child may be named as the aggrieved or the respondent only if a spousal relationship, intimate personal relationship or informal care relationship exists between the child and the other party named in the domestic violence order: *Domestic and Family Violence Protection Act 1989 (Qld)* s 12D(2).

⁴⁵⁷ *Domestic and Family Violence Protection Act 1989 (Qld)* ss 12B (Meaning of *family relationship* and *relative*), 12D(1), (2). The Act therefore cannot be used to directly protect an aggrieved child from a violent parent.

that the *Child Protection Act 1999* (Qld) deals with the protection of children who are in abusive environments.⁴⁵⁸

The position in other jurisdictions

6.42 The civil restraining order legislation in the ACT, New South Wales, the Northern Territory, South Australia, Tasmania, Victoria and Western Australia allows a third party to make an application on behalf of a child who is unable to apply on his or her own behalf.⁴⁵⁹ The legislative formulation of who may apply as a third party for a child varies between jurisdictions. However, the range of persons entitled to apply for a child includes a parent or guardian of the child, a child welfare officer, someone with whom the child normally resides, a police officer and a person with the written consent of a parent or the leave of the court.

6.43 As mentioned earlier in this chapter, the ACT legislation makes provision for a child to apply for a protection order without the assistance of a next friend.⁴⁶⁰ The child must be granted leave by the court to make the application if the court is satisfied that the child understands the consequences of applying for a protection order and will understand the proceedings to make an application for certain orders.⁴⁶¹

Submissions

6.44 In its Discussion Paper, the Commission sought submissions in relation to the following issues:⁴⁶²

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

⁴⁵⁸ When the Domestic Violence Legislation Amendment Bill 2001 (Qld) was introduced into the Queensland Parliament, the Hon Judith Spence MP, Minister for Families and Minister for Aboriginal and Torres Strait Islander Policy and Minister for Disability Services, in the second reading of the Bill, stated that the Bill did not enable children to bring an application against their parent or guardian because that type of matter was considered to be a child protection issue and is dealt with under the *Child Protection Act 1999* (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 1 November 2001, 3339. Note also that under the *Child Protection Act 1999* (Qld), children in abusive environments can be removed by police officers or officers of the Department of Child Safety and placed with a foster or kinship carer: *Child Protection Act 1999* (Qld) ss 18(1)–(2), 82(1)(a), (b). Also see para 3.26 of this Report.

⁴⁵⁹ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 11, 12; *Crimes Act 1900* (NSW) s 562ZQ(3); *Justices Act* (NT) s 82, as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) s 99A, 99J; *Justices Act 1959* (Tas) s 106B(2), (3); *Crimes (Family Violence) Act 1987* (Vic) s 7(1); *Restraining Orders Act 1997* (WA) ss 25(1), (2), 38(1), (2). Section 562ZQ(3) is replicated in s 48(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Section 82 of the *Justices Act* (NT) is a new provision. As to the application of the legislation in the New South Wales, the Northern Territory and Victoria, see note 427 of this Report.

⁴⁶⁰ See para 6.38 of this Report.

⁴⁶¹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 12(3). See note 454 of this Report.

⁴⁶² Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 18 (Questions 3-2-3-6).

- if so, the categories of persons who may need an application brought on their behalf such as people with impaired decision-making capacity and children;
- if so, whether the *Peace and Good Behaviour Act 1982* (Qld) should identify particular persons who may make a complaint on behalf of another person and who those persons should be; and
- whether the court should be given power to grant leave to a person other than those specified to make a complaint.

6.45 The submissions received by the Commission in response to these issues were divided, to some extent, in relation to whether the *Peace and Good Behaviour Act 1982* (Qld) should identify particular persons or groups of persons who may need an application to be made on their behalf, and on the related issue of who should be permitted to bring an application on behalf of those persons. Some submissions preferred to identify particular persons or groups of persons who may need an application to be made on their behalf, and who should be permitted to bring an application on behalf of those persons. Other respondents preferred the eligibility scheme set out in section 14 of the *Domestic and Family Violence Protection Act 1989* (Qld). Two submissions also addressed the issue of whether the court should be given power to grant leave to a person, other than a specified person, to make a complaint on another person's behalf.⁴⁶³

6.46 A Queensland magistrate identified various classes of people who may need an application to be brought on their behalf by another person.⁴⁶⁴

- people with impaired decision-making capacity;
- children; and
- any other person whom a court considers is vulnerable.

6.47 The magistrate considered that the identity of the person who could bring an application on another's behalf should be specified, 'without limiting' the classes of person, to include:⁴⁶⁵

- a guardian appointed under the *Guardianship and Administration Act 2000* (Qld);
- the Adult Guardian;

⁴⁶³ Submissions 15, 19. This issue is also discussed at para 6.130–6.134 of this Report.

⁴⁶⁴ Submission 12.

⁴⁶⁵ Ibid.

- perhaps someone on behalf of a person with a mental illness that affects his or her capacity, or the ‘allied person’ where one has been chosen or declared under the *Mental Health Act 2000* (Qld); and
- any other person who has a sufficient interest in the welfare of the person under the incapacity.⁴⁶⁶

6.48 Legal Aid Queensland considered that, although it would be appropriate in some circumstances for an application to be made on behalf of another person, it may be restrictive to identify particular groups who may need an application to be made on their behalf.⁴⁶⁷

In our experience it is often the case that a number of people in a household are in need of the protection offered by an order. A procedure whereby one person could make an application on behalf of a number of others residing at the same address and with the written consent of those others would assist such situations.

6.49 One community legal service considered that the Act should identify particular persons who may need an application to be made on their behalf by another person. Those persons should be:⁴⁶⁸

- people with impaired decision-making capacity;
- children; and
- people with a physical disability such as age or illness that may restrict their ability to make an application on their own behalf.

6.50 This submission considered that the Act should identify particular persons who may make a complaint on behalf of another person, namely, a police officer or, in the case of a child, a parent or guardian of a child. In addition, this submission also favoured enabling a court to grant leave to make a complaint to a person other than those persons already specified.⁴⁶⁹ This approach is consistent with the approach taken in the Tasmanian civil restraining order legislation.⁴⁷⁰

6.51 The Townsville Community Legal Service Inc considered that, rather than specifying a list of persons who may need an application made on their behalf, the Act should generally allow representation by another party so as to

⁴⁶⁶ The magistrate noted this approach would require some preliminary process to identify a sufficient interest.

⁴⁶⁷ Submission 13.

⁴⁶⁸ Submission 15.

⁴⁶⁹ This submission gave the examples of a carer, welfare officer or spouse/partner where the other spouse/partner is ill or infirm.

⁴⁷⁰ See para 6.131 of this Report.

encourage representation where appropriate.⁴⁷¹ A similar approach is used under the Queensland domestic violence legislation.⁴⁷²

6.52 The Women's Legal Service considered that, like the *Domestic and Family Violence Protection Act 1982* (Qld), there should be provision for an 'authorised person' to bring an application for the protection of the affected person. This submission considered that the mechanism should be flexible enough to allow the authorised person to bring the application either in his or her own right or on the affected person's behalf, depending on the circumstances of each case. This submission suggested the following examples of persons who should be permitted to bring a third party application, but did not consider that the Act should include an exhaustive list:⁴⁷³

- a parent, on behalf of a child or on behalf of a number of people in a family where the behaviour is affecting more than one person;
- the Adult Guardian or other person on behalf of an elderly person; and
- the Department of Communities/Child Safety on behalf of a child.

6.53 Caxton Legal Centre Inc suggested it would minimise confusion if the Act clearly specified the categories of persons who can initiate an application under the Act. This submission further suggested that, as is the case in Tasmania, it may provide for greater flexibility if any such new provision allows 'persons other than those specified to apply to the court for leave to make an application'.⁴⁷⁴

6.54 Caxton Legal Centre Inc supported the inclusion of an amendment to enable 'authorised persons' (similar to the definition set out in section 14 of the *Domestic and Family Violence Protection Act 1989* (Qld)) to bring applications on behalf of other people, such as those who, through disability, frailty, infirmity or other special reason such as illiteracy, are unable or ill-equipped to initiate complaints by themselves. For example, such a provision would cover situations where:⁴⁷⁵

- there is no formally appointed substitute decision-maker, either under a power of attorney or an order of the Guardianship and Administration Tribunal;

⁴⁷¹ Submission 14.

⁴⁷² *Domestic and Family Violence Protection Act 1989* (Qld) s 14(2). See note 418 of this Report.

⁴⁷³ Submission 8.

⁴⁷⁴ Submission 19.

⁴⁷⁵ Ibid.

- people may be unable or reticent to apply for an order in their own right as a result of age and frailty, physical impairment or other need for support in the court process (in such cases family members who provide care and accommodation may be best placed to bring an application); and
- informal and paid carers and support workers may wish to make an application under the Act to protect a person they are supporting.

6.55 The Citizens Advice Bureau and Gold Coast Legal Service also cautioned against the introduction of an exhaustive list of people who may apply for an order on another's behalf as it carried a risk that someone may be inadvertently excluded. In their view, the court should have the discretion to enable one person to apply to act as *amicus curiae* (in relation, for example, to an elderly person or a person from a non-English speaking background).⁴⁷⁶

6.56 Queensland Advocacy Inc considered that if a person has the requisite capacity to apply for an order but is prevented from doing so because of a disability (for example, a physical inability to communicate), he or she should be entitled to nominate another person to apply on his or her behalf.⁴⁷⁷ This submission suggested that a person with impaired capacity should be represented by an 'advocate' who fulfils particular criteria and is trusted by the person.⁴⁷⁸ This broader approach entitles someone other than a guardian appointed by the *Guardianship and Administration Act 2000* (Qld) to apply for an order. This submission also suggested that police should be empowered to apply on behalf of an aggrieved person but only in emergency situations.⁴⁷⁹

6.57 The Queensland Public Tenants Association Inc suggested a non-exhaustive definition of 'care or charge' should be included in the Act. This submission considered any person who fell outside the definition and who was unable to make an application without assistance should be supported to make an application in his or her own right.⁴⁸⁰

⁴⁷⁶ Submission 5. 'Amicus curiae' is defined as 'a person, not being representative of a party to the proceedings, permitted to argue a point of law or fact before the court, usually on behalf of some party indirectly interested': CCH Australia, *The CCH Macquarie Dictionary of Law* (revised ed, 1996).

⁴⁷⁷ Submission 20.

⁴⁷⁸ Ibid. This submission defined 'advocacy' in the following terms:

Advocacy is functioning (speaking, acting, writing) with minimum conflict of interest on behalf of the sincerely perceived interests of a person, in order to promote, protect and defend the welfare of, and justice for the person in a fashion which strives to be emphatic and vigorous. The essential elements of Social Advocacy are strict partiality, minimal conflict of interest, emphasis on fundamental needs and issues, vigorous action, fidelity and being mindful of the most vulnerable person.

⁴⁷⁹ Applications by police are considered below at para 6.108–6.129 of this Report.

⁴⁸⁰ Submission 6.

6.58 The ability of an application to be made by, or on behalf of, a child was addressed by the Department of Child Safety. The Department expressed concern about the application of the *Peace and Good Behaviour Act 1982* (Qld) to children. It noted that children:⁴⁸¹

may in many instances lack the necessary capacity to either make an application or to seek out and secure the support of someone (including police) to make the application on their behalf. This would lead to reduced uptake of the legislation by children as applicants.

6.59 It also noted that if children were to be included as applicants, resources for legal representation would be required.

6.60 The Department of Child Safety considered further research is needed to determine the scope of the issues that would be addressed by including children as applicants under the *Peace and Good Behaviour Act 1982* (Qld). It also suggested that conflicts involving children might be better dealt with by targeted mediation and ‘other youth at risk services’ than by court processes.⁴⁸²

6.61 However, if the legislation were to allow parents to make applications on behalf of their children, the Department of Child Safety considered that the legislation should include a definition of ‘parent’ modelled on the definition used in the *Education (General Provisions) Act 2006* (Qld) or the *Child Employment Act 2006* (Qld).⁴⁸³ The definitions in those statutes are in like terms and clarify that a person who is granted guardianship of a child under the *Child Protection Act 1999* (Qld) is to be regarded as the child’s parent. Section 10 of the *Education (General Provisions) Act 2006* (Qld) provides:

10 Meaning of parent

- (1) A **parent**, of a child, is any of the following persons—
 - (a) the child’s mother;
 - (b) the child’s father;
 - (c) a person who exercises parental responsibility for the child.
- (2) However, a person standing in the place of a parent of a child on a temporary basis is not a parent of the child.
- (3) A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.
- (4) A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.

⁴⁸¹ Submission 29.

⁴⁸² Submission 29. See also para 6.102–6.103 of this Report.

⁴⁸³ Submission 29.

- (5) Despite subsections (1), (3) and (4), if—
- (a) a person is granted guardianship of a child under the *Child Protection Act 1999*; or
 - (b) a person otherwise exercises parental responsibility for a child under a decision or order of a federal court or a court of a State;
- then a reference in this Act to a parent of a child is a reference only to a person mentioned in paragraph (a) or (b).

6.62 The Department of Child Safety expressed the view that the legislation should similarly clarify that the Chief Executive of the Department is to be regarded as the ‘parent’ of a child who is in the Chief Executive’s guardianship.⁴⁸⁴

The Commission’s view

6.63 For the purposes of achieving a sufficiently accessible mechanism for making an application under the proposed Personal Protection Bill 2007, the Commission considers it desirable to clearly specify in the Bill that an application for a personal protection order may be made on behalf of another person and to specify those persons who are entitled to apply on behalf of another person.

Applications on behalf of aggrieved persons who may require or desire assistance

6.64 There may be circumstances in which an aggrieved person may require or desire assistance in bringing an application. For example, an aggrieved person may face difficulties in making an application because of a physical disability, age, frailty, a language barrier or geographic isolation. The difficulties faced by such persons may relate to the vulnerability of their position or the practical difficulty in gaining access to protective measures such as a personal protection order. It may also be more convenient or desirable for an application to be made by another person on the aggrieved person’s behalf, for example, where there is more than one aggrieved person for the application.

6.65 Provided the aggrieved person has the requisite capacity to do so, he or she should be able to authorise another person to make the application on his or her behalf.⁴⁸⁵ The Commission therefore considers that the Personal Protection Bill 2007 should include a provision allowing an ‘authorised person’

⁴⁸⁴ Submission 29. Note that the *Child Protection Act 1999* (Qld) provides that the Childrens Court may make a child protection order granting guardianship of a child to specified persons, including the Chief Executive of the Department of Child Safety. Under that Act, the Court may grant short-term guardianship of a child to the Chief Executive of the Department of Child Safety: *Child Protection Act 1999* (Qld) s 61(e). Also, the Court may grant long-term guardianship of a child to the Chief Executive of the Department of Child Safety or certain other persons: *Child Protection Act 1999* (Qld) s 61(f).

⁴⁸⁵ Note that a person may have impaired capacity for some matters but not others: see para 6.31 of this Report. Even if the aggrieved person has impaired capacity for some other matter, he or she would be able to authorise a third party to make an application if the aggrieved person has capacity to make the authorisation.

for an aggrieved person to make an application for a personal protection order on the aggrieved person's behalf. The Bill should provide that an 'authorised person' is:

- an adult authorised in writing by the aggrieved person to appear for the aggrieved person; or
- an adult whom a court is satisfied is authorised by the aggrieved person to appear for the aggrieved person even though the authority is not written.

6.66 This is consistent with the provision in section 14(1)(b) and (2) of the *Domestic and Family Violence Protection Act 1989* (Qld).⁴⁸⁶

6.67 The Commission has also recommended that provision be made for a police officer to apply for an aggrieved person⁴⁸⁷ and for a person, who is not otherwise specified as an eligible applicant, to make an application on behalf of an aggrieved person with the leave of the court.⁴⁸⁸ Those provisions ensure that an application can still be made if the aggrieved person is unable to make the application or to authorise another person to apply on his or her behalf.

Applications on behalf of persons without legal capacity to apply

6.68 The Commission is of the view that the lack of definition of the term 'care or charge' in section 4 of the *Peace and Good Behaviour Act 1982* (Qld) may lead to uncertainty about the entitlement of certain persons to make a complaint for another person who might otherwise be unable to make an application. Consequently, the Commission considers the term 'care or charge' should not be used in the Personal Protection Bill 2007. Instead, the Bill should clearly specify those persons who can apply for a personal protection order on behalf of an adult without capacity to make an application and participate in proceedings on his or her own or an aggrieved person who is a child.

Applications on behalf of adults without legal capacity to apply

6.69 The Commission considers provision should be made in the Personal Protection Bill 2007 to enable applications to be made for aggrieved persons who do not have capacity to bring an application and participate in proceedings on their own and who are unable to authorise another person to apply on their behalf.

6.70 Under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), a guardian, administrator or attorney (under an enduring power of attorney) may be appointed as a substitute decision-

⁴⁸⁶ See note 418 of this Report.

⁴⁸⁷ See para 6.125–6.126 of this Report.

⁴⁸⁸ See para 6.134 of this Report.

maker for an adult with impaired decision-making capacity for particular matters, including an adult's legal matters.⁴⁸⁹ The Adult Guardian, who is an independent statutory official, also has functions and powers to protect the rights and interests of adults with impaired decision-making capacity.⁴⁹⁰

6.71 The Commission therefore considers that the Personal Protection Bill 2007 should allow a person who is acting, within his or her authority, under another Act for an adult with impaired decision-making capacity to make an application on the adult's behalf.⁴⁹¹ This is generally similar to the position under the *Domestic and Family Violence Protection Act 1989* (Qld).⁴⁹² The Personal Protection Bill 2007 should provide that a person is 'acting under another Act' for an aggrieved person if the person is:

- a guardian, for a personal matter, or an administrator, for a financial matter, for the aggrieved person under the *Guardianship and Administration Act 2000* (Qld) and is acting within the person's powers under that Act; or
- the Adult Guardian, and the Adult Guardian considers the aggrieved person has impaired capacity for making an application for a personal protection order; or
- the aggrieved person's attorney and is acting within the attorney's powers under an enduring power of attorney under the *Powers of Attorney Act 1998* (Qld).

⁴⁸⁹ *Guardianship and Administration Act 2000* (Qld) ss 12(1), 82(1)(c); *Powers of Attorney Act 1998* (Qld) s 32(1)(a). A guardian may be appointed to deal with all or some of an adult's personal or health matters, including 'a legal matter not relating to the adult's financial or property matters': *Guardianship and Administration Act 2000* (Qld) s 12(1), (2), sch 2 (definition of 'personal matter' and 'financial matter'). An administrator may be appointed to deal with all or some of an adult's financial matters, including 'a legal matter relating to the adult's financial or property matters': *Guardianship and Administration Act 2000* (Qld) s 12(1), (2), sch 2 (definition of 'financial matter'). An attorney may be assigned decision-making power under an enduring power of attorney for some or all of an adult's financial, personal or health matters, including legal matters: *Powers of Attorney Act 1998* (Qld) s 32(1), sch 2 (definitions of 'personal matter' and 'financial matter'). For an overview of the framework for substitute decision-making under the *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld) see Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*, Report No 62 (2007) Vol 1, ch 2.

⁴⁹⁰ *Guardianship and Administration Act 2000* (Qld) ss 173, 174(1), 175, 176.

⁴⁹¹ The Commission has recommended at para 20.58 of this Report that 'impaired capacity', for the Personal Protection Bill 2007, should have the meaning given in schedule 4 of the *Guardianship and Administration Act 2000* (Qld). Schedule 4 of the *Guardianship and Administration Act 2000* (Qld) provides that 'impaired capacity', for a person for a matter, means the person does not have capacity for the matter. 'Capacity', for a person for a matter, is defined in sch 4 of that Act to mean that the person is capable of understanding the nature and effect of decisions about the matter, freely and voluntarily making decisions about the matter, and communicating the decisions in some way.

⁴⁹² *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1)(d), (4). Section 14 of the *Domestic and Family Violence Protection Act 1989* (Qld) is set out at note 418 of this Report. See also para 6.34 of this Report.

6.72 The Commission considers this appropriate given that under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) respectively, a guardian, administrator or attorney is required to act in accordance with the terms of his or her appointment, which may be limited.⁴⁹³

6.73 The Commission notes that, in many situations, there may be no one appointed to act as a guardian or administrator under the *Guardianship and Administration Act 2000* (Qld) or as an attorney under the *Powers of Attorney Act 1998* (Qld) for an adult who does not have capacity to make an application and participate in proceedings or, where such a person is appointed, his or her terms of appointment may be limited.

6.74 The Commission has recommended that the Adult Guardian may make an application for an aggrieved person if the Adult Guardian considers the aggrieved person has impaired capacity for making an application for a personal protection order. The Commission has also recommended that a police officer may make an application for an aggrieved person⁴⁹⁴ and that a person, who is not otherwise specified as an eligible applicant, may seek leave of the court to apply for an aggrieved person.⁴⁹⁵

6.75 The ability for a person to seek leave to apply may be especially important if the aggrieved person does not have capacity for the proceeding and is reliant on third parties. A provision to this effect would also enable someone who fulfils Queensland Advocacy Inc's preferred definition of an 'advocate' (that is, someone who satisfies specific criteria and who is not authorised to act under another Act for an adult with impaired decision-making capacity for the proceeding)⁴⁹⁶ to apply to the court for leave to make an application on the adult's behalf. This would include, for example, a guardian, administrator or attorney with limited terms of appointment who would nonetheless be an appropriate person to act on the adult's behalf.

Applications on behalf of children

6.76 The Commission considers that a child may be an aggrieved person for a personal protection order.⁴⁹⁷ The Commission notes that the *Acts Interpretation Act 1954* (Qld) defines a 'child' to mean an individual who is

⁴⁹³ *Guardianship and Administration Act 2000* (Qld) ss 33, 36; *Powers of Attorney Act 1998* (Qld) s 67.

⁴⁹⁴ See para 6.125 of this Report.

⁴⁹⁵ See para 6.134 of this Report.

⁴⁹⁶ See note 478 of this Report.

⁴⁹⁷ Also note that in Chapter 3 of this Report, the Commission has recommended that it is not appropriate for the Personal Protection Bill 2007 to cover children in 'family relationships', as defined under the *Domestic and Family Violence Protection Act 1989* (Qld) and that the Personal Protection Bill 2007 should provide that a protection order cannot be made against a person if a 'domestic relationship', under the *Domestic and Family Violence Protection Act 1989* (Qld), exists between that person and an aggrieved person for the order. See para 3.7, 3.36 of this Report.

under 18,⁴⁹⁸ and considers that definition is appropriate and sufficient for the purposes of the Personal Protection Bill 2007.

6.77 The Commission considers it is desirable to include a specific provision in the Personal Protection Bill 2007 to enable a ‘parent’ to apply for a personal protection order on behalf of a child. The Bill should include a definition of ‘parent’ modelled on the definition in section 10 of the *Education (General Provisions) Act 2006* (Qld).⁴⁹⁹

6.78 This acknowledges that a person who takes parental responsibility for a child is the appropriate person to make an application on the child’s behalf. It would also clarify that, if the Chief Executive of the Department of Child Safety has been granted guardianship of a child, the Chief Executive is to be regarded as the child’s parent, and the person eligible to apply for a personal protection order for the child.

6.79 The Commission has also recommended in this chapter that provision should be made in the Personal Protection Bill 2007 to enable any person, who is otherwise not eligible to make an application, to apply to the court for leave to make an application. A provision to that effect would enable a person who does not have parental responsibility for a child to apply to the court for leave to make an application on behalf of the child.⁵⁰⁰

6.80 The Commission has also recommended that a police officer may make an application for an aggrieved person.⁵⁰¹

APPLICATIONS BY, OR ON BEHALF OF, YOUNG PERSONS

6.81 There may be circumstances in which it is desirable for an older child (a ‘young person’) to be able to apply for a personal protection order in his or her own right. It may be that a vulnerable young person is living with abusive or neglectful carers who are not prepared to act on the child’s behalf. In addition, a young person who lives independently of his or her family may be vulnerable to the behaviour of another person, for example, a neighbour, that constitutes grounds for making an order.

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

6.82 As mentioned earlier, it is unclear under the *Peace and Good Behaviour Act 1982* (Qld) whether a young person could make a complaint on

⁴⁹⁸ *Acts Interpretation Act 1954* (Qld) s 36 (definition of ‘child’).

⁴⁹⁹ See para 6.61 of this Report.

⁵⁰⁰ See para 6.106 and 6.134 of this Report.

⁵⁰¹ See para 6.125 of this Report.

his or her own behalf.⁵⁰² However, anecdotal information given to the Commission suggests that some magistrates may make orders in favour of young people without the involvement of a litigation guardian.⁵⁰³

The Domestic and Family Violence Protection Act 1989 (Qld)

6.83 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that a child may be named as the aggrieved or the respondent in a domestic violence order.⁵⁰⁴ However, a child is unable to be named as an aggrieved or a respondent if the relationship between the child and the other person named in the order is a ‘family relationship’.⁵⁰⁵

The position in other jurisdictions

6.84 In a number of other Australian jurisdictions, children may apply for a civil restraining order themselves, subject to satisfying certain requirements.

6.85 In New South Wales,⁵⁰⁶ a child of 16 or 17 years of age may make a complaint, while in South Australia⁵⁰⁷ and Victoria,⁵⁰⁸ a child of 14 years or over may seek the leave of the court to make a complaint. In Tasmania, 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.⁵⁰⁹

6.86 As mentioned earlier in this chapter, in the ACT, a child may be given leave to make an application for a personal protection order or a workplace order without the assistance of a next friend, if the court is satisfied the child understands the consequences of a protection order application and will

502 See para 6.40 of this Report.

503 Submission 13.

504 *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(1). However, the child may be named as the aggrieved or the respondent only if a spousal relationship, intimate personal relationship or informal care relationship exists between the child and the other party named in the domestic violence order: *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(2).

505 *Domestic and Family Violence Protection Act 1989* (Qld) ss 12B (Meaning of *family relationship* and *relative*), 12D(1), 12D(2). Section 12B(1) provides that a family relationship exists between two persons if one of them is the relative of the other. The Act therefore cannot be used to directly protect an aggrieved child from a violent parent. The protection of children is dealt with by the *Child Protection Act 1999* (Qld), under which children in abusive environments can be removed by police officers or officers of the Department of Child Safety and placed with a foster or kinship carer.

506 *Crimes Act 1900* (NSW) s 562ZQ(7). Only a police officer can make a complaint for an order if the person for whose protection the order would be made is a child under the age of 16 years at the time of the complaint: *Crimes Act 1900* (NSW) s 562ZQ(3). Section 562ZQ(3), (7) is replicated in s 48(3), (6) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 427 of this Report.

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

508 *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(c)(iv). For the application of this legislation, see note 427 of this Report.

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

understand the proceedings.⁵¹⁰ An age limit is not prescribed so that the age of the child, as opposed to the child's understanding of proceedings and consequences of the order, is not a barrier to the child's application.⁵¹¹

Submissions

6.87 In its Discussion Paper, the Commission sought submissions on the following issues in relation to the eligibility of young people to apply for an order:⁵¹²

- whether the *Peace and Good Behaviour Act 1982* (Qld) should make provision for a young person to make a complaint in his or her own right; and
- if so, whether such a provision should be limited in any way – for example, with respect to the age of the young person or the circumstances in which a young person may make a complaint.

6.88 The majority of submissions on these issues supported the amendment of the *Peace and Good Behaviour Act 1982* (Qld) to enable a young person under 18, particularly one living independently of his or her family, to make a complaint in his or her own right.⁵¹³ Several of these submissions also addressed the related issue of whether such a provision should be limited in any way.

6.89 A Queensland magistrate supported the view that young persons of 'a particular age' should be able to make a complaint in their own right:⁵¹⁴

Given that significant numbers of children do not live with their parents, and children have an entitlement to receive Centrelink benefits from a particular age, thus facilitating their living away from home, it is suggested that the age at which children should be able to bring an application is that age. This would then enable them to take steps to protect their interests when they may no longer have a parent willing or interested in protecting their interests against, for example, difficult neighbours.

⁵¹⁰ *Domestic Violence and Protection Orders Act 2001* (ACT) s 12(2)(c), (3). See para 6.43 of this Report.

⁵¹¹ Australian Capital Territory, Department of Justice and Community Safety, *Report on the Review of the Protection Orders Act 2001* (April 2004) 10-11. Note some respondent agencies to that Report did not support the child as an applicant for an order if there is a person *in loco parentis* who can make an application on the child's behalf.

⁵¹² Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 19 (Questions 3-8–3-9).

⁵¹³ Submissions 5, 8, 11, 12B, 14, 18, 19.

⁵¹⁴ Submission 12B.

6.90 This submission considered that no distinction should be made on the bases on which an order in favour of a child is granted.⁵¹⁵

6.91 The Youth Advocacy Centre Inc expressed the view that, in addition to the current provision that a complaint can be made by a person who has the 'care or charge' of the complainant, a young person should be permitted to make an application in his or her own name, particularly if that person lives independently of his or her family:⁵¹⁶

This would be consistent with situations where young people under 18 years old are living independently of family and are assessed by other agencies as independent. Young people living independently arguably have a greater need to access the remedies under the Act as independent living involves potential disputes involving neighbours or co-tenants.

6.92 The Logan Youth Legal Service also considered that young people should be able to make a complaint pursuant to the Act in their own right:⁵¹⁷

We believe that young people who are likely to seek the protection of a peace and good behaviour order are also likely to be living independently. Young people who are living independently of adult support regularly make choices about their own welfare. The young person's legal representative should be able to assist the Magistrate regarding the young person's understanding of their circumstances and the legal impact of their choices.

6.93 This submission further considered it may be appropriate that magistrates have a discretion to require the involvement of a litigation guardian in circumstances where it appears the young person is not competent to instruct their legal representative directly:⁵¹⁸

We do not believe it would be appropriate to limit a Magistrate's discretion to determine whether a litigation guardian is required by reference to a young person's age. Young people's level of independence, maturity and experience varies widely between individuals. Nor do we believe it is practical to prospectively limit a Magistrate's discretion to hear certain types of complaints without the involvement of a litigation guardian. In our view, a flexible discretion that allows a Magistrate to exercise their discretion based on the specific circumstances of a complaint and capacity of a young person is preferable to arbitrary limits that may lead to inappropriate outcomes for some young people.

If the involvement of a litigation guardian is required in a particular complaint, we believe that a specialist youth advocate should be appointed.

515 Ibid.

516 Submission 11.

517 Submission 18.

518 Ibid.

6.94 Legal Aid Queensland also expressed the view that young people should be able to make a complaint in their own right.⁵¹⁹

Often young people have no adult who is able or willing to make an application for an order on their behalf. Further, 'older' children, and in particular those aged 15 [to] 17 [years], will usually be 'Gillick' competent, and able to understand the consequences of any decision they might make to apply for an order. [note omitted]

6.95 Legal Aid Queensland further considered that the consequence of not enabling a young person to apply for an order in his or her own right might be to deny access to a protective mechanism, and thereby expose the young person to further harm or risk of harm.⁵²⁰

6.96 The Women's Legal Service suggested it may be appropriate to incorporate an age limit at which a young person may be competent to apply for an order.⁵²¹

6.97 The Townsville Community Legal Service Inc supported the entitlement of a child to make a complaint under the Act but considered the court rules and procedures set out in the *Magistrates Court Act 1921* (Qld) or the *Uniform Civil Procedure Rules 1999* (Qld) already sufficiently catered for the capacity of a child to make a complaint.⁵²²

6.98 Two submissions opposed enabling young people to make an application in their own right.⁵²³

6.99 The Queensland Police Service considered that, if children were able to make complaints in their own right, it may result in vexatious, trivial or unfounded complaints being made, thereby placing an onerous burden on Justices of the Peace and the courts:⁵²⁴

This is in light of the frequency that children receive, or are threatened with, physical punishment and adverse sanctions by their parents, guardians, teachers and other authority figures in the normal course of disciplining them for unacceptable conduct.

6.100 Instead, the Queensland Police Service supported an amendment to the Act to provide that a complaint may be made on behalf of a child by a parent or guardian of the child.

⁵¹⁹ Submission 13. In *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 188–9, Lord Scarman enunciated the principle that a young person who has achieved sufficient understanding and intelligence to understand what is involved in proposed health care can consent to that health care.

⁵²⁰ Submission 13.

⁵²¹ Submission 8.

⁵²² Submission 14.

⁵²³ Submissions 6, 21.

⁵²⁴ Submission 21.

6.101 The Queensland Public Tenants Association Inc also suggested it was unnecessary to enable a child to make a complaint as a child's parent or carer could make an application on the child's behalf.⁵²⁵

6.102 The Department of Child Safety also expressed concern about allowing young people to apply for orders. It considered that young people, 'even those living independently' may lack the necessary capacity to make an application or seek out the support of others to apply on their behalf. The Department of Child Safety also commented that 'trepidation about possible involvement of child protection authorities' would add to children's reluctance to use the legislation.⁵²⁶

6.103 As noted above, the Department of Child Safety considered that conflicts involving children might be better dealt with by targeted 'youth at risk services' than by court processes.⁵²⁷ It also considered that further research is required into the scope of the issues to be addressed by including young people as applicants under the *Peace and Good Behaviour Act 1982* (Qld).

The Commission's view

6.104 It is unclear under the existing provisions of the *Peace and Good Behaviour Act 1982* (Qld) whether a young person can make an application in his or her own right, or is required to be represented by a litigation guardian.⁵²⁸ In contrast, the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a child may be named as an aggrieved or a respondent in an application (although he or she cannot make an application against his or her parent or another relative).

6.105 The Commission acknowledges the concerns expressed in some submissions that, in some instances, a young person could bring an inappropriate application for a personal protection order. However, the Commission considers the paramount consideration is to ensure that the proposed Personal Protection Bill 2007 provides young people who are in genuine need of protection with an accessible mechanism for applying for a personal protection order. Although in many instances, a young person could be represented by a parent or another person, there may be circumstances in which the young person may be unable or unwilling to obtain such representation. The Commission considers that a young person, who has the capacity to understand the nature and consequences of a personal protection order, should be able to make an application with the leave of the court.

⁵²⁵ Submission 6.

⁵²⁶ Submission 29.

⁵²⁷ Ibid. See also para 6.60 of this Report.

⁵²⁸ See para 6.40 of this Report.

6.106 The Commission also considers that a young person, who has the requisite capacity to apply for a personal protection order on his or her own behalf, should be able to authorise another person to seek leave to apply for an order on behalf of the young person. The imposition of a requirement to obtain the leave of the court to apply for an order would enable the court to determine whether the child understands the nature and consequences of a personal protection order.

6.107 The Commission therefore recommends that the Personal Protection Bill 2007 provide that the court may give leave to apply for a personal protection order to a child who is an aggrieved person for the order, or to an authorised person for the child, only if the court is satisfied the child has the capacity to understand the nature and consequences of a personal protection order.

APPLICATIONS BY POLICE

6.108 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.⁵²⁹

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

6.109 The *Peace and Good Behaviour Act 1982* (Qld) does not specifically empower a police officer to apply for an order on behalf of another person.⁵³⁰

6.110 The introduction of a provision of this kind in the Commission's proposed Personal Protection Bill 2007 would create additional rights and responsibilities for police officers in relation to applications for personal protection orders. This would obviously have resource implications for the Queensland Police Service, members of which already have rights and responsibilities in relation to applying for protection orders under domestic violence legislation.⁵³¹

⁵²⁹ Queensland Police Service, *Operational Procedures Manual* [13.4.1]. Information provided by the Acting Commissioner, Queensland Police Service, 6 September 2004; Submission 21.

⁵³⁰ The existing provisions of the *Peace and Good Behaviour Act 1982* (Qld) enable a person to bring an application on behalf of another only if the other is under the person's 'care or charge': *Peace and Good Behaviour Act 1982* (Qld) s 4(1).

⁵³¹ *Domestic and Family Violence Protection Act 1989* (Qld) ss 14(1)(c), (3), 67, 69, 71, 72. The Crime and Misconduct Commission in its recent report on the policing of domestic violence in Queensland noted that, while spousal relationships continue to make up the majority of domestic violence incidents, the new categories of relationship (family, intimate personal, informal care) have increased the number of domestic violence jobs dealt with by police by about 20 per cent: Crime and Misconduct Commission, *Policing Domestic Violence in Queensland: Meeting the Challenges*, Report (March 2005) 35.

The *Domestic and Family Violence Protection Act 1989* (Qld)

6.111 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that police are empowered to, and in some cases must, seek orders to protect victims of domestic violence. If a police officer reasonably believes that a person has been subjected to domestic violence from another person, the officer is required to investigate the matter. If the police officer's belief is confirmed by the investigation and the officer reasonably believes there is sufficient reason to take action, the officer is authorised to take certain action under the Act, including applying for a protection order on behalf of the aggrieved.⁵³² In addition, if a police officer takes someone into custody to prevent personal injury or property damage, the officer must apply for a protection order.⁵³³

6.112 Section 67 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides:

67 Police action relating to domestic violence

- (1) If a police officer reasonably suspects a person is an aggrieved, it is the duty of the officer to investigate or cause to be investigated the complaint, report, or circumstance on which the officer's reasonable suspicion is based, until the officer is satisfied the suspicion is unfounded.
- (2) If, after the investigation, the officer reasonably believes—
 - (a) the person is an aggrieved; and
 - (b) there is sufficient reason for the officer to take action;

the officer may—

 - (c) apply for a protection order to protect the aggrieved; and
 - (d) take other action that the officer is required or authorised to take by this Act.

⁵³² *Domestic and Family Violence Protection Act 1989* (Qld) ss 14(1)(c), (3), 67.

⁵³³ *Domestic and Family Violence Protection Act 1989* (Qld) s 71(1). Section 69(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a police officer, who has reasonable grounds for suspecting that an act of domestic violence has been committed and there is a danger of personal injury to a person, or damage to the person's property, by a respondent, may take the respondent into custody until the earlier of a number of specified events occurs.

The position in other jurisdictions

6.113 Legislative provisions in the ACT, New South Wales, the Northern Territory, South Australia, Tasmania, Victoria, and Western Australia allow an application to be made by a police officer for civil restraining orders.⁵³⁴

Submissions

6.114 In its Discussion Paper, the Commission canvassed the role of police officers in relation to making a complaint on behalf of another person, and sought submissions about whether a police officer should be under an obligation to make a complaint on behalf of another person and, if so, in what circumstances.⁵³⁵

6.115 The majority of submissions that addressed the role of police officers in making complaints under the *Peace and Good Behaviour Act 1982* (Qld) considered police officers should be empowered to make a complaint on behalf of another person, particularly if there is an imminent risk of violence to the complainant.⁵³⁶

6.116 The Chief Magistrate of Queensland suggested that the scheme for police applications should mirror the scheme under the *Domestic and Family Violence Protection Act 1989* (Qld), whereby police officers are empowered to make an application where they consider it is necessary to protect the complainant.⁵³⁷

6.117 A similar view was expressed by the Townsville Community Legal Service Inc.⁵³⁸

6.118 The South West Brisbane Community Legal Service Inc suggested police intervention was warranted in circumstances of imminent violence.⁵³⁹

⁵³⁴ *Domestic Violence and Protection Orders Act 2001* (ACT) s 11(3); *Crimes Act 1900* (NSW) s 562ZQ(2)(b); *Justices Act* (NT) s 82(c), as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) s 99A; *Justices Act 1959* (Tas) s 106B(2)(a); *Crimes (Family Violence) Act 1987* (Vic) s 7(1)(a), (c)(i); *Restraining Orders Act 1997* (WA) ss 25(1)(b), 38(1)(b). In certain circumstances it is obligatory for a police officer to make a complaint: *Crimes Act 1900* (NSW) s 562ZR. Sections 562ZQ(2)(b), 562ZR of the *Crimes Act 1900* (NSW) are replicated in ss 48(2)(b), 49 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Section 82(c) of the *Justices Act* (NT) is a new provision. As to the application of the legislation in New South Wales, the Northern Territory and Victoria, see note 427 of this Report.

⁵³⁵ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 19 (Question 3-7).

⁵³⁶ Submissions 5, 8, 12, 14, 15, 19.

⁵³⁷ Information provided by the Chief Magistrate, Judge MP Irwin, 25 August 2004.

⁵³⁸ Submission 14.

⁵³⁹ Submission 15.

The Women's Legal Service considered it appropriate for police officers to apply for an order 'in certain circumstances'.⁵⁴⁰

6.119 The Women's Legal Service also expressed concern that the resource implications of imposing a requirement on police officers to make complaints under the *Peace and Good Behaviour Act 1982* (Qld) might consequently jeopardise the safety of those covered by the *Domestic Violence and Family Protection Act 1989* (Qld). Nonetheless, it considered it desirable to empower police officers to make complaints under the *Peace and Good Behaviour Act 1982* (Qld) where the safety of the person aggrieved is at risk or where he or she experiences isolation. This submission also considered that some of those circumstances may justify mandatory police intervention.⁵⁴¹

6.120 Caxton Legal Centre Inc suggested that, notwithstanding the possible resource implications for the Queensland Police Service, police officers should be involved in making applications for a peace and good behaviour order in the following circumstances:⁵⁴²

- where serious threats have been made and where a party or parties appear to be at imminent risk; or
- where other significant circumstances warrant special assistance being given to a complainant.

6.121 Caxton Legal Centre Inc also considered that police should be able to make a telephone or facsimile application for an urgent interim order where it is not practicable to make an immediate complaint at the court because of the time or place at which the incident occurs.⁵⁴³

6.122 The Queensland Police Service opposed any increased involvement of police officers in the administration and enforcement of the *Peace and Good Behaviour Act 1982* (Qld). In the view of the Queensland Police Service, the imposition of additional rights and responsibilities of police officers in relation to peace and good behaviour orders carries significant resource implications for the Queensland Police Service.⁵⁴⁴

Operational police officers and police prosecutors currently have to devote a significant amount of their time and effort in the performance of their duties to the enforcement of the *Domestic and Family Violence Protection Act 1989*. Should police officers become legally obligated to make peace and good behaviour order applications on behalf of complainants, their level of

⁵⁴⁰ Submission 8.

⁵⁴¹ Ibid.

⁵⁴² Submission 19.

⁵⁴³ Ibid. The issue of making applications by electronic means is discussed at para 9.113–9.124 of this Report.

⁵⁴⁴ Information provided by the Acting Commissioner, Queensland Police Service, 6 September 2004.

involvement with such matters would be expected to be similar to their current level of involvement with domestic violence complaints.

6.123 The Queensland Police Service further considered that any consequent increase in the involvement of police officers in the administration and enforcement of the *Peace and Good Behaviour Act 1982* (Qld) would severely limit the availability of police officers to attend to more serious matters during their operational shifts.⁵⁴⁵

6.124 The Queensland Public Tenants Association was also opposed to police applications.⁵⁴⁶ This submission also considered that disputes between public housing tenants are more appropriately dealt with under the provisions of the *Residential Tenancies Act 1994* (Qld) without the need for police involvement.

The Commission's view

6.125 The Commission considers that the proposed Personal Protection Bill 2007 should provide that a police officer may apply for a personal protection order for an aggrieved person. This would permit a police officer, in circumstances where it is convenient or necessary to do so, to apply for a personal protection order on behalf of an aggrieved person.

6.126 The Commission is also of the view that, in certain circumstances, a police officer should be required to apply for a personal protection order against a person. This obligation should arise only if the police officer reasonably believes that:

- there is an unacceptable risk that the person will:
 - endanger the safety of an aggrieved person for the order, or a relative or associate of the aggrieved person; or
 - cause substantial damage to property of an aggrieved person for the order, or a relative or associate of the aggrieved person; and
- no other person is willing and able to apply for the order.

6.127 The proviso would clarify that a police officer need not apply for a personal protection order if there is another person willing and able to make the application.

6.128 The involvement of police in making applications under the Bill accords with the community policing and crime prevention role of the Queensland Police

⁵⁴⁵ Submission 21.

⁵⁴⁶ Submission 6.

Service, particularly given the significance of protection orders in preventing the escalation of disputes into violent crime.⁵⁴⁷

6.129 The Commission acknowledges that involvement of police officers in the administration and enforcement of the Personal Protection Bill 2007 would likely have significant resource implications for the Queensland Police Service, members of which already have substantial rights and responsibilities in relation to policing domestic violence orders. Nonetheless, the Commission considers this factor should not preclude a significant role for police officers in policing protection orders.

APPLICATIONS BY SOME OTHER PERSON WITH THE LEAVE OF THE COURT

6.130 Limiting eligibility to make an application for a personal protection order under the Personal Protection Bill 2007 to particular people who are specified in the legislation carries the risk that the list may be incomplete. This may be avoided by a provision allowing persons other than those specified to apply to the court for leave to make an application.⁵⁴⁸

The position in other jurisdictions

6.131 The civil restraining order legislation in Tasmania provides for persons, other than those already specified under that legislation, to apply to the Court for leave to make an application.⁵⁴⁹

Submissions

6.132 In its Discussion Paper, the Commission sought submissions in relation to whether the court should be given power to grant leave to persons, other than those who may be specified, to make a complaint on another person's behalf.⁵⁵⁰

⁵⁴⁷ The Commission also notes that the imposition of a duty on a police officer to make an application raises the issue of the liability of the officer for acts or omissions done by that officer for the purposes of the Personal Protection Bill 2007. Section 10.5 of the *Police Service Administration Act 1990* (Qld) provides that the State is vicariously liable for the torts of a police officer as a joint tortfeasor and is also liable for a police officer's contributory negligence: *Police Service Administration Act 1990* (Qld) s 10.5(1), (3). See, for example, *Peat v Lin* [2005] 1 Qd R 40, [7] (Atkinson J). Where the State pays damages awarded against a police officer, it may recover contribution from the officer: *Police Service Administration Act 1990* (Qld) s 10.6(3). However, the State must indemnify and keep indemnified a police officer for acts done in an emergency in good faith and without gross negligence: *Police Service Administration Act 1990* (Qld) s 10.5(5).

⁵⁴⁸ For example, *Justices Act 1959* (Tas) s 106B(2)(c), (3).

⁵⁴⁹ *Justices Act 1959* (Tas) s 106B(2)(c), (3).

⁵⁵⁰ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 19 (Question 3-6).

6.133 Two submissions addressed this issue. The South West Brisbane Community Legal Centre Inc considered that, in addition to identifying in the Act particular persons who may make a complaint on another person's behalf, the court should be empowered to grant leave to a person other than those specified to make a complaint on another person's behalf.⁵⁵¹ Caxton Legal Centre Inc expressed a similar view.⁵⁵²

The Commission's view

6.134 Even though the Commission has recommended that the Personal Protection Bill 2007 provide for a broad eligibility scheme which specifies those persons with an entitlement to apply for a personal protection order, the Commission also considers it prudent to include a 'catch-all' provision that enables any person, other than those specified, to apply to the court for leave to make an application for an aggrieved person. This would maximise the accessibility of the eligibility provisions under the Personal Protection Bill 2007 and so avoid the risk of inadvertent exclusion of any particular category of applicant.⁵⁵³ The requirement to obtain the leave of the court in these circumstances would enable inappropriate applications to be filtered out.

JOINT APPLICATIONS

6.135 Disputes of the kind covered under the proposed Personal Protection Bill 2007 may involve many people. Because of this, it may be appropriate to allow an application to be made jointly by, or against, more than one person.⁵⁵⁴

The Peace and Good Behaviour Act 1982 (Qld)

6.136 The *Peace and Good Behaviour Act 1982* (Qld) provides that an order can include 'such other stipulations or conditions as the Court thinks fit'.⁵⁵⁵ Anecdotal information given to the Commission suggests that, in some circumstances where protection is sought for a family or a group of related people, individual members of the family or group may bring multiple complaints as a result of some uncertainty about who may be protected under the Act.⁵⁵⁶

⁵⁵¹ Submission 15. See para 6.50 of this Report.

⁵⁵² Submission 19. See para 6.53 of this Report.

⁵⁵³ See also para 6.75 of this Report.

⁵⁵⁴ See para 20.4 of this Report in relation to joint respondents.

⁵⁵⁵ *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

⁵⁵⁶ Submission 19.

The *Domestic and Family Violence Protection Act 1989* (Qld)

6.137 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that only one person may be named as an aggrieved in a domestic violence order,⁵⁵⁷ although it does provide for other persons to be named in, and protected by, an order.⁵⁵⁸

Submissions

6.138 Two submissions to the Discussion Paper addressed the issue of whether the *Peace and Good Behaviour Act 1982* (Qld) should provide for the making of joint applications.⁵⁵⁹ One of these submissions also addressed the issue of multiple respondents to a complaint.⁵⁶⁰

6.139 A Queensland magistrate considered there was some ambiguity in the Act as to whether, within the one complaint, there can be more than one complainant, and more than one respondent/defendant.⁵⁶¹ The magistrate opposed the concept of multiple complainants or respondents in relation to applications for an order:⁵⁶²

There have been examples of both, and it is likely that different approaches have been taken by different magistrates. There are difficulties where there is more than one complainant or respondent/defendant. One difficulty is whether there can be a 'split decision' so that the complaint is dismissed against one respondent but not against the other. Similarly, there is a doubt about whether the complaint is made out in respect of one complainant but not the other. It should be made clear that in any one complaint there can be **only one** complainant and **only one** respondent/defendant. [original emphasis]

6.140 Caxton Legal Centre Inc considered the application process would be more efficient if one complainant could apply specifically for an order either jointly with a spouse or individually on behalf of a whole family, particularly where the dispute concerns neighbours. This submission considered that with such an approach 'the process arguably should be more efficient both from the point of view of the applicant and the court'.⁵⁶³

557 *Domestic and Family Violence Protection Act 1989* (Qld) s 12F(1), (2).

558 *Domestic and Family Violence Protection Act 1989* (Qld) s 21. The Act also provides that more than one respondent can be named in an application for a domestic violence order: *Domestic and Family Violence Protection Act 1989* (Qld) s 12F(3), (4). These issues are discussed at para 4.10 of this Report.

559 Submissions 12B, 19.

560 Submission 12B.

561 Ibid.

562 Ibid.

563 Submission 19.

The Commission's view

6.141 It is possible that disputes involving 'personal violence' under the proposed Personal Protection Bill 2007 may involve many people. This situation might arise, for example, in a dispute between neighbouring families.

6.142 In the view of the Commission, the Personal Protection Bill 2007 should specify that an application for a personal protection order may be made by one or more applicants and for one or more aggrieved persons. This would make the application process simpler in cases where there is more than one aggrieved party. The conferral of party status also entitles each aggrieved person to participate in further proceedings.

6.143 The Commission notes that where an application is made in relation to more than one aggrieved person, the court may make one or more orders naming one, some or all of the aggrieved persons, as it considers appropriate in its discretion.

6.144 Elsewhere in this Report, the Commission has also recommended that the Personal Protection Bill 2007 should not prevent an application for a protection order from being made in relation to more than one respondent.⁵⁶⁴

RECOMMENDATIONS

6.145 The Commission makes the following recommendations:

Applications by an aggrieved person

- 6-1 The Personal Protection Bill 2007 should provide that an aggrieved person may apply for a personal protection order under the Bill. The Bill should provide that a person is an aggrieved person for a personal protection order if personal violence, constituting the ground on which the order is to be made, has been committed against the person.⁵⁶⁵

See Personal Protection Bill 2007 cll 8(1)(a), 14(1)(a)(i).

⁵⁶⁴ See para 20.4 of this Report.

⁵⁶⁵ See para 6.21 of this Report.

- 6-2 In addition to allowing an aggrieved person to make an application, the Personal Protection Bill 2007 should also make provision for a third party to apply on behalf of an aggrieved person. The Bill should further provide that if an application for a personal protection order is made by a person who is not an aggrieved person for the order, the application must be made for the aggrieved person.⁵⁶⁶

See Personal Protection Bill 2007 cl 14(1)(a)(ii)–(iv), (b), (c), (2).

Applications on behalf of aggrieved persons who may require or desire assistance

- 6-3 The Personal Protection Bill 2007 should include a provision allowing an ‘authorised person’ for an aggrieved person to make an application for a personal protection order on the aggrieved person’s behalf. The Bill should include the following definition of ‘authorised person’: ⁵⁶⁷

‘authorised person’, for an aggrieved person, means:

- (a) an adult authorised in writing by the aggrieved person to appear for the aggrieved person; or
- (b) an adult whom a court is satisfied is authorised by the aggrieved person to appear for the aggrieved person even though the authority is not written.

See Personal Protection Bill 2007 cl 3, 14(1)(a)(ii), sch (dictionary).

Applications on behalf of adults without legal capacity to apply

- 6-4 The Personal Protection Bill 2007 should include a provision to the effect that a person who is acting under another Act for an adult with impaired decision-making capacity may make an application for a personal protection order on the adult’s behalf. The Bill should provide that a person is ‘acting under another Act’ for an aggrieved person if the person is:⁵⁶⁸

⁵⁶⁶ See para 6.23 of this Report.

⁵⁶⁷ See para 6.65 of this Report.

⁵⁶⁸ See para 6.71 of this Report.

- (a) a guardian, for a personal matter, or an administrator, for a financial matter, for the aggrieved person under the *Guardianship and Administration Act 2000* (Qld) and is acting within the person's powers under that Act; or
- (b) the Adult Guardian, and the Adult Guardian considers the aggrieved person has impaired capacity for making an application for a personal protection order; or
- (c) the aggrieved person's attorney and is acting within the attorney's powers under an enduring power of attorney under the *Powers of Attorney Act 1998* (Qld).

See Personal Protection Bill 2007 cl 14(1)(a)(iii), 25.

Applications on behalf of children

- 6-5 The Personal Protection Bill 2007 should provide that a 'parent' may apply for a personal protection order on behalf of a child who is an aggrieved person for the order. The Bill should include a definition of 'parent' modelled on the definition in section 10 of the *Education (General Provisions) Act 2006* (Qld).⁵⁶⁹

See Personal Protection Bill 2007 cl 14(1)(b)(i), 26.

Applications by, or on behalf of, young persons

- 6-6 The Personal Protection Bill 2007 should provide that the court may give leave to apply for a personal protection order to a child who is an aggrieved person for the order, or to an authorised person for the child. The court may give leave to apply to the child, or an authorised person for the child, only if the court is satisfied the child has the capacity to understand the nature and consequences of a personal protection order.⁵⁷⁰

See Personal Protection Bill 2007 cl 14(1)(b)(ii), 15(3), (4).

Applications by police

- 6-7 The Personal Protection Bill 2007 should provide that a police officer may apply for a personal protection order for an aggrieved person.⁵⁷¹

⁵⁶⁹ See para 6.77 of this Report.

⁵⁷⁰ See para 6.107 of this Report.

⁵⁷¹ See para 6.125 of this Report.

See Personal Protection Bill 2007 cl 14(1)(c).

- 6-8 The Personal Protection Bill 2007 should provide that a police officer must apply for a personal protection order against a person if the police officer reasonably believes that:⁵⁷²
- (a) there is an unacceptable risk that the person will:
 - (i) endanger the safety of an aggrieved person for the order, or a relative or associate of the aggrieved person; or
 - (ii) cause substantial damage to property of an aggrieved person for the order, or a relative or associate of the aggrieved person; and
 - (b) no other person is willing and able to apply for the order.

See Personal Protection Bill 2007 cl 24.

Applications by some other person with the leave of the court

- 6-9 The Personal Protection Bill 2007 should include a ‘catch-all’ provision to the effect that any person, other than those specified, may apply to the court for leave to make an application for a personal protection order for an aggrieved person.⁵⁷³

See Personal Protection Bill 2007 cl 14(1)(a)(iv), 15(1), (2).

Joint applications

- 6-10 The Personal Protection Bill 2007 should provide that an application for a personal protection order may be made by one or more applicants and for one or more aggrieved persons.⁵⁷⁴

See Personal Protection Bill 2007 cl 14(4).

⁵⁷² See para 6.126 of this Report.

⁵⁷³ See para 6.134 of this Report.

⁵⁷⁴ See para 6.142 of this Report.

Chapter 7

Conditions of a personal protection order

INTRODUCTION	143
THE GENERALITY OF THE CURRENT ORDER	143
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	143
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	144
The position in other jurisdictions.....	144
Submissions	144
The Commission's view	145
A STANDARD CONDITION	146
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	146
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	146
The position in other jurisdictions.....	146
Submissions	147
The Commission's view	148
DISCRETIONARY CONDITIONS	148
Conditions required to be necessary and appropriate	148
Specific conditions	149
Restricting access to premises	156
Factors to consider when imposing discretionary conditions.....	159
Conditions sought by the applicant	160
Conditions agreed to by the parties	161
Special conditions relating to weapons.....	162
The position in other jurisdictions.....	166
RECOMMENDATIONS	174

INTRODUCTION

7.1 The terms of reference require the Commission to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an ‘effective mechanism for protection of the community from breaches of the peace’.⁵⁷⁵ A relevant issue in considering this matter is the nature of the conditions that the court is able to include when it makes an order.

7.2 The effectiveness of a protection order will depend, in part, on the extent to which it is possible to prevent the respondent to the order from engaging in particular conduct towards a person protected by the order. This is sought to be achieved by the inclusion in an order of conditions prohibiting the respondent from engaging in prohibited or other conduct towards a person protected by the order or in relation to that person’s property.

7.3 In this chapter, the Commission considers the imposition on a personal protection order of a standard condition prohibiting personal violence and specific conditions which may be imposed at the court’s discretion. In relation to specific conditions, it considers when the court may impose a specific condition and what factors the court must take into account when doing so, examples of specific conditions that can be imposed, conditions restricting access to premises, conditions sought by the applicant or agreed by the parties and conditions relating to weapons.

THE GENERALITY OF THE CURRENT ORDER

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

7.4 The *Peace and Good Behaviour Act 1982* (Qld) does not specify any particular limitations or restrictions that a court may include in a peace and good behaviour order.

7.5 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,’⁵⁷⁶ and that the order may contain ‘such other stipulations or conditions’ as the court considers appropriate.⁵⁷⁷

7.6 The generality of the existing provision for making an order under the *Peace and Good Behaviour Act 1982* (Qld) allows the court flexibility in making an order. However, the absence of a list of possible specified conditions that may be imposed when an order is made under the Act raises other issues.

⁵⁷⁵ The terms of reference are set out in Appendix 1 to this Report.

⁵⁷⁶ *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

⁵⁷⁷ *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

7.7 The more generally an order is expressed, the more difficult it will be for the person protected by the order to demonstrate that a respondent is in breach of the order and to have the order enforced. It will also be more difficult for a respondent 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 breaching the order.

7.8 The lack of guidance to the court in imposing conditions may also lead to different approaches to the making of orders.

The Domestic and Family Violence Protection Act 1989 (Qld)

7.9 In marked contrast to the *Peace and Good Behaviour Act 1982* (Qld), the *Domestic and Family Violence Protection Act 1989* (Qld) gives more detailed guidance to the court in fashioning the terms of an order. The Act provides for the inclusion of both standard and discretionary conditions in a domestic violence order.⁵⁷⁸

The position in other jurisdictions

7.10 The civil restraining order legislation in most other Australian jurisdictions also enables the court to include specific restrictions and conditions in an order.⁵⁷⁹ The ACT and New South Wales legislation provides for the inclusion of both standard and discretionary conditions in an order while the legislation in the other jurisdictions enables the court to impose discretionary conditions.⁵⁸⁰

Submissions

7.11 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should be amended to

⁵⁷⁸ *Domestic and Family Violence Protection Act 1989* (Qld) ss 22, 25, 26.

⁵⁷⁹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 42; *Crimes Act 1900* (NSW) ss 562ZD–562ZF; *Justices Act* (NT) s 89, as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) s 99(3)–(4); *Justices Act 1959* (Tas) s 106B(4B), (5A), (7); *Crimes (Family Violence) Act 1987* (Vic) ss 4(2), 5; *Restraining Orders Act 1997* (WA) ss 13, 14, 36.

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Sections 562ZD–562ZF of the *Crimes Act 1900* (NSW) are substantially replicated in ss 35–37 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Section 89 of the *Justices Act* (NT) is a new provision. The *Domestic and Family Violence Act* (NT) repeals pt IV div 7 of the *Justices Act* (NT) introducing a new pt IVA. The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed. In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

⁵⁸⁰ See para 7.22–7.24 of this Report.

provide for specific conditions to be included in a peace and good behaviour order.⁵⁸¹

7.12 The Commission received a number of submissions in relation to this issue.⁵⁸² Each of these submissions expressed support for such an amendment.⁵⁸³

7.13 A number of submissions considered that there are various advantages in making provision in the Act for the inclusion of possible specific conditions in an order. By describing the specific behaviour prohibited under an order, it would help the parties to understand what types of behaviour are captured by the order.⁵⁸⁴ In addition, the inclusion of specific conditions would make it easier to prove a breach of the order.⁵⁸⁵

7.14 Both the Women's Legal Service and Caxton Legal Centre Inc suggested it would be useful to include information about conditions that can be imposed on an order in the application form or other documentation provided when an application is filed.⁵⁸⁶ For example, the Caxton Legal Centre Inc observed:⁵⁸⁷

Many self-represented litigants will not be equipped to draft their own orders and it may be helpful to both applicants and the court if applicants are specifically advised about the types of orders which are available.

The Commission's view

7.15 The Commission generally considers that the imposition on a personal protection order of standard and discretionary conditions prohibiting the respondent from engaging in certain activities would increase the effectiveness of the order.

7.16 The Commission also considers that the inclusion of a list of conditions in the Personal Protection Bill 2007 for the court to consider would result in greater certainty for both the applicant and respondent, and in greater consistency in the determination of applications. Clarity in the conditions of an order may also assist police in the conduct of their duties in relation to matters under the proposed Personal Protection Bill 2007.

581 Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 91 (Question 8-1).

582 Submissions 5, 6, 6A, 8, 12A, 14, 15, 19, 20, 26, 27.

583 Ibid.

584 Submissions 6, 12A, 14, 20, 27.

585 Submissions 12A, 14, 19.

586 Submissions 8, 19.

587 Submission 19.

7.17 The imposition of specific conditions on personal protection orders is considered in the following sections of this chapter.

7.18 The Commission is also of the view that the application form for a personal protection order should specify the types of specific conditions that may be imposed on a respondent. This would inform applicants, particularly unrepresented applicants, about the types of conditions that can be made in an order.

A STANDARD CONDITION

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

7.19 As noted earlier in this chapter, the *Peace and Good Behaviour Act 1982* (Qld) empowers the Court to make an order in general terms that ‘the defendant shall keep the peace and be of good behaviour for such time, specified in the order, as the Court thinks fit’.⁵⁸⁸

The *Domestic and Family Violence Protection Act 1989* (Qld)

7.20 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that, if a court makes a domestic violence order, the court must impose a condition that the respondent:

- be of good behaviour towards the aggrieved and not commit domestic violence; and
- be of good behaviour towards a named person in the order and not commit an act of associated domestic violence against the person.⁵⁸⁹

7.21 If a court does not include these standard conditions in the order, the order is taken to include the conditions.⁵⁹⁰

The position in other jurisdictions

7.22 In the ACT, the legislation specifies that a personal protection order restrains the respondent from engaging in conduct that constitutes personal violence toward the aggrieved person.⁵⁹¹

⁵⁸⁸ See para 7.5 of this Report.

⁵⁸⁹ *Domestic and Family Violence Protection Act 1989* (Qld) ss 17, 22. An act of ‘associated domestic violence’ is an act, or threatened act, of wilful injury, wilful damage to the property of a relative or associate of the aggrieved or intimidation or harassment: *Domestic and Family Violence Protection Act 1989* (Qld) ss 3, sch (definition of ‘associated domestic violence’), 21(1).

⁵⁹⁰ *Domestic and Family Violence Protection Act 1989* (Qld) s 25(1).

⁵⁹¹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 20(3).

7.23 In New South Wales, the civil restraining order legislation provides that an apprehended violence order is taken to specify that the defendant is prohibited from engaging in particular conduct, including conduct that intimidates the protected person or a person with whom he or she has a domestic relationship, and from stalking the protected person.⁵⁹²

7.24 In the other Australian jurisdictions, however, no standard condition is provided for. Rather, the court is given a broad power to impose such restraints on the respondent as it considers necessary or desirable to prevent the occurrence of particular behaviour.⁵⁹³

Submissions

7.25 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should make provision for the automatic imposition of a standard condition on a peace and good behaviour order.⁵⁹⁴

7.26 The Commission received a number of submissions in relation to this issue. The majority of these submissions supported the imposition of a standard condition to the effect that a person against whom an order is made must keep the peace and be of good behaviour (or some other wording to prohibit the requisite behaviour).⁵⁹⁵

7.27 One Queensland magistrate also commented that the terminology used in the current form of a peace and good behaviour order requiring the person against whom the order is made to ‘keep the peace and be of good behaviour’ is ‘vague’ and considered by many to be ‘archaic’.⁵⁹⁶

7.28 Those submissions that favoured the imposition of a standard condition on a peace and good behaviour order generally did not consider it should be within the court’s discretion to order that a standard condition does not apply.⁵⁹⁷ However, Legal Aid Queensland considered that, in the absence of ‘special

⁵⁹² *Crimes Act 1900* (NSW) s 562ZE. This provision is replicated in s 36 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 579 of this Report.

⁵⁹³ *Justices Act* (NT) s 89, as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) s 99(3); *Justices Act 1959* (Tas) s 106B(1); *Crimes (Family Violence) Act 1987* (Vic) s 4(2); *Restraining Orders Act 1997* (WA) ss 13(1), 36(1). As to the application of the legislation in the Northern Territory and Victoria, see note 579 of this Report.

⁵⁹⁴ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 91 (Question 8-3).

⁵⁹⁵ Submissions 5, 8, 12B, 13, 14, 15.

⁵⁹⁶ Submission 12B.

⁵⁹⁷ Submissions 5, 8, 14, 15.

'circumstances', standard conditions generally should be included in an order, but did not elaborate on what might constitute such circumstances.⁵⁹⁸

The Commission's view

7.29 The Commission considers that the Personal Protection Bill 2007 should provide that it is a condition of a personal protection order that a respondent for the order must not commit 'personal violence'⁵⁹⁹ against a person protected by the order. This is generally similar to the standard condition provided for in the domestic violence legislation.

7.30 The imposition of a standard condition on a personal protection order would have several advantages. It would prohibit a respondent from engaging in behaviour that constitutes grounds for a personal protection order, including behaviour of a different type to the behaviour on which the order was sought, in relation to the particular aggrieved person and any named person for the order. A standard condition would also be expressed in contemporary language in contrast to the archaic and vague language presently used in the *Peace and Good Behaviour Act 1982* (Qld). It would also encourage consistency of orders generally and with orders made under the *Domestic and Family Violence Protection Act 1989* (Qld).

DISCRETIONARY CONDITIONS

Conditions required to be necessary and appropriate

The Peace and Good Behaviour Act 1982 (Qld)

7.31 In addition to the stipulation that the court may order 'that the defendant shall keep the peace and be of good behaviour',⁶⁰⁰ the *Peace and Good Behaviour Act 1982* (Qld) empowers the court to make 'such other stipulations or conditions' in the order as the court considers appropriate.⁶⁰¹

The Domestic and Family Violence Protection Act 1989 (Qld)

7.32 When a court makes or varies a domestic violence order, it may also impose conditions on the respondent that the court considers:

- necessary in the circumstances; and

⁵⁹⁸ Submission 13.

⁵⁹⁹ See Chapter 5 of this Report for what constitutes 'personal violence' being the grounds for making a personal protection order.

⁶⁰⁰ *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

⁶⁰¹ *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

- desirable in the interests of the aggrieved, any named person in the order and the respondent.⁶⁰²

The position in other jurisdictions

7.33 In the ACT, New South Wales, the Northern Territory, South Australia, Tasmania and Victoria, the court has the general power to impose the conditions or prohibitions it considers necessary or desirable in the circumstances.⁶⁰³

7.34 For example, in Tasmania, the court may impose 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.⁶⁰⁴

7.35 In Western Australia, the court may impose such restraints in any order as it considers appropriate to prevent the respondent engaging in particular behaviour.⁶⁰⁵

The Commission's view

7.36 The Commission considers that the court should have discretion to impose the conditions on a personal protection order the court considers necessary and appropriate in the circumstances. This should apply when the court makes or varies a personal protection order. A provision to this effect should be included in the Personal Protection Bill 2007.

Specific conditions

The Peace and Good Behaviour Act 1982 (Qld)

7.37 The *Peace and Good Behaviour Act 1982 (Qld)* gives the court a broad discretion to make other stipulations and conditions in addition to the standard orders.⁶⁰⁶

⁶⁰² *Domestic and Family Violence Protection Act 1989 (Qld)* s 25(2).

⁶⁰³ *Domestic Violence and Protection Orders Act 2001 (ACT)* s 42(1); *Crimes Act 1900 (NSW)* s 562ZD(1); *Justices Act (NT)* s 89, as amended by the *Domestic and Family Violence Act (NT)*; *Summary Procedure Act 1921 (SA)* s 99(3); *Justices Act 1959 (Tas)* s 106B(1); *Crimes (Family Violence) Act 1987 (Vic)* s 4(2). Section 562ZD(1) of the *Crimes Act 1900 (NSW)* is replicated in s 35(1) of the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*. Section 89 of the *Justices Act (NT)* is a new provision. As to the application of the legislation in New South Wales, the Northern Territory and Victoria, see note 579 of this Report.

⁶⁰⁴ *Justices Act 1959 (Tas)* s 106B(1).

⁶⁰⁵ *Restraining Orders Act 1997 (WA)* ss 13(1), 36(1).

⁶⁰⁶ *Peace and Good Behaviour Act 1982 (Qld)* s 6(4).

The Domestic and Family Violence Protection Act 1989 (Qld)

7.38 As mentioned earlier in this chapter, the *Domestic and Family Violence Protection Act 1989 (Qld)* provides that a domestic violence order requires that the respondent must be of good behaviour and must not commit acts of domestic violence or associated domestic violence.⁶⁰⁷

7.39 The respondent must also comply with any other conditions stated in the order.⁶⁰⁸

7.40 Examples of the specific conditions the court may impose on a respondent to a domestic violence order include conditions:⁶⁰⁹

- prohibiting stated behaviour of the respondent against the persons protected by the order;
- prohibiting the respondent from remaining at premises, entering or attempting to enter premises, or approaching within a stated distance of premises even though the respondent has a legal or equitable interest in the premises;⁶¹⁰
- prohibiting the respondent from approaching, or attempting to approach, a person protected by the order, including stating in the order a distance within which an approach is prohibited;
- prohibiting contact, or attempted contact, with a person protected by the order; and
- prohibiting the location, or attempted location, of a person protected by the order if that person's whereabouts are not known to the respondent.

7.41 A condition that prohibits a respondent from asking someone else to contact or to locate a person protected by the order does not prohibit the respondent from asking:⁶¹¹

- someone else who is a lawyer to contact the person; or
- someone else, including a lawyer, to locate the person for a purpose authorised by an Act.

⁶⁰⁷ See para 7.20–7.21 of this Report.

⁶⁰⁸ *Domestic and Family Violence Protection Act 1989 (Qld)* ss 17(b), 25(2).

⁶⁰⁹ *Domestic and Family Violence Protection Act 1989 (Qld)* s 25(3)(a)–(e).

⁶¹⁰ This is referred to as an 'ouster' condition. See para 7.73–7.74 of this Report.

⁶¹¹ *Domestic and Family Violence Protection Act 1989 (Qld)* s 25(7).

7.42 The meaning of ‘premises’ is defined in section 6 of the *Domestic and Family Violence Protection Act 1989* (Qld) to include an area of land, a building or structure (including a dwelling house), a vehicle, a vessel, an aircraft or a caravan as follows:

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

- (a) an area of land (including a road within the meaning of the *Transport Operations (Road Use Management) Act 1995*);
- (b) a building or structure (whether movable or immovable), including a dwelling house;
- (c) a vehicle, vessel or aircraft;
- (d) a caravan or trailer.

7.43 The meaning of ‘property’ is defined in section 7 of the *Domestic and Family Violence Protection Act 1989* (Qld) as follows:

Property, of a person, means property that—

- (a) the person owns; or
- (b) the person does not own, but—
 - (i) is used and enjoyed by the person; or
 - (ii) is available for the person’s use or enjoyment; or
 - (iii) is in the person’s care or custody; or
 - (iv) is at the premises at which the person is residing.

The position in other jurisdictions

7.44 Most other jurisdictions that have civil restraining order legislation confer on the court a broad discretion to determine what conditions should be imposed in any particular case. Different jurisdictions include different examples of specific conditions in their legislation.

7.45 While many of the specific conditions are similar in effect to those contained in the Queensland domestic violence legislation, there are also some additional conditions. Examples of conditions and restrictions that are included in the civil restraining order legislation in these jurisdictions are the power to:

- prohibit the respondent from damaging the aggrieved person's property⁶¹² or property in the possession of the person seeking to be protected;⁶¹³
- prohibit the respondent from taking possession of, or require the return of, particular property of the aggrieved person;⁶¹⁴
- prohibit the respondent from causing another person to engage in any conduct restrained by the order;⁶¹⁵ and
- state the conditions on which the respondent may:⁶¹⁶
 - be on particular premises;
 - be in a particular place; or
 - approach or contact a particular person.

Submissions

7.46 In its Discussion Paper, the Commission sought submissions on the types of conditions that should be provided in the *Peace and Good Behaviour Act 1982* (Qld) for imposition on an order.⁶¹⁷

7.47 All of the submissions that addressed this issue considered that similar conditions to those provided under the *Domestic and Family Violence Protection Act 1989* (Qld) should be included in the *Peace and Good Behaviour Act 1982* (Qld).⁶¹⁸

7.48 The Chief Magistrate of Queensland considered the *Peace and Good Behaviour Act 1982* (Qld) should include specific conditions that can be made in an order so that the court can make orders 'prohibiting the defendant from approaching or having contact with the complainant etc rather than the vague terms of the current order'.⁶¹⁹

⁶¹² *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(2)(g); *Crimes (Family Violence) Act 1987* (Vic) s 5(1)(e).

⁶¹³ *Restraining Orders Act 1997* (WA) s 36(1)(b).

⁶¹⁴ *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(2)(a), (3).

⁶¹⁵ *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(2)(i); *Crimes (Family Violence) Act 1987* (Vic) s 5(1)(f); *Restraining Orders Act 1997* (WA) ss 13(2)(f), 36(2)(g). For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 579 of this Report.

⁶¹⁶ *Domestic Violence and Protection Orders Act 2001* (ACT) s 42(2)(j).

⁶¹⁷ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 91 (Question 8-2).

⁶¹⁸ Submissions 5, 6, 8, 14, 15, 19, 26.

⁶¹⁹ Submission 12C.

The Commission's view

The general approach to the inclusion of examples of specific conditions

7.49 The Commission considers the Personal Protection Bill 2007 should include a list of examples of specific conditions that the court may impose on a personal protection order. This would assist the court in fashioning an order to accommodate the circumstances of the parties and would also provide greater consistency and clarity in the making of orders. Identifying particular types of behaviour that are prohibited may also increase the effectiveness of a personal protection order. It might also help to prevent the occurrence of accidental or technical breaches.

7.50 This section of the chapter considers examples of specific conditions for personal protection orders. Chapter 8 deals with examples of specific conditions that may be imposed in workplace protection orders.

Specific conditions based on the scheme under the Domestic and Family Violence Protection Act 1989 (Qld)

7.51 In the Commission's view, the list of specific conditions the court may impose in a personal protection order should include conditions generally similar to some of those set out in the *Domestic and Family Violence Protection Act 1989* (Qld).

7.52 The Commission considers the list of specific conditions set out in the Personal Protection Bill 2007 should include conditions that are generally similar to those included in section 25(3)(a)–(e) of the *Domestic and Family Violence Protection Act 1989* (Qld), described in paragraph 7.40 of this chapter.

7.53 These conditions restrain the respondent from committing personal violence by restricting particular conduct of the respondent. The Commission considers it would generally be appropriate to include similar examples in the proposed Personal Protection Bill 2007, particularly given the Commission's recommendations that the grounds for a personal protection order should be generally similar to the grounds for a domestic violence order.⁶²⁰

7.54 In particular, the Commission considers the inclusion of a condition prohibiting stated behaviour of the respondent against the person/s protected by the order is likely to assist the respondent to abide by the terms of the order. It would also supplement the standard condition of each order that the respondent must not commit personal violence against a person protected by the order.⁶²¹

⁶²⁰ See para 5.41, 5.66, 5.81, 5.110, 5.113 of this Report.

⁶²¹ See para 7.29 of this Report.

7.55 Further, as a means of assisting the parties to a personal protection order to identify the kinds of behaviour covered by the order, the Commission considers it would be useful for a description of the kinds of conduct which would constitute personal violence to be included in the body of the order.

7.56 The Commission also considers the inclusion of conditions prohibiting the respondent from approaching, contacting, locating, or attempting to approach, contact or locate, a person protected by the order would minimise the possibility of physical interaction or contact between the respondent and a person protected by the order.

7.57 The Commission acknowledges that domestic violence disputes and other types of personal disputes occur in different contexts. For this reason, the Commission has proposed to include in the Bill a variation of the ouster condition, restraining access to premises, contained in section 25(3)(b) of the *Domestic and Family Violence Protection Act 1989* (Qld).⁶²² The proposed provision is discussed at paragraphs 7.73 to 7.85 of this chapter.

7.58 In addition, the Commission considers the Personal Protection Bill 2007 should include, as an example of a condition that may be imposed in a personal protection order, a condition to prohibit the respondent from causing someone else to engage in conduct prohibited under the order, including asking someone else to contact or locate a person protected by the order. This is similar to the provision in section 25(3)(d)–(e) of the *Domestic and Family Violence Protection Act 1989* (Qld). This would circumvent the possibility that the respondent could avoid prosecution for breach even though he or she caused someone else to commit further unwanted behaviour against a person protected by an order.

7.59 The Commission also considers that the Personal Protection Bill 2007 should include a provision similar in effect to section 25(7) of the *Domestic and Family Violence Protection Act 1989* (Qld), as described in paragraph 7.41 of this chapter. The Commission is of the view that even when the court has imposed a condition in an order that prohibits a respondent from asking someone else to contact or to locate a person protected by the order, the respondent should be able to ask a lawyer to contact an aggrieved or a named person, or someone else (including a lawyer) to locate an aggrieved or named person for a purpose authorised by an Act.⁶²³

7.60 This would enable a respondent to use an appropriate intermediary to locate a person protected by the order. For example, the respondent's lawyer might locate an aggrieved person protected by an order for the purpose of satisfying procedural requirements related to legal proceedings between the respondent and the aggrieved person.

⁶²² See para 7.40 of this Report.

⁶²³ See *Domestic and Family Violence Protection Act 1989* (Qld) s 25(7).

7.61 The Commission therefore recommends the inclusion of a provision in the Personal Protection Bill 2007 to the effect that a condition in a personal protection order that prohibits a respondent from asking someone else to contact or locate a person protected by the order does not prohibit the respondent from asking a lawyer acting for the respondent to contact a person protected by the order, or from asking someone else to locate a person protected by the order for a purpose authorised by an Act.

Other examples of specific conditions

7.62 The Commission also considers that, in addition to the examples of specific conditions based on the *Domestic and Family Violence Protection Act 1989* (Qld) noted above, the Personal Protection Bill 2007 should include further examples of specific conditions that may be imposed in a personal protection order.

7.63 The Commission considers that the proposed Bill should include as an example of a specific condition, a condition to prohibit stated behaviour of the respondent against the property of a person protected by the order.

7.64 The Commission notes that section 7 of the *Domestic and Family Violence Protection Act 1989* (Qld) broadly defines 'property' to mean property of a person that the person owns or does not own, but is used and enjoyed by the person, or is available for the person's use or enjoyment, or is in the person's care or custody, or is at the premises at which the person is residing.⁶²⁴

7.65 In the Commission's view, the Personal Protection Bill 2007 should include a definition of 'property' similar in effect to the definition contained in section 7 of the *Domestic and Family Violence Protection Act 1989* (Qld). This would clarify the meaning of property in the context of the operation of an order.

7.66 The Commission also considers that the Personal Protection Bill 2007 should include as an example of a specific condition, a condition stating the conditions on which the respondent may be on particular premises or at a particular place, or may approach or contact a person protected by the order. This approach is taken in the ACT legislation.⁶²⁵

7.67 The availability of such an example may assist the court when crafting conditions that are 'necessary and appropriate' in the circumstances. It might also help the parties to an order to crystallise any issues about the practical operation of the order.

⁶²⁴ See para 7.43 of this Report.

⁶²⁵ See para 7.45 of this Report.

7.68 The Commission is of the view that the Personal Protection Bill 2007 should also provide for conditions related to the return or recovery of, or access to, property. In some circumstances, one party to an order may possess property belonging to another of the parties. This might occur, for example, where the respondent moves out of accommodation shared with the person protected by the order and leaves behind his or her property or takes the other person's property. The Commission therefore considers that a provision should be included in the proposed Bill specifying that, despite another condition in the order, the court may impose a condition to allow the respondent to enter particular premises to recover his or her property or to return property of a person protected by the order.

7.69 The Commission also considers that a provision should be included in the Bill to the effect that, if the court imposes a condition in a personal protection order prohibiting a respondent from entering particular premises, the court must consider including in the order another condition to allow the respondent to go on to the stated premises to recover or return property.

7.70 Finally, the Commission considers that, if a court decides to impose a condition on a personal protection order allowing a respondent to recover or return property, the court may also impose the conditions it considers appropriate to control the way the respondent recovers or returns property. Such conditions may include, for example, a requirement for police or other supervision or specifying the time for the recovery or return of property.⁶²⁶

7.71 The Commission also notes that the provisions allowing the court to impose conditions about the recovery or return of property are not intended to require or empower the court to determine title to property.

Restricting access to premises

The Peace and Good Behaviour Act 1982 (Qld)

7.72 The *Peace and Good Behaviour Act 1982 (Qld)* makes no specific reference to a condition restricting a respondent's access to premises.⁶²⁷

The Domestic and Family Violence Protection Act 1989 (Qld)

7.73 As noted above in paragraph 7.40, when making a domestic violence order, the court may impose a condition prohibiting the respondent from remaining at, entering or attempting to enter, or approaching within a stated distance of premises, even though the respondent has a legal or equitable interest in the premises.⁶²⁸ The premises that may be stated in such an order

⁶²⁶ See also para 7.85 of this Report.

⁶²⁷ The court is given power to make 'stipulations or conditions' as it thinks fit: *Peace and Good Behaviour Act 1982 (Qld)* s 6(4).

⁶²⁸ *Domestic and Family Violence Protection Act 1989 (Qld)* s 25(3)(b).

include premises where the aggrieved and the respondent live together, or previously lived together, and premises where the aggrieved or a named person resides, works or frequents.⁶²⁹

7.74 This type of condition is known under the *Domestic and Family Violence Protection Act 1989* (Qld) as an 'ouster condition'.⁶³⁰

7.75 When imposing an ouster condition, the court must consider including in the order another condition to enable the respondent to remain at or return to the premises under controlled conditions to collect his or her property.⁶³¹

7.76 Australian research indicates that people who experience family violence must often leave their homes in order to escape the violence.⁶³² An ouster condition allows the person protected by an order to remain in his or her own home even though the respondent has a legal or equitable interest (as an owner or a tenant) in the premises.⁶³³

7.77 In addition, the *Residential Tenancies Act 1994* (Qld) has provisions to assist co-tenants, spouses of tenants, and persons not named on a residential tenancy lease in violent situations. However, that Act generally does not apply to certain tenancy agreements, including where the tenant is a boarder or a lodger or is supplied with temporary refuge accommodation.⁶³⁴

7.78 People who suffer domestic violence, injury or damage to the premises while living in rental accommodation can take action under the *Residential Tenancies Act 1994* (Qld) to remove the violent person from the premises regardless of the person's status on the tenancy agreement.⁶³⁵ This can be done by making an application under that Act to obtain an order from the Small

629 *Domestic and Family Violence Protection Act 1989* (Qld) s 25A(2).

630 *Domestic and Family Violence Protection Act 1989* (Qld) s 3, sch (definition of 'ouster condition'). Ouster orders are also known as 'exclusion orders' or 'sole use and occupation orders': See *Butterworths Encyclopaedic Australian Legal Dictionary* (definition of 'exclusion order') at 29 January 2008.

631 *Domestic and Family Violence Protection Act 1989* (Qld) s 25A(3), (4).

632 D Chung et al, *Home Safe Home: The Link between Domestic and Family Violence and Women's Homelessness* (November 2000) 46–7.

633 Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006) 317–20. A survey in 2000 of Queensland magistrates' attitudes to domestic violence indicated that magistrates are reluctant to issue ouster orders except in cases of severe physical violence: R Field and B Carpenter, 'Issues Relating to Queensland Magistrates Understandings of Domestic Violence' (Paper presented at The Domestic Violence Court Assistance Network Conference, 17–19 June 2003).

634 The *Residential Tenancies Act 1994* (Qld) also generally does not apply to an agreement if the tenant is subject to an agreement under the *Manufactured Homes (Residential Parks) Act 2003* (Qld) or certain other tenancy agreements: *Residential Tenancies Act 1994* (Qld) ss 10(3), 20A–27. Section 16(1) of the Act provides that the Act does not apply to a lease if the State is a lessor and the lease is granted under the authority of an authorising law (including the *Housing Act 2003* (Qld)). However, by virtue of s 16(2), the Act applies to a residential tenancy agreement under which the tenant under the headlease lets the premises to a person whose right of occupancy arises under an affordable housing scheme.

635 *Residential Tenancies Act 1994* (Qld) ss 150, 150A, 169, 183, 184, 188, 189.

Claims Tribunal⁶³⁶ to replace a tenant on the tenancy agreement or to terminate the agreement.⁶³⁷ Where an urgent application is made by a co-tenant or occupant for the termination of the tenancy agreement on the basis that a tenant named on the agreement has caused, or is likely to cause, serious damage to the premises or injury to the co-tenant, or another person on the premises, the applicant can also apply to the Tribunal for an interim restraining order against the tenant.⁶³⁸

7.79 The Magistrates Court, in an application for a domestic violence order, can also make an order about the tenancy if the parties are entitled to apply for such an order under the *Residential Tenancies Act 1994* (Qld).⁶³⁹ Further, section 62A of the *Domestic and Family Violence Protection Act 1989* (Qld) provides, among other things, that the procedures applicable to a tenancy application, made on an application for a protection order or an application made in relation to an existing protection order, are the procedures under the *Small Claims Tribunals Act 1973* (Qld).

7.80 The availability of an ouster condition in an order made under the *Domestic and Family Violence Protection Act 1989* (Qld) or an order about a tenancy made under the *Residential Tenancies Act 1994* (Qld) is limited to situations which fall within the scope of those Acts.

The position in other jurisdictions

7.81 The civil restraining order legislation in New South Wales, South Australia, Tasmania and Western Australia provides that the court can specifically restrain the respondent from accessing premises whether or not the person has a legal or equitable interest in the premises.⁶⁴⁰

The Commission's view

7.82 The Commission considers that the Personal Protection Bill 2007 should provide, as an example of one of the specific conditions that may be imposed in a personal protection order made under the Bill, that the court can specifically restrain the respondent from remaining at, entering or attempting to enter, or approaching within a stated distance of particular premises, even if the person has a legal or equitable interest in the premises.

636 The *Small Claims Tribunals Act 1973* (Qld) empowers the Small Claims Tribunal to make an order about a tenancy application made under the *Residential Tenancies Act 1994* (Qld): *Small Claims Tribunals Act 1973* (Qld) s 16(1)(d).

637 See note 634 of this Report.

638 *Residential Tenancies Act 1994* (Qld) s 190.

639 *Domestic and Family Violence Protection Act 1989* (Qld) s 38(4), (5).

640 *Crimes Act 1900* (NSW) s 562ZD(2)(b); *Summary Procedure Act 1921* (SA) s 99(4); *Justices Act 1959* (Tas) s 106B(4B)(a); *Restraining Orders Act 1997* (WA) ss 13(4), 36(5). Section 562ZD(2)(b) of the *Crimes Act 1900* (NSW) is replicated in s 35(2)(b) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 579 of this Report.

7.83 Personal disputes may arise in a broad range of situations and contexts, including between people residing at shared premises in respect of which neither of them, or only one of them, has a legal or equitable interest. For this reason, the Commission considers the specific condition should be expressed to apply ‘even if the person has a legal or equitable interest in the premises’.

7.84 For the sake of clarity in the application of this provision, the Commission considers that the Personal Protection Bill 2007 should include a definition of ‘premises’ similar in effect to section 6 of the *Domestic and Family Violence Protection Act 1989* (Qld).⁶⁴¹

7.85 As mentioned in paragraph 7.69, the Commission considers that a provision should be included in the Personal Protection Bill 2007 to the effect that, when imposing a restraint on the access of a respondent to specified premises, the court must consider including in the order another condition to enable the respondent to return to the premises to recover his or her property or to return property. The Bill should also provide that, when such a condition is imposed, the court may also impose the conditions it considers appropriate to control the way the respondent recovers or returns property. This might include, for example, requiring police or other supervision.

7.86 The Commission has recommended elsewhere in this Report that the Personal Protection Bill 2007 should provide that a court, on an application for a personal protection order, or an application made in relation to an existing personal protection order, has jurisdiction to deal with a tenancy application made under the *Residential Tenancies Act 1994* (Qld) and that the procedures under the *Small Claims Tribunals Act 1973* (Qld) apply to the hearing of a tenancy application by the court.⁶⁴²

Factors to consider when imposing discretionary conditions

The Peace and Good Behaviour Act 1982 (Qld)

7.87 The *Peace and Good Behaviour Act 1982* (Qld) empowers the court to include in an order ‘such other stipulations or conditions as the Court thinks fit’.⁶⁴³ It does not require the court to take any specific factors into account when exercising its discretion to impose a stipulation or condition.

⁶⁴¹ See para 7.42 of this Report.

⁶⁴² See para 20.159 of this Report.

⁶⁴³ *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

The Domestic and Family Violence Protection Act 1989 (Qld)

7.88 The *Domestic and Family Violence Protection Act 1989* (Qld) directs the court, when it imposes conditions on a respondent to an order, to take certain matters into consideration. The court must give paramount importance to the need to protect the aggrieved and any other person sought to be protected by the order, and the welfare of any child of the aggrieved.⁶⁴⁴ The court ‘may’ also consider the accommodation needs of all persons affected by the proceedings, the order’s effect on any child of the aggrieved, and existing orders relating to guardianship or custody of, or access to, a child of the aggrieved.⁶⁴⁵

The Commission’s view

7.89 The Commission considers that the Personal Protection Bill 2007 should include a provision, generally modelled on section 25(5) of the *Domestic and Family Violence Protection Act 1989* (Qld), to the effect that, in deciding whether to impose specific conditions in a personal protection order, the need to protect each person protected by the order must be of paramount importance to the court.

Conditions sought by the applicant

7.90 In its Discussion Paper, the Commission sought submissions on whether a complainant for a peace and good behaviour order should be able to seek the inclusion of specific conditions in the order.⁶⁴⁶

Submissions

7.91 Four community legal services made submissions in relation to this issue, each considering that it should be possible for a complainant to request the court to include specific conditions catering for the complainant’s circumstances in an order.⁶⁴⁷ However, it was also considered by these submissions that the court should have discretion to refuse to include a condition sought by the complainant. The various circumstances in which this discretion could be exercised included where it is in the interests of justice to refuse to include a condition in the order,⁶⁴⁸ where the condition is

⁶⁴⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 25(5).

⁶⁴⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 25(6).

⁶⁴⁶ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 91 (Question 8-6).

⁶⁴⁷ Submissions 5, 8, 14, 15.

⁶⁴⁸ Submission 14.

unnecessary,⁶⁴⁹ and where the imposition of a condition would unfairly restrict the defendant in the normal course of day-to-day living.⁶⁵⁰

The Commission's view

7.92 Earlier in this Report, the Commission has recommended that the Personal Protection Bill 2007 should provide that the court has a general discretion to include specific conditions in a personal protection order that it considers necessary and appropriate in the circumstances.⁶⁵¹ Given this general discretion, it is unnecessary to make separate provision in the Bill for the inclusion of specific conditions sought by an applicant.

Conditions agreed to by the parties

7.93 In its Discussion Paper, the Commission sought submissions on whether the parties to an application should be able to agree to the conditions to be included in an order.⁶⁵²

Submissions

7.94 Various submissions on this issue considered that the parties to an application should be able to agree to the inclusion of specific conditions in an order, subject to the court being satisfied that the conditions agreed by the parties are necessary or desirable.⁶⁵³

7.95 The Women's Legal Service considered that the magistrate should be able to query the conditions agreed by the parties if they raise safety concerns.⁶⁵⁴

7.96 One submission opposed a provision allowing parties to agree to the conditions to be included in an order.⁶⁵⁵

The Commission's view

7.97 Earlier in this Report, the Commission has recommended that the Personal Protection Bill 2007 should provide that the court has a general discretion to include specific conditions in a personal protection order that it

649 Submission 8.

650 Submission 15.

651 See para 7.36 of this Report.

652 Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 91 (Question 8-8).

653 Submissions 5, 8, 12B, 15.

654 Submission 8.

655 Submission 14.

considers necessary and appropriate in the circumstances.⁶⁵⁶ Given this general discretion, it is unnecessary to provide in the Bill for the inclusion of specific conditions agreed to by the parties.

7.98 The Commission considers that parties to an application should be able to agree to the inclusion of specific conditions in a protection order. However, the Commission also considers the inclusion in an order of a condition agreed by the parties should be subject to the court being satisfied that the condition is necessary and appropriate in the circumstances.

7.99 The Commission considers this an appropriate safeguard given the possibility that the parties in protection order proceedings may often be self-represented and may require assistance in formulating effective conditions.

Special conditions relating to weapons

The Peace and Good Behaviour Act 1982 (Qld)

7.100 The *Peace and Good Behaviour Act 1982 (Qld)* does not impose any particular limitation on the availability or use of weapons by a respondent to a peace and good behaviour order.

7.101 However, the weapons legislation in Queensland provides that a person against whom a peace and good behaviour order is made must notify police of the order within 14 days.⁶⁵⁷ Action in relation to the person's weapons licence may then be taken under the *Weapons Act 1990 (Qld)*. This is discussed at paragraphs 7.115–7.117 below.

The Domestic and Family Violence Protection Act 1989 (Qld)

7.102 In response to concerns about the use of firearms in domestic violence disputes, and particularly domestic homicides involving the use of firearms, the *Domestic and Family Violence Protection Act 1989 (Qld)* was amended in 1992 to include a scheme for the regulation of the possession of weapons by respondents to domestic violence orders.⁶⁵⁸

7.103 Under this scheme, all domestic violence orders contained a standard condition prohibiting the respondent from possessing a weapon for the duration of the order.⁶⁵⁹ A court, when making a domestic violence order, was also required to make an order revoking or suspending (in the case of a temporary

⁶⁵⁶ See para 7.36 of this Report.

⁶⁵⁷ *Weapons Regulation 1996 (Qld)* s 14(b)(ii); *Weapons Act 1990 (Qld)* s 24(1), (2)(g).

⁶⁵⁸ *Domestic Violence (Family Protection) Amendment Act 1992 (Qld)* ss 7, 23–27. See also the Second Reading Speech of the Domestic Violence (Family Protection) Amendment Bill 1992 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 18 June 1992, 5933 (Hon Anne Warner, Minister for Family Services and Aboriginal and Islander Affairs).

⁶⁵⁹ *Domestic Violence (Family Protection) Act 1989 (Qld)*, reprinted as in force 28 May 1993, s 23(2).

order) all weapons licences issued in the name of the respondent.⁶⁶⁰ By virtue of amendments to the *Domestic and Family Violence Protection Act 1989* (Qld) in 2002, most of the provisions in that Act that dealt with weapons were transferred into the *Weapons Act 1990* (Qld).⁶⁶¹

7.104 If a person is named as a respondent in a domestic violence order, the *Weapons Act 1990* (Qld) applies to the person for the duration of the order.⁶⁶² This is despite any exemption that would otherwise apply under the latter Act.⁶⁶³

7.105 Before making a domestic violence order, the court is required to make inquiries about any weapons licence or weapons in the respondent's possession, and their relevance for employment purposes.⁶⁶⁴ The court, to the extent it considers reasonable, may include in an order information about any weapons licence or weapons in the respondent's possession and any weapons the respondent may access as part of the respondent's employment or because the *Weapons Act 1990* (Qld) has not applied to the person.⁶⁶⁵ The court may also include a statement that when the order is served on the person, the *Weapons Act 1990* (Qld) applies to the person despite any exemption that would otherwise apply under the latter Act.⁶⁶⁶

7.106 The *Domestic and Family Violence Protection Act 1989* (Qld) currently provides that, if the court is satisfied that the respondent has used, or threatened to use, a thing in committing an act of domestic violence or associated domestic violence, 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.⁶⁶⁷

7.107 A person possesses a weapon or thing if the person has it in his or her custody or control, has the ability to obtain its custody or has a claim to its custody.⁶⁶⁸

7.108 Examples of things that may be used as a weapon include an animal (including a pet), an antique firearm, crossbow or spear gun or a cricket or

⁶⁶⁰ *Domestic Violence (Family Protection) Act 1989* (Qld), reprinted as in force 28 May 1993, s 23(3)–(4)

⁶⁶¹ *Domestic Violence Legislation Amendment Act 2002* (Qld) ss 19–22, 45–52.

⁶⁶² *Domestic and Family Violence Protection Act 1989* (Qld) s 23(2).

⁶⁶³ *Domestic and Family Violence Protection Act 1989* (Qld) s 23(1); *Weapons Act 1990* (Qld) s 2. The *Weapons Act 1990* (Qld) does not apply to people who are employed in specified occupations (eg. police officers and members of the armed services) when exercising their duties of employment. This means that these employees do not need a weapons licence to possess weapons at work.

⁶⁶⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 24(1).

⁶⁶⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 24(2)(a), (c).

⁶⁶⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 24(2)(b).

⁶⁶⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 26(1), (2).

⁶⁶⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 5 (Meaning of possession).

baseball bat.⁶⁶⁹

7.109 If the respondent is prohibited from possessing the ‘thing’, then it is taken to be a weapon and may be dealt with under the *Domestic and Family Violence Protection Act 1989* (Qld) and the *Weapons Act 1990* (Qld) as a weapon for which there is no licence.⁶⁷⁰

7.110 To ensure that a police officer has as much information available as is possible when the officer exercises a power under an Act to obtain or seize a weapon, the *Domestic and Family Violence Protection Act 1989* (Qld) provides that in making a domestic violence order, the court must specify as much information as it can about the weapons that the respondent possesses.⁶⁷¹

The Weapons Act 1990 (Qld)

7.111 The *Weapons Act 1990* (Qld) and the *Weapons Regulation 1996* (Qld) regulate the licensing of firearms in Queensland.

7.112 One of the requirements for holding a weapons licence in Queensland is that the person is a fit and proper person.⁶⁷² An authorised officer must consider certain factors in deciding or considering, for the issue, renewal, suspension or revocation of a licence, whether a person is, or is no longer, a fit and proper person.⁶⁷³ These factors include the mental fitness of the person, whether a domestic violence order (including a temporary protection order) has been made against the person, whether there is any indication that the person is a risk to public safety or that authorising the person to possess a weapon would be contrary to the public interest, and the public interest.

7.113 A person is taken not to be a fit and proper person to hold a licence if, in Queensland or elsewhere during a defined period, the person has been convicted of one of various offences including an offence involving the use or threatened use of violence or the use, carriage, discharge or possession of a weapon; or has become the subject of a domestic violence order (other than a temporary protection order).⁶⁷⁴

⁶⁶⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 26(1).

⁶⁷⁰ *Domestic and Family Violence Protection Act 1989* (Qld) s 26(3). Under the *Weapons Act 1990* (Qld), it is an offence for a person to unlawfully possess a firearm without a licence: *Weapons Act 1990* (Qld) ss 49A, 50.

⁶⁷¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 29.

⁶⁷² *Weapons Act 1990* (Qld) s 10(2)(e).

⁶⁷³ *Weapons Act 1990* (Qld) s 10B(1).

⁶⁷⁴ *Weapons Act 1990* (Qld) s 10B(2).

7.114 A person is also taken not to be a fit and proper person to hold a licence if the person is prevented by a court order from holding a licence or possessing a weapon.⁶⁷⁵

Peace and good behaviour orders

7.115 As noted in paragraph 7.100 of this chapter, the *Peace and Good Behaviour Act 1982* (Qld) does not impose any particular limitation on the availability or the use of weapons for a respondent to a peace and good behaviour order.

7.116 However, one of the conditions of a weapons licence issued under the *Weapons Act 1900* (Qld) is that a licensee, within 14 days of a specified change in the licensee's circumstances, must notify an officer in charge of a police station of the change and deliver the licence to the officer.⁶⁷⁶ The making of a peace and good behaviour order (or an order made under similar legislation in another jurisdiction) against a licensee or a licensee's representative is one such circumstance.⁶⁷⁷

7.117 Upon such notification, the police officer is required to give notice to an authorised officer under the *Weapons Act 1990* (Qld).⁶⁷⁸ The authorised officer is then required to 'take the appropriate action in relation to the licence'.⁶⁷⁹ This may include suspending or revoking the licence on the basis that the person is no longer a fit and proper person to hold a licence. The decision whether to suspend or revoke a weapons licence is discretionary, having regard to particular factors, except in certain prescribed circumstances.⁶⁸⁰

Domestic violence orders

7.118 The *Weapons Act 1990* (Qld) prohibits a respondent to a domestic violence order from possessing a weapon or a weapons licence for the duration of the order.

7.119 A person with a weapons licence against whom a domestic violence order has been made must notify police of the order within 14 days.⁶⁸¹ The police must then notify an authorised officer under the *Weapons Act 1990* (Qld) who must then 'take the appropriate action in relation to the licence'.⁶⁸²

⁶⁷⁵ *Weapons Act 1990* (Qld) s 10B(4).

⁶⁷⁶ *Weapons Act 1990* (Qld) s 24(2)(1).

⁶⁷⁷ *Weapons Act 1990* (Qld) s 24(2)(g); *Weapons Regulation 1996* (Qld) s 14(b)(ii).

⁶⁷⁸ *Weapons Act 1990* (Qld) s 24(4).

⁶⁷⁹ *Weapons Act 1990* (Qld) s 24(5)(b).

⁶⁸⁰ See para 7.112–7.114 of this Report.

⁶⁸¹ *Weapons Act 1990* (Qld) s 24(1),(2)(a)(iv).

⁶⁸² *Weapons Act 1990* (Qld) s 24(4), (5)(b).

7.120 When a temporary domestic violence order has been made against the licence holder, the *Weapons Act 1990* (Qld) provides for the automatic suspension of the licence while the order is in force.⁶⁸³ It also provides for the revocation of a licence if the licence holder becomes subject to a domestic violence order.⁶⁸⁴

7.121 The *Weapons Act 1990* (Qld) also prevents the issue of a weapons licence to a person who is, or who has been, the subject of a domestic violence order, other than a temporary protection order, made in Queensland or elsewhere within a prescribed period.⁶⁸⁵ Such a person is deemed not to be a 'fit and proper person' to hold a licence.

7.122 The *Weapons Act 1990* (Qld) also makes provision for the surrender of suspended or revoked licences and weapons.⁶⁸⁶

The position in other jurisdictions

7.123 The civil restraining order legislation in the ACT, New South Wales, South Australia, Tasmania, Victoria and Western Australia enables the court to impose restraints in an order prohibiting or restricting the possession of firearms by the person against whom the order is made.⁶⁸⁷

7.124 The weapons legislation in most jurisdictions also contains a scheme to regulate the possession and use of firearms where a restraining order has been made against a licence holder.⁶⁸⁸ This forms part of a nationally consistent legislative scheme.

683 *Weapons Act 1990* (Qld) s 27A(1).

684 *Weapons Act 1990* (Qld) s 28A(1). The revocation has effect until the domestic violence order is no longer in force: *Weapons Act 1990* (Qld) s 28A(4).

685 *Weapons Act 1990* (Qld) s 10B(2)(b). For the purposes of this section, a 'relevant period' means (a) for the issue or renewal of a licence – the five year period immediately before the day the person applies for the issue or renewal of the licence; or (b) for the suspension or revocation of a licence – the five year period immediately before the date of the suspension notice under s 28, or a revocation notice under s 29, is given for that suspension or revocation: *Weapons Act 1990* (Qld) s 10B(5).

686 *Weapons Act 1990* (Qld) s 29B.

687 *Domestic Violence and Protection Orders Act 2001* (ACT) s 38; *Crimes Act 1900* (NSW) s 562ZD(2)(d); *Summary Procedure Act 1921* (SA) ss 99(3a), (3b), 99D; *Justices Act 1959* (Tas) s 106B(4B)(b), (7); *Crimes (Family Violence) Act 1987* (Vic) s 5(1)(h), (1A), (1B); *Restraining Orders Act 1997* (WA) ss 14, 36(2)(f), (6), 62E. For the application of the legislation in New South Wales and Victoria, see note 579 of this Report.

688 In 1996, the Australasian Police Ministers' Council resolved to include in State weapons legislation circumstances in which licence applications are to be refused or licences to be cancelled. It proposed the following specific reasons in its proposed minimum standards: where the applicant/licence holder has been the subject of an apprehended violence order, domestic violence order, restraining order or conviction for assault with a weapon/aggravated assault within the past five years: Australasian Police Ministers' Council, Special Firearms Meeting, *Resolutions*, 10 May 1996, 12.

The ACT

7.125 In the ACT, a final personal protection order (including a workplace order) will generally have the effect of cancelling any firearms licence held by the respondent.⁶⁸⁹

7.126 The *Firearms Act 1996* (ACT) provides that if a person has been subject to a protection order under the *Domestic Violence and Protection Orders Act 2001* (ACT) within a particular period, the person's firearms licence may be cancelled and any application for a firearms licence shall be refused.⁶⁹⁰

New South Wales

7.127 When making an apprehended violence order under the New South Wales civil restraining order legislation, the court has a general power to prohibit or restrict the possession of all or any specified firearms by the defendant.⁶⁹¹

7.128 The firearms legislation in New South Wales makes provision for the automatic suspension of a firearms licence or permit if an interim apprehended violence order is made against the licence or permit holder.⁶⁹² The licence is consequently revoked if a final apprehended violence order is made.⁶⁹³ A licence or permit for a firearm must not be issued to a person who is subject to an apprehended violence order or who has, at any time within 10 years before the licence or permit application was made, been subject to such an order.⁶⁹⁴

South Australia

7.129 The South Australian civil restraining order legislation specifies that 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

Note that in the Northern Territory, the *Firearms Act* (NT) provides that a licence is not to be granted to a person who is subject to an order, made under section 99 of the *Justices Act* (NT), to keep the peace and be of good behaviour and that, if such an order is made against a person, any licence, permit or registration for a firearm held by the person is automatically revoked: *Firearms Act* (NT) ss 3 (definition of 'order to keep the peace'), 10(3)(h), 40(1)(a). Note also that those provisions of the *Firearms Act* (NT) have not been consequentially amended under the *Domestic and Family Violence Act* (NT) which was assented to on 12 December 2007 and will commence on a date to be proclaimed. That Act repeals pt IV div 7 of the *Justices Act* (NT) and introduces a new pt VIA, which provides a scheme for the making of 'personal violence restraining orders'.

689 *Domestic Violence and Protection Orders Act 2001* (ACT) s 38(1), (2). But see s 38(3).

690 *Firearms Act 1996* (ACT) ss 41(3)(a), 22(1)(a), s 4 (definition of 'protection order').

691 *Crimes Act 1900* (NSW) s 562ZD(2)(d). That provision is replicated in s 35(2)(d) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 579 of this Report.

692 *Firearms Act 1996* (NSW) s 23; *Weapons Prohibition Act 1998* (NSW) s 17.

693 *Firearms Act 1996* (NSW) s 24(1); *Weapons Prohibition Act 1998* (NSW) s 18(1).

694 *Firearms Act 1996* (NSW) ss 11(5)(c), 29(3)(c). This prohibition does not apply where an apprehended violence order has been revoked.

by the court.⁶⁹⁵ 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.⁶⁹⁶ 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.⁶⁹⁷ The South Australian legislation also makes provision, if a restraining order subject to confirmation is not confirmed, for the return of a firearm and for the lapse of orders affecting the defendant's ability to hold or obtain a licence or permit.⁶⁹⁸

7.130 Further, 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.⁶⁹⁹ 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.⁷⁰⁰

7.131 An application for a firearms licence may be refused on the basis the person is not fit and proper to hold a licence.⁷⁰¹ That Act also provides for the cancellation of a firearms licence if the licence holder is not a fit and proper person to hold the licence.⁷⁰²

Tasmania

7.132 In Tasmania, the court may make a restraint 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.⁷⁰³

7.133 The *Firearms Act 1996* (Tas) provides a scheme for the suspension and cancellation of firearms licences if a licence holder becomes subject to an restraint order made under the *Justices Act 1959* (Tas).

7.134 The Tasmanian firearms legislation makes a distinction between restraint orders relating to personal injury and other restraint orders. A firearms

695 *Summary Procedure Act 1921* (SA) s 99D(1)(a)(i).

696 *Summary Procedure Act 1921* (SA) s 99D(1)(b).

697 *Summary Procedure Act 1921* (SA) s 99D(1)(c), (d).

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

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

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

701 *Firearms Act 1977* (SA) s 12(6)(a)(i).

702 *Firearms Act 1977* (SA) s 20(1)(b).

703 *Justices Act 1959* (Tas) s 106B(4B)(b).

licence must be cancelled if a restraint order relates to personal injury.⁷⁰⁴ In cases where a licence holder is subject to an interim restraint order or a restraint order other than one relating to personal injury, the licence must be suspended or cancelled.⁷⁰⁵ However, on the written application of the licence holder, the Commissioner may reinstate the licence on consideration of numerous factors including the order made by the court in issuing the restraint order or interim restraint order.⁷⁰⁶

7.135 The Tasmanian firearms legislation also prohibits the grant of a firearms licence to a person who is subject to a restraint order relating to personal injury.⁷⁰⁷

Victoria

7.136 In Victoria, an intervention order may include a condition revoking any licence, permit or other authority to possess, carry or use firearms.⁷⁰⁸ The effect of such a condition is to disqualify the respondent from obtaining such a licence during the course of the order and for a period of five years from the time the order ends.⁷⁰⁹

7.137 Under the Victorian firearms legislation, a person who is, or was, during a specified period, subject to an intervention order, is ineligible for a firearms licence⁷¹⁰ and is prohibited from possessing, carrying or using a firearm.⁷¹¹ Provision is also made for the cancellation of any firearms licence held by a person who is subject to an intervention order.⁷¹²

Western Australia

7.138 The Western Australian civil restraining order legislation provides that, unless the court orders otherwise, a 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.⁷¹³ The respondent must give up possession of all firearms and firearms licences held by the

⁷⁰⁴ *Firearms Act 1996 (Tas) s 51(1).*

⁷⁰⁵ *Firearms Act 1996 (Tas) s 51(3).*

⁷⁰⁶ *Firearms Act 1996 (Tas) s 51(6), (7).*

⁷⁰⁷ *Firearms Act 1996 (Tas) s 29(3)(d).*

⁷⁰⁸ *Crimes (Family Violence) Act 1987 (Vic) s 5(1)(h).* For the application of this legislation, see note 579 of this Report.

⁷⁰⁹ *Crimes (Family Violence) Act 1987 (Vic) s 5(1A)(a).*

⁷¹⁰ *Firearms Act 1996 (Vic) ss 3 (definition of 'prohibited person', para (c)(i)), 17(a).*

⁷¹¹ *Firearms Act 1996 (Vic) ss 3 (definition of 'prohibited person', para (c)(i)), 5(1), (1A).*

⁷¹² *Firearms Act 1996 (Vic) ss 3 (definition of 'prohibited person', para (c)(i)), 46(1).*

⁷¹³ *Restraining Orders Act 1997 (WA) s 14(1).*

respondent.⁷¹⁴ 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:⁷¹⁵

- 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.

7.139 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.⁷¹⁶ 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.⁷¹⁷

7.140 A misconduct restraining order may restrain the respondent from being in possession of a firearm or a firearm's licence, or applying for a firearms licence.⁷¹⁸ The provisions that apply to a violence restraining order in relation to the possession of a firearm or a firearms licence also apply to a misconduct restraining order that prohibits the respondent from being in possession of a firearm or a firearm's licence, or applying for a firearms licence.⁷¹⁹

7.141 The Western Australian firearms legislation provides that the court, when making a violence restraining order, may disqualify a person from holding a licence, permit or approval for a firearm under the Act.⁷²⁰ A 'violence restraining order' is defined in the legislation to mean an order imposing restraints on a person's lawful activities and behaviour to prevent the person committing certain offences against the person⁷²¹ or behaving in a manner that could reasonably be expected to cause fear that the person will commit such an offence.⁷²²

⁷¹⁴ *Restraining Orders Act 1997 (WA) s 14(2).*

⁷¹⁵ *Restraining Orders Act 1997 (WA) s 14(5).*

⁷¹⁶ *Restraining Orders Act 1997 (WA) s 14(5).*

⁷¹⁷ *Restraining Orders Act 1997 (WA) s 14(6).*

⁷¹⁸ *Restraining Orders Act 1997 (WA) s 36(3)(c).*

⁷¹⁹ *Restraining Orders Act 1997 (WA) s 36(6).* See para 7.138–7.139 of this Report.

⁷²⁰ *Firearms Act 1973 (WA) s 27A(1)*

⁷²¹ The specified offences are those contained in pt V of the *Criminal Code (WA)* (other than ch XXXIV and XXXV).

⁷²² *Firearms Act 1973 (WA) s 11(4).*

Submissions

7.142 The South West Brisbane Community Legal Centre Inc considered that, like the domestic violence scheme, the making of a peace and good behaviour order should automatically trigger restrictions on the possession and use of weapons.⁷²³

7.143 Caxton Legal Centre Inc considered that if the behaviour that gives rise to an order involves the use, or threatened use, of a firearm, the respondent to the order should be prohibited from possessing a firearm for the duration of the order.⁷²⁴ This respondent also suggested the *Peace and Good Behaviour Act 1982* (Qld) should include a scheme relating to weapons based on the provisions in the *Domestic and Family Violence Protection Act 1989* (Qld).⁷²⁵

The Commission's view

7.144 The particular nature of domestic violence relationships makes them susceptible to serious violence. There is a significant incidence of serious violent offences such as homicide and serious assault committed in spousal and familial relationships.⁷²⁶ The possession of a weapon may facilitate the occurrence of serious harm in domestic violence cases.

7.145 However, the risk of serious violence is not limited to domestic violence situations. Serious violence, or the threat of serious violence, may also occur in a dispute of the kind that would be covered by the Personal Protection Bill 2007.

7.146 In many other such disputes there may be little likelihood of the use, or threatened use, of a firearm or other weapon by a party.

7.147 The current weapons scheme for peace and good behaviour orders enables an authorised officer to exercise a discretion whether or not to suspend or cancel a weapons licence of a respondent to a peace and good behaviour order.⁷²⁷ This provides a safeguard in relation to the use of weapons in the most serious cases.

Special condition about holding a weapons licence or possessing a weapon

7.148 The Commission is of the view that the court should be empowered to include a condition in a personal protection order to prohibit the respondent from holding a weapons licence or from possessing a weapon. The

723 Submission 15.

724 Submission 19.

725 See para 7.104–7.110 of this Report.

726 Queensland Police Service, *Annual Statistical Review 2004/2005* (2005) 91–100. See also J Mouzos and C Rushforth, *Family Homicide in Australia*, Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice, No 255 (June 2003).

727 See para 7.116–7.117 of this Report.

Commission notes its recommendation elsewhere in this Report that the court would need to be satisfied that a special condition, such as one relating to weapons, is necessary and appropriate in the circumstances.⁷²⁸

7.149 The effect, under the *Weapons Act 1990* (Qld), of such a condition imposed in a protection order would be that the respondent is deemed not to be a fit and proper person to hold a licence.⁷²⁹ As such, an authorised officer may suspend or revoke any licence held by the respondent⁷³⁰ and no licence could be issued to the respondent.⁷³¹ On the issue of a licence suspension or revocation notice, the licensee is directed to surrender the licence and the weapon held under the licence by a stated reasonable time.⁷³² In addition, the respondent may be subject to a penalty for possession of a weapon without a licence.⁷³³

Special condition for a thing that has been used as a weapon

7.150 The Commission also considers that the Personal Protection Bill 2007 should include a provision, similar to section 26(2) of the *Domestic and Family Violence Protection Act 1989* (Qld), empowering the court to include a condition in a personal protection order to prohibit a respondent from possessing a stated 'thing' for the duration of the order.

7.151 The Commission also considers it desirable to include a provision in the Personal Protection Bill 2007, similar to section 26(3) of the *Domestic and Family Violence Protection Act 1989* (Qld), that if the court includes such a condition about a thing used as a weapon, the thing should be taken to be a weapon and may be dealt with under the Bill and under the *Weapons Act 1990* (Qld) as a weapon for which there is no licence. This would enable the seizure of the thing under the *Weapons Act 1990* (Qld).

Other provisions when a condition about a weapon or a thing is imposed

7.152 The Commission considers that, similar to section 23 of the *Domestic and Family Violence Protection Act 1989* (Qld), the Personal Protection Bill 2007 should specify that if the court imposes a condition in a personal protection order prohibiting the respondent from holding a weapons licence, or from possessing a weapon or a thing that could be used as a weapon, the *Weapons Act 1990* (Qld) applies to the person for the duration of the order, despite any exemption that would otherwise apply under the latter Act.

728 See para 7.36 of this Report.

729 *Weapons Act 1990* (Qld) s 10B(4). See para 7.114 of this Report.

730 *Weapons Act 1990* (Qld) ss 28(1)(b), 29(1)(d).

731 *Weapons Act 1990* (Qld) s 10(2)(d), (e).

732 *Weapons Act 1990* (Qld) s 30(1)(c), (3). The maximum penalty for failing to comply with such a direction is \$1500 or six months imprisonment: *Weapons Act 1990* (Qld) s 30(3); *Penalties and Sentences Act 1992* (Qld) s 5.

733 *Weapons Act 1990* (Qld) s 50(1).

7.153 The Commission further considers that the Personal Protection Bill 2007 should specify that a respondent who was not present in court when the personal protection order was made cannot be convicted of an offence under the *Weapons Act 1990* (Qld) for an act or omission that happened before he or she was given a copy of the order.

7.154 Additionally, the Commission considers that the Personal Protection Bill 2007 should include a provision requiring the court, when it makes a personal protection order to include as much information as possible in the order about any weapons licence held by the respondent or weapons in the respondent's possession, including a thing that the respondent is prohibited from possessing under the order. This is consistent with section 29 of the *Domestic and Family Violence Protection Act 1989* (Qld).

7.155 The Commission also considers that notification of orders that include conditions about weapons or things used as weapons should be required to be given to the Commissioner of Police, who is an authorised officer under the *Weapons Act 1990* (Qld).⁷³⁴ At present, a person against whom a peace and good behaviour order has been made, who holds a weapons licence, must notify police of the order.⁷³⁵ The Commission considers that this requirement should similarly apply for the purposes of the Personal Protection Bill 2007. There may be circumstances in which it is appropriate for action to be taken under the *Weapons Act 1990* (Qld) even where the court that makes the personal protection order has not included a condition in the order about weapons.

7.156 However, the Commission does not consider this requirement would be sufficient where a condition relating to weapons is included in a personal protection order. In those circumstances, notification should be given as promptly as is practicable, without reliance on the respondent to the order. Further, the current notification requirement applies only to a respondent who holds a licence. The Commission considers the registrar should be required to give a copy of the order to the Commissioner of Police as soon as practicable. The Commission notes its recommendation, in Chapter 20 of this Report, that the registrar should be required to give a copy of any order made under the Personal Protection Bill 2007 to the Commissioner of Police within one business day after the order is made, and considers such provision sufficient.⁷³⁶

7.157 The Commission notes that, upon notification of a court order preventing a person from possessing a weapon or a weapons licence, an authorised officer under the *Weapons Act 1990* (Qld) is empowered, but not required, to suspend or revoke the person's weapons licence.⁷³⁷ The

⁷³⁴ *Weapons Act 1990* (Qld) s 153(1)(a).

⁷³⁵ See para 7.101 of this Report.

⁷³⁶ See para 20.112 of this Report.

⁷³⁷ *Weapons Act 1990* (Qld) ss 28(1)(b), 29(1)(d). See para 7.149 of this Report.

Commission considers it may generally be appropriate for a court order as to the possession of weapons or a weapons licence, whether or not as part of a protection order, to be automatically effected under the weapons legislation. The Commission notes that the Queensland Police Service is currently reviewing the *Weapons Act 1990* (Qld)⁷³⁸ and considers it may be appropriate for this matter to be considered in that review.

RECOMMENDATIONS

7.158 The Commission makes the following recommendations:

Conditions specified in the application form

7-1 The application form for a personal protection order should specify the types of specific conditions that may be imposed on a respondent in a personal protection order.⁷³⁹

Standard condition of personal protection orders

7-2 The Personal Protection Bill 2007 should provide that it is a condition of a personal protection order that a respondent for the order must not commit personal violence against the persons protected by the order.⁷⁴⁰

See Personal Protection Bill 2007 cl 29.

Discretionary conditions for personal protection orders

7-3 The Personal Protection Bill 2007 should provide that a court that makes or varies a personal protection order may impose the conditions in the order it considers necessary and appropriate in the circumstances.⁷⁴¹

See Personal Protection Bill 2007 cl 30(1).

⁷³⁸ Information provided to the Commission by the Legal Services Branch, Queensland Police Service, 3 December 2007.

⁷³⁹ See para 7.18 of this Report.

⁷⁴⁰ See para 7.29 of this Report. Note that at para 4.31–4.32 of this Report, the Commission has recommended that the Personal Protection Bill 2007 provide that a personal protection order protects an aggrieved person for the order and may also protect an aggrieved person's relative or associate who is named in the order (a 'named person').

⁷⁴¹ See para 7.36 of this Report.

- 7-4 The Personal Protection Bill 2007 should include a list of examples of specific conditions that the court may include in a personal protection order including:⁷⁴²
- (a) conditions generally similar to those contained in sections 25(3)(a)–(e) of the *Domestic and Family Violence Protection Act 1989* (Qld), namely, conditions:⁷⁴³
- (i) prohibiting stated behaviour of a respondent in relation to a person protected by the order;
 - (ii) prohibiting a respondent from remaining at, entering or attempting to enter, or approaching within a stated distance of, stated premises, even if the respondent has a legal or equitable interest in the premises;⁷⁴⁴
 - (iii) prohibiting a respondent from approaching, or attempting to approach, a person protected by the order, including stating in the order a distance within which an approach is prohibited;
 - (iv) prohibiting a respondent from contacting, or attempting to contact, a person protected by the order;
 - (v) prohibiting a respondent from locating, or attempting to locate, a person protected by the order if the person's whereabouts are not known to the respondent;
 - (vi) prohibiting a respondent from causing someone else to engage in conduct prohibited under the order, including asking someone else to contact or locate a person protected by the order;⁷⁴⁵ and

⁷⁴² See para 7.49 of this Report.

⁷⁴³ See para 7.52 of this Report.

⁷⁴⁴ See para 7.82 of this Report.

⁷⁴⁵ See para 7.58 of this Report.

(b) conditions:

- (i) prohibiting stated behaviour of a respondent against property of a person protected by the order;⁷⁴⁶
- (ii) stating the conditions on which a respondent may be on particular premises or at a particular place, or may approach or contact a person protected by the order;⁷⁴⁷
- (iii) allowing a respondent, despite another condition in the order, to enter particular premises to recover his or her property or to return property of a person protected by the order.⁷⁴⁸

See Personal Protection Bill 2007 cl 30(3)(a)–(i).

7-5 The Personal Protection Bill 2007 should provide that a condition in a personal protection order that prohibits a respondent from asking someone else to contact or locate a person protected by the order does not prohibit the respondent from asking a lawyer acting for the respondent to contact a person protected by the order, or from asking someone else to locate a person protected by the order for a purpose authorised under an Act.⁷⁴⁹

See Personal Protection Bill 2007 cl 30(4).

7-6 The Personal Protection Bill 2007 should include the following definition of ‘property’, similar in effect to the definition of property contained in section 7 of the *Domestic and Family Violence Protection Act 1989* (Qld):⁷⁵⁰

property, of a person, means property—

- (a) the person owns; or
- (b) the person does not own, but is—

⁷⁴⁶ See para 7.63 of this Report.

⁷⁴⁷ See para 7.66 of this Report.

⁷⁴⁸ See para 7.68 of this Report.

⁷⁴⁹ See para 7.59 of this Report.

⁷⁵⁰ See para 7.65 of this Report.

- (i) used and enjoyed by the person; or
- (ii) available for the person's use or enjoyment; or
- (iii) in the person's care or custody; or
- (iv) at the premises at which the person is residing.

See Personal Protection Bill 2007 cl 3, sch (definition).

7-7 The Personal Protection Bill 2007 should include the following definition of 'premises', similar in effect to the definition of premises contained in section 6 of the *Domestic and Family Violence Protection Act 1989* (Qld):⁷⁵¹

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

- (a) an area of land, including a road within the meaning of the *Transport Operations (Road Use Management) Act 1995* (Qld);
- (b) a building or structure, whether movable or immovable, including a dwelling house;
- (c) a vehicle, vessel or aircraft;
- (d) a caravan or trailer.

See Personal Protection Bill 2007 cl 3, sch (definition)

7-8 The Personal Protection Bill 2007 should include a provision to the effect that, if a court imposes a condition in a personal protection order prohibiting a respondent from entering particular premises, the court must consider including in the order another condition allowing the respondent to enter the premises to recover his or her property or to return property of a person protected by the order.⁷⁵²

See Personal Protection Bill 2007 cl 30(5).

⁷⁵¹ See para 7.84 of this Report.

⁷⁵² See para 7.69, 7.85 of this Report.

- 7-9 The Personal Protection Bill 2007 should provide that, if a court decides to impose, as a condition of a personal protection order, a condition allowing a respondent to recover or return property, the court may also impose the conditions it considers appropriate to control the way the respondent recovers or returns the property.⁷⁵³

See Personal Protection Bill 2007 cl 31.

- 7-10 The Personal Protection Bill 2007 should provide that in deciding whether to impose specific conditions in a personal protection order, the need to protect the persons protected by the order must be of paramount importance to the court.⁷⁵⁴

See Personal Protection Bill 2007 cl 30(2).

Special conditions relating to weapons

- 7-11 The Personal Protection Bill 2007 should provide that the court may include conditions in a personal protection order prohibiting a respondent from:⁷⁵⁵

- (a) holding a weapons licence; or
- (b) possessing a weapon; or
- (c) possessing a stated thing that could be used as a weapon.

See Personal Protection Bill 2007 cl 30(3)(i).

- 7-12 The Personal Protection Bill 2007 should include a provision to the effect that, if the court includes a condition in a personal protection order prohibiting a respondent from possessing a stated thing that could be used as a weapon, the thing is taken to be a weapon and may be dealt with under the Bill and under the *Weapons Act 1990* (Qld) as a weapon for which there is no licence.⁷⁵⁶

See Personal Protection Bill 2007 cl 30(6).

- 7-13 The Personal Protection Bill 2007 should include a provision, generally modelled on section 23 of the *Domestic and Family Violence Protection Act 1989* (Qld), so that:

⁷⁵³ See para 7.70, 7.85 of this Report.

⁷⁵⁴ See para 7.89 of this Report.

⁷⁵⁵ See para 7.148, 7.150 of this Report.

⁷⁵⁶ See para 7.151 of this Report.

- (a) if the court makes a protection order prohibiting the respondent from holding a weapons licence, or from possessing a weapon or a thing that could be used as a weapon, the *Weapons Act 1990* (Qld) applies to the respondent for the duration of the order, despite any exemption that would otherwise apply under the latter Act;⁷⁵⁷ and
- (b) notwithstanding paragraph (a) above, if the respondent is not present in court when the court makes the protection order, the respondent can not be convicted of an offence under the *Weapons Act 1990* (Qld), because of the operation of paragraph (a), for an act or omission that happens before a copy of the protection order is served on the respondent.⁷⁵⁸

See Personal Protection Bill 2007 cl 61.

- 7-14 The Personal Protection Bill 2007 should include a provision requiring the court, when it makes a personal protection order, to state as much information as possible in the order about any weapons licence held by the respondent, or any weapons, or things which the respondent is prohibited from possessing under the order, that the respondent possesses.⁷⁵⁹

See Personal Protection Bill 2007 cl 32.

757 See para 7.152 of this Report.

758 See para 7.153 of this Report.

759 See para 7.154 of this Report.

Chapter 8

Workplace protection orders

INTRODUCTION	181
POWER TO MAKE WORKPLACE PROTECTION ORDERS	181
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	181
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	182
The position in other jurisdictions.....	182
Submissions	183
The Commission's view	185
GROUNDS FOR OBTAINING A WORKPLACE PROTECTION ORDER	186
The position in other jurisdictions.....	186
Submissions	186
The Commission's view	186
WHO MAY APPLY FOR A WORKPLACE PROTECTION ORDER	189
The position in other jurisdictions.....	190
Submissions	191
The Commission's view	192
CONDITIONS OF A WORKPLACE PROTECTION ORDER	194
The position in other jurisdictions.....	194
Submissions	195
The Commission's view	196
APPLICATION OF OTHER PROVISIONS TO WORKPLACE PROTECTION ORDERS	198
RECOMMENDATIONS	198

INTRODUCTION

8.1 The Commission's terms of reference require it to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an 'appropriate, easily accessible and effective mechanism for protection of the community from breaches of the peace', having regard to various matters, including the ambit of conduct covered by the Act.⁷⁶⁰

8.2 Elsewhere in this Report, the Commission has made recommendations about the scope of its proposed Personal Protection Bill 2007 in providing for protection orders. The Discussion Paper also asked whether there should be particular grounds for obtaining an order in specific situations, such as in the workplace.⁷⁶¹

8.3 This chapter considers the power of the court to make a specific kind of protection order in relation to the workplace (a 'workplace protection order'). A workplace protection order prohibits a person from committing particular conduct in relation to the workplace ('workplace violence'). The chapter also considers the grounds for obtaining a workplace protection order, who may apply for a workplace protection order, the conditions of a workplace protection order and the application of other provisions of the proposed Bill to workplace protection orders.

POWER TO MAKE WORKPLACE PROTECTION ORDERS

8.4 In Queensland, particular forms of violence and property damage in the workplace may potentially be dealt with under the *Peace and Good Behaviour Act 1982* (Qld) and the relevant provisions of the *Criminal Code* (Qld). These statutes are of general application and are not limited to the workplace. Their application will depend on whether the particular circumstances satisfy the relevant legislative requirements.

8.5 There is no legislative provision, however, for a specific kind of restraining order made in relation to the workplace to protect people and property at the workplace.

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

8.6 There is no provision in the *Peace and Good Behaviour Act 1982* (Qld) for a specific kind of order made in relation to the workplace.

8.7 The current grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) are not limited in terms of the situation in which the

⁷⁶⁰ The terms of reference are set out in Appendix 1 to this Report.

⁷⁶¹ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 38 (Question 4-7).

behaviour complained of occurs. However, eligibility to apply for an order under the Act is 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.⁷⁶²

The Domestic and Family Violence Protection Act 1989 (Qld)

8.8 The *Domestic and Family Violence Protection Act 1989 (Qld)* makes no provision for a specific workplace-based order.

The position in other jurisdictions

8.9 In the ACT, the civil restraining order legislation enables a court to make a specific type of personal protection order in relation to the workplace.⁷⁶³ This kind of order is known under the legislation as a 'workplace order'.

8.10 The ACT legislation entitles an employer to apply for a workplace order for an employee.⁷⁶⁴

8.11 An employer's right to apply for a workplace order was initially conferred as a right to apply on behalf of an employee and arose because teachers in government schools did not wish to be identified as parties to an order. It was also thought that employees generally, in both the public and private sector, would benefit from such a provision.⁷⁶⁵ The approach to employee applications later shifted from allowing an employer to make an application on behalf of the aggrieved person to establishing a separate scheme for protection orders in the workplace for which the employer is the aggrieved person.⁷⁶⁶

8.12 Under the ACT legislation, 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.⁷⁶⁷ In this context, the focus of a workplace order is on the relationship of the violence to an employee in his or her capacity

762 *Peace and Good Behaviour Act 1982 (Qld) s 4(1), (2).*

763 *Domestic Violence and Protection Orders Act 2001 (ACT) pt 5 div 5.3.*

764 The right for employers to make an application for a restraining order on behalf of an employee was first introduced in the ACT by amendments to the *Magistrates Court Act 1930 (ACT): Magistrates Court Act 1930 (ACT) s 198 (Entitlement to apply)*, amended by the *Magistrates Court Amendment Act 2000 (ACT) s 5*. The restraining order provisions of the *Magistrates Court Act 1930 (ACT)* were later incorporated into the *Protection Orders Act 2001 (ACT)*. Those provisions are now contained in the *Domestic Violence and Protection Orders Act 2001 (ACT) pt 5 div 5.3.*

765 See ACT, *Parliamentary Debates*, Legislative Assembly, 30 August 2000, 1338, 2671 (Mr Wayne Berry).

766 See *Protection Orders Act 2001 (ACT)* (repealed). Those provisions are now contained in the *Domestic Violence and Protection Orders Act 2001 (ACT) pt 5, div 5.3.*

767 *Domestic Violence and Protection Orders Act 2001 (ACT) s 45*. 'Personal violence' in relation to the workplace is defined in the *Domestic Violence and Protection Orders Act 2001 (ACT) s 44*. See para 8.27 of this Report.

as an employee in a particular workplace. The employer is the aggrieved person for the purpose of making an application.

8.13 The ACT legislation also specifically provides for workplace orders to be made in relation to a workplace that is a 'child facility', such as a childcare centre or a paediatric hospital, where the respondent 'poses a risk to people at the workplace, for example, children, carers or teachers'.⁷⁶⁸ This ground was added to the ACT civil restraining order legislation by amendments in 2005⁷⁶⁹ to address concerns about the risk of harm to children, and to protect staff at child facilities.⁷⁷⁰

8.14 The ACT is the only jurisdiction to provide for a type of order specific to the workplace in its civil restraining order legislation. Several other Australian jurisdictions have examined the issue of specifically protecting employees in a workplace by means of civil restraining order legislation but have made no recommendation for legislative amendment.⁷⁷¹

Submissions

8.15 In its Discussion Paper, the Commission sought submissions on whether there should be particular grounds for obtaining an order under the *Peace and Good Behaviour Act 1982* (Qld) in specific situations, such as in the workplace.⁷⁷²

8.16 Commerce Queensland, a peak body representing Queensland employers, favoured the specific inclusion in the legislation of workplace orders. It acknowledged the potential overlap between workplace orders and other

⁷⁶⁸ *Domestic Violence and Protection Orders Act 2001* (ACT) s 45(2). A 'child facility' is defined in s 42A of that Act to mean:

- a preschool, childcare centre, school, or other similar facility the main purpose of which is the care or education of children; or
- a paediatric ward, or other facility in a hospital the main purpose of which is to provide health services for children; or
- an office or other facility used by or for the Territory for children or young people who are, under the *Children and Young People Act 1999* (ACT), ch 7, in need of care and protection.

⁷⁶⁹ *Domestic Violence and Protection Orders Amendment Act 2005* (ACT) ss 24, 25 (commenced 25 March 2005). The amendments contained in that Act were partly made in response to a review of the operation of provisions about personal and domestic violence orders and were generally directed at increasing protection for people from violence, harassment and intimidation: Explanatory Statement, Domestic Violence and Protection Orders Amendment Bill 2005 (ACT) 2.

⁷⁷⁰ See ACT, *Parliamentary Debates*, Legislative Assembly, 17 March 2005, 1154 (Ms Karin MacDonald).

⁷⁷¹ In Western Australia, the Ministry of Justice in its evaluation of the *Restraining Orders Act 1997* (WA) made no recommendation pending the provision of further advice on legislative and operational requirements: Ministry of Justice, Western Australia, Policy and Legislation Division, *Report on the Evaluation of the First Six Months of the Operation of the Restraining Orders Act 1997* (December 1998) 54. The New South Wales Law Reform Commission in its review of the apprehended violence legislation considered whether to expand the range of persons able to apply for an order to include employer corporations. The Commission ultimately did not support the general availability of third party applications. New South Wales Law Reform Commission, Report, *Apprehended Violence Orders Report No 103* (2003) [6.6], [6.8].

⁷⁷² Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 38 (Question 4-7).

means of legal redress (with the consequence that there would be infrequent demand for such orders) but considered that such an overlap did not justify the omission of a workplace order mechanism.⁷⁷³ In the view of this submission, while other avenues for dealing with unwanted behaviours may address only the immediate circumstances, such as where a person who has damaged company property is arrested by the police, a peace and good behaviour order would safeguard against such behaviour recurring. This submission also expressed the view that often employees will report incidents of mistreatment to their employer but, for various reasons, will be unwilling or reluctant to take action in respect of the matter themselves.

8.17 Commerce Queensland gave the following examples as situations in which a workplace order would be useful:

- where a former employee whose claim of unfair dismissal has not settled at conciliation and who has consequently fixated upon the employer and engaged in obsessive harassing behaviours such as telephone calls and loitering; and
- where a former employee in a small shop, who is a respondent in an anti-discrimination claim, constantly comes into the shop with his or her family members to harass and intimidate people.

8.18 The Queensland Working Women's Service Inc and Young Workers Advisory Service considered the legislation to obtain a workplace order should be used cautiously in conjunction with fair industrial practices, and also observed harassing or offensive behaviour may be covered by internal workplace policies, for example, workplace grievance mechanisms.⁷⁷⁴

8.19 One community legal service, while opposed to prescriptive grounds to cover a specific situation such as the workplace, suggested that there needs to be some contextual element to avoid the exploitative use of the legislation.⁷⁷⁵

8.20 A Queensland magistrate considered that if the grounds for a complaint are broadened, there does not appear to be a need for a specific workplace order.⁷⁷⁶

⁷⁷³ Submission 23.

⁷⁷⁴ Submission 3.

⁷⁷⁵ Submission 14.

⁷⁷⁶ Submission 12.

The Commission's view

8.21 The Commission is of the view that it is appropriate for the Personal Protection Bill 2007 to provide a legislative mechanism for the protection of people in the workplace, through the provision of a scheme for the making of workplace protection orders.

8.22 The Commission intends that the focus of a workplace protection order should be on the workplace rather than a particular employer or employee. The purpose of a workplace protection order is to ensure the safety and protection of employers and employees for the workplace and for the protection of property at the workplace, where particular conduct has been threatened towards such persons or property because that person or property is connected with the workplace.

8.23 The option of a workplace protection order may be appropriate where, for example, a person who has a grievance against a workplace commits workplace violence against one or more employees at the workplace or property at the workplace. In particular, in workplaces that have large numbers of employees, a high staff turnover, or employees who regularly change their daily roles, it may be more convenient or desirable for an employer to apply for a workplace order than for one or more employees to apply, separately or together, for one or more personal protection orders.

8.24 The Commission notes that, in the workplace context, an employer has rights and obligations, which arise under the employment relationship, and which include duties and obligations to ensure the health and safety of his or her employees.⁷⁷⁷

8.25 The Commission does not intend for the availability of workplace protection orders to create a new right or obligation in relation to employment relationships. A workplace protection order is available as a legislative mechanism for the protection of people and property in the workplace. However, an employer is under no compulsion to apply for such an order. For the sake of clarity, the Commission considers that the Personal Protection Bill 2007 should provide that the availability of workplace protection orders under the Bill does not create a new right or obligation in relation to employment relationships.

⁷⁷⁷ For example, occupational health and safety legislation imposes on every employer general obligations to ensure the health, safety and welfare at work of all their employees. Under the *Workplace Health and Safety Act 1995* (Qld), an employer is required to undertake risk management practices to ensure the health and safety of employees: *Workplace Health and Safety Act 1995* (Qld) ss 22(2), 28. Employees are also entitled to compensation for an injury, including psychological and psychiatric disorders, arising out of or in the course of employment under the *Workers' Compensation and Rehabilitation Act 2003* (Qld). The employer also has both contractual and tortious obligations. The contractual obligations arise from an implied term to take reasonable care not to expose employees to unnecessary risks to their health and safety: *Wright v TNT Management Pty Ltd* (1989) 15 NSWLR 679, 684 (Mahoney J) citing *Halsbury's Laws of England* (4th ed, 2002) Vol 16 [560]. The tortious obligation, in negligence, arises from the fact that employers are under a non-delegable duty of care to their employees to ensure that they do not expose them to risks which could affect their health or safety: see, for example, *Kondis v State Transport Authority* (1984) 154 CLR 672; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

GROUNDS FOR OBTAINING A WORKPLACE PROTECTION ORDER

8.26 Earlier in this chapter, the Commission has recommended that the Personal Protection Bill 2007 provide for a scheme for the making of workplace protection orders. This raises for consideration the issue of the grounds for making a workplace protection order.

The position in other jurisdictions

8.27 The ACT civil restraining order legislation provides for a workplace order to be made if the court is satisfied the respondent has engaged in personal violence in relation to the workplace, and may engage in personal violence in relation to the workplace during the time the order is proposed to operate if the order is not made.⁷⁷⁸ ‘Personal violence in relation to the workplace’ is behaviour that:⁷⁷⁹

- 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.

Submissions

8.28 Commerce Queensland considered that harassing and offensive behaviour should be included as a ground for a workplace order under the *Peace and Good Behaviour Act 1982* (Qld) as well as personal injury and property damage, or threats of personal injury or property damage.⁷⁸⁰ This submission also suggested there should be no requirement of fear.

The Commission’s view

8.29 The purpose of a workplace protection order is to ensure the safety and protection of an employer for a workplace and his or her employees and to protect property at the workplace. This is to be achieved by providing that a workplace protection order may be made when there is a requisite connection between the commission of particular conduct and the workplace.

⁷⁷⁸ *Domestic Violence and Protection Orders Act 2001* (ACT) s 45.

⁷⁷⁹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 44.

⁷⁸⁰ Submission 23.

8.30 The Commission considers that the Personal Protection Bill 2007 should provide for a specific type of prohibited conduct, committed in relation to a workplace, called ‘workplace violence’. The Commission further considers that workplace violence should be defined as any of the following acts that a person commits in relation to a workplace:

- wilful injury of another person who is an employer for the workplace or an employee of an employer for the workplace, committed while the other person is engaged in an activity relating to the workplace or because the other person is an employer for the workplace or an employee of an employer for the workplace;
- harassment or intimidation of another person who is an employer for the workplace or an employee of an employer for the workplace, committed while the other person is engaged in an activity relating to the workplace or because the other person is an employer for the workplace or an employee of an employer for the workplace;
- wilful damage to property at the workplace;
- a threat to commit any of those acts.

8.31 Since the workplace is the focus of a workplace protection order, wilful damage to property in the workplace is intended to cover any property in the workplace, regardless of its ownership.

8.32 The Commission has recommended that the Personal Protection Bill 2007 should include a provision specifying that a person who counsels or procures someone else to commit an act that, if done by the person, would be an act of personal violence is taken to have committed the act. The Bill should make similar provision in relation to workplace violence.⁷⁸¹

8.33 The Commission has also recommended elsewhere in this Report that the Personal Protection Bill 2007 should provide that the relevant conduct for obtaining a personal protection order is ‘personal violence’ and that ‘personal violence’ is a form of ‘prohibited conduct’ under the Bill. The Commission also considers that the Bill should similarly provide that ‘workplace violence’ is a type of ‘prohibited conduct’ under the Bill.⁷⁸²

8.34 The Commission considers it appropriate that ‘workplace violence’ covers substantially the same type of conduct, in relation to the workplace, as the conduct covered by ‘personal violence’, in relation to an individual, which the Commission has recommended elsewhere in this Report for personal

⁷⁸¹ See para 5.163 of this Report.

⁷⁸² See para 5.42 of this Report.

protection orders.⁷⁸³ Similarly, the Commission is of the view that the grounds on which the court may make a workplace protection order should mirror the grounds in relation to personal protection orders.⁷⁸⁴

8.35 The Commission is therefore of the view that the court may make a workplace protection order against a person if it is satisfied of the following grounds:

- the person has committed workplace violence in relation to a workplace; and
- the person is likely to commit workplace violence in relation to the workplace again.

8.36 Further, for the purpose of deciding whether a person is likely to commit workplace violence in relation to the workplace again, the court may have regard to past conduct of the person. The Commission has recommended a similar provision in relation to the proposed grounds for obtaining a personal protection order under the Bill.⁷⁸⁵

8.37 The Commission also considers that it is important that the inclusion of these grounds in the Personal Protection Bill 2007 does not result in unintended or undesirable consequences. The Commission considers this is addressed by clearly specifying the behaviour covered by ‘workplace violence’. The Commission considers that, given the similarity of ‘workplace violence’ and ‘personal violence’, the same considerations in relation to the type of conduct covered by the grounds for personal protection orders would apply in relation to workplace protection orders. For example, the Commission notes that conduct must be of some significance, in the light of the particular circumstances, to be regarded as ‘intimidation or harassment’.⁷⁸⁶

8.38 The Commission has also recommended the inclusion of procedural safeguards to prevent the misuse of the legislation. In Chapter 5, for example, the Commission has recommended that the Personal Protection Bill 2007 should provide that nothing in the Bill prevents the court from summarily

⁷⁸³ The Commission has recommended at para 5.66, 5.81, 5.110, 5.113 of this Report that the Personal Protection Bill 2007 should provide that ‘personal violence’ is the commission by the respondent against an aggrieved person of wilful injury, wilful damage or harassing or intimidating behaviour, or a threat to commit one of those acts.

⁷⁸⁴ The Commission has recommended at para 5.41–5.43, 5.145 of this Report that the Personal Protection Bill 2007 should provide that the court may make a personal protection order against a person if it is satisfied that the person has committed personal violence against an aggrieved person and the person is likely to commit personal violence against the aggrieved person again if the order is not made.

⁷⁸⁵ See para 5.146 of this Report.

⁷⁸⁶ See para 5.87 of this Report.

dismissing an application, including an application for a workplace protection order, if it is satisfied the application is malicious, false, frivolous or vexatious.⁷⁸⁷

8.39 It is possible that the definition of ‘workplace violence’ may capture an act that is done at a workplace for an industrial dispute.⁷⁸⁸ The Commission considers that, if an act is done for the purpose of an industrial dispute under the *Industrial Relations Act 1999* (Qld), the appropriate avenues for dealing with that act, and its consequences, if necessary, are through the industrial disputes process and any common law or criminal proceedings that are available and which the parties decide to pursue. The Commission is therefore of the view that the Personal Protection Bill 2007 should include a proviso that, for the purposes of the Bill, an act that is done for an industrial dispute under the *Industrial Relations Act 1999* (Qld) is not ‘workplace violence’.⁷⁸⁹ If, however, an act amounts to ‘personal violence’ against an individual, the individual may be able to make a complaint under the criminal law or, if the grounds are met, an application for a personal protection order under the Personal Protection Bill 2007.

WHO MAY APPLY FOR A WORKPLACE PROTECTION ORDER

8.40 The *Peace and Good Behaviour Act 1982* (Qld) provides that a person may make a complaint about the conduct of another person towards the complainant or the complainant’s property, or towards a person under the complainant’s ‘care or charge’.⁷⁹⁰ The expression ‘care or charge’ is not defined. The question whether an employee is under the ‘care or charge’ of his or her employer has received little judicial consideration in Queensland. While there is some authority to suggest that an employee is not under his or her employer’s care or charge,⁷⁹¹ an employer owes a non-delegable duty of care to his or her employees.⁷⁹² At present, therefore, it is unclear whether an employer is able to bring an application for a peace and good behaviour order on behalf of an employee or a group of employees. In the absence of a right by an employer to apply for a peace and good behaviour order on behalf of an

787 The Commission has also recommended, at para 20.175 of this Report that, if the court dismisses an application as malicious, false, frivolous or vexatious, the court may make a costs order.

788 An ‘industrial dispute’ under the *Industrial Relations Act 1999* (Qld) means a dispute, including a threatened or probable dispute, or a situation that is likely to give rise to a dispute, about an industrial matter: *Industrial Relations Act 1999* (Qld) s 4, sch 5 (definition of ‘industrial dispute’). For what constitutes an ‘industrial matter’, see *Industrial Relations Act 1999* (Qld) s 7.

789 The *Criminal Code* (Qld) similarly provides that ‘unlawful stalking’ does not include ‘acts done for the purposes of a genuine industrial dispute’: *Criminal Code* (Qld) s 359D(b). A restraining order therefore cannot be made under s 359F of the *Criminal Code* (Qld) in criminal proceedings for unlawful stalking in respect of such conduct.

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

791 *SJ Mead on behalf of Telstra Corporation Limited v KC Ivory* (Unreported, District Court of Queensland, Wylie DCJ, 20 February 1998) [14].

792 See *Kondis v State Transport Authority* (1984) 154 CLR 672.

employee, only the employee is eligible to apply for an order for his or her protection.

The position in other jurisdictions

8.41 The workplace orders scheme under the ACT's civil restraining order legislation provides for an employer to apply for a workplace order for the purpose of protecting people in the workplace.⁷⁹³

8.42 An 'employer' is defined under the ACT civil restraining order legislation as someone who engages an individual under a contract of service, under a contract for services, under an apprenticeship, under a vocational training agreement, or to work as a volunteer.⁷⁹⁴ An 'employee' is defined as an individual engaged under a contract of service, under a contract for services, under an apprenticeship, under a vocational training agreement, or to work as a volunteer.⁷⁹⁵

8.43 The *Domestic Violence and Protection Orders Act 2001* (ACT) specifically provides that an employer is the aggrieved person for the purpose of making an application for a workplace order to restrain certain conduct against the employer's employees.⁷⁹⁶ A recent amendment to the ACT legislation also enables a person in control of a child facility or a person employed in a child facility to apply for a workplace order.⁷⁹⁷ The court may make the order in relation to a workplace that is a child facility if satisfied that the respondent poses a risk to people at the workplace, for example children, carers or teachers.⁷⁹⁸

793 An 'aggrieved person, for a workplace order' means the employer of the person against whom the conduct is directed: *Domestic Violence and Protection Orders Act 2001* (ACT) s 42A (definition of 'aggrieved person, for a workplace order' para (a)). Section 43 of the *Domestic Violence and Protection Orders Act 2001* (ACT) provides that the availability of workplace orders under that Act does not create a new right or obligation in relation to employment relationships.

794 *Domestic Violence and Protection Orders Act 2001* (ACT) s 3, Dictionary (definition of 'employer').

795 *Domestic Violence and Protection Orders Act 2001* (ACT) s 3, Dictionary (definition of 'employee').

796 *Domestic Violence and Protection Orders Act 2001* (ACT) ss 11(2), 42A (definition of 'aggrieved person' para (a)). Note that in *Firestone v Australian National University* (2004) 184 FLR 53, the court considered the issue of whether a workplace order should specify the particular employees whom the appellant was prohibited from contacting. In this case, the appellant appealed against a workplace order which prohibited the appellant from entering the premises of the Australian National University, being the workplace, and from 'contacting an employee of the workplace'. The order did not specify particular employees whom the appellant was prohibited from contacting. Higgins CJ at [60] found that the order was defective in not specifying the employees who should not be contacted and commented that such specificity in the order 'would be desirable ... to avoid the prospect of accidental or inadvertent breach'. Higgins CJ observed:

It is important to avoid the waste of resources in pursuing a breach action which, when the facts are known, is revealed as innocent and not culpable. Further, a person has a right to know what he or she is forbidden to do.

However, because the order had expired and no breach action was pending, the appeal was dismissed.

797 *Domestic Violence and Protection Orders Act 2001* (ACT) ss 11(2), 42A (definition of 'aggrieved person', (b)). The amendment was made in response to a recommendation of the ACT Law Reform Commission: ACT Law Reform Commission, *Sexual Assault*, Report No 18 (2001) 63.

798 *Domestic Violence and Protection Orders Act 2001* (ACT) s 45(2).

8.44 The focus of a workplace order is on the workplace rather than individual employees.⁷⁹⁹ Consequently, the *Domestic Violence and Protection Orders Act 2001* (ACT) provides that an employer or other specified person is the aggrieved person for a workplace order. There is no requirement under that Act for an affected employee to give consent to the application.

Submissions

8.45 The submissions received by the Commission in relation to the question of who should be able to apply for a workplace order were evenly divided.

8.46 The Townsville Community Legal Service Inc suggested that legislative provisions relating to orders in the workplace ought to be general rather than prescriptive about who may for an order and the type of order that may be obtained.⁸⁰⁰ This submission suggested an employer might be able to make an application as an authorised person; alternatively, the legislation could adopt the eligibility criteria used in the *Anti-Discrimination Act 1992* (Qld), which provides for a complaint to be made by an individual, a representative or an entity. This submission also suggested this approach would enable an employer or an institution to apply for an order to protect others.

8.47 Commerce Queensland considered the *Peace and Good Behaviour Act 1982* (Qld) should include a mechanism, based on the ACT model, to enable an employer for a workplace to apply for a workplace order.⁸⁰¹ This submission considered that there should be no requirement for an affected employee to give consent to the application as such a requirement might unduly frustrate the process. This submission also considered that concerns about possible inappropriate paternalistic motivations of employers in using the mechanism would be adequately addressed by the vetting of the application upon the hearing of the matter by a magistrate.

8.48 The Queensland Working Women's Service Inc and Young Workers Advisory Service expressed concern that bringing an application for a workplace order might involve a degree of paternalism on the part of the employer.⁸⁰² Nonetheless, this submission expressed the view that, consistent with the responsibility of an employer to provide a safe work environment, it may be appropriate, in certain circumstances, for an employer to seek a workplace order on behalf of an employee. This submission suggested that it would be appropriate for an employer to apply for an order to protect an employee only in circumstances where the employee is at risk of harm and

⁷⁹⁹ See the Second Reading Speech of the Protection Orders Bill 2001 (ACT): ACT, *Parliamentary Debates*, Legislative Assembly, 15 June 2001, 1819 (Mr Bill Stefaniak, Minister for Education and Attorney-General).

⁸⁰⁰ Submission 14A.

⁸⁰¹ Submission 23.

⁸⁰² Submission 3.

consents to the application for an order. In the case of an employee who is a child, this submission suggested an additional requirement of consultation with the person who provides care and supervision for the child (for example, a parent, a guardian or a person at the child's school).

8.49 Two submissions, from the Queensland Council of Unions and Caxton Legal Centre Inc, supported the retention of the existing legislative approach whereby the employee as the complainant may apply for an order, rather than an employer on behalf of an employee.⁸⁰³ Caxton Legal Centre Inc suggested that in extreme cases this power could be misused by government department staff wishing to penalise members of the public who have legitimate complaints:⁸⁰⁴

This could have the effect of excluding a person from a government department when that person otherwise has wholly legitimate complaints about service provision by the relevant department. We appreciate that there may be serious cases where an individual's behaviour could warrant intervention by an employer, however, we submit that further research would need to be done to fully explore this issue before the Act is extended in this way. It is also likely that such events can be adequately dealt with under existing alternative Acts or Regulations.

The Commission's view

8.50 As mentioned earlier in this chapter, the focus of a workplace protection order is on the workplace. Consistent with this focus, and with the employer's legal responsibilities to ensure the health and safety of his or her employees at the workplace, the Commission considers it appropriate that the Personal Protection Bill 2007 provide that an employer for a workplace in relation to which the workplace violence constituting the grounds for the order has been committed is the aggrieved person for a workplace protection order and the person who may apply for the order.

8.51 Since the grounds for obtaining a workplace protection order include conduct committed against an employer or an employee for a workplace, or against property at the workplace, the availability of a workplace protection order does not depend on an employer having been personally subject to workplace violence. Nonetheless, the Commission considers it appropriate, given the focus of a workplace protection order is on the workplace rather than on individuals, for an employer, as a representative of the workplace, to be the relevant eligible person to apply for the order.

8.52 This position contrasts with the eligibility provisions the Commission has proposed in relation to the making of personal protection orders which provide that an aggrieved person is a person against whom personal violence has been committed.

803 Submissions 16, 19.

804 Submission 19.

8.53 The Commission considers that the Personal Protection Bill 2007 should also specify that an application for a workplace protection order may be made by one or more applicants and for one or more aggrieved persons.⁸⁰⁵

8.54 The Commission also considers the Personal Protection Bill 2007 should include definitions of 'employer' and 'employee', similar to the definitions used in the ACT legislation.⁸⁰⁶

8.55 Whilst it will usually be an employer for the workplace who applies for a workplace protection order, the Personal Protection Bill 2007 should also provide that a police officer may be an applicant for a workplace protection order on behalf of an employer for the workplace. This approach is consistent with that taken by the Commission in relation to personal protection orders.⁸⁰⁷

8.56 The Commission does not, however, consider it necessary to make provision in the Bill requiring police to make applications for workplace protection orders in certain circumstances, particularly given that applications will usually be made by an employer and that, consequently, the need for police applications will be uncommon.

8.57 In the Commission's view, the ability of an employer, or a police officer, to make an application for an order to protect employees should not be conditional upon the consent of the individual employees to the order being made. In some workplaces, where the employees are employed on a casual basis or as shift workers, it may be impractical, or unreasonable, to impose a requirement on an employer to obtain the consent of an employee as a prerequisite to the making of a workplace protection order. The Personal Protection Bill 2007 should therefore include a provision to clarify that an application for a workplace protection order may be made whether or not an employee of an aggrieved person agrees to the making of the application.

8.58 Given that an application for a workplace protection order may be made without the consent of an employee for the workplace, the Commission considers that an employee who is to be protected by a workplace protection order should have standing to appear on the hearing of the application to make, vary or set aside an order. In this regard, the Commission notes that its general recommendation about a person's entitlement to appear in proceedings for an application under the Personal Protection Bill 2007, is sufficient to deal with the standing of an employee, who is or is sought to be protected by a workplace protection order, to appear in an application to make, vary or set aside the order.⁸⁰⁸

805 See para 6.142 of this Report.

806 See para 8.42 of this Report.

807 See para 6.125 of this Report.

808 See para 20.74 of this Report.

CONDITIONS OF A WORKPLACE PROTECTION ORDER

8.59 The Peace and Good Behaviour Act 1982 (Qld) does not specify any particular limitations or restrictions that a court may include in a peace and good behaviour order.

8.60 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,’ and that the order may contain ‘such other stipulations or conditions’ as the court considers appropriate.

The position in other jurisdictions

8.61 The ACT civil restraining order legislation provides that 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.⁸⁰⁹

8.62 In addition, the legislation specifies certain conduct that the court may prohibit and identifies conduct that may be made subject to particular conditions.

8.63 Section 47(2) of the *Domestic Violence and Protection Orders Act 2001* (ACT) provides that a final workplace order may do one or more of the following:⁸¹⁰

- 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.

8.64 In addition, a final personal protection order (including a workplace order) will generally have the effect of cancelling any firearms licence held by

⁸⁰⁹ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 42(1), 47(1).

⁸¹⁰ *Domestic Violence and Protection Orders Act 2001* (ACT) s 47(2).

the respondent.⁸¹¹

8.65 The Supreme Court of the ACT has considered whether a workplace order should specify the particular employees whom the respondent was prohibited from contacting. In *Firestone v Australian National University*,⁸¹² the respondent appealed against a workplace order that prohibited him from entering the premises of his workplace, a university campus, and from 'contacting an employee of the workplace'. The order did not specify the particular employees whom the respondent was prohibited from contacting. The court found that the order was defective because it did not specify the particular employees who should not be contacted and commented that such specificity in the order 'would be desirable ... to avoid the prospect of accidental or inadvertent breach'.⁸¹³

Submissions

8.66 Two submissions received by the Commission in response to the Discussion Paper specifically considered the types of conditions that should be included in workplace orders.⁸¹⁴

8.67 The Queensland Council of Unions considered provision should be made in the peace and good behaviour legislation for specific types of conditions that can be made in a workplace order:⁸¹⁵

[T]o provide generality within the order runs the risk of inadvertent breaches. This appears to be an issue that is more prudently covered in the legislation rather than developed in the authorities.

8.68 Commerce Queensland considered that it would be desirable for the court to exercise its discretion in fashioning the conditions of an order.⁸¹⁶ It also considered that it would be appropriate for the peace and good behaviour legislation to include specific conditions that can be included in an order and that conditions for a workplace order should be based on the similar provision in the ACT legislation.⁸¹⁷

8.69 In relation to whether a workplace order should specify the particular employees protected by the order, Commerce Queensland considered that an order should be able to apply to all employees of that workplace and, for the

⁸¹¹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 38(1), (2). But see s 38(3).

⁸¹² (2004) 184 FLR 53.

⁸¹³ *Ibid* [60].

⁸¹⁴ Submissions 16, 23.

⁸¹⁵ Submission 16.

⁸¹⁶ Submission 23.

⁸¹⁷ See *Domestic Violence and Protection Orders Act 2001* (ACT) s 47(2) which is discussed at para 8.63 of this Report.

purposes of clarity, to any employees specifically named in the order. However, it cautioned against requiring that an order specify the persons who are to be protected, because other persons who may later be affected by the behaviour might be overlooked.

8.70 In addition, Commerce Queensland considered that a term imposing geographic restrictions should be able to be imposed under a workplace order. The order should also be wide enough to protect an employee, in his or her capacity as an employee, while outside the workplace, such as on his or her way home from work.

The Commission's view

8.71 The Commission considers that the Personal Protection Bill 2007 should provide that it is a condition of a workplace protection order that the respondent must not commit workplace violence in relation to the workplace described in the order. The Commission has made a similar recommendation in relation to personal protection orders.⁸¹⁸

8.72 The Commission also considers that the court, when making or varying a workplace protection order, should have discretion to impose the conditions it considers necessary and appropriate in the circumstances. Further, in deciding whether to impose specific conditions in a workplace protection order, the need to protect a person protected by the order is to be of paramount importance to the court. The Commission has recommended the inclusion of similar requirements in relation to personal protection orders.⁸¹⁹

8.73 The Commission also considers the Personal Protection Bill 2007 should include the following list of examples of specific conditions the court may include in a workplace protection order, generally similar to those specified in section 47(2) of the *Domestic Violence and Protection Orders Act 2001* (ACT),⁸²⁰ rather than those it has recommended for personal protection orders:

- conditions prohibiting the respondent from entering or approaching within a stated distance of the workplace;
- conditions prohibiting the respondent from approaching or contacting a person protected by the order;
- conditions prohibiting the respondent from causing someone else to engage in conduct prohibited under the order, including asking someone else to contact a person protected by the order;

⁸¹⁸ See para 7.29 of this Report.

⁸¹⁹ See para 7.36, 7.89 of this Report.

⁸²⁰ See para 8.63 of this Report.

- conditions on which the respondent may enter or approach the workplace, or approach or contact a person protected by the order.

8.74 The Commission also notes that the standard condition it has recommended for workplace protection orders (that the respondent must not commit workplace violence in relation to the workplace) is sufficient to prohibit the respondent from damaging property in the workplace, without the need to impose a specific condition to that effect.⁸²¹

8.75 Further, the same provisions the Commission has recommended in relation to conditions about weapons in personal protection orders should apply to workplace protection orders.⁸²² This would ensure that where the respondent has made a threat of serious violence involving a weapon or a thing that could be used as a weapon, the court may include conditions in the order preventing the respondent from possessing a weapon, or a stated thing that could be used as a weapon, or from holding a weapons licence in a workplace protection order.

8.76 In the Commission's view, it is desirable for an order to identify particular persons who are to be protected by an order where it is appropriate to do so. However, the Commission does not consider the naming of individual employees who are to be protected by the order should be required. In some situations, it may be difficult to name a specific employee in an order. For example, the respondent's behaviour may be directed towards employees generally. If employees were required to be named, it may also be necessary to initiate, or to continue with, proceedings under the Personal Protection Bill 2007 to accommodate variations relating to the employees protected by the order. These problems could be avoided by naming the employees as members of a class. However, the Commission also acknowledges the competing view that the persons protected by an order should be specifically named so that a respondent to the order knows the identity of the persons protected by the order, thereby enabling the respondent to avoid an inadvertent breach of the order.⁸²³

8.77 In the Commission's view, the Personal Protection Bill 2007 should be sufficiently flexible to enable the tension between these considerations to be resolved on a case by case basis. This can be accommodated by allowing the court sufficient flexibility, in the exercise of its discretion in formulating the conditions of the order, to identify the persons protected by the order, by name, as members of a class, or by some other relevant description. The Commission does not, therefore, consider it necessary to include a specific provision in the Bill about the way in which an employer or employee protected by a workplace protection order is to be identified in the order.

⁸²¹ 'Workplace violence' includes wilful damage to property at the workplace: see para 8.30 of this Report.

⁸²² See para 7.148–7.154 of this Report.

⁸²³ See para 8.65 of this Report. See also *Firestone v Australian National University* (2004) 184 FLR 53.

8.78 The Commission also considers that, as with the scheme for personal protection orders under the Bill, the application form for a workplace protection order should specify the types of conditions that may be imposed on a respondent in a workplace protection order.

APPLICATION OF OTHER PROVISIONS TO WORKPLACE PROTECTION ORDERS

8.79 Elsewhere in this Report, the Commission has made a number of recommendations about the provisions of the Personal Protection Bill 2007 in relation to protection orders generally. For example, the Commission has made recommendations about the procedures and proceedings for making and hearing an application, making protection orders or interim protection orders, varying and setting aside protection orders, making protection orders by consent, appeals and the registration of orders made outside Queensland.

8.80 The Commission considers that, unless the Personal Protection Bill 2007 specifically provides otherwise in relation to workplace protection orders, the general provisions of the Personal Protection Bill 2007 dealing with protection orders should apply to workplace protection orders.

RECOMMENDATIONS

8.81 The Commission makes the following recommendations:

Power to make workplace protection orders

- 8-1 The Personal Protection Bill 2007 should provide for a specific kind of protection order made in relation to the workplace (a 'workplace protection order').⁸²⁴
- 8-2 The Personal Protection Bill 2007 should provide that the availability of workplace protection orders under the Bill does not create a new right or obligation in relation to employment relationships.⁸²⁵

See Personal Protection Bill 2007 cl 60.

⁸²⁴ See para 8.21 of this Report.

⁸²⁵ See para 8.25 of this Report.

Grounds for obtaining a workplace protection order

8-3 The Personal Protection Bill 2007 should provide that the court may make a workplace protection order against a person if it is satisfied the person:⁸²⁶

- (a) has committed workplace violence in relation to a workplace; and
- (b) is likely to commit workplace violence in relation to the workplace again.

See Personal Protection Bill 2007 cl 33(1).

8-4 The Personal Protection Bill 2007 should provide that ‘workplace violence’ is any of the following acts a person commits in relation to a workplace:⁸²⁷

- (a) wilful injury of another person who is an employer for the workplace or an employee of an employer for the workplace, committed while the other person is engaged in an activity relating to the workplace or because the other person is an employer for the workplace or an employee of an employer for the workplace;
- (b) harassment or intimidation of another person who is an employer for the workplace or an employee of an employer for the workplace, committed while the other person is engaged in an activity relating to the workplace or because the other person is an employer for the workplace or an employee of an employer for the workplace;
- (c) wilful damage to property at the workplace;
- (d) a threat to commit any of those acts.

For the purposes of the Personal Protection Bill 2007, ‘workplace violence’ is a form of ‘prohibited conduct’.⁸²⁸

See Personal Protection Bill 2007 cl 6(1), (3).

⁸²⁶ See para 8.35 of this Report.

⁸²⁷ See para 8.30 of this Report.

⁸²⁸ See para 8.33 of this Report

- 8-5 The Personal Protection Bill 2007 should provide that a person who counsels or procures someone else to commit an act that, if done by the person, would be an act of workplace violence is taken to have committed the act.⁸²⁹

See Personal Protection Bill 2007 cl 6(1), (5)

- 8-6 The Personal Protection Bill 2007 should provide that, for deciding whether the person is likely to commit workplace violence in relation to the workplace again, the court may have regard to past conduct of the person.⁸³⁰

See Personal Protection Bill 2007 cl 33(3).

- 8-7 The Personal Protection Bill 2007 should provide that an act done for an industrial dispute under the *Industrial Relations Act 1999* (Qld) is not 'workplace violence'.⁸³¹

See Personal Protection Bill 2007 cl 6(4).

Who is an aggrieved person for a workplace protection order

- 8-8 The Personal Protection Bill 2007 should provide that a person is an aggrieved person for a workplace order if the person is an employer for the workplace in relation to which workplace violence, constituting the ground on which the order is or may be made, has been committed.⁸³²

See Personal Protection Bill 2007 cl 8(1)(b).

Who may apply for a workplace protection order

- 8-9 The Personal Protection Bill 2007 should provide that any of the following persons may apply for a workplace protection order:⁸³³

(a) an aggrieved person for the order; or

829 See para 8.32 of this Report.

830 See para 8.36 of this Report.

831 See para 8.39 of this Report.

832 See para 8.50 of this Report.

833 See para 8.51, 8.55 of this Report.

(b) a police officer, for an aggrieved person.

See Personal Protection Bill 2007 cl 10, 16(1), (2).

8-10 The Personal Protection Bill 2007 should specify that an application for a workplace protection order may be made by one or more applicants and for one or more aggrieved persons.⁸³⁴

See Personal Protection Bill 2007 cl 16(4).

8-11 The Personal Protection Bill 2007 should define an ‘employer’ as someone who engages an individual:⁸³⁵

(a) under a contract of service; or

(b) under a contract for services; or

(c) under an apprenticeship; or

(d) under a training contract under the *Vocational Education, Training and Employment Act 2000* (Qld); or

(e) to work as a volunteer.

See Personal Protection Bill 2007 cl 3, sch (definition of ‘employer’).

8-12 The Personal Protection Bill 2007 should define an ‘employee’ as an individual engaged by an employer.⁸³⁶

See Personal Protection Bill 2007 cl 3, sch (definition of ‘employee’).

8-13 The Personal Protection Bill 2007 should include a provision to clarify that an application for a workplace protection order may be made whether or not an employee of an aggrieved person agrees to the making of the application.⁸³⁷

See Personal Protection Bill 2007 cl 16(5).

⁸³⁴ See para 8.53 of this Report

⁸³⁵ See para 8.54 of this Report.

⁸³⁶ Ibid.

⁸³⁷ See para 8.57 of this Report.

Conditions of a workplace protection order

8-14 The Personal Protection Bill 2007 should provide that an application form for a workplace protection order should specify the types of conditions that may be imposed on the order.⁸³⁸

8-15 The Personal Protection Bill 2007 should provide that it is a condition of a workplace protection order that the respondent for the order must not commit workplace violence in relation to the workplace stated in the order.⁸³⁹

See Personal Protection Bill 2007 cl 34.

8-16 The Personal Protection Bill 2007 should provide that a court that makes or varies a workplace protection order may impose the conditions on the order the court considers necessary and appropriate in the circumstances.⁸⁴⁰

See Personal Protection Bill 2007 cl 35(1).

8-17 The Personal Protection Bill 2007 should provide that in deciding whether to impose specific conditions on a workplace protection order, the need to protect the persons protected by the order must be of paramount importance to the court.⁸⁴¹

See Personal Protection Bill 2007 cl 35(2).

8-18 The Personal Protection Bill 2007 should include a list of examples of specific conditions the court may include in a workplace protection order, generally modelled on those specified under the *Domestic Violence and Protection Orders Act 2001* (ACT) including:⁸⁴²

- (a) conditions prohibiting a respondent from entering or approaching within a stated distance of, the workplace stated in the order;
- (b) conditions prohibiting a respondent from approaching or contacting a person protected by the order;

⁸³⁸ See para 8.78 of this Report.

⁸³⁹ See para 8.71 of this Report.

⁸⁴⁰ See para 8.72 of this Report.

⁸⁴¹ Ibid.

⁸⁴² See para 8.73 of this Report.

- (c) conditions prohibiting a respondent from causing someone else to engage in conduct prohibited under the order, including asking someone else to contact a person protected by the order;
- (d) conditions on which a respondent may enter or approach the workplace, or may approach or contact a person protected by the order.

See Personal Protection Bill 2007 cl 35(3)(a)–(d).

- 8-19 The Personal Protection Bill 2007 should provide that the court may include conditions prohibiting a respondent from possessing a weapon, or a stated thing that could be used as a weapon, or from holding a weapons licence in a workplace protection order. Further, the provisions the Commission has recommended in relation to conditions about weapons in personal protection orders should also apply in relation to workplace protection orders.⁸⁴³

See Personal Protection Bill 2007 cl 35(3)(e), (5), 36, 61.

Application of other provisions to workplace protection orders

- 8-20 Unless the Personal Protection Bill 2007 specifically provides otherwise in relation to workplace protection orders, the general provisions of the Personal Protection Bill 2007 dealing with protection orders should apply to workplace protection orders.⁸⁴⁴

See Personal Protection Bill 2007 cl 35(4).

⁸⁴³ See para 8.75 of this Report.

⁸⁴⁴ See para 8.80 of this Report.

Chapter 9

Applications

INTRODUCTION	205
THE USUAL PROCEDURE FOR INITIATING AN APPLICATION.....	205
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	205
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	206
The position in other jurisdictions.....	207
Submissions	208
The Commission's view	209
FORMAL REQUIREMENTS	209
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	209
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	210
The position in other jurisdictions.....	210
Submissions	210
The Commission's view	213
THE ROLE OF JUSTICES OF THE PEACE IN THE APPLICATION PROCESS.....	214
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	214
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	216
The position in other jurisdictions – New South Wales	216
Submissions	216
The Commission's view	218
SCREENING OF APPLICATIONS FOR UNSUBSTANTIATED OR UNMERITORIOUS COMPLAINTS	219
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	219
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	219
The position in other jurisdictions.....	219
Submissions	222
The Commission's view	223
APPLICATIONS MADE BY TELEPHONE OR OTHER ELECTRONIC MEANS.....	223
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	224
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	224
The position in other jurisdictions.....	225
Submissions	228
The Commission's view	230
PROCEDURES FOR MAKING AN APPLICATION BY TELEPHONE OR OTHER ELECTRONIC MEANS	233
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	233
Submissions	235
The Commission's view	235
NOTICES TO APPEAR.....	238
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	238
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	238
The <i>Police Powers and Responsibilities Act 2000</i> (Qld).....	239
The Commission's view	240
RECOMMENDATIONS	242

INTRODUCTION

9.1 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.⁸⁴⁵

9.2 This chapter examines the provisions of the *Peace and Good Behaviour Act 1982* (Qld) dealing with the procedures for making an application for a peace and good behaviour order. It also compares these provisions with provisions for making an application under the *Domestic and Family Violence Act 1989* (Qld) and under the civil restraining order legislation in other jurisdictions.

9.3 This chapter considers the process of making an application for a protection order, including an application for an interim protection order made by telephone or other electronic means, under the proposed Personal Protection Bill 2007.

9.4 In particular, this chapter considers the process of initiating an application, the degree of formality required for applications, the role of justices of the peace, the screening of applications for unmeritorious complaints, telephone applications and the use of notices to appear to start proceedings. The Commission's recommendations in this chapter apply to both personal protection orders and workplace protection orders.

THE USUAL PROCEDURE FOR INITIATING AN APPLICATION

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

9.5 The *Peace and Good Behaviour Act 1982* (Qld) currently provides that an application for a peace and good behaviour order is initiated by making a complaint to a justice of the peace.⁸⁴⁶

9.6 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.⁸⁴⁷ If the justice of the peace is satisfied that there are grounds for the complaint⁸⁴⁸ and that it is reasonable in the circumstances for the complainant to be in fear of the defendant,⁸⁴⁹ or fearful that the defendant will destroy or damage any property

⁸⁴⁵ The terms of reference are set out in Appendix 1 to this Report.

⁸⁴⁶ *Peace and Good Behaviour Act 1982* (Qld) s 4.

⁸⁴⁷ *Peace and Good Behaviour Act 1982* (Qld) s 5.

⁸⁴⁸ The grounds for making a complaint are discussed at para 5.11–5.18 of this Report.

⁸⁴⁹ For a complaint made pursuant to s 4(1) of the *Peace and Good Behaviour Act 1982* (Qld).

of the complainant,⁸⁵⁰ the justice of the peace may issue a summons requiring the defendant to appear before, or a warrant requiring that the defendant be apprehended and brought before, a Magistrates Court.⁸⁵¹

9.7 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.⁸⁵²

The *Domestic and Family Violence Protection Act 1989* (Qld)

9.8 In comparison, an application for a protection order under the *Domestic and Family Violence Protection Act 1989* (Qld) is made by completing a form ('Form DV1') available from Magistrates Courts or police stations.⁸⁵³ Information supplied to the Commission indicates that the court registry generally receives applications for domestic violence orders directly from applicants.⁸⁵⁴

9.9 Section 47 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that, on application made for a protection order, a clerk of the court or a justice may issue a summons directing the respondent to appear at the time and place set out in the summons with a view to the respondent being heard on the matter.⁸⁵⁵ The clerk need not issue a summons if the applicant asks the clerk to arrange for the application to be heard by the court for the purpose of making a temporary protection order.⁸⁵⁶ If the court refuses to make the temporary protection order and the applicant does not withdraw the application, the clerk must issue the summons.⁸⁵⁷ A justice may only issue a

⁸⁵⁰ For a complaint made pursuant to s 4(2) of the *Peace and Good Behaviour Act 1982* (Qld).

⁸⁵¹ *Peace and Good Behaviour Act 1982* (Qld) s 4(2A). 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). Mediation and other dispute resolution processes are discussed in Chapter 10 of this Report.

⁸⁵² *Peace and Good Behaviour Regulation 1999* (Qld) s 4. 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.

⁸⁵³ See <http://www.communities.qld.gov.au/violenceprevention/forms/documents/pdf/dv01_protectionorder.pdf> at 4 February 2008.

⁸⁵⁴ Information provided by Magistrates Court Branch of the Department of Justice and Attorney-General, 1 August 2007.

⁸⁵⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 47(1). However, a justice may issue a summons under s 47(1) of the Act only if the justice knows that a Magistrates Court is sitting at the time and place that the justice specifies in the summons for when it is returnable: *Domestic and Family Violence Protection Act 1989* (Qld) s 47(7).

⁸⁵⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 47(2).

⁸⁵⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 47(3).

summons if the justice knows that a Magistrates Court is sitting at the time and place specified in the summons.⁸⁵⁸

9.10 However, a summons under section 47 need not be issued if a police officer who makes an application for a protection order issues and serves on the respondent a notice in the form of a notice to appear under the *Police Powers and Responsibilities Act 2000* (Qld).⁸⁵⁹ For the purposes of the court being satisfied on the non-appearance of the respondent that he or she has been given certain documents, such a notice is taken to be a summons.⁸⁶⁰

The position in other jurisdictions

9.11 In the ACT, an application for a protection order is made in the prescribed form.⁸⁶¹ On receiving the application, the registrar must set a return date for the application and serve a copy of the application and notice of the date set for the hearing on the respondent.⁸⁶²

9.12 In New South Wales, applications are made by issuing and filing an application notice.⁸⁶³ On receiving an application, an authorised officer may issue a warrant.⁸⁶⁴

9.13 In South Australia and Victoria, applications are made by way of complaint. Upon receiving the complaints, the court or registrar, respectively, may issue a summons or a warrant.⁸⁶⁵

9.14 In the Northern Territory, an application for a personal violence restraining order is made in the approved form and filed in the court. As soon as practicable after the application is filed, the clerk of the court is required to

⁸⁵⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 47(7).

⁸⁵⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 47(8). A notice mentioned in s 47(8) need not state an alleged offence as required under the *Police Powers and Responsibilities Act 2000* (Qld); *Domestic and Family Violence Protection Act 1989* (Qld) s 47(9)(a).

⁸⁶⁰ *Domestic and Family Violence Protection Act 1989* (Qld) ss 47(9)(b), 49. See para 11.19 of this Report.

⁸⁶¹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 11(1); *Court Procedures Act 2004* (NSW) s 8.

⁸⁶² *Domestic Violence and Protection Orders Act 2001* (ACT) ss 15(1), 16(1)(b), (5)(a).

⁸⁶³ *Crimes Act 1900* (NSW) ss 562J(1), 562ZQ(1); *Local Courts Act 1982* (NSW) s 37. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Section 562J(1) of the *Crimes Act 1900* (NSW) is substantially replicated in s 18(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

⁸⁶⁴ *Crimes Act 1900* (NSW) s 562ZZI. This provision is replicated in s 88 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 863 of this Report.

⁸⁶⁵ *Summary Procedure Act 1921* (SA) ss 49(1), (5), 57(1), 99(1); *Crimes (Family Violence) Act 1987* (Vic) ss 7(1), 9(1). In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained; *Crimes Act 1958* (Vic) s 21A(5).

give written notice of the time and place for the hearing of the application to the parties to the order being sought.⁸⁶⁶

9.15 In Tasmania, an application for a restraint order is made by application filed with the clerk of the court and served on the respondent.⁸⁶⁷

9.16 In Western Australia, an application for a restraining order is made to the court in person in the prescribed form. The registrar is then required to fix the date, time and place for the hearing of the application and issue a summons to bring the respondent to court.⁸⁶⁸

Submissions

9.17 In its Discussion Paper, the Commission sought submissions on whether the existing mechanism for making a complaint under the *Peace and Good Behaviour Act 1982* (Qld) provides an ‘appropriate, easily accessible and effective mechanism for protection of the community from breaches of the peace’.⁸⁶⁹

9.18 Submissions made to the Commission on this issue generally considered that the current procedure for making a complaint under the *Peace and Good Behaviour Act 1982* (Qld) should be streamlined to provide for the making of an application directly to the court, as is provided under the *Domestic and Family Violence Protection Act 1989* (Qld).

9.19 Three community legal services commented that existing provisions for making a complaint under the *Peace and Good Behaviour Act 1982* (Qld) are archaic and considered the procedure should generally be similar to the procedure set out in the *Domestic and Family Violence Protection Act 1989* (Qld).⁸⁷⁰

9.20 Legal Aid Queensland also considered the current application procedure unsatisfactory:⁸⁷¹

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

⁸⁶⁶ *Justices Act* (NT) ss 84, 85, as amended by the *Domestic and Family Violence Act* (NT). Sections 84, 85 of the *Justices Act* (NT) are new provisions. The *Domestic and Family Violence Act* (NT) repeals pt IV div 7 of the *Justices Act* (NT) introducing a new pt IVA. The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed.

⁸⁶⁷ *Justices Act 1959* (Tas) s 106B(2); *Justices (Restraint Orders) Rules 2003* (Tas) rr 4(1)(c), 6(2)(a).

⁸⁶⁸ *Restraining Orders Act 1997* (WA) ss 9(1), 25(1), (3), 26(3), 38(1), (4), 39.

⁸⁶⁹ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 50 (Question 5-1).

⁸⁷⁰ Submissions 5, 8, 14.

⁸⁷¹ Submission 13.

negotiate this process unrepresented. ... There is the potential for applications with merit never to get to court because the applicants lack the ability to draft the complaint.

9.21 The Townsville Community Legal Service Inc and a group of Magistrates Court registrars from the Magistrates Court Branch of the Department of Justice and Attorney-General also preferred that the application be made directly to the court registry.⁸⁷²

9.22 Caxton Legal Centre Inc also considered the application process should be made as streamlined as possible.⁸⁷³

9.23 In contrast, the South West Brisbane Community Legal Centre Inc considered the current procedure for making an application reasonably appropriate and accessible but capable of improvement.⁸⁷⁴

The Commission's view

9.24 The Commission considers the current procedure for making an application under the *Peace and Good Behaviour Act 1982* (Qld) is unnecessarily complex, and should be simplified.

9.25 The Commission considers the usual process for initiating an application under the Personal Protection Bill 2007 should be generally similar to the process used under the *Domestic and Family Violence Protection Act 1989* (Qld), so that once an application form has been completed, it is filed with the court.

9.26 Formal requirements in relation to the application and the role of justices of the peace in the application process are discussed below.⁸⁷⁵

FORMAL REQUIREMENTS

9.27 The ability of an aggrieved person to make an application may be affected by the degree of formality required.

The Peace and Good Behaviour Act 1982 (Qld)

9.28 Under the *Peace and Good Behaviour Act 1982* (Qld), the making of a complaint before a justice of the peace is a formal process. The complaint must

⁸⁷² Submissions 14, 28.

⁸⁷³ Submission 19. Another submission considered the paperwork for obtaining an order should be simplified: submission 22.

⁸⁷⁴ Submission 15.

⁸⁷⁵ See para 9.27–9.67 of this Report.

be made in writing, in the approved form,⁸⁷⁶ and must be made on oath.⁸⁷⁷

The Domestic and Family Violence Protection Act 1989 (Qld)

9.29 In contrast, there is no requirement in the *Domestic and Family Violence Protection Act 1989* (Qld) for an application for a protection order to be made on oath. However, the application form for a protection order ('Form DV1'⁸⁷⁸) requires that, unless the applicant is a member of the Queensland Police Service, the applicant must make a declaration as to the truth of the contents of the application in the presence of a justice of the peace, commissioner for declarations or solicitor.⁸⁷⁹

9.30 Under the criminal law, making a false statement on oath is a more serious criminal offence than making a false statement by declaration.⁸⁸⁰ Consequently, a higher maximum penalty applies for making a false statement, for example, in a complaint for a peace and good behaviour order, than for making a false declaration, for example, in an application for a domestic violence order.

The position in other jurisdictions

9.31 In New South Wales, the ACT, South Australia and Western Australia, the application is required to be made in writing in a prescribed form, but need not be on oath.⁸⁸¹

Submissions

9.32 In its Discussion Paper, the Commission sought submissions on whether it should be necessary to make a complaint for a peace and good behaviour

876 See <<http://www.courts.qld.gov.au/Forms/PGB/PGB-f-1-20070801.doc>> at 19 March 2008.

877 *Peace and Good Behaviour Act 1982* (Qld) s 4(4); *Peace and Good Behaviour Regulation 1999* (Qld) s 9. Section 193 of the *Criminal Code* (Qld) provides that it is a criminal offence to make a false statement in a statement required to be under oath or solemn declaration or affirmation. The maximum penalty for this offence is seven years imprisonment.

878 See <http://www.communities.qld.gov.au/violenceprevention/forms/documents/pdf/dv01_protectionorder.pdf> at 4 February 2008.

879 Section 194 of the *Criminal Code* (Qld) provides that any person who makes a false declaration before a person authorised by law to take or receive declarations commits a misdemeanour. The maximum penalty provided under this section for making a false declaration is three years imprisonment.

880 See note 877 and 879 of this Report.

881 *Domestic Violence and Protection Orders Act 2001* (ACT) s 11(1); *Court Procedures Act 2004* (ACT) s 8(2), Form 2; *Crimes Act 1900* (NSW) ss 562J(1), 562ZQ(1); *Local Courts Act 1982* (NSW) ss 37, 40(1); *Summary Procedure Act 1921* (SA) s 49, Form 1; *Restraining Orders Act 1997* (WA) ss 25(3), 38(4), Forms 1, 4. Sections 562J(1), 562ZQ(1) of the *Crimes Act 1900* (NSW) are substantially replicated in ss 18(1), 50 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 863 of this Report.

order in writing and on oath.⁸⁸²

The requirement of writing

9.33 The requirement of making a complaint in writing was generally supported in the submissions made to the Commission.⁸⁸³ A number of submissions also perceived that reducing the matter of the complaint to writing may assist applicants in the formulation of their complaints.⁸⁸⁴ For example, a Queensland magistrate observed:⁸⁸⁵

The requirement for the complaint to be in writing assists in crystallizing the basis of a complaint.

9.34 Two community legal services suggested that a written application should not be required in circumstances of urgency or where it is physically impractical to do so.⁸⁸⁶

9.35 In contrast, Queensland Advocacy Inc and the Working Against Violence Support Service Inc expressed concern that the requirement of writing may impede the ability of persons with a disability or who come from a non-English speaking background to make a complaint.⁸⁸⁷ The Women's Legal Service also suggested that persons unable to read and/or write in English might be provided with assistance to put their complaint in writing.⁸⁸⁸

The requirement of an oath

9.36 The submissions made in relation to the making of an application were divided about whether it should be necessary for a complaint to be made on oath.

9.37 A number of submissions opposed the requirement of making a complaint on oath.⁸⁸⁹ Three community legal services noted that the *Domestic and Family Violence Protection Act 1989* (Qld) does not require an application to be made on oath.⁸⁹⁰ In particular, the Women's Legal Service observed that the 'oath means little or nothing to most people in the community and the

⁸⁸² Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 50 (Questions 5-2, 5-3).

⁸⁸³ Submissions 5, 8, 12B, 13, 14, 15, 19, 27.

⁸⁸⁴ Submissions 5, 8, 12B.

⁸⁸⁵ Submission 12B.

⁸⁸⁶ Submissions 8, 15.

⁸⁸⁷ Submissions 20, 27.

⁸⁸⁸ Submission 8.

⁸⁸⁹ Submissions 5, 8, 14, 15, 20.

⁸⁹⁰ Submissions 8, 14, 15.

requirement is out of step with the procedures in other contexts'.⁸⁹¹ Queensland Advocacy Inc expressed concern that such a requirement may be a procedural barrier in the application process for persons with a disability.⁸⁹²

9.38 Two submissions supported the retention of requiring a complaint to be made on oath.⁸⁹³ A Queensland magistrate suggested the requirement of an oath reflects the seriousness of making a complaint:⁸⁹⁴

By also requiring the complaint to be on oath, it should impose on the complainant some awareness of the seriousness of the making of a complaint. It should also be pointed out to a complainant what are the consequences of making a false complaint.

The application form

9.39 A number of submissions suggested that the existing form for making a complaint under the *Peace and Good Behaviour Act 1982* (Qld) could be made simpler and more 'user-friendly' to assist people in making applications.⁸⁹⁵ Legal Aid Queensland observed:⁸⁹⁶

The application form provides little guidance in terms of directing the applicant to the type of information which may assist in determining whether the applicant is in real fear. There is also no information about what type of conditions or orders the court may be prepared to make to protect the Applicant.

9.40 Several community legal services suggested that the 'directive' type of form used for making an application under the *Domestic and Family Violence Protection Act 1989* (Qld) may be useful as a template for the complaint form used under the *Peace and Good Behaviour Act 1982* (Qld).⁸⁹⁷ The Women's Legal Service observed:⁸⁹⁸

The procedure should be similar to that under the [*Domestic and Family Violence Protection Act 1989* (Qld)] where an application form, in plain English, prompts answers to specific questions about the issues which are to be made out. This assists the complainant to turn their mind to each of the things that need to be shown and is more user-friendly. It also makes the process of assessing complaints easier.

891 Submission 8.

892 Submission 20.

893 Submissions 12B, 13.

894 Submission 12B. Another submission, although opposed in principle to the requirement of making a complaint on oath, also suggested that the requirement 'demonstrates the seriousness of the proceedings': submission 5.

895 Submissions 8, 13, 14, 19, 22, 27.

896 Submission 13.

897 Submissions 8, 13, 14, 19.

898 Submission 8.

The Commission's view

The requirement of writing

9.41 In the Commission's view, the procedure for commencing a proceeding for an order under the Personal Protection Bill 2007 should generally require an application to be made in writing. If the requirement of making an application in writing affects the person's ability to apply for a protection order, for example, where an aggrieved person is not fluent in English or has poor literacy skills, the aggrieved person may be assisted to put the application in writing, or the application may be made on his or her behalf by another person.⁸⁹⁹

9.42 The Commission acknowledges that the requirement for an application to be made in writing may raise issues other than an aggrieved person's ability to make a written application. In this regard, the Commission has recommended in this Report that, in limited circumstances, an application for a protection order may be made by telephone, radio or other electronic means.⁹⁰⁰

The requirement of an oath

9.43 In the Commission's view, it should not be necessary for an application for a protection order to be made on oath. Instead, the Commission considers that, generally, the Personal Protection Bill 2007 should provide that the information contained in an application for a protection order must be verified by statutory declaration. Even though the requirement of an oath reflects the seriousness of making an application, the Commission considers it unnecessary to require an application for a protection order to be made on oath. The Commission considers it would be a sufficient requirement if the applicant made a declaration as to the truth of the statements made in the application. Such a declaration may only be taken by certain persons, such as a justice of the peace or a lawyer.⁹⁰¹

9.44 The Commission also considers that, consistent with the provision made in the application form under the *Domestic and Family Violence Protection Act 1989* (Qld), the Personal Protection Bill 2007 should provide that the general requirement for the information contained in an application for a protection order to be verified by statutory declaration does not apply if the application is made by a police officer.

The application form

9.45 The Commission considers the current form for making a complaint under the *Peace and Good Behaviour Act 1982* (Qld) gives insufficient

⁸⁹⁹ See para 6.64 of this Report. The Commission has recommended, for example, that an application may be made on behalf of an aggrieved person by an adult who is authorised in writing by the aggrieved, or, in the absence of a written authorisation, an adult whom the court believes has been authorised by the aggrieved.

⁹⁰⁰ See para 9.114 of this Report.

⁹⁰¹ *Oaths Act 1867* (Qld) s 13.

guidance to the complainant as to the information required to substantiate the particulars of the complaint. The Commission considers that the application form for a protection order should be written in plain English and in a manner that directs the applicant to provide specific information about the grounds on which the protection order is sought and other relevant matters. In the Commission's view, the application form for a protection order should be modelled on the current application form for a protection order under the *Domestic and Family Violence Protection Act 1989* (Qld) ('Form DV1').

9.46 The use of similar forms for applications made under the Personal Protection Bill 2007 and the *Domestic and Family Violence Protection Act 1989* (Qld) would also facilitate the process of treating an application which has been wrongly commenced under the Personal Protection Bill 2007 as an application commenced under the *Domestic and Family Violence Protection Act 1989* (Qld) and vice versa.⁹⁰²

THE ROLE OF JUSTICES OF THE PEACE IN THE APPLICATION PROCESS

The Peace and Good Behaviour Act 1982 (Qld)

9.47 As mentioned earlier in this chapter, an application for a peace and good behaviour order is initiated by making a complaint to a justice of the peace. Once the complaint has been made, the justice of the peace may issue a summons requiring the defendant to appear before, or a warrant requiring that the defendant be apprehended and brought before, a Magistrates Court.⁹⁰³

9.48 The *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) generally authorises certain justices of the peace – including a justice of the peace (magistrates court) or a justice of the peace (qualified) – to issue a summons or a warrant.⁹⁰⁴ A justice of the peace who is conferred with the requisite power under that Act is therefore authorised to issue a summons or a warrant under the *Peace and Good Behaviour Act 1982* (Qld).

902

At para 20.131 of this Report, the Commission has recommended that the Personal Protection Bill 2007 should enable the court to treat an application which has been wrongly commenced under that legislation as an application commenced under the *Domestic and Family Violence Protection Act 1989* (Qld). The Commission has also recommended, at para 20.132 of this Report, that the *Domestic and Family Violence Protection Act 1989* (Qld) should be consequentially amended to insert a reciprocal provision, so that, where the parties fall within the scope of the *Domestic and Family Violence Protection Act 1989* (Qld), an application for a protection order made under the Personal Protection Bill 2007 may be treated as an application for a domestic violence protection order.

903

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

904

See *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 3 (definitions of 'justice of the peace' and 'procedural action or order'), 19, 29; *Justices Act 1886* (Qld) s 24. For a discussion of the categories of justice of the peace in Queensland and their functions and powers, see Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Report No 54 (1999).

9.49 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 generally be handled by justices of the peace in the court system:⁹⁰⁵

[M]ost 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.

9.50 Although it would appear that the power to issue a summons or warrant is rarely, if ever, exercised by a justice of the peace in the community,⁹⁰⁶ that possibility is left open by the *Peace and Good Behaviour Act 1982* (Qld).

9.51 Even where the power to issue a summons or warrant under the *Peace and Good Behaviour Act 1982* (Qld) 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.⁹⁰⁷

9.52 It has also been suggested to the Commission that the two-step process of having to make an initial complaint to a justice of the peace and subsequently file the complaint in court may be an obstacle for some people. While this process potentially discourages the filing of inappropriate applications, it may also restrict the ability of some people who have a meritorious claim to make a complaint:⁹⁰⁸

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.

905 See the Second Reading debate of the Peace and Good Behaviour Bill 1982 (Qld): Queensland *Parliamentary Debates*, Legislative Assembly, 10 November 1982, 2141–2 (Hon Samuel Doumany, Minister for Justice and Attorney-General).

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

907 Information provided by the Chief Magistrate of Queensland, Judge MP Irwin, 25 August 2004; submission 12A.

908 Information provided by Legal Aid Queensland, 8 September 2004; Submission 13. On the other hand, however, neither Caxton Legal Centre Inc nor the Queensland Police Service considered the present procedure to be overly complex: information provided by Acting Commissioner, Queensland Police Service, 6 September 2004 and by Caxton Legal Centre Inc, 23 August 2004.

The Domestic and Family Violence Protection Act 1989 (Qld)

9.53 The *Domestic and Family Violence Protection Act 1989* (Qld) enables a clerk of the court or a justice of the peace to issue a summons to direct the respondent to appear.⁹⁰⁹ Any justice of the peace other than a justice of the peace (commissioner for declarations) is empowered to issue such a summons.⁹¹⁰

The position in other jurisdictions – New South Wales

9.54 In contrast, under the New South Wales civil restraining order legislation, if the application is for an apprehended violence order, only an authorised officer (a magistrate, a registrar or an employee of the Attorney-General's Department who is authorised for the purpose) may issue a warrant for the arrest of the defendant.⁹¹¹

Submissions

9.55 In its Discussion Paper, the Commission sought submissions on whether justices of the peace should continue to have a role in the process of commencing a proceeding under the *Peace and Good Behaviour Act 1982* (Qld). The Discussion Paper also sought submissions on whether the power to issue a summons or warrant should be restricted to certain justices of the peace, and if so, which justices.⁹¹²

9.56 A substantial number of submissions expressed concern about the current role of justices of the peace in the process of commencing a proceeding under the *Peace and Good Behaviour Act 1982* (Qld).⁹¹³

909 *Domestic and Family Violence Protection Act 1989* (Qld) s 47(1). However, a summons need not be issued if a police officer who makes an application for a protection order issues and serves on the respondent a notice in the form of a notice to appear under the *Police Powers and Responsibilities Act 2000* (Qld); *Domestic and Family Violence Protection Act 1989* (Qld) s 47(8). A notice mentioned in s 47(8) need not state an alleged offence as required under the *Police Powers and Responsibilities Act 2000* (Qld); *Domestic and Family Violence Protection Act 1989* (Qld) s 47(9)(a). For the purposes of the court being satisfied, on the non-appearance of the respondent, that he or she has been given certain documents, such a notice is taken to be a summons: *Domestic and Family Violence Protection Act 1989* (Qld) ss 47(9)(b), 49. See para 11.19 of this Report.

910 *Domestic and Family Violence Protection Act 1989* (Qld) ss 3, 47(1), sch (definition of 'justice'). However, if a respondent fails to appear before the court in relation to an application for a protection order, the court may order any justice to issue a warrant for the apprehension of a respondent: *Domestic and Family Violence Protection Act 1989* (Qld) s 49.

911 *Crimes Act 1900* (NSW) ss 562A (definition of 'authorised officer'), 562ZZI; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 3 (definition of 'authorised officer'). Sections 562A (definition of 'authorised officer'), 562ZZI of the *Crimes Act 1900* (NSW) are replicated in ss 3(1) (definition of 'authorised officer'), 88 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 863 of this Report.

912 Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 50–51 (Questions 5–4–5–6).

913 Submissions 2, 5, 6, 8, 12, 12B, 14, 19, 20, 27.

9.57 The Chief Magistrate of Queensland observed in this regard:⁹¹⁴

[T]he perception of magistrates that some registrars and their Justice of the Peace staff are not adequately trained to take a complaint under the Act. Experience is that most Justices do not take steps required ... to make enquiries or receive evidence. In some cases a complaint is issued by a Justice of the Peace where there is no allegation of a threat. This is unfair to a defendant who may have to engage legal representation at his/her own cost to answer the complaint.

I am advised that to remedy this, facts sheets are to be issued to court staff to assist them in understanding their obligations under the Act particularly as it has been identified that police officers are referring persons to the court to make the complaints.

9.58 A Queensland magistrate agreed that adequate training of justices of the peace was essential if justices of the peace continued with their role in receiving complaints.⁹¹⁵

9.59 Caxton Legal Centre Inc suggested that an advantage of the current requirement for a justice of the peace to issue a summons is that it provides some protection against vexatious or unmeritorious complaints, particularly in neighbourhood disputes. In the view of Caxton Legal Centre Inc, if justices of the peace continued to fulfil their role in the process of commencing a proceeding, only certain justices of the peace who have undertaken appropriate training should be authorised to issue a summons or warrant under the Act.⁹¹⁶

9.60 Two community legal services suggested the power to issue a summons or a warrant be limited to certain justices of the peace (for example, court-employed justices of the peace) who are authorised for that purpose under the *Peace and Good Behaviour Act 1982* (Qld).⁹¹⁷ One of these submissions, from the Women's Legal Service, observed:

The use of JPs is generally archaic and there are concerns about JPs' ability to make assessments of reasonableness. This concern may be overcome by adopting an approach similar to the approach in New South Wales where only an authorised justice (a magistrate, a JP employed in the Attorney-General's Department or an employee of the Attorney-General's Department who is so authorised) may issue a summons or warrant.

9.61 The Women's Legal Service also suggested that empowering police to make applications might overcome possible difficulties experienced by applicants in rural or remote areas in accessing the mechanism for making a

⁹¹⁴ Submission 12.

⁹¹⁵ Submission 12B.

⁹¹⁶ Submission 19.

⁹¹⁷ Submissions 5, 8.

complaint consequent upon the removal of the powers of community justices of the peace to process complaints:⁹¹⁸

[R]emoving the ability of community JPs to issue a summons or warrant may cause particular difficulties in rural and remote areas which may need to be addressed by giving police the power to make applications.

9.62 Three community legal services considered that the existing procedure for making a complaint to a justice of the peace is unnecessary, and instead suggested simplifying the procedure to enable the filing of an application for a peace and good behaviour order with the court.⁹¹⁹

9.63 In contrast, the Queensland Police Service expressed satisfaction with the current process for making a complaint under the *Peace and Good Behaviour Act 1982* (Qld) to a justice of the peace. Nonetheless, the Queensland Police Service suggested that complainants in remote areas may be deterred from applying for an order due to the distance that they have to travel to obtain the services of a suitable justice of the peace.⁹²⁰ A community legal service expressed a similar view.⁹²¹

The Commission's view

9.64 Sometimes it may be necessary, or more convenient, for a justice of the peace, rather than a registrar, to issue a summons in relation to an application for a protection order.

9.65 Currently, a justice of the peace, who has general jurisdiction to issue a summons under the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld), is authorised to issue a summons under the *Peace and Good Behaviour Act 1982* (Qld).⁹²²

9.66 The Commission considers that the Personal Protection Bill 2007 should include provisions to the effect of section 47(1)–(3) and (7) of the *Domestic and Family Violence Protection Act 1989* (Qld) as described at paragraph 9.9 above, so that, on application for a protection order, the registrar or a justice is empowered to issue a summons directing the respondent to appear before a

⁹¹⁸ Submission 8.

⁹¹⁹ Submissions 5, 13, 14.

⁹²⁰ Information provided by Acting Commissioner, Queensland Police Service, 6 September 2004.

⁹²¹ Submission 15.

⁹²² See para 9.48 of this Report.

stated court on a stated day and at a stated time and place to be heard on the application.⁹²³

9.67 It is noted that the Commission has made recommendations elsewhere in this Report to the effect that, if a respondent fails to appear before the court in relation to an application for a protection order, the court may order the issue of a warrant, by a justice, for the respondent to be taken into custody and brought before the court.⁹²⁴

SCREENING OF APPLICATIONS FOR UNSUBSTANTIATED OR UNMERITORIOUS COMPLAINTS

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

9.68 The *Peace and Good Behaviour Act 1982* (Qld) requires the justice of the peace to whom a complaint is made to be satisfied that the complaint is substantiated before he or she may issue a summons or warrant.⁹²⁵ The Act also enables a justice of the peace to refer the matter of a complaint to mediation in certain circumstances.⁹²⁶ In these respects, the Act confers a role in the screening of applications on justices of the peace.

The *Domestic and Family Violence Protection Act 1989* (Qld)

9.69 There is no express provision in the *Domestic and Family Violence Protection Act 1989* (Qld) for the preliminary screening of unsubstantiated or unmeritorious complaints. If the court dismisses the application as malicious, deliberately false, frivolous or vexatious, the court may award costs on the application.⁹²⁷

The position in other jurisdictions

9.70 The civil restraining order legislation in New South Wales and South Australia includes a mechanism to assess applications in order to identify complaints that are unlikely to be substantiated or that lack merit.

923 The Commission has also recommended at para 9.165 of this Report that the Personal Protection Bill 2007 should provide that a police officer who makes an application for a protection order may issue and serve on the respondent a notice in the form of a 'notice to appear' under the *Police Powers and Responsibilities Act 2000* (Qld). The Commission has also recommended that, if a police officer who files an application for a protection order issues and serves such a notice on the respondent, the registrar need not issue a summons for the respondent on the filing of the application and need not serve a copy of the application or the notice on the respondent.

924 See para 11.22 of this Report.

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

926 *Peace and Good Behaviour Act 1982* (Qld) s 4(3). See also Chapter 10 of this Report.

927 *Domestic and Family Violence Protection Act 1989* (Qld) s 61.

New South Wales

9.71 In New South Wales, the function of screening applications is conferred on authorised officers.⁹²⁸ Unless the application is made by a police officer, an authorised officer has a discretion to refuse to issue a summons or warrant on an application for an apprehended personal violence order.⁹²⁹

9.72 However, there is a presumption against the exercise of the discretion if the application includes allegations of a personal violence offence,⁹³⁰ an offence of stalking or intimidation,⁹³¹ or certain kinds of harassment.⁹³² The authorised officer may exercise the discretion if satisfied that the application is frivolous, vexatious, without substance or has no reasonable prospect of success, or that the application could be dealt with more appropriately by mediation or other alternative dispute resolution.⁹³³

9.73 In deciding whether or not to exercise the discretion, the authorised officer must take into account, in addition to any other factors the authorised officer considers relevant:⁹³⁴

- 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;

⁹²⁸ An ‘authorised officer’ has the same meaning as under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); *Crimes Act 1900* (NSW) s 562A (definition of ‘authorised officer’). Section 3 of that Act provides that an authorised officer is a Magistrate or a Children’s Magistrate, a registrar of a Local Court, or an employee of the Attorney General’s Department authorised by the Attorney General as an authorised officer for the purposes of the Act either personally or as the holder of a specified office. Section 562A (definition of ‘authorised officer’) of the *Crimes Act 1900* (NSW) is replicated in s 3(1) (definition of ‘authorised officer’) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 863 of this Report.

⁹²⁹ *Crimes Act 1900* (NSW) s 562M(1). Section 562M of the *Crimes Act 1900* (NSW) is substantially replicated in s 53 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

⁹³⁰ A personal violence offence includes a number of offences under the *Crimes Act 1900* (NSW) such as manslaughter, assault occasioning actual bodily harm, common assault, causing danger with firearm or speargun, maliciously destroying or damaging property, or attempting to commit such offences: *Crimes Act 1900* (NSW) s 562A (definition of ‘personal violence offence’). That provision is substantially replicated in s 4 (Meaning of ‘personal violence offence’) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

⁹³¹ ‘Stalking’ includes following a person, watching or frequenting the vicinity of a person’s place of residence, business or work or a place the person frequents for social or leisure activities: *Crimes Act 1900* (NSW) ss 562A (definition of ‘stalking’), 545AB(6). ‘Intimidation’ includes harassment or molestation of a person, approaching a person in a way that causes the person to fear for his or her safety, or conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship: *Crimes Act 1900* (NSW) ss 562AB(6), 562D(1). These definitions of stalking and intimidation are substantially replicated in ss 7 (Meaning of ‘intimidation’), 8 (Meaning of ‘stalking’) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

⁹³² *Crimes Act 1900* (NSW) s 562M(4).

⁹³³ *Crimes Act 1900* (NSW) s 562M(3).

⁹³⁴ *Crimes Act 1900* (NSW) s 562M(5).

- 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 an application for an apprehended violence order;
- the relative bargaining power of the parties; and
- whether the application is in the nature of a cross-application.

9.74 There is no corresponding discretion where the application is made by a police officer. In that situation, the authorised officer must issue process.⁹³⁵ Further, if it appears to the authorised officer 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 officer must issue a warrant for the arrest of the defendant.⁹³⁶

South Australia

9.75 In South Australia, the screening process is carried out within the court system after the application has been filed in the court. Under the South Australian legislation, the court has a power to dismiss the complaint in certain circumstances where the complaint is made by the complainant personally,⁹³⁷ including where the court considers that the complaint is frivolous, vexatious, without substance or has no reasonable prospect of success.⁹³⁸

9.76 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.⁹³⁹ The court must also take into account whether the complaint is in the nature of a cross-application,⁹⁴⁰ together with any other matters that the court considers relevant.⁹⁴¹ 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.⁹⁴²

935 *Crimes Act 1900* (NSW) s 562M(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, *Apprehended Violence Orders*, Report No 103 (October 2003) 107 rec 15.

936 *Crimes Act 1900* (NSW) s 562ZZI(3). This provision is replicated in s 88(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

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

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

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

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

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

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

Submissions

9.77 In its Discussion Paper, the Commission sought submissions on whether it is 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.⁹⁴³

9.78 The Queensland Public Tenants Association Inc and a number of community legal services considered it desirable for the application process to include a mechanism for assessing applications prior to hearing to identify applications that are unmeritorious or have little chance of success.⁹⁴⁴

9.79 The Townsville Community Legal Service Inc considered a screening process should occur only after the application has been filed.⁹⁴⁵ In this respect, the Townsville Community Legal Service Inc observed:⁹⁴⁶

[T]he nature of the behaviour about which the person is seeking protection is such that an application should be assumed to have merit in the first instance.

9.80 The Women's Legal Service also considered it undesirable for court staff to carry out the screening process at the stage when the application is filed. This submission suggested that the role of court staff at this stage should be merely to determine whether the application form is adequately filled out.⁹⁴⁷

9.81 The Citizens Advice Bureau and Gold Coast Legal Service and Caxton Legal Centre Inc suggested that the screening process could be carried out in a preliminary conference at an early stage of proceedings.⁹⁴⁸ In this regard, Caxton Legal Centre Inc also cautioned that, given the delicate nature of peace and good behaviour disputes and the power imbalance faced by genuine victims of harassing behaviour, this process, unless approached carefully, might cause further victimisation.⁹⁴⁹

9.82 In contrast, the South West Brisbane Community Legal Centre Inc suggested the inclusion in the Act of a screening process similar to the New South Wales legislative scheme.⁹⁵⁰ This submission noted that the discretion to refuse to issue process in respect of applications that are frivolous, vexatious, without substance or with little prospect of success was subject to a

⁹⁴³ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 51 (Question 5-8).

⁹⁴⁴ Submissions 5, 6, 14, 15, 19.

⁹⁴⁵ Submission 14.

⁹⁴⁶ Ibid.

⁹⁴⁷ Submission 8.

⁹⁴⁸ Submissions 5, 19.

⁹⁴⁹ Submission 19.

⁹⁵⁰ Submission 15.

presumption against the exercise of the discretion if the application includes allegations of personal violence, stalking, intimidation or harassment.⁹⁵¹

The Commission's view

9.83 The Commission considers that the provisions under the Personal Protection Bill 2007 which deal with making an application for a protection order should not include an administrative mechanism for screening unsubstantiated or unmeritorious applications. The acceptance of an application for a protection order on its face would simplify the application procedure. It would also remove the risk of meritorious applications being wrongly rejected before the allegations made in the application can be properly tested.

9.84 Elsewhere in this Report, the Commission has recommended the inclusion in the Personal Protection Bill 2007 of various measures to safeguard against unmeritorious or ill-founded applications, including alternative dispute resolution mechanisms, summary dismissal and potential liability for costs.⁹⁵² The Commission considers that these measures provide a sufficient mechanism for discouraging those applications that are unmeritorious or have little chance of success.⁹⁵³

APPLICATIONS MADE BY TELEPHONE OR OTHER ELECTRONIC MEANS

9.85 In this Report, the Commission has recommended that the Personal Protection Bill 2007 should empower a court to make interim protection orders in certain circumstances.⁹⁵⁴

9.86 The Commission anticipates that, ordinarily, applications for interim protection orders would be dealt with inside normal registry working hours.⁹⁵⁵ However, there may be circumstances where a person is in need of immediate temporary protection but is unable to have an application for an interim order dealt with quickly because of time, distance or some other circumstance. This situation might arise, for example, where a person's safety or property is endangered and it is not practicable for him or her to apply to a court for immediate temporary protection because it is outside normal registry working hours or because the person lives in a remote or rural area.

951 *Crimes Act 1900 (NSW) s 562M(4)*. See para 9.71–9.73 of this Report.

952 See para 5.188, 10.40, 20.175 of this Report respectively.

953 Note also that under the *Vexatious Proceedings Act 2005 (Qld)*, an order may be obtained in the Supreme Court to prevent a person who has made frequent vexatious applications from making further applications without leave of the court.

954 See para 12.39 of this Report. An interim protection order is an order which has effect for a short period. In the general context of civil restraining order legislation, the purpose of an interim order is to enable the court to protect persons seeking the remedy of an order pending the determination of their application.

955 See para 12.42 of this Report.

The Peace and Good Behaviour Act 1982 (Qld)

9.87 The *Peace and Good Behaviour Act 1982* (Qld) seems to require that a complaint be made in person. There is no provision for the making of an application by telephone or 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.

The Domestic and Family Violence Protection Act 1989 (Qld)

9.88 Section 54 of the *Domestic and Family Violence Protection Act 1989* (Qld) enables a police officer, in certain circumstances, to apply to a magistrate by means of telephone, facsimile, telex, radio, or other electronic means for a temporary protection order.⁹⁵⁶

9.89 Section 54(1)(a) deals with the situation where a police officer who has investigated a domestic violence matter⁹⁵⁷ reasonably believes there is sufficient reason for the officer to take action⁹⁵⁸ and believes that, because of certain circumstances, it is not practicable for an application to be heard and determined quickly. That section provides:

54 Applications by telephone, facsimile etc.

- (1) A police officer may, by way of telephone, facsimile, telex, radio or other similar facility, apply under this section for a temporary protection order to a magistrate if—
 - (a) the police officer may, under section 67(2),⁹⁵⁹ make an application for a protection order, and believes that because of distance, time or other circumstances, it is not practicable for an application made to a court, or to be made to a court, to be heard and determined quickly; or ... [note added]

956 Section 39G of the *Domestic and Family Violence Protection Act 1989* (Qld) empowers a magistrate to make a temporary protection order in respect of an application made under s 54.

957 *Domestic and Family Violence Protection Act 1989* (Qld) s 67(1).

958 *Domestic and Family Violence Protection Act 1989* (Qld) s 67(2).

959 Section 67 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides:

67 Police action relating to domestic violence

- (1) If a police officer reasonably suspects a person is an aggrieved, it is the duty of the officer to investigate or cause to be investigated the complaint, report, or circumstance on which the officer's reasonable suspicion is based, until the officer is satisfied the suspicion is unfounded.
- (2) If, after the investigation, the officer reasonably believes—
 - (a) the person is an aggrieved; and
 - (b) there is sufficient reason for the officer to take action; the officer may—
 - (c) apply for a protection order to protect the aggrieved; and
 - (d) take other action that the officer is required or authorised to take by this Act.

9.90 Section 54(1)(b) and (c) enables a police officer to make an application by telephone, radio or other similar means⁹⁶⁰ if the police officer has taken a person into custody⁹⁶¹ on reasonable suspicion that the person has committed an act of domestic violence and that there is a danger of personal injury or property damage.

The position in other jurisdictions

9.91 The civil restraining order legislation in New South Wales, South Australia, Tasmania, Victoria and Western Australia makes provision for a police officer to make an application by telephone or other electronic means.⁹⁶²

New South Wales

9.92 In New South Wales, a police officer may make a telephone application to an authorised officer⁹⁶³ for an interim apprehended violence order. A telephone application may be made if:⁹⁶⁴

- an incident occurs involving the person against whom the order is sought and the person who would be protected by the order; and

960 See *Domestic and Family Violence Protection Act 1989* (Qld) ss 71(2), 72(2).

961 See *Domestic and Family Violence Protection Act 1989* (Qld) s 69(1).

962 *Crimes Act 1900* (NSW) s 562O; *Summary Procedure Act 1921* (SA) s 99B; *Justices Act 1959* (Tas) s 106DA; *Crimes (Family Violence) Act 1987* (Vic) s 8(4)–(10); *Restraining Orders Act 1997* (WA) ss 17–24. In Western Australia, eligibility to make an application by telephone, radio or other electronic means is limited to an ‘authorised person’ or the person seeking to be protected if he or she is introduced to the magistrate by an authorised person. 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.

Also note that provision is made in the ACT for emergency orders, of an interim nature, to be made on application by telephone by police in certain circumstances in relation to domestic violence: *Domestic Violence and Protection Orders Act 2001* (ACT) ss 62–63.

Section 562O of the *Crimes Act 1900* (NSW) is substantially replicated in s 25 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 863 of this Report. For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 865 of this Report.

963 An ‘authorised officer’ has the same meaning as under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW): *Crimes Act 1900* (NSW) ss 562A (definition of ‘authorised officer’). Section 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provides that an authorised officer is a Magistrate or a Children’s Magistrate, a registrar of a Local Court, or an employee of the Attorney General’s Department authorised by the Attorney General as an authorised officer for the purposes of the Act either personally or as the holder of a specified office. Section 562A (definition of ‘authorised officer’) of the *Crimes Act 1900* (NSW) is replicated in s 3(1) (definition of ‘authorised officer’) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 863 of this Report.

964 *Crimes Act 1900* (NSW) ss 562O(1), 562P(1). The *Crimes Act 1900* (NSW) previously included, in repealed s 562H(2), a requirement that ‘it is not practicable to make an immediate complaint for an interim order by a court because of the time at which, or the place at which, the incident occurs’. That provision was repealed by the *Crimes Amendment (Apprehended Violence) Act 2006* (NSW) s 3, sch 1. Sections 562O(1), 562P(1) of the *Crimes Act 1900* (NSW) are replicated in ss 25(1), 26(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

- a police officer has good reason to believe that the 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.

9.93 A telephone application may be made at any time and whether or not the court is sitting.⁹⁶⁵

9.94 A police officer investigating the incident concerned must, in certain circumstances, make a telephone application if the officer suspects or believes a domestic violence offence, an offence of stalking or an offence of child abuse has recently been or is being committed, is imminent, or is likely to be committed or in respect of which proceedings have been commenced.⁹⁶⁶

South Australia

9.95 In South Australia, in an urgent situation, a complaint may be made to the court by telephone. 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.⁹⁶⁷ The court must 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. The court is to satisfy itself by questioning the complainant and any other available witnesses by telephone.⁹⁶⁸

Tasmania

9.96 The Tasmanian civil restraining order legislation provides that, 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 occurred, the police officer may make an application to a magistrate for an interim restraint order against the person by telephone, radio or facsimile.⁹⁶⁹

⁹⁶⁵ *Crimes Act 1900* (NSW) s 562P(2). This provision is replicated in s 26(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

⁹⁶⁶ *Crimes Act 1900* (NSW) s 562Q(1). This provision is replicated in s 27(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

⁹⁶⁷ *Summary Procedure Act 1921* (SA) s 99B(1)(a).

⁹⁶⁸ *Summary Procedure Act 1921* (SA) s 99B(1)(b).

⁹⁶⁹ *Justices Act 1959* (Tas) s 106DA(2).

Victoria

9.97 Under the Victorian family violence legislation, a member of the police force may make a telephone or facsimile application for an interim intervention order 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. Before making such a complaint, the police officer must complete a form of complaint setting out the grounds on which the order is sought.⁹⁷⁰

Western Australia

9.98 In Western Australia, an application for a violence restraining order may be made by telephone, facsimile, radio, video conference, email or similar means to a magistrate authorised by the Chief Magistrate to hear such applications.⁹⁷¹ The Chief Magistrate is to ensure that, as far as practicable, there is at least one such authorised magistrate available at all times.⁹⁷²

9.99 The application may be made by an authorised person⁹⁷³ or by the person seeking to be protected if he or she is introduced to the magistrate by an authorised person.⁹⁷⁴ However, a telephone application is not to be made unless the authorised person reasonably believes that:⁹⁷⁵

- 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.

970 *Crimes (Family Violence) Act 1987* (Vic) s 8(4), (5). For the application of this legislation, see note 865 of this Report.

971 *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 order and that an act of family and domestic 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). Note, there are no equivalent provisions in relation to applications for misconduct restraining orders.

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

973 An 'authorised person' is defined in 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.

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

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

Submissions

9.100 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should provide for applications to be made by telephone or other electronic means.⁹⁷⁶

9.101 The Discussion Paper also asked if the *Peace and Good Behaviour Act 1982* (Qld) should provide for such applications:⁹⁷⁷

- who should be able to make the application;
- to whom should the application be made; and
- in what circumstances should the application be able to be made?

Applications made by telephone or other electronic means

9.102 A Queensland magistrate, registrars of the Magistrates Court Branch of the Department of Justice and Attorney-General, Queensland Advocacy Inc, the Queensland Public Tenants Association Inc and three community legal services expressed the view that the *Peace and Good Behaviour Act 1982* (Qld) should provide, in limited circumstances, for applications to be made by telephone or other electronic means.⁹⁷⁸

9.103 For example, it was suggested by a Queensland magistrate that:⁹⁷⁹

The Act should allow for applications to be made by telephone or other electronic means, only if there is provision for a temporary or interim order. Acceptance of such an application should only be allowed where the situation is such that there is a strong urgency and an interim order is necessary to protect the position for a brief time.

...

The prerequisite for the making of an application in electronic form is in situations where there is a high likelihood of injury or damage to property **and** a delay or lack of opportunity to file material with the court prior to having the matter considered on an urgent basis ... [original emphasis]

9.104 This submission also distinguished between telephone applications made by a police officer and applications made by complainants, possibly in electronic form:⁹⁸⁰

⁹⁷⁶ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 51 (Question 5-12).

⁹⁷⁷ Ibid (Question 5-13).

⁹⁷⁸ Submissions 6, 8, 12B, 14, 15, 20, 28.

⁹⁷⁹ Submission 12B.

⁹⁸⁰ Ibid.

Unless we are moving to an electronic lodgement system for use by the public with appropriate security and verification processes as to who the lodging parties are, we will still need paper documents lodged and for the parties to appear, whether by telephone, video link or in person.

I am unclear whether ‘electronic means’ is intended to include facsimile transmissions. If it does so, then I can see no problem with complainants making their application by facsimile, perhaps accompanied by some form of identification, for example, a copy of the complainant’s drivers licence. If an application is to be made by telephone, applications should only be able to be made by a police officer.

Who may make an application

9.105 Each of the submissions that addressed the issue of eligibility to make a telephone application considered that a police officer should be able to bring such an application.⁹⁸¹ The South West Brisbane Community Legal Centre Inc also supported extending eligibility to make a telephone application to a complainant or a person acting on the complainant’s behalf.⁹⁸²

Who should hear the application

9.106 Four community legal services considered the issue of who should hear such an application.⁹⁸³ In three of these submissions, it was considered that the application should be made to a magistrate.⁹⁸⁴ The other community legal service considered the application should be made to an ‘authorised person’, namely a justice of the peace, as is presently the case.⁹⁸⁵

The circumstances in which an application may be made

9.107 A Queensland magistrate and three community legal services proposed that telephone orders should be available in circumstances of urgency.⁹⁸⁶

9.108 Queensland Advocacy Inc supported the availability of telephone applications in circumstances where an aggrieved person seeks urgent protection and is prevented from personally lodging an application.⁹⁸⁷

981 Submissions 5, 8, 12, 14, 15.

982 Submission 15.

983 Submissions 5, 8, 14, 15.

984 Submissions 5, 8, 14.

985 Submission 15.

986 Submissions 5, 8, 12B, 14, 20.

987 Submission 20.

9.109 Further, a number of submissions variously considered that provision for telephone applications should be made available where it is not practicable to bring an application in the ordinary manner because of time, distance or other circumstances.⁹⁸⁸

9.110 Three of these submissions specifically included isolation or disability as circumstances that may impede the making of an application in the ordinary manner.⁹⁸⁹

9.111 For example, the Women's Legal Service commented:⁹⁹⁰

Particular consideration needs to be given to accessibility issues for people who experience isolation such as those in rural and remote locations, people with disabilities and people from culturally diverse backgrounds.

9.112 Similarly, the South West Brisbane Community Legal Centre Inc suggested:⁹⁹¹

The circumstances where such an application can be made should include where a rural or remote area is involved or where the complainant is disabled in some manner by illness, age, infirmity or other disability and cannot make a complaint in person.

The Commission's view

9.113 As mentioned earlier, there may be situations in which a person needs immediate temporary protection and, because of time, distance or some other circumstance, it is not practicable for the person to have an application for a protection order heard and decided quickly.

9.114 In the Commission's view, the Personal Protection Bill 2007 should make specific provision for a police officer, in limited circumstances, to apply to a magistrate for an interim protection order by means of telephone, facsimile, radio, email, videoconferencing or another form of electronic communication.

9.115 The Commission considers that eligibility to make such an application should be limited to police officers.

9.116 The role of the police generally involves the protection of life and property, the preservation of peace and safety and the prevention of crime. Consistent with this general role, where the personal safety or property of a person is in danger, it is appropriate for the police to provide an initial response by dealing with the imminent risk and, if necessary, to apply for an interim protection order to prevent the unwanted behaviour from happening again. Also

⁹⁸⁸ Submissions 5, 6, 8, 14, 15, 20.

⁹⁸⁹ Submissions 6, 8, 15.

⁹⁹⁰ Submission 8.

⁹⁹¹ Submission 15.

provision for police to make applications under the Bill accords with the community policing and crime prevention role of the Queensland Police Service, particularly given the importance of protection orders in dealing with disputes before they escalate into violent crime.

9.117 The involvement of the police in making an application by telephone or other electronic means also provides a filtering mechanism in relation to non-urgent applications. In particular, it may help to prevent the use of frivolous, vexatious or malicious applications as a tool for harassment.

9.118 The procedures involved in obtaining an order by such means also raise a number of practical considerations. For example, the circumstances of urgency give rise to the necessity to truncate the procedures for making a telephone application so as to enable the application to be heard and determined quickly. There is also the necessity for someone to prepare the order in the terms specified by the magistrate and to serve the order on the parties to the application. The Commission considers that the police are best placed to make a telephone application in circumstances of urgency and to prepare and serve a telephone order. It is also consistent with the Commission's recommendation, made elsewhere in this Report, that the police may be required to serve the respondent with an order if the order is made in the respondent's absence.⁹⁹²

9.119 The Commission further considers that applications made by telephone or other electronic means should be heard only by a magistrate.

9.120 Elsewhere in this Report, the Commission has recommended the following grounds for obtaining an interim protection order under the Personal Protection Bill 2007:⁹⁹³

- there is a *prima facie* case that a respondent has engaged in prohibited conduct (ie, 'personal violence' or 'workplace violence'); and
- for an interim personal protection order, it is necessary and appropriate to make the order to ensure the safety of an aggrieved person for the order, or a relative or associate of an aggrieved person, or to prevent substantial damage to property of an aggrieved person for the order, or a relative or associate of an aggrieved person; or
- for an interim workplace protection order, it is necessary and appropriate to make the order to ensure the safety of an employer or employee at the workplace or to prevent substantial damage to property in the workplace.

⁹⁹² See para 19.59–19.60 of this Report.

⁹⁹³ See para 12.43 of this Report.

9.121 The Commission has recommended that these grounds apply for both an application for an interim protection order made to a court or an application for an interim protection order made by telephone or other electronic means to a magistrate.⁹⁹⁴ The Commission considers that a magistrate, to whom an application for an interim protection order is made by telephone or other electronic means, must also be satisfied that it is not possible for a court to make an interim protection order quickly, because of time, distance or other circumstances. These particular circumstances are sufficient to justify the making of an interim protection order without requiring the attendance in court of the person seeking protection under the order.

9.122 The Commission therefore considers that the Personal Protection Bill 2007 should provide that a police officer may make an application for an interim protection order by telephone, facsimile, radio, email, videoconferencing or another form of electronic communication if the police officer reasonably believes that:

- a person has engaged in prohibited conduct (ie, ‘personal violence’ or ‘workplace violence’); and
- because of distance, time or other circumstances, it is not possible for a court to make an interim protection order quickly; and
- having regard to the nature of the prohibited conduct of the person, it is necessary and appropriate for an interim protection order to be made against the person immediately to ensure someone else’s safety or to prevent substantial damage to property.

9.123 In light of the Commission’s recommendation that eligibility to apply for an interim protection order by telephone or other electronic means should be limited to police officers, consideration should be given by the Commissioner of Police to including the role of police in making an application for an interim protection order by telephone or other electronic means in the procedures contained in the Queensland Police Service Operational Procedures Manual.

9.124 The Commission further considers that, if the implementation of this scheme for making telephone applications for an interim protection order is not operating effectively, for example, because police are declining to act in those matters, the role of police in making such applications should be reviewed. If it is apparent that the role or function of the police in making such applications is inadequate, ineffective or inefficient, then consideration should be given to addressing those deficiencies through appropriate mechanisms, including the amendment of the Personal Protection Bill 2007.

994

See para 12.43, 12.46 of this Report.

PROCEDURES FOR MAKING AN APPLICATION BY TELEPHONE OR OTHER ELECTRONIC MEANS

The *Domestic and Family Violence Protection Act 1989* (Qld)

9.125 The procedures for making an application for a temporary protection order to a magistrate by telephone, radio or other electronic means are set out in section 54(3)–(7) to 57 of the *Domestic and Family Violence Protection Act 1989* (Qld).

Making an application by telephone etc

9.126 Section 54(3) to (7) of the *Domestic and Family Violence Protection Act 1989* (Qld) requires the police officer, before making the application, to prepare a form of application for a protection order.⁹⁹⁵ The police officer is further required to inform the magistrate of the particulars of the application and file the form of application in the office of the clerk of the court where the order is to be returned.⁹⁹⁶ The magistrate is entitled to presume that the police officer is in fact a police officer and that the requirements of section 54 have been complied with.⁹⁹⁷ On the filing of the form of application, an application for a protection order is taken to be made to the court at that place.⁹⁹⁸

Duties of a magistrate

9.127 Section 55 of the *Domestic and Family Violence Protection Act 1989* (Qld) imposes certain duties on a magistrate to whom a telephone application under section 54 is made.

9.128 The magistrate must reduce the particulars of the application to writing in, or to the effect of, the approved form.⁹⁹⁹

9.129 If a magistrate makes a temporary protection order, he or she must complete and sign the order, record on the order the factors that cause him or her to be satisfied that a court could properly make a protection order under the *Domestic and Family Violence Protection Act 1989* (Qld), inform the applicant of the terms of the order, and give the clerk of the court at which the order is to be returned the written particulars of the application and the order.¹⁰⁰⁰

⁹⁹⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 54(3).

⁹⁹⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 54(4), (6).

⁹⁹⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 54(5).

⁹⁹⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 54(7).

⁹⁹⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 55.

¹⁰⁰⁰ *Domestic and Family Violence Protection Act 1989* (Qld) s 55(a)(i)–(iv).

9.130 If the magistrate refuses to make the order, he or she must give written reasons for the refusal, and as soon as is practicable, cause the written particulars of the application and the written reasons for the refusal to be given to the clerk of the court where the application for a protection order has been filed.¹⁰⁰¹

Duties of a police officer

9.131 Section 56 of the *Domestic and Family Violence Protection Act 1989* (Qld) imposes certain duties on a police officer who obtains a temporary protection order after making a telephone application under section 54.

9.132 The police officer is required to prepare three copies of the order, in the terms conveyed to him or her by the magistrate. The order must include certain matters including the name of the magistrate who made the order, the date and time the order was made and the place and time at which the order is to be returned before a court.¹⁰⁰² One copy of the temporary order is to be served on each of the aggrieved and the respondent. A copy of the application must also be served on the respondent.¹⁰⁰³

Setting a date for hearing after a temporary protection order is made

9.133 Section 57 of the *Domestic and Family Violence Protection Act 1989* (Qld) sets out the way in which the 'return date' of a temporary protection order made on a telephone application is to be determined.

9.134 A temporary protection order must specify the time and place for the application to be heard.¹⁰⁰⁴ The order is to come back before the court within 30 days after the day on which the temporary protection order was made, or, if there is not a suitable hearing date within that period, the next suitable hearing date.¹⁰⁰⁵

Proof of temporary protection order

9.135 Section 53 of the *Evidence Act 1977* (Qld) provides that evidence of a court order, and of any particulars relating to the order, may be given by the production of the original of the order, an examined copy of the order,¹⁰⁰⁶ a

1001 *Domestic and Family Violence Protection Act 1989* (Qld) s 55(b).

1002 *Domestic and Family Violence Protection Act 1989* (Qld) s 56(1).

1003 *Domestic and Family Violence Protection Act 1989* (Qld) s 56(2).

1004 *Domestic and Family Violence Protection Act 1989* (Qld) s 57(1).

1005 *Domestic and Family Violence Protection Act 1989* (Qld) s 57(2)–(3).

1006 'An examined copy is one examined against the original. As evidence of the examination is usually necessary, proof by examined copy is rare': JD Heydon, *Cross on Evidence* (2008) [41100] n 1.

document purporting to be a sealed copy of the order, or an official certificate.¹⁰⁰⁷

9.136 This would make proof of a temporary telephone order difficult in circumstances where the document relied on is the unsealed form of the order prepared by the police officer.¹⁰⁰⁸

9.137 Section 84(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides, however, that a copy of an order made under that Act is evidence of the making of the order and of the matters contained in the order in particular proceedings:

84 Evidentiary provision

- (1) In any proceeding with the view to giving effect to any provision of this Act a document purporting to be—
 - (a) a copy of a protection order or a temporary protection order; or
 - (b) a copy of an order revoking a protection order or a temporary protection order, or varying the prohibitions and restrictions imposed by a protection order or a temporary protection order;

shall be evidence and, in the absence of evidence to the contrary, conclusive evidence of the making of the order and of the matters contained therein.

Submissions

9.138 The Townsville Community Legal Service Inc considered generally that provisions similar to section 54 of the *Domestic and Family Violence Protection Act 1989* (Qld) should be included in the legislation.¹⁰⁰⁹

9.139 Caxton Legal Centre Inc suggested that, as a matter of procedural fairness, a person against whom an order has been sought should be informed of the allegations made against him or her and given an opportunity to be heard at a final hearing. This submission noted in this regard the importance of the service of the relevant application form.¹⁰¹⁰

The Commission's view

9.140 The *Domestic and Family Violence Protection Act 1989* (Qld) contains comprehensive provisions for the procedures that apply in relation to a telephone application for a temporary protection order. The Commission also

¹⁰⁰⁷ *Evidence Act 1977* (Qld) s 53(1)(a), (d)–(g).

¹⁰⁰⁸ See para 9.132 of this Report.

¹⁰⁰⁹ Submission 14.

¹⁰¹⁰ Submission 20.

notes that similar procedures are set out in the *Police Powers and Responsibilities Act 2000* (Qld) for the issue of warrants and other prescribed authorities by phone, facsimile, radio, email or similar facility in urgent or other special circumstances.¹⁰¹¹

9.141 The Commission considers that the procedures for making an application, by telephone, facsimile, radio, email, videoconferencing or other form of electronic communication, for an interim protection order under the Personal Protection Bill 2007 should be generally similar to the provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) and the telephone warrant provisions of the *Police Powers and Responsibilities Act 2000* (Qld). This would provide police and magistrates with a generally consistent scheme for processing telephone applications brought under the Personal Protection Bill 2007 and the *Domestic and Family Violence Protection Act 1989* (Qld). It would also provide a set of procedures similar to those used by police in other contexts.

9.142 In particular, the Commission considers the Personal Protection Bill 2007 should make provision for the following:

- If the police officer has not already applied to a court for a protection order, the police officer must, as soon as practicable after applying to a magistrate by telephone or other electronic means, for an interim protection order, prepare an application for a protection order and file the application in the court which will deal with the application.¹⁰¹²
- If the magistrate makes an interim protection order on an application by a police officer by telephone or other electronic means, the magistrate must complete and sign the original order and record in it the reasons the magistrate is satisfied there are grounds for making the order.
- The magistrate must either immediately give a copy of the order to the applicant, if there is a reasonably practicable way of doing so, such as by sending a copy by facsimile or email, or must tell the applicant the terms of the order, including when and where the application for the final order will be heard by the court.
- If the magistrate tells the applicant the terms of the order, the applicant must complete a form of order which includes the magistrate's name and the terms of the order, including the time and place at which the application for the final order will be heard.

¹⁰¹¹ *Police Powers and Responsibilities Act 2000* (Qld) ss 800 (Obtaining warrants, orders and authorities, etc, by telephone or similar facility), 801(Steps after issue of prescribed authority).

¹⁰¹² The Commission notes that, in some circumstances, the requirement for a police officer to file an application may result more than one application being filed in relation to the same parties. This situation may arise if another applicant has already filed an application for a protection order in relation to the same parties.

- As soon as practicable after the interim order is made, a police officer must serve a copy of the order and a copy of the related application on each respondent and aggrieved person. If the police officer completed a form of order, he or she must give it to the registrar of the court that is to hear the application for the final protection order.
- As soon as practicable after the interim order is made, the magistrate must give the original order and written particulars of the application for the protection order and the application for the interim order, as communicated to the magistrate by the applicant, to the registrar of the court that is to hear the application for the final protection order.
- If the magistrate refuses to make the interim protection order, the magistrate must:
 - record the reasons for refusing to make the interim order; and
 - as soon as practicable, give written particulars of the application for the protection order and the application for the interim protection order, as communicated to the magistrate by the applicant, and the reasons for the magistrate's refusal, to the registrar of the court that is to hear the application for the final protection order.

9.143 The Commission notes that when a temporary protection order has been made, section 56 of the *Domestic and Family Violence Protection Act 1989* (Qld) requires service of the order, and the application to which it relates, to be effected by the police officer. The Commission has recommended at paragraph 9.142 of this Report that the Bill should include a provision of similar effect. The Commission considers this is an appropriate exception to the general requirement under the Personal Protection Bill 2007 that service of applications and orders be effected by the registrar.¹⁰¹³

9.144 The Commission also notes that for an interim protection order made by telephone or other electronic means, proof of the order in reliance on the copy given to, or prepared by, the police officer could be difficult given that the form of the order will be neither the original order nor a sealed copy of the order.¹⁰¹⁴ The Commission therefore considers that, to facilitate proof of an interim telephone order, the Personal Protection Bill 2007 should provide that the copy of the order given to the applicant by the magistrate, or the form of the order completed by the applicant in the terms conveyed by the magistrate, is a duplicate of, and is as effective as, the original order. The Commission notes that section 84(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) is in broader terms and applies to other orders made under that Act.

¹⁰¹³ See para 19.58 of this Report.

¹⁰¹⁴ Note that s 53 of the *Evidence Act 1977* (Qld) provides that evidence of a court order may be given by producing the original of the order, an examined copy of the order, a sealed copy of the order or an official certificate. See para 9.135 of this Report.

However, the Commission considers the provisions of section 53 of the *Evidence Act 1977* (Qld) sufficient to deal with proof of other orders made under the Personal Protection Bill 2007.

NOTICES TO APPEAR

9.145 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that while the usual procedure for starting proceedings on the making of an application under that Act is for the issue of a summons by the clerk or a justice, a summons need not be issued if a police officer who makes an application issues and serves on the respondent a notice in the form of a notice to appear under the *Police Powers and Responsibilities Act 2000* (Qld).¹⁰¹⁵

9.146 This raises the issue whether the Personal Protection Bill 2007 should make similar provision.

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

9.147 The *Peace and Good Behaviour Act 1982* (Qld) does not make provision for the issue of a notice in the form of a notice to appear under the *Police Powers and Responsibilities Act 2000* (Qld) in place of a summons on a complaint for a peace and good behaviour order.

The *Domestic and Family Violence Protection Act 1989* (Qld)

9.148 Section 47(8) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a summons under that Act need not be issued on an application for a protection order if a police officer, who applies for a protection order, issues and serves on the respondent a notice in the form of a notice to appear under the *Police Powers and Responsibilities Act 2000* (Qld).

9.149 The notice need not state an alleged offence as required under the *Police Powers and Responsibilities Act 2000* (Qld).¹⁰¹⁶ The notice is taken to be a summons for the purposes of the court's power to proceed in the absence of the respondent if satisfied the respondent has been given a copy of the application and summons.¹⁰¹⁷

1015 *Domestic and Family Violence Protection Act 1989* (Qld) s 47(1), (8). See para 9.10 of this Report.

1016 *Domestic and Family Violence Protection Act 1989* (Qld) s 47(9)(a).

1017 *Domestic and Family Violence Protection Act 1989* (Qld) s 47(9)(b). Section 49 of that Act provides that if the respondent fails to appear but the court is satisfied the respondent was given a copy of the application and summons, or a copy of other particular documents, the court may proceed to hear and determine the matter, adjourn the matter or issue a warrant for the respondent to be taken into custody and brought before the court.

9.150 Section 47(8)–(9) provides:

- (8) A summons under this section need not be issued if a police officer who makes an application for a protection order, issues and serves on the respondent a notice in the form of a notice to appear under the *Police Powers and Responsibilities Act 2000*.
- (9) A notice mentioned in subsection (8)—
 - (a) need not state an alleged offence as required under the *Police Powers and Responsibilities Act 2000*; and
 - (b) is taken, for section 49, to be a summons.

The *Police Powers and Responsibilities Act 2000* (Qld)

9.151 Chapter 14, part 5 of the *Police Powers and Responsibilities Act 2000* (Qld) provides for police to issue ‘notices to appear’ as an alternative to arrest to start proceedings against a person for an alleged offence.¹⁰¹⁸

9.152 A notice to appear requires the person to appear in a court of summary jurisdiction at a stated time and place in relation to the alleged offence.¹⁰¹⁹ Such a requirement is taken to be a summons issued by a justice under the *Justices Act 1886* (Qld).¹⁰²⁰

9.153 A notice to appear must also state the substance of the alleged offence.¹⁰²¹ The statement need only provide general particulars of the offence, such as the type of the offence and when and where it is alleged to have been committed.¹⁰²² Such a statement in a notice to appear is taken to be a complaint under the *Justices Act 1886* (Qld).¹⁰²³

9.154 A notice to appear must be served personally¹⁰²⁴ and, if it is to be served on a child, it must be served ‘as discreetly as practicable’.¹⁰²⁵ As soon as reasonably practicable after it is served, and before the time for the person’s appearance, the notice to appear must be filed with the clerk of the court.¹⁰²⁶

¹⁰¹⁸ *Police Powers and Responsibilities Act 2000* (Qld) s 382(1).

¹⁰¹⁹ *Police Powers and Responsibilities Act 2000* (Qld) s 384(1)(d).

¹⁰²⁰ *Police Powers and Responsibilities Act 2000* (Qld) s 388(2)(a).

¹⁰²¹ *Police Powers and Responsibilities Act 2000* (Qld) s 384(1)(a).

¹⁰²² *Police Powers and Responsibilities Act 2000* (Qld) s 386(1).

¹⁰²³ *Police Powers and Responsibilities Act 2000* (Qld) s 388(1).

¹⁰²⁴ *Police Powers and Responsibilities Act 2000* (Qld) s 382(3).

¹⁰²⁵ *Police Powers and Responsibilities Act 2000* (Qld) s 383.

¹⁰²⁶ *Police Powers and Responsibilities Act 2000* (Qld) s 385(1).

9.155 Subject to the other provisions of the *Police Powers and Responsibilities Act 2000* (Qld) dealing with notices to appear, the provisions of the *Justices Act 1886* (Qld) and any other Act apply to a notice to appear as they apply to a complaint and summons.¹⁰²⁷

The Commission's view

9.156 In this chapter, the Commission has recommended that the usual procedure for starting proceedings for a protection order under its proposed Personal Protection Bill 2007 is for an application to be filed in court and a summons to be issued requiring the respondent to appear at the hearing of the application.¹⁰²⁸ This procedure is generally consistent with the process under the *Domestic and Family Violence Protection Act 1989* (Qld).

9.157 The Commission has also made recommendations that police may, and in some circumstances must, apply for a protection order.¹⁰²⁹

9.158 The Commission considers it desirable for the Personal Protection Bill 2007 to allow a police officer, who has made, or is making, an application for a protection order, to issue and serve a notice requiring the respondent to appear in court, in the place of a summons issued by the registrar or a justice of the peace. Such a notice should be taken as a summons for the purpose of the Personal Protection Bill 2007.

9.159 This would have the advantage of streamlining the process of serving the respondent with a document requiring his or her appearance in court when police decide to make an application for a protection order against the person. Without such a process, the application would first need to be filed and a summons issued by a registrar or justice of the peace before a copy of the application and summons could be served on the respondent.¹⁰³⁰ This would involve a time delay between the police intervention which triggers the making of the application by police and the service of the summons on the respondent.

9.160 Given the purpose of enabling police to issue a notice is to streamline the initiation of proceedings by police, the Commission considers it appropriate that existing mechanisms under the *Police Powers and Responsibilities Act 2000* (Qld) be utilised. As such, the Commission considers it appropriate that a notice issued and served by police requiring the respondent to appear under the Personal Protection Bill 2007 should be in the form of a 'notice to appear' under

¹⁰²⁷ *Police Powers and Responsibilities Act 2000* (Qld) s 388(5).

¹⁰²⁸ See para 9.25, 9.66 of this Report.

¹⁰²⁹ See para 6.125–6.126 of this Report.

¹⁰³⁰ The Commission has recommended that, in relation to the issue of a summons, either the registrar may issue a summons when the application is filed, or a justice of the peace (qualified) or a justice of the peace (magistrates court) may issue a summons which must be filed by the applicant along with the application. See para 9.66 of this Report.

the *Police Powers and Responsibilities Act 2000* (Qld). This is the position under the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁰³¹

9.161 However, a ‘notice to appear’ under the *Police Powers and Responsibilities Act 2000* (Qld) is required to state the substance, in general particulars, of the alleged offence.¹⁰³² To that extent, a ‘notice to appear’ is taken to be a complaint.

9.162 The Commission does not consider it desirable, however, that a notice issued by police, in lieu of a summons, under the Personal Protection Bill 2007 should also replace the filing and service of the application containing the complaint. The Commission has made recommendations elsewhere in this chapter about the formal requirements for an application made under the Bill.¹⁰³³ The Commission considers that an application made by a police officer should also be made in the required form.¹⁰³⁴ This will ensure the respondent, and the aggrieved person for the order being sought, have sufficient information about the application before it is heard.

9.163 The Commission also notes that a notice issued in place of a summons under the Personal Protection Bill 2007 should not include a statement or reference to an alleged offence. Rather, the notice should require the person to appear in court at a stated time and place and a copy of the application, which has been or is to be filed with the court, should be served on the respondent along with the notice or as soon as reasonably practicable after the notice is served.

9.164 Under the *Police Powers and Responsibilities Act 2000* (Qld), the police officer must file the notice in a court as soon as reasonably practicable after it is served.¹⁰³⁵ Under the provisions for making an application which the Commission has recommended elsewhere in this chapter, a copy of the application would also need to be filed.¹⁰³⁶

9.165 The Commission is therefore of the view that the Personal Protection Bill 2007 should provide for the following:

- If a police officer has made, or is to make, an application for a protection order, a police officer may issue and serve on the respondent a notice in the form of a ‘notice to appear’ under the *Police Powers and Responsibilities Act 2000* (Qld). A copy of the application which has

¹⁰³¹ See para 9.148 of this Report.

¹⁰³² See para 9.153 of this Report.

¹⁰³³ See para 9.41–9.46 of this Report.

¹⁰³⁴ Note that the Commission has recommended elsewhere in this chapter that an application made by a police officer need not be witnessed. See para 9.44 of this Report.

¹⁰³⁵ *Police Powers and Responsibilities Act 2000* (Qld) s 385(1).

¹⁰³⁶ See para 9.25 of this Report.

been or is to be filed in court must also be served either together with the notice or as soon as practicable after the notice is served.

- If a police officer issues and serves a notice to appear on the respondent, the registrar need not issue a summons for the respondent on the filing of the application and need not serve a copy of the application or the notice on the respondent.
- A notice issued and served on a respondent by police under the Bill need not state an alleged offence as required under the *Police Powers and Responsibilities Act 2000* (Qld).
- A notice issued and served on a respondent by police under the Bill is taken to be a summons requiring the respondent to appear before the stated court at the stated time and place to be heard on the application.
- The police officer must file a copy of the notice to appear as soon as practicable after serving the notice on the respondent.

9.166 This is generally consistent with the position under the *Domestic and Family Violence Protection Act 1989* (Qld).

9.167 The Commission also notes that, elsewhere in this Report, it has recommended that the Queensland Police Service should review existing police powers under the *Police Powers and Responsibilities Act 2000* (Qld), such as powers of entry and detention, to ensure they are sufficient for the administration and enforcement of the proposed Personal Protection Bill 2007.¹⁰³⁷

RECOMMENDATIONS

9.168 The Commission makes the following recommendations:

The usual procedure for initiating an application

9-1 The usual process for initiating an application under the Personal Protection Bill 2007 should be generally similar to the process used under the *Domestic and Family Violence Protection Act 1989* (Qld), so that once an application form has been completed, it is filed with the court.¹⁰³⁸

See Personal Protection Bill 2007 cl 17(1)(a).

¹⁰³⁷ See para 3.62 of this Report.

¹⁰³⁸ See para 9.25 of this Report.

The requirement of writing

- 9-2 An application made under the Personal Protection Bill 2007 should be made in writing except where otherwise provided for under the Bill.¹⁰³⁹

See Personal Protection Bill 2007 cl 17(1)(a).

Verification by statutory declaration

- 9-3 The Personal Protection Bill 2007 should provide that, generally, the information contained in an application for a protection order must be verified by statutory declaration.¹⁰⁴⁰

See Personal Protection Bill 2007 cl 17(3).

- 9-4 The Personal Protection Bill 2007 should provide that the general requirement for the information contained in an application for a protection order to be verified by statutory declaration does not apply if the application is made by a police officer.¹⁰⁴¹

See Personal Protection Bill 2007 cl 17(4).

The application form

- 9-5 The application form for a protection order should be written in plain English and in a manner that directs the applicant to provide specific information about the grounds on which a protection order is sought and other relevant matters.¹⁰⁴²

See Personal Protection Bill 2007 cl 17(1)(b).

- 9-6 The application form for a protection order should be modelled on the current application form for a protection order under the *Domestic and Family Violence Protection Act 1989* (Qld) (Form DV1).¹⁰⁴³

¹⁰³⁹ See para 9.41 of this Report.

¹⁰⁴⁰ See para 9.43 of this Report.

¹⁰⁴¹ See para 9.44 of this Report.

¹⁰⁴² See para 9.45 of this Report.

¹⁰⁴³ Ibid.

The role of justices of the peace in the application process

- 9-7 The Personal Protection Bill 2007 should include a provision to the effect of section 47(1)–(3) and (7) of the *Domestic and Family Violence Protection Act 1989* (Qld) so that, on application for a protection order, a registrar or a justice is empowered to issue a summons directing the respondent to appear before a stated court on a stated day and at a stated time and place to be heard on the application.¹⁰⁴⁴

See Personal Protection Bill 2007 cl 19, 20.

Screening of applications for unsubstantiated or unmeritorious complaints

- 9-8 The provisions under the Personal Protection Bill 2007 which deal with making an application for a protection order should not include an administrative mechanism for screening unsubstantiated or unmeritorious applications.¹⁰⁴⁵

Applications by telephone or other electronic means

- 9-9 The Personal Protection Bill 2007 should provide for a police officer, in limited circumstances, to apply to a magistrate by means of telephone, facsimile, radio, email, videoconferencing or another form of electronic communication for an interim protection order.¹⁰⁴⁶

See Personal Protection Bill 2007 cl 18(2).

- 9-10 The Personal Protection Bill 2007 should provide that a police officer may make an application by telephone, facsimile, radio, email, videoconferencing or another form of electronic communication for an interim protection order if the police officer reasonably believes that:¹⁰⁴⁷

- (a) a person has engaged in prohibited conduct; and

1044 See para 9.66 of this Report.

1045 See para 9.83 of this Report.

1046 See para 9.114 of this Report.

1047 See para 9.122 of this Report.

- (b) because of distance, time or other circumstances, it is not possible for a court to make an interim protection order quickly; and
- (c) having regard to the nature of the prohibited conduct of the person, it is necessary and appropriate for an interim protection order to be made against the person immediately to ensure someone else's safety or prevent substantial damage to property.

See Personal Protection Bill 2007 cl 18(1).

- 9-11 Consideration should be given by the Commissioner of Police to including the role of police in making an application for an interim protection order by telephone or other electronic means in the procedures contained in the Queensland Police Service Operational Procedures Manual.¹⁰⁴⁸
- 9-12 If the implementation of the scheme for making telephone applications for an interim protection order is not operating effectively, the role of police in making such applications should be reviewed, and, if it is apparent that the role or function of the police in making such applications is inadequate, ineffective or inefficient, then consideration should be given to addressing those deficiencies through appropriate mechanisms, including the amendment of the Personal Protection Bill 2007.¹⁰⁴⁹
- 9-13 The procedures for making an application by telephone, facsimile, radio, email, videoconferencing or another form of electronic communication for an interim protection order under the Personal Protection Bill 2007 should be similar to the telephone application provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) and the telephone warrant provisions of the *Police Powers and Responsibilities Act 2000* (Qld). In particular, the Personal Protection Bill 2007 should provide for the following:¹⁰⁵⁰

¹⁰⁴⁸ See para 9.123 of this Report.

¹⁰⁴⁹ See para 9.124 of this Report.

¹⁰⁵⁰ See para 9.141–9.144 of this Report.

- (a) If the police officer has not already applied to a court for a protection order, the police officer must, as soon as practicable after applying to a magistrate by telephone or other electronic means for an interim protection order, prepare an application for the interim protection order and file the application in court.
- (b) If the magistrate makes an interim protection order on an application by a police officer by telephone or other electronic means, the magistrate must complete and sign the original order and record in it the reasons the magistrate is satisfied there are grounds for making the order.
- (c) The magistrate must either immediately give a copy of the order to the applicant, if there is a reasonably practicable way of doing so, such as by sending a copy by facsimile or email, or must tell the applicant the terms of the order, including when and where the application for the final order will be heard by the court.
- (d) If the magistrate tells the applicant the terms of the order, the applicant must complete a form of order which includes the magistrate's name and the terms of the order, including when and where the application for the final order will be heard.
- (e) The copy of the order given to the applicant by the magistrate, or the form of the order completed by the applicant in the terms conveyed by the magistrate, is a duplicate of, and is as effective as, the original order.
- (f) As soon as practicable after the interim order is made, a police officer must serve a copy of the duplicate order and a copy of the related application on each respondent and aggrieved person. If the police officer completed a form of order, he or she must give it to the registrar of the court that is to hear the application for the final protection order.
- (g) As soon as practicable after the interim order is made, the magistrate must give the original order and written particulars of the application for the protection order and the application for the interim order, as communicated to the magistrate by the applicant, to the registrar of the court that is to hear the application for the final protection order.
- (h) If the magistrate refuses to make the interim protection order, the magistrate must:

- (i) record the reasons for refusing to make the interim order; and
- (ii) as soon as practicable, give written particulars of the application for the protection order and the application for the interim order, as communicated to the magistrate by the applicant, and the reasons for the magistrate's refusal, to the registrar of the court that is to hear the application for the final protection order.

See Personal Protection Bill 2007 cl 18(3), 45, 46.

Notices to appear

- 9-14 The Personal Protection Bill 2007 should provide that, if a police officer has made, or is to make, an application for a protection order, a police officer may issue and serve on the respondent a notice in the form of a 'notice to appear' under the *Police Powers and Responsibilities Act 2000* (Qld). A copy of the application which has been or is to be filed in court must also be served either together with the notice or as soon as practicable after the notice is served.¹⁰⁵¹

See Personal Protection Bill 2007 cl 22(1), (2), (3).

- 9-15 The Personal Protection Bill 2007 should provide that, if a police officer issues and serves a notice to appear on the respondent, the registrar need not issue a summons for the respondent on the filing of the application and need not serve a copy of the application or the notice on the respondent.¹⁰⁵²

See Personal Protection Bill 2007 cl 19(3)(c), 21(2).

- 9-16 The Personal Protection Bill 2007 should provide that a notice issued and served on a respondent by police under the Bill need not state an alleged offence as required under the *Police Powers and Responsibilities Act 2000* (Qld).¹⁰⁵³

See Personal Protection Bill 2007 cl 22(4)(a).

1051 See para 9.165 of this Report.

1052 Ibid.

1053 Ibid.

9-17 The Personal Protection Bill 2007 should provide that a notice issued and served on a respondent by police under the Bill is taken to be a summons requiring the respondent to appear before the stated court at the stated time and place to be heard on the application.¹⁰⁵⁴

See Personal Protection Bill 2007 cl 22(4)(b).

9-18 The Personal Protection Bill 2007 should provide that the police officer must file a copy of the notice to appear as soon as practicable after serving the notice on the respondent.¹⁰⁵⁵

See Personal Protection Bill 2007 cl 22(5).

1054 Ibid.

1055 Ibid.

Chapter 10

Mediation and other dispute resolution mechanisms

INTRODUCTION	250
WHAT IS MEDIATION?	250
MEDIATION UNDER THE <i>PEACE AND GOOD BEHAVIOUR ACT 1982</i> (QLD)	251
THE <i>JUSTICES ACT 1886</i> (QLD)	251
THE <i>DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989</i> (QLD)	252
DISPUTE RESOLUTION PROCESSES IN OTHER CONTEXTS	252
THE POSITION IN OTHER AUSTRALIAN JURISDICTIONS	254
ACT	254
New South Wales	254
Northern Territory	255
South Australia	256
Victoria	256
ISSUES RAISED BY THE CURRENT MECHANISM FOR REFERRAL TO MEDIATION	257
Submissions	257
The Commission's view	259
ISSUES FOR CONSIDERATION	260
MANDATORY OR DISCRETIONARY REFERRAL	260
Submissions	262
The Commission's view	266
CRITERIA FOR REFERRAL TO DISPUTE RESOLUTION	268
Submissions	270
The Commission's view	271
TIMING OF REFERRAL	273
Submissions	274
The Commission's view	274
WHO SHOULD CONDUCT THE MEDIATION?	274
Submissions	276
The Commission's view	277
THE COST OF MEDIATION	279
Submissions	280
The Commission's view	281
PRELIMINARY CONFERENCES	281
Submissions	282
The Commission's view	284
PROCEDURES FOLLOWING DISPUTE RESOLUTION PROCESSES	286
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	286
The position in other jurisdictions – New South Wales, Northern Territory and Victoria ..	286
Submissions	287
The Commission's view	288
RECOMMENDATIONS	290

INTRODUCTION

10.1 This chapter considers whether adequate provision is made in the *Peace and Good Behaviour Act 1982* (Qld) for the referral of a complaint to mediation. As part of its review of the *Peace and Good Behaviour Act 1982* (Qld), the Commission's terms of reference require it to consider whether the Act provides an 'appropriate, easily accessible and effective mechanism for protecting the community against breaches of the peace'.¹⁰⁵⁶ One of the issues raised in the Discussion Paper was whether the current provision in the Act for referral of a complaint to mediation is adequate and appropriate to promote the effective resolution of disputes.

WHAT IS MEDIATION?

10.2 Mediation is a 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.¹⁰⁵⁷ It has been described as:¹⁰⁵⁸

[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.

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

10.4 There are a number of advantages in resolving disputes by mediation. For example, it is likely to achieve a resolution more quickly, and with less expense and formality, than a court proceeding. 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 if 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 mediation may be more appropriate in a situation where there is an ongoing relationship between the parties, for example, where the parties are neighbours.¹⁰⁵⁹

1056 The terms of reference are set out in Appendix 1 to this Report.

1057 For example, see the range of procedures described in National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) 4–10.

1058 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) 9.

1059 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, *Mediation* <<http://www.justice.qld.gov.au/18.htm>> at 16 March 2008; Department of Justice and Attorney-General, *Dispute resolution centres* <<http://www.justice.qld.gov.au/475.htm>> at 16 March 2008; Department of Justice and Attorney-General, *Types of disputes we handle* <<http://www.justice.qld.gov.au/1011.htm>> at 16 March 2008. See also L Boulle, *Mediation: Principles Process Practice* (2nd ed, 2005) 130–3.

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

10.5 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).¹⁰⁶⁰ A referral to mediation may be made whether the basis of the complaint is a threat by the defendant to engage in certain conduct,¹⁰⁶¹ or intentional conduct of the defendant towards the complainant.¹⁰⁶² However, the power to refer the matter to mediation is dependent on the consent of the complainant.

10.6 If the complainant consents to the referral, and the justice of the peace exercises his or her discretion to order the complainant to submit the matter to mediation, the complainant must, as soon as practicable, file the complaint and an application for mediation in the approved form with the nearest dispute resolution centre.¹⁰⁶³

10.7 The *Dispute Resolution Centres Act 1990* (Qld), which regulates the mediation of matters referred under the *Peace and Good Behaviour Act 1982* (Qld), generally provides that the parties' attendance at, and participation in, mediation sessions is voluntary.¹⁰⁶⁴

THE *JUSTICES ACT 1886* (QLD)

10.8 Section 53 of the *Justices Act 1886* (Qld) empowers a justice to issue a summons upon a complaint that any person is guilty, or is suspected, of having committed any indictable offence, simple offence or breach of duty, within the jurisdiction of the justice.¹⁰⁶⁵ Section 53A of the *Justices Act 1886* (Qld) provides that, if a summons has been issued under section 53, a magistrate or the clerk of the court for the place where the defendant is required to appear may order the complainant to submit the matter to mediation under the *Dispute Resolution Centres Act 1990* (Qld).¹⁰⁶⁶ The referral can only be made if the magistrate or the clerk of the court considers the matter would be better

¹⁰⁶⁰ *Peace and Good Behaviour Act 1982* (Qld) s 4(3). The *Peace and Good Behaviour Act 1982* (Qld) was amended by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66. The amendments extended the power of a justice of the peace to refer a complaint to mediation pursuant to s 4(3).

¹⁰⁶¹ *Peace and Good Behaviour Act 1982* (Qld) s 4(1). See para 5.12 of this Report.

¹⁰⁶² *Peace and Good Behaviour Act 1982* (Qld) s 4(2). See para 5.15 of this Report.

¹⁰⁶³ *Peace and Good Behaviour Regulation 1999* (Qld) s 6.

¹⁰⁶⁴ *Dispute Resolution Centres Act 1990* (Qld) s 31. The requirement of voluntariness does not apply in the case of a dispute in a civil action that is the subject of a referring order: see para 10.13 of this Report.

¹⁰⁶⁵ *Justices Act 1886* (Qld) s 53.

¹⁰⁶⁶ *Justices Act 1886* (Qld) s 53A(1). Section 94 of the *Justice and Other Legislation Amendment Act 2007* (Qld) amended section 53A of the *Justices Act 1886* (Qld) to extend the mediation referral power under s 53A to magistrates.

resolved by mediation than proceeding on the summons or the complainant consents to the order.¹⁰⁶⁷

10.9 It is unclear whether the power of a magistrate or a clerk of the court to make an order to mediate under section 53A is exercisable only in respect of a summons ‘issued under section 53’, or whether, by virtue of the operation of section 8 of the *Peace and Good Behaviour Act 1982* (Qld), the power is exercisable in respect of a summons issued under the *Peace and Good Behaviour Act 1982* (Qld).¹⁰⁶⁸

10.10 Further, section 88 of the *Justices Act 1886* (Qld) generally empowers the justices or justice present to adjourn a hearing in any case of a charge of a simple offence or breach of duty. The power to adjourn a hearing includes a power to adjourn a hearing ‘to enable the matter of a charge of a simple offence or breach of duty to be the subject of a mediation session under the *Dispute Resolution Centres Act 1990* (Qld)’.¹⁰⁶⁹ The power so conferred is a power to adjourn for a particular reason rather than a power to order the parties to mediation.

THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)

10.11 The *Domestic and Family Violence Act 1989* (Qld) is silent in relation to the referral of domestic violence matters to mediation.¹⁰⁷⁰

DISPUTE RESOLUTION PROCESSES IN OTHER CONTEXTS

10.12 There are other legislative provisions that incorporate alternative dispute resolution processes into the procedures in the Magistrates Courts.¹⁰⁷¹

10.13 In a civil action in the Magistrates Court, the court may, by a referring order, refer the dispute in relation to the claim before the court to mediation¹⁰⁷²

1067 *Justices Act 1886* (Qld) s 53A(2).

1068 Section 8 of the *Peace and Good Behaviour Act 1982* (Qld) provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications.

1069 *Justices Act 1886* (Qld) s 88(1B). The Dispute Resolution Branch of the Department of Justice and Attorney-General has informed the Commission that magistrates refer disputes in relation to peace and good behaviour matters to mediation. The Dispute Resolution Branch has also informed the Commission that, if during proceedings under the *Peace and Good Behaviour Act 1982* (Qld), the court refers a matter to the Branch for mediation, the matter is usually adjourned until the mediation has taken place: submission 24.

1070 See the discussion at para 10.55 of this Report in relation to mediation in the context of a history of violence or ongoing violence between the parties.

1071 *Magistrates Courts Act 1921* (Qld) pt 5 (ADR Processes); *Uniform Civil Procedure Rules 1999* (Qld) ch 9 pt 4 (Alternative dispute processes).

1072 *Magistrates Courts Act 1921* (Qld) s 29(3). Mediation is defined as ‘a process ... under which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication’: *Magistrates Courts Act 1921* (Qld) s 23.

or case appraisal.¹⁰⁷³ The parties may also agree to refer the dispute to one of those processes.¹⁰⁷⁴ If the court refers the dispute to a mediator under the *Dispute Resolution Centres Act 1990* (Qld), the order may appoint the director of a Dispute Resolution Centre as mediator.¹⁰⁷⁵ If a referring order is made, the parties must attend before the convenor appointed to conduct the mediation or case appraisal and not impede him or her in conducting and finishing the mediation or case appraisal within the time allowed.¹⁰⁷⁶ If a party ‘impedes’ the dispute resolution process, a Magistrates Court may impose sanctions against the party, by staying a claim for further relief by the defaulting party or by taking the party’s actions into account when awarding costs.¹⁰⁷⁷

10.14 The cost of these processes is borne by the parties to the action.¹⁰⁷⁸ Because these provisions are concerned with the resolution of disputes in a civil action, it is unclear whether they apply in relation to the matter of a complaint made under the *Peace and Good Behaviour Act 1982* (Qld).¹⁰⁷⁹

10.15 In a civil proceeding started by claim, a registrar may conduct a directions conference with a view to early resolution of the matter without resort to adjudication of the matter.¹⁰⁸⁰ However, these provisions do not apply to matters under the *Peace and Good Behaviour Act 1982* (Qld).

1073 *Magistrates Courts Act 1921* (Qld) s 29(3). Case appraisal is defined as ‘a process ... under which a case appraiser provisionally decides a dispute’: *Magistrates Courts Act 1921* (Qld) s 24(1). Note, similar provisions apply in relation to the Supreme and District Courts of Queensland: *District Court of Queensland Act 1967* (Qld) ss 96–97; *Supreme Court of Queensland Act 1991* (Qld) ss 101–102.

1074 *Magistrates Courts Act 1921* (Qld) s 28(1). If the parties agree to refer the dispute, they must subsequently file a consent order in the prescribed form with the registrar: *Magistrates Courts Act 1921* (Qld) s 28(2). The consent order is taken to be a referring order made under s 29: *Magistrates Courts Act 1921* (Qld) ss 2 (definition of ‘referring order’), 28(3).

1075 *Magistrates Courts Act 1921* (Qld) s 29(5).

1076 *Magistrates Courts Act 1921* (Qld) s 30(1).

1077 *Magistrates Courts Act 1921* (Qld) s 30(2).

1078 *Uniform Civil Procedure Rules 1999* (Qld) ch 9 pt 4 div 5 (ADR Costs); *Magistrates Courts Act 1921* (Qld) s 33.

1079 Under the *Magistrates Court Act 1921* (Qld), the Magistrates Court, in its civil jurisdiction, may hear and determine certain civil actions for claims up to a specified monetary amount: *Magistrates Courts Act 1921* (Qld) s 4. Part 5 of the *Magistrates Courts Act 1921* (Qld) governs ADR processes in the Magistrates Courts. An ‘ADR process’ is a process of mediation or case appraisal by which the parties are helped to achieve an early inexpensive settlement or resolution of their dispute: *Magistrates Courts Act 1921* (Qld) s 22(1). A ‘dispute’ means, amongst other things, a dispute in an action or something else about which the parties are in dispute that may be dealt with at the same time as an ADR dispute: *Magistrates Courts Act 1921* (Qld) s 2 (definition of ‘dispute’). An ‘ADR dispute’ means a dispute referred to an ADR process: *Magistrates Courts Act 1921* (Qld) s 2 (definition of ‘ADR dispute’). The referral of a matter to mediation under pt 5 of the *Magistrates Courts Act 1921* (Qld) therefore appears limited to proceedings in a civil action. It should also be noted that, even though proceedings initiated under the *Peace and Good Behaviour Act 1982* (Qld) are not criminal in character (see *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45), s 8 of the *Peace and Good Behaviour Act 1982* (Qld) provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications.

1080 See *Magistrates Courts Act 1921* (Qld) s 16; *Uniform Civil Procedure Rules 1999* (Qld) rr 523, 524.

THE POSITION IN OTHER AUSTRALIAN JURISDICTIONS

ACT

10.16 In the ACT, before an application for a protection order is heard, a preliminary conference may be conducted by the registrar of the court.¹⁰⁸¹ A preliminary conference, like mediation, may assist parties to achieve a negotiated settlement.¹⁰⁸² However, in contrast to mediation, a conference also enables the court to better manage the progress of an application.

10.17 The objects of a preliminary conference are, among other things, to find out whether the matter may be settled by consent before the hearing of the application and to work out and limit the issues to be decided in the proceeding.¹⁰⁸³ The preliminary conference must try to identify facts agreed on, issues not agreed on, and any unusual or urgent factors that require special attention.¹⁰⁸⁴ Anything said or done by the parties at the preliminary conference is generally inadmissible as evidence at the hearing of the application.¹⁰⁸⁵

10.18 The ACT legislation also imposes an obligation on the registrar to refer the parties to mediation at any time during a preliminary conference, if the registrar is satisfied that the application is likely to be more effectively resolved by mediation than by a hearing.¹⁰⁸⁶

New South Wales

10.19 In New South Wales, an authorised officer¹⁰⁸⁷ to whom an application for an apprehended personal violence order is made has a discretion, provided that the application was not made by a police officer, to refuse to issue a warrant or application notice.¹⁰⁸⁸ The discretion may be exercised if the

¹⁰⁸¹ *Domestic Violence and 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: *Domestic Violence and Protection Orders Regulation 2002* (ACT) s 7.

¹⁰⁸² A review of the ACT legislation indicated that the current provisions are broad enough to enable a person to appoint another person, such as an agent or legal representative, to act on his or her behalf in certain circumstances or to have a support person present when his or her application is heard or during the preliminary conference: ACT, Department of Justice and Community Safety, *Report on the Review of the Protection Orders Act 2001* (April 2004) 11–12.

¹⁰⁸³ *Domestic Violence and Protection Orders Regulation 2002* (ACT) s 6(1)(a), (b).

¹⁰⁸⁴ *Domestic Violence and Protection Orders Regulation 2002* (ACT) s 6(2).

¹⁰⁸⁵ *Domestic Violence and Protection Orders Regulation 2002* (ACT) s 9.

¹⁰⁸⁶ *Domestic Violence and Protection Orders Act 2001* (ACT) s 18A. This section was inserted in the Act by the *Domestic Violence and Protection Orders Amendment Act 2005* (ACT) s 11.

¹⁰⁸⁷ See para 9.54 of this Report.

¹⁰⁸⁸ *Crimes Act 1900* (NSW) s 562M. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Section 562M of the *Crimes Act 1900* (NSW) is substantially replicated in s 53 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

authorised officer is satisfied of the existence of certain circumstances.¹⁰⁸⁹ Otherwise, in deciding whether or not to exercise the discretion, the authorised officer 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,¹⁰⁹⁰ the availability and accessibility of mediation or other alternative dispute resolution services,¹⁰⁹¹ and the willingness and capacity of each party to resolve the matter otherwise than through an application for an apprehended violence order.¹⁰⁹²

10.20 The New South Wales Law Reform Commission has recommended that the role of mediation in resolving the matters referred to in a complaint for an apprehended violence order should be strengthened. In the view of that Commission, the authorised officer's satisfaction that the matters referred to in the complaint may more appropriately be dealt with by mediation or another form of alternative dispute resolution, should in itself warrant the exercise of the discretion to refuse to issue a summons or warrant.¹⁰⁹³

10.21 Except in cases of serious violence, the New South Wales Law Reform Commission favoured the policy that other avenues of dispute resolution should be encouraged.¹⁰⁹⁴ It considered, however, that matters should not be referred to mediation where there is a history or allegations of personal violence, or conduct amounting to serious harassment, or where there has been a previous failed attempt at mediation in relation to the same issue or where the mediation service has assessed that a dispute is not suitable for mediation.¹⁰⁹⁵

Northern Territory

10.22 Under recent amendments to the *Justices Act* (NT) in the Northern Territory, the court must refer the protected person and the defendant to mediation before hearing an application for a personal violence restraining order.¹⁰⁹⁶ However, if the court is satisfied it is in the interests of justice to do so because, for example, there is a history of violence committed against the protected person by the defendant and there has been a previous unsuccessful

1089 *Crimes Act 1900* (NSW) s 562M(3).

1090 *Crimes Act 1900* (NSW) s 562M(5)(c).

1091 *Crimes Act 1900* (NSW) s 562M(5)(d).

1092 *Crimes Act 1900* (NSW) s 562M(5)(e).

1093 New South Wales Law Reform Commission, Report, *Apprehended Violence Orders*, Report No 103 (2003) [5.23], rec 16. See *Crimes Act 1900* (NSW) s 562M(3).

1094 *Ibid* [5.44]–[5.45].

1095 *Ibid* [5.50]–[5.52], rec 17.

1096 *Justices Act* (NT) s 86(1), as amended by the *Domestic and Family Violence Act* (NT). In the Northern Territory, the *Domestic and Family Violence Act* (NT) repeals pt IV div 7 of the *Justices Act* (NT) introducing a new pt IVA. The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed. Section 86 of the *Justices Act* (NT) is a new provision.

attempt at mediation, the court must not refer the parties to mediation and must proceed to hear the application.¹⁰⁹⁷

10.23 A referral to mediation is made under the *Community Justice Centre Act* (NT),¹⁰⁹⁸ which provides for mediation services to be conducted by the Northern Territory Community Justice Centre.¹⁰⁹⁹ Under that Act, the Director of the Centre has discretion to accept or refuse an application for mediation services.¹¹⁰⁰ However, under the personal violence restraining order legislation, the Director must accept a referral by the court on a personal violence restraining order application.¹¹⁰¹ A referral to mediation stays the proceeding until the court is given a written report on the outcome of the mediation or attempted mediation.¹¹⁰² In deciding the application, the court must take account of the report.¹¹⁰³

South Australia

10.24 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.¹¹⁰⁴

Victoria

10.25 In Victoria, the Magistrates' Court may, with or without the consent of the parties, refer a proceeding to mediation.¹¹⁰⁵ The court may also refer a proceeding to a pre-hearing conference.¹¹⁰⁶

¹⁰⁹⁷ *Justices Act* (NT) s 86(2), as amended by the *Domestic and Family Violence Act* (NT).

¹⁰⁹⁸ *Justices Act* (NT) s 86(1), (4), as amended by the *Domestic and Family Violence Act* (NT).

¹⁰⁹⁹ *Community Justice Centre Act 2005* (NT) ss 7, 8.

¹¹⁰⁰ *Community Justice Centre Act 2005* (NT) s 13(3), (4).

¹¹⁰¹ *Justices Act* (NT) s 86(5), as amended by the *Domestic and Family Violence Act* (NT).

¹¹⁰² *Justices Act* (NT) s 86(3), as amended by the *Domestic and Family Violence Act* (NT). The Director of the Community Justice Centre must give the court a written report on the outcome of the mediation or attempted mediation: *Justices Act* (NT) s 86(6), as amended by the *Domestic and Family Violence Act* (NT).

¹¹⁰³ *Justices Act* (NT) s 86(8), as amended by the *Domestic and Family Violence Act* (NT). The court may also refer the matter back to the Director of the Community Justice Centre with directions: *Justices Act* (NT) s 86(7), as amended by the *Domestic and Family Violence Act* (NT).

¹¹⁰⁴ *Summary Procedure Act 1921* (SA) s 99CA(2)(c)(i).

¹¹⁰⁵ *Magistrates' Court Act 1989* (Vic) s 108. Section 126A of that Act empowers the court to make an order binding a person to keep the peace or be of good behaviour.

¹¹⁰⁶ *Magistrates' Court Act 1989* (Vic) s 107.

ISSUES RAISED BY THE CURRENT MECHANISM FOR REFERRAL TO MEDIATION

10.26 As mentioned earlier in this chapter, the current mechanism under the *Peace and Good Behaviour Act 1982* (Qld) for the referral of peace and good behaviour complaints to mediation provides that, if a justice of the peace who receives a complaint under the Act considers that the matter of the complaint would be better resolved by mediation than by proceedings in the Magistrates Court, the justice of the peace may order the complainant to submit the matter to mediation.¹¹⁰⁷ The power to refer the matter to mediation is dependent on the consent of the complainant.

10.27 The power to refer the matter to mediation may be exercised if the justice of the peace considers that the matter would be better resolved by mediation than by proceedings in the Magistrates Court. This raises the issue of how, and upon what bases, a justice of the peace might be satisfied that mediation is likely to better resolve a dispute than continuing with court proceedings. It is noted that the Commission has recommended elsewhere in this Report that justices of the peace should have a limited role in the application process under the Personal Protection Bill 2007.¹¹⁰⁸ This role does not include formally screening applications.¹¹⁰⁹

10.28 The power of a justice of the peace to refer a matter to mediation under the Act is also dependent on the consent of the complainant. This raises the issue of how a justice of the peace could be satisfied, in the absence of the defendant, that the matter would be better resolved by mediation.

10.29 The *Peace and Good Behaviour Act 1982* (Qld) is silent in relation to the power of a Magistrate to refer a matter to mediation.

Submissions

10.30 The Commission received numerous submissions about the operation of the present provision in the *Peace and Good Behaviour Act 1982* (Qld) for the referral of matters to mediation.¹¹¹⁰

10.31 The Dispute Resolution Branch of the Department of Justice and Attorney-General, the mediation service provider for disputes referred to mediation under the *Peace and Good Behaviour Act 1982* (Qld), considered

¹¹⁰⁷ *Peace and Good Behaviour Act 1982* (Qld) s 4(3). The *Peace and Good Behaviour Act 1982* (Qld) was amended by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66. The amendments extended the power of a justice of the peace to refer a complaint to mediation pursuant to the *Peace and Good Behaviour Act 1982* (Qld) s 4(3).

¹¹⁰⁸ See para 9.66 of this Report. This recommendation limits the role of a justice of the peace in the application process to having the power to issue a summons or a warrant to secure the appearance of the respondent.

¹¹⁰⁹ See para 9.83 of this Report.

¹¹¹⁰ Submissions 5, 6, 8, 12, 12B, 13, 14, 19, 24.

that the mediation process is often the most effective way for parties to resolve their disputes. However, the Dispute Resolution Branch expressed several concerns about the actual process for the referral of matters to mediation under the *Peace and Good Behaviour Act 1982* (Qld).¹¹¹¹

[It] is evident that the courts are not referring as many cases as could be the case and that in some cases referrals are being made that actually result in inefficiencies.

10.32 First, the Dispute Resolution Branch observed that its statistical data in relation to such referrals indicated the referral to mediation of only a small percentage of matters compared to the overall number of peace and good behaviour order applications dealt with by the Magistrates Courts. The Branch postulated this low referral rate could be the result of some uncertainty about the referral process.¹¹¹²

It is unclear whether this is due to a limited awareness of mediation as an option, a belief that mediation is not an appropriate manner for managing such matters or concerns regarding the Dispute Resolution Branch's capacity to manage such matters.

10.33 Second, the Dispute Resolution Branch noted that the majority of peace and good behaviour matters referred for mediation come from only three Magistrates Courts in South-East Queensland:¹¹¹³

In 2004, in excess of 50% of Peace and Good Behaviour referrals originated from three courts in South East Queensland while the remaining number were referred by a total of fourteen other courts within the referral area. In total between only 80 and 90 matters are referred to mediation by the Dispute Resolution Branch in South East Queensland each year. Referrals are similarly limited (if not less frequent) in each of the Dispute Resolution Branch's five regional Dispute Resolution Centres.

10.34 The Dispute Resolution Branch also observed that the Act does not provide guidance about when the matter of a complaint may be better resolved by mediation.¹¹¹⁴

10.35 Finally, the Dispute Resolution Branch noted, in relation to the matters referred in 2004, significant differences in the outcomes of matters referred to mediation by various magistrates.¹¹¹⁵ The Branch suggested that these differences may relate to factors such as skill in assessing matters as appropriate for mediation and willingness to make referrals.¹¹¹⁶ For example,

¹¹¹¹ Submission 24.

¹¹¹² Ibid.

¹¹¹³ Ibid.

¹¹¹⁴ Ibid.

¹¹¹⁵ Ibid.

¹¹¹⁶ Ibid.

one court has referred 15% of files, 75% of which resulted in verbal or written agreements. Another court, meanwhile, has referred 7% of files with none resulting in an agreement.

10.36 To redress these issues, the Dispute Resolution Branch suggested the inclusion in the *Peace and Good Behaviour Act 1982* (Qld) of legislative criteria to assist magistrates in the exercise of their discretion as to the referral of a matter to mediation, as well as further education and training about the mediation process.

10.37 A number of submissions that expressed dissatisfaction about the present provision for mediation under the Act suggested various avenues of reform to improve the system, mostly in regard to the voluntariness of entry into mediation, and process issues.¹¹¹⁷

10.38 The proposals of the Dispute Resolution Branch and those of other submissions are discussed in more detail later in this chapter.

10.39 Only one submission expressed satisfaction with the current system of referral to mediation under the Act.¹¹¹⁸

The Commission's view

10.40 The Commission considers that, in light of the operational issues raised above, and the concerns expressed in some submissions about the efficacy of the current mechanism for the referral of peace and good behaviour matters to mediation,¹¹¹⁹ provision should be made in the Personal Protection Bill 2007 for a new mechanism for the referral of matters to mediation.

10.41 The Commission considers it desirable that the new mechanism clearly articulate the source of the power to refer, the person or body who may exercise the power and the circumstances in which the power may be exercised. The relevant issues are dealt with as they arise in this chapter and elsewhere in this Report.

¹¹¹⁷ Submissions 6, 8, 12B, 12C, 13, 14.

¹¹¹⁸ Submission 15. This submission also suggested following the ACT model insofar as it applies to the referral of matters to a preliminary conference. See para 10.16–10.18 of this Report.

¹¹¹⁹ The Commission notes the concerns expressed by the Dispute Resolution Branch about the efficacy of the current mechanism for the referral of peace and good behaviour matters to mediation. Because the statistical information does not reveal the reasons for these variations, the Commission considers this information is capable of limited interpretation. Nonetheless, the quantitative statistical information supplied by the Dispute Resolution Branch seems to indicate, at least in recent times, the existence of some regional variation both in the numbers of matters referred to mediation under the Act, and in the numbers of those matters resolved by mediation.

ISSUES FOR CONSIDERATION

10.42 The rest of this chapter considers the following issues in relation to the role of mediation in resolving disputes under the Personal Protection Bill 2007:

- whether the referral of the matter of an application under the Personal Protection Bill 2007 to mediation should be a mandatory step in the court process or within the discretion of the court;
- if the discretionary model of referral to mediation is preferred, whether the discretion should be exercised in accordance with legislative or other guidelines;
- the timing of referral;
- who should conduct a mediation;
- the cost of mediation;
- whether the court should conduct preliminary conferences between the parties prior to the hearing of a matter, and if so, whether the court should conduct preliminary conferences in all cases; and
- procedures following dispute resolution processes.

MANDATORY OR DISCRETIONARY REFERRAL

10.43 This section considers referral to mediation as a mandatory or a discretionary step in the court process. It also considers the role of party consent to mediation. This section further discusses the related issue of the appropriateness of certain matters for mediation, particularly in the context of peace and good behaviour matters.

10.44 There are various ways in which referral to mediation can be linked to court processes, each of which involves different levels of court involvement or action.¹¹²⁰

10.45 Sometimes, provision is made under the relevant legislation or rules of court for the referral of a dispute to mediation as a routine or mandatory step in the court process without any discretion for the court or the parties to decline or object to referral.¹¹²¹

¹¹²⁰ For a discussion of court referral to alternate dispute resolution processes, see K Mack, *Court Referral To ADR: Criteria And Research* (2003) [5.5.1]–[5.5.5]; L Boulle, *Mediation: Principles Process Practice* (2nd ed, 2005) 374–417.

¹¹²¹ See, for example, *Supreme Court of Queensland Act 1991* (Qld) ss 102, 103. See also L Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 379–82.

10.46 The mandatory referral of a matter to mediation ensures that, before the matter proceeds beyond a certain stage, an attempt has been made to resolve the dispute.¹¹²² Even when one or more of the parties is initially reluctant to participate in mediation, it is nevertheless possible that the parties may still be assisted by the mediator to reach an agreement.

10.47 However, mandatory referral could result in the referral of unsuitable matters to mediation, even when provision is made to screen out cases other than those considered suitable for mediation. Further, a requirement to undertake mediation might make the process unnecessarily complex and stressful for the parties. It may also delay the determination of a matter in circumstances where the need for an order may be immediate.

10.48 Sometimes, the relevant statute or court rules specifically confer on the court discretion to refer matters to mediation with, or without, the consent of the parties. The discretionary referral model enables the court to refer matters to mediation as it considers appropriate.

10.49 Whether the consent of the parties is required for referral to mediation is an issue that is sometimes addressed in legislation. There has been considerable debate about the role of party choice in alternative dispute resolution processes.¹¹²³

10.50 It has been suggested that voluntary participation is not in itself the crucial issue in regard to a successful mediation, but rather that the parties participate in good faith.¹¹²⁴ One reason for concern about referring a party to mediation who does not want to participate is that the compelled party may not participate in good faith, and so the process is likely to be unsuccessful and may even increase costs and cause delay.¹¹²⁵ Notwithstanding that voluntariness is often considered an important pre-condition for successful alternative dispute resolution processes, many Australian courts have powers to refer matters to such processes with or without consent of the parties.¹¹²⁶

10.51 The appropriateness of a matter for mediation is a substantive issue in considering the suitability of a mandatory or a discretionary mechanism for the referral of matters to mediation under the Personal Protection Bill 2007.

10.52 There are many factors that determine the general appropriateness of a dispute for mediation or whether the parties are likely to resolve the dispute by way of a mediation process.

¹¹²² Some mediation models may operate on a presumptive basis whereby provision is made for the screening of cases to ensure that wholly inappropriate matters do not go to mediation: L Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 26–28.

¹¹²³ See H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) [3.4].

¹¹²⁴ K Mack, *Court Referral To ADR: Criteria And Research* (2003) [6.1], [8.9].

¹¹²⁵ Ibid.

¹¹²⁶ Ibid [6.1], [8.4.3].

10.53 Sometimes, the kinds of disputes involved in the context of the *Peace and Good Behaviour Act 1982* (Qld) involve people who have an ongoing relationship with each other, such as people who live or work in close proximity to one another. In such situations, the grant of an order may not necessarily resolve the underlying issues in the dispute.

10.54 In addition, some disputes arising in the context of the *Peace and Good Behaviour Act 1982* (Qld) involve minor matters that might be better dealt with through means of dispute resolution outside the court system. The New South Wales Law Reform Commission, in its review of the New South Wales civil restraining order legislation, noted that diverting such cases away from the court system relieves the strain on court time and resources.¹¹²⁷

10.55 On the other hand, an attempt at mediation may be inappropriate where there has been a history of violence between the parties or there is ongoing violence between them. Violence may create an imbalance of power between the parties that affects their capacity to negotiate effectively. It is also possible that the use of mediation could place those involved in the mediation session at risk of personal danger.¹¹²⁸ Furthermore, in cases of serious harassment, it is possible that mediation may provide another opportunity for the respondent to harass the victim.

10.56 Mediation may also be inappropriate 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.

10.57 Although some of these matters may make the successful resolution of the dispute by way of mediation less likely, they may not necessarily be a barrier to a successful alternative dispute resolution process.¹¹²⁹ For example, a person in an unequal bargaining position, with appropriate support by staff of a relevant support service, may be able to participate effectively.

Submissions

Mediation as a mandatory step in the application process

10.58 The Chief Magistrate of Queensland supported an increased role for mediation in resolving the kind of disputes covered by the *Peace and Good Behaviour Act 1982* (Qld), suggesting that, subject to the local availability 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:¹¹³⁰

¹¹²⁷ Ibid.

¹¹²⁸ See L Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 263.

¹¹²⁹ Ibid 156.

¹¹³⁰ Information provided by the Chief Magistrate, Judge MP Irwin, 25 August 2004. Submission 12C.

This is because it is considered that matters of this nature are best resolved if possible in the first instance without the parties coming before a court which should be the avenue of last resort. It is also considered that the mediation services have the skills and experience to determine whether a matter is appropriately the subject of mediation, including whether a party may be overborne or further victimised.

10.59 The Chief Magistrate further observed that this proposal does not require the complainant's consent for referral.¹¹³¹

10.60 A Queensland magistrate supported a system of referring matters to mediation before the assignment of a hearing date and, if the mediation is successful, recording the outcome as a consent order (if consent orders are provided for under the legislation). This respondent further suggested the early allocation of a tentative hearing date would avoid an applicant/complainant being prejudiced with a later hearing date, if the matter goes to mediation but is not successful.¹¹³²

10.61 The Queensland Public Tenants Association Inc also considered that, subject to the capacity of the parties to participate in the process, it should be mandatory for parties to attempt mediation before the hearing of an application for a peace and good behaviour order because, in the case of disputes between public housing tenants, any ongoing relationship between the parties may be irreparably damaged if one party takes the matter to court without first attempting to resolve the matter by mediation.¹¹³³

10.62 It was also suggested by the Youth Advocacy Centre Inc that when a matter involves a child, upon filing the complaint the matter should be automatically referred by the court to mediation and only if mediation fails, should the matter be heard by a Childrens Court Magistrate.¹¹³⁴

10.63 However, the majority of the submissions received by the Commission about the mediation process provided under the *Peace and Good Behaviour Act 1982* (Qld) did not support the inclusion of mediation as a mandatory step in the application process under the *Peace and Good Behaviour Act 1982* (Qld), either before or after the filing of an application for an order under the Act.¹¹³⁵

Referral to mediation at the court's discretion

10.64 The Dispute Resolution Branch of the Department of Justice and Attorney-General suggested it is appropriate for the court to exercise discretion

¹¹³¹ Ibid.

¹¹³² Submission 12B.

¹¹³³ Submission 6.

¹¹³⁴ Submission 11.

¹¹³⁵ Submissions 3, 5, 8, 14, 15, 19, 24.

to refer peace and good behaviour matters to mediation.¹¹³⁶ It observed that, as suitability for mediation depends on the individual circumstances of the dispute, the context and the parties, it is ‘no doubt often difficult for the court to be able to exercise this discretion effectively’. However, this submission also noted that certain factors may increase the efficiency of the referral process, including the parties’ willingness to negotiate and readiness to settle the dispute, particularly prior to hearing.

10.65 The Dispute Resolution Branch also suggested that the imposition of a requirement that the complainant attempt mediation in order to make an application under the *Peace and Good Behaviour Act 1982* (Qld) might actually deter some genuine complainants from accessing the mechanism for obtaining an order:¹¹³⁷

While the addition of this extra step may well deter trivial complaints, it is also likely to have the effect of making the system less accessible and may deter complainants with serious and legitimate fears who do not wish to participate in mediation for a range of reasons.

10.66 The Townsville Community Legal Service Inc considered that referral to mediation should be within the discretion of the presiding magistrate rather than being a mandatory step prior to the filing of a complaint.¹¹³⁸

10.67 The South West Brisbane Community Legal Centre Inc considered that the Act should provide for a discretion to refer an application to mediation prior to a hearing provided that those doing the referring are adequately trained in understanding the effect that violence, or the threat of violence, has on a person’s capacity to enter into a mediation process on an equal footing with the other party.¹¹³⁹

10.68 Queensland Advocacy Inc expressed concern that some people with a disability may be distrustful of the mediation process:¹¹⁴⁰

Complaints about service providers to Disability Services Queensland are routinely mediated and involve long delays and, often, unsatisfactory outcomes. This occurs despite guidelines that mediation should not be undertaken where there has been violence. This has created a sense of mistrust of mediation of those types of disputes by people with a disability.

¹¹³⁶ Submission 24.

¹¹³⁷ Ibid.

¹¹³⁸ Submission 14. This submission also considered that justices of the peace ought not consider complaints under the Act other than as a witness to an oath and that the current discretion of a justice of the peace to order that the matter be mediated should be removed.

¹¹³⁹ Submission 15.

¹¹⁴⁰ Submission 20.

10.69 The Women's Legal Service also suggested the inclusion on the application form for a peace and good behaviour order of questions about what attempts at mediation, if any, had been made and whether the complainant would be willing to attempt mediation.¹¹⁴¹

Consent of the parties to referral

10.70 The Citizens Advice Bureau and Gold Coast Legal Service and Commerce Queensland considered referral to mediation is only appropriate when both parties consent.¹¹⁴²

10.71 Queensland Advocacy Inc expressed doubt about the capacity of a person with impaired decision-making capacity to give proper consent to mediation.¹¹⁴³ This submission suggested that, if the question of consent is posed by a person in authority, a person with impaired decision-making capacity is likely to give the consent without any necessary understanding. This submission therefore suggested that any imbalance in the bargaining position of the parties that might arise where a matter involves a person with impaired decision-making capacity could be redressed, to some extent, by allowing the person's advocate to participate in the mediation process.

Voluntariness

10.72 A number of submissions received in response to the Discussion Paper, including a submission from the Dispute Resolution Branch of the Department of Justice and Attorney-General, supported the voluntary entry of the parties into the mediation process.¹¹⁴⁴

Appropriateness of matters for mediation

10.73 Several submissions received in response to the Discussion Paper commented that mediation is particularly useful when there will be an ongoing relationship between the parties, for example, as neighbours.¹¹⁴⁵ The Dispute Resolution Branch suggested that disputes between people within such relationships are often most effectively resolved through mediation because the process involves a greater focus on communication and problem solving between the parties as well as a fundamental transformation in their relationship.¹¹⁴⁶

¹¹⁴¹ Submission 8.

¹¹⁴² Submissions 5, 23.

¹¹⁴³ Submission 20.

¹¹⁴⁴ Submissions 3, 5, 8, 13, 14, 19, 23, 24.

¹¹⁴⁵ Submissions 6, 8, 24. For example, in its submission, the Dispute Resolution Branch observed that, in 2004, more than half of the matters referred to the Dispute Resolution Branch under the *Peace and Good Behaviour Act 1982* (Qld) related to disputes between neighbours or other parties with an ongoing relationship.

¹¹⁴⁶ Submission 24.

10.74 Legal Aid Queensland and a number of community legal services generally supported mediation as an appropriate mechanism for the resolution of disputes under the Act. However, these submissions variously opposed the referral of a matter to mediation if the matter raises allegations of actual or threatened serious violence or harassing or intimidating behaviour or there has been a previous failed attempt at mediation.¹¹⁴⁷

The Commission's view

An express power to refer matters to mediation

10.75 In the Commission's view, the Personal Protection Bill 2007 should expressly empower the court, if it is hearing an application to make, vary or set aside a protection order, and it considers it appropriate, to refer any of the issues arising in the proceeding to mediation.¹¹⁴⁸ In referring the issues to mediation, the court should also be required to identify the parties to the application who must attend the mediation sessions. The Commission also considers that, as is currently the case under the *Peace and Good Behaviour Act 1982* (Qld), the provisions of the *Dispute Resolution Centres Act 1990* (Qld) should generally apply, subject to some exceptions, to referrals made under the Bill.¹¹⁴⁹

Mediation at the court's discretion

10.76 The Commission acknowledges that, in many instances, mediation may be an appropriate mechanism to resolve a dispute of the kind covered by the Personal Protection Bill 2007. This may be so, for example, in some neighbourhood disputes where there is an ongoing relationship between the parties. However, the Commission also recognises that some disputes will involve characteristics that could make them inappropriate for referral to mediation.¹¹⁵⁰ It is possible that these matters are unlikely to be resolved or that one party may be overborne and the outcome may not be truly consensual. This may be counter-productive, causing distress to the parties and delay when the appropriate remedy is the immediate protection of an order. This may be the case where a party seeks the remedy of an order as a last resort. It is also possible that, in some circumstances, mediation may provide an opportunity for further victimisation of the aggrieved person by the respondent.

10.77 The Commission therefore considers that the court's power to refer an issue under the Personal Protection Bill 2007 to mediation should be discretionary rather than mandatory. This would enable the court to make an

¹¹⁴⁷ Submissions 13, 14, 15, 19.

¹¹⁴⁸ This does not apply to an ex parte application for an interim order made by telephone or other electronic means heard by a magistrate. Such applications are intended to assist a person who needs immediate, temporary protection. See para 9.113–9.114 of this Report.

¹¹⁴⁹ See para 10.81, 10.103 of this Report.

¹¹⁵⁰ See para 10.55–10.56 of this Report.

assessment of whether a particular matter is appropriate for referral to mediation, and to exercise its discretion to refer the matter to mediation accordingly.

Consent of the parties to referral

10.78 There may be circumstances when the court considers that a matter should be referred to mediation even when one or both parties do not give their consent. If the referral of a matter to mediation were contingent on the cooperation of one or both parties, it might result in the non-referral of matters which may in fact be amenable to mediation.

10.79 The Commission therefore considers that the Personal Protection Bill 2007 should provide that the court may refer all or some of the issues raised in a protection order application to mediation whether or not any of the parties agree to the referral.

Voluntariness

10.80 The *Dispute Resolution Centres Act 1990* (Qld) generally provides that the parties' attendance at, and participation in, mediation sessions is voluntary.¹¹⁵¹

10.81 In light of the Commission's recommendation that the Personal Protection Bill 2007 should empower the court to refer the matter of a complaint to mediation whether or not any of the parties agree to the referral, the Commission considers that the requirement of voluntariness under the *Dispute Resolution Centres Act 1990* (Qld) should not apply in respect of a referral to mediation made under the Personal Protection Bill 2007. The Personal Protection Bill 2007 should, therefore, provide that, despite the *Dispute Resolution Centres Act 1990* (Qld), a person referred to mediation by the court must attend at and participate in a mediation session conducted for the mediation.

Mediation where one of the parties is a child

10.82 The Commission has considered whether the court should be required to make an order referring a matter to mediation when one or more of the parties is a child. In the Commission's view, the court should be able to exercise its discretion as to whether to refer a matter to mediation in all cases, regardless of whether the relevant party is an adult or a child. The Commission considers that requiring mediation in all matters involving children could result in the inappropriate referral of matters to mediation and possibly cause detriment to the child.

¹¹⁵¹

Dispute Resolution Centres Act 1990 (Qld) s 31. The requirement of voluntariness does not apply in the case of a dispute in a civil action that is the subject of a referring order: see para 10.13 of this Report.

CRITERIA FOR REFERRAL TO DISPUTE RESOLUTION

10.83 This section considers 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.¹¹⁵²

Legislative criteria as to exercise of the discretion

10.84 Most Australian courts now have legislation or rules of court that enable the court to refer eligible matters to some form of alternative dispute resolution.¹¹⁵³ However, legislation or rules of court cannot prescribe in detail for the ‘complex mix of features’ which must be considered in the referral decision in any particular case.¹¹⁵⁴ This places significant responsibility on the courts to make suitable referral decisions.¹¹⁵⁵

10.85 Generally, the legislation and rules of court prescribe only minimum eligibility standards, or are limited to empowering the court to make a referral. Sometimes, they identify criteria for screening out unsuitable disputes.¹¹⁵⁶

10.86 Despite the inherent limitations of court referral to mediation, the development of specific criteria as to how to exercise the discretion to refer the matter of an application under the Personal Protection Bill 2007 to mediation may help to achieve consistency or predictability in the selection of matters as appropriate for mediation. The development of legislative criteria may also help to clearly indicate when a court is empowered to make a referral to a dispute resolution process.

10.87 The New South Wales Law Reform Commission has recommended that the New South Wales civil restraining order legislation should enable the court to refer matters to mediation on an application for an apprehended personal violence order even without the consent of one or both parties. However, a matter must not be referred to mediation where there is a history or there are allegations of personal violence or conduct amounting to serious harassment, or where there has been a previous failed attempt at mediation in

¹¹⁵² At present, a justice of the peace to whom a complaint is made may, with the complainant’s consent, order 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.

¹¹⁵³ K Mack, *Court Referral To ADR: Criteria And Research* (2003) [8.11].

¹¹⁵⁴ Ibid [8.4].

¹¹⁵⁵ H Astor, *Quality in Court Connected Mediation programs: An Issues Paper*, Australian Institute of Judicial Administration Incorporated (2001) 30, cited in K Mack, *Court Referral To ADR: Criteria And Research* (2003) [8.11].

¹¹⁵⁶ See, for example, *Crimes Act 1958* (NSW) ss 562M(5), 562N(2). Sections 21 and 53 of the *Crimes (Domestic and Family Violence Act 2007)* (NSW) replicate ss 562M and 562N of the *Crimes Act 1958* (NSW). As to the application of the legislation in New South Wales, see note 1088 of this Report.

relation to the same issue or where the mediation service has assessed that a dispute is not suitable for mediation.¹¹⁵⁷

Pre-mediation assessment

10.88 It has been suggested that referral decisions in particular cases require greater knowledge about the dispute, the disputants, the available processes and practitioners, and factors indicating success or failure, than would ordinarily be available to the court.¹¹⁵⁸ This raises the issue of pre-mediation assessment by the mediation service provider at the point of contact with the disputants in light of the particular features of the dispute, disputants and the alternative dispute resolution process, among other factors.

10.89 The *Dispute Resolution Centres Act 1990* (Qld) provides for a pre-mediation assessment process, under which a director of a dispute resolution centre may accept, or decline to accept, a referral for mediation.¹¹⁵⁹ Generally, the appropriateness of matters for mediation (including peace and good behaviour matters) is assessed according to a range of criteria, including whether the parties are willing to communicate and negotiate, whether the parties are likely to act in good faith, the relative bargaining positions of the parties (so far as it is likely to affect the conduct of the mediation process) as well as the capacity and commitment of the parties to achieve resolution of the dispute. The assessment process also includes an evaluation of any underlying issues in the application.¹¹⁶⁰

10.90 A matter may be assessed as inappropriate for mediation if the parties are unwilling to negotiate or lack faith in the mediation process or there exists between the parties a history of actual violence or allegations of violence or a power imbalance likely to affect the conduct of the mediation process.¹¹⁶¹

10.91 However, the Dispute Resolution Branch may sometimes accept the referral of matters in which these criteria are met, particularly those where the parties are willing to engage in the process, if it appears the matter can be handled in such a way as to avoid compromising the mediation process. For example, a history of violence may not determine a matter as inappropriate if it is likely that mediation can be conducted in safety and with the equitable involvement of all parties.¹¹⁶²

¹¹⁵⁷ New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (October 2003) [5.51] rec 17. See *Crimes Act 1900* (NSW) s 562N(2). Section 562N of the *Crimes Act 1900* (NSW) is replicated in s 21 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 1088 of this Report.

¹¹⁵⁸ K Mack, *Court Referral To ADR: Criteria And Research* (2003) [8.11].

¹¹⁵⁹ *Dispute Resolution Centres Act 1990* (Qld) ss 28(5), 32(1).

¹¹⁶⁰ Submission 24.

¹¹⁶¹ Ibid.

¹¹⁶² Ibid.

10.92 Pre-mediation assessment also provides an opportunity for the parties to a dispute to thoroughly consider how they will engage in the mediation process and refine the issues they wish to negotiate through mediation.¹¹⁶³

Submissions

Legislative criteria as to the exercise of the discretion to refer

10.93 The Dispute Resolution Branch of the Department of Justice and Attorney-General considered the central issue in regard to the referral of peace and good behaviour matters to mediation related to the volume and appropriateness of the referrals.¹¹⁶⁴

10.94 The Dispute Resolution Branch suggested that legislative criteria similar to those used in its pre-mediation screening process might assist the person who makes the referral decision to identify a matter as being appropriate for mediation.¹¹⁶⁵ However, the Branch cautioned that the range of variables which could affect the appropriateness of a matter to be mediated might make it difficult to establish such criteria.

10.95 The Dispute Resolution Branch also suggested magistrates might be assisted in the application of criteria as to the exercise of their discretion to refer a matter to mediation by the introduction of ongoing education and information programs in regard to the role, benefits and process of mediation:¹¹⁶⁶

While many Magistrates may have been exposed to mediation, it may not have been in the context of the Peace and Good Behaviour matters that they are contemplating for referral. They may also not be fully aware of the model of mediation adopted by the chosen service provider and the types of issues that should be considered when considering the appropriateness of a given matter for this model.

10.96 The Women's Legal Service supported the inclusion in the *Peace and Good Behaviour Act 1982* (Qld) of guidelines as to how the discretion to refer should be exercised.¹¹⁶⁷ This respondent also suggested that the questions set out in the application form should be tailored to assist in the assessment of whether or not mediation would be appropriate.

¹¹⁶³ Ibid.

¹¹⁶⁴ Ibid.

¹¹⁶⁵ See para 10.89–10.91 of this Report.

¹¹⁶⁶ Submission 24.

¹¹⁶⁷ Submission 8.

10.97 On the other hand, the Citizens Advice Bureau and Gold Coast Legal Service considered that the Act should not prescribe guidelines for referral to mediation but rather leave the decision about referral to the discretion of the deciding person.¹¹⁶⁸

Pre-mediation assessment

10.98 The Dispute Resolution Branch considered it appropriate that the mediation service provider exercise a second level of discretion in the referral process:¹¹⁶⁹

Intake staff at the Dispute Resolution Branch deal with such matters on a daily basis (and are usually mediators themselves) and are equipped to further assess such referrals using their 'expert' knowledge. It is no doubt the case that they are often in a position to allocate more time to the assessment process than is available to magistrates. This safety net approach allows a second level of assessment to ensure the appropriateness of matters for mediation. This is not to diminish the need however of improved referral mechanisms at the court.

...

As the service provider is in a better position than the court to consider individual disputes in detail and determine whether mediation would be beneficial, a second level of discretion should be left to them in regard to acceptance of matters for mediation.

The Commission's view

10.99 It has been suggested that the development of criteria as to how to exercise the discretion to refer the matter of a complaint under the *Peace and Good Behaviour Act 1982* (Qld) to mediation may assist the court in the selection of appropriate matters for referral to mediation, and promote consistency and predictability in the referral process.¹¹⁷⁰ The Commission, however, considers it undesirable to include formal criteria in the Personal Protection Bill 2007 for the guidance of magistrates as to the exercise of the discretion to refer a matter for mediation. In the Commission's view, the development of relevant criteria or guidelines for the referral of matters to mediation under the Personal Protection Bill 2007 would most properly be dealt with by the Magistrates Court as an administrative matter. This would enable the Magistrates Court to formulate criteria or guidelines as it considers appropriate, perhaps within the framework of a practice direction or judicial guidelines.

¹¹⁶⁸ Submission 5.

¹¹⁶⁹ Submission 24.

¹¹⁷⁰ K Mack, *Court Referral To ADR: Criteria And Research* (2003) [7.1].

10.100 The Commission recommends the Chief Magistrate of Queensland consider formulating a practice direction or guidelines, in consultation with the Dispute Resolution Branch of the Department of Justice and Attorney-General, in respect of appropriate factors for referral to mediation, and, in particular, the appropriateness of referral to mediation of matters involving serious violence.

10.101 The Commission places considerable importance on the development of guidelines, in light of the nature and context of the disputes dealt with under the existing *Peace and Good Behaviour Act 1982* (Qld) (which may involve an ongoing relationship, an allegation of violence or threatened violence, or both), and the concerns raised in relation to violence as a factor in mediation by various academic commentators, the New South Wales Law Reform Commission and in various submissions received by this Commission.

10.102 It is considered that suitable criteria for consideration may include the following factors:

- an evaluation of any underlying issues in the application;
- whether there exists between the parties a sense of willingness to communicate and negotiate in good faith;
- the relative bargaining positions of the parties (so far as it is likely to affect the conduct of the mediation process);
- whether there is a history of violence between the parties or there is ongoing violence between them;
- the capacity of the parties to achieve resolution of the dispute;
- any delay that may be occasioned by the mediation of the application; and
- whether there has been a previous failed attempt at mediation in relation to the same issue, or whether the dispute has been previously assessed as unsuitable for mediation by a mediation service provider.

10.103 In this Report, the Commission has recommended that the Personal Protection Bill 2007 should empower the court to refer all or some of the issues arising in a proceeding on an application to make, vary or set aside a protection order, to mediation under the *Dispute Resolution Centres Act 1990* (Qld).¹¹⁷¹ The Commission has also recommended that the court may refer an issue to mediation whether or not any of the parties agree to the referral.¹¹⁷² Given those recommendations, the Commission considers that the Personal Protection Bill 2007 should override the relevant provisions of the *Dispute*

¹¹⁷¹ See para 10.75–10.77 of this Report.

¹¹⁷² See para 10.79 of this Report.

Resolution Centres Act 1990 (Qld) which otherwise give the director of a Dispute Resolution Centre discretion to accept or decline to accept a referral for mediation. The Personal Protection Bill 2007 should therefore provide that the issues referred to mediation under the Bill are taken to be a dispute accepted for mediation by the director of the Dispute Resolution Centre under the *Dispute Resolution Centres Act 1990* (Qld).

TIMING OF REFERRAL

10.104 In some circumstances, it may be apparent at the beginning of the application process that it is appropriate to refer the matter to mediation. In other circumstances, it may transpire that the suitability of a matter for mediation only becomes apparent as the application process unfolds.

10.105 For example, in the case of an application involving a person with impaired capacity, caution is often needed in assessing the underlying seriousness of the issue complained of:¹¹⁷³

It is not uncommon for a person with impaired capacity to voice a matter which at first glance appears petty or trivial. It often takes particular skill and time to uncover what may actually be a serious matter.

10.106 In its Report on the civil restraining order legislation, the New South Wales Law Reform Commission commented, in relation to the timing of referrals to mediation in proceedings for an apprehended personal violence order, that:¹¹⁷⁴

[I]ssues amenable to mediation may not be apparent at the start of proceedings, but may emerge later during the course of the hearing to determine if an interim or final APVO should be granted. Consequently, the Commission is of the view that the power to refer a matter to mediation should be available at any stage of proceedings, before or after an APVO is granted. It should also be available in lieu of, or in addition to an APVO being granted. For while some issues involved in a dispute may be responsive to mediation, there may also be underlying threats of violence which should be responded to by way of an APVO. Mediation cannot be used as a substitute for protection.

10.107 The New South Wales civil restraining order legislation provides that a court may refer the protected person and the defendant to mediation at any time when considering whether to make an apprehended personal violence order or after making such an order.¹¹⁷⁵

¹¹⁷³ Submission 20.

¹¹⁷⁴ New South Wales Law Reform Commission, Report, *Apprehended Violence Orders*, Report No 103 (2003) [5.4], rec 17.

¹¹⁷⁵ *Crimes Act 1900* (NSW) s 562N(1). This provision is replicated in s 21(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1088 of this Report.

Submissions

10.108 Caxton Legal Centre Inc considered that it would be beneficial to confer on the court a general power to refer applications to mediation at any time prior to final determination.¹¹⁷⁶

10.109 The Townsville Community Legal Service Inc suggested that a presiding magistrate should have discretion to refer a matter to mediation at any stage of the process.¹¹⁷⁷

The Commission's view

10.110 In the Commission's view, there should be no limitation on the timing of when a matter can be referred to mediation in proceedings on an application for the making, variation or setting aside of a protection order. The Commission therefore considers that the Personal Protection Bill 2007 should empower the court to make a referral to mediation at any stage in the proceedings on such an application before the application is decided. This approach ensures flexibility in the application of alternative dispute resolution procedures under the legislation.

WHO SHOULD CONDUCT THE MEDIATION?

10.111 If mediation is to have a role in resolving applications under the Personal Protection Bill 2007, consideration needs to be given to who should conduct the mediation.

10.112 The *Peace and Good Behaviour Act 1982* (Qld) currently provides that, if a justice of the peace to whom a complaint is made considers that the matter would be better resolved by mediation than by proceedings in the Magistrates Court, the justice of the peace may order the complainant to submit the matter to mediation under the *Dispute Resolution Centres Act 1990* (Qld).¹¹⁷⁸ The mediation of matters referred under the *Peace and Good Behaviour Act 1982* (Qld) is conducted externally to the court by the Dispute Resolution Branch of the Department of Justice and Attorney-General.¹¹⁷⁹

¹¹⁷⁶ Submission 19.

¹¹⁷⁷ Submission 14.

¹¹⁷⁸ *Peace and Good Behaviour Act 1982* (Qld) s 4(3). The *Peace and Good Behaviour Act 1982* (Qld) was amended by the *Justice and Other Legislation Amendment Act 2004* (Qld) s 66. The amendments extended the power of a justice of the peace to refer a complaint to mediation pursuant to s 4(3).

¹¹⁷⁹ The Dispute Resolution Centres of Queensland provide mediation services in a wide range of disputes. Just under half the disputes dealt with involve conflicts between neighbours about such issues as fencing, trees, children and noise. Other types of disputes dealt with include workplace disputes, commercial or business disputes and family conflicts: Department of Justice and Attorney-General, *Types of disputes we handle* <<http://www.justice.qld.gov.au/1011.htm>> at 16 March 2008.

10.113 The *Dispute Resolution Centres Act 1990* (Qld), which regulates the mediation of disputes referred under the *Peace and Good Behaviour Act 1982* (Qld) and certain other disputes, sets out various matters relating to the mediation of disputes referred to mediation by court order or otherwise.

10.114 In particular, the Act confers various protections on the parties to a mediation session including the inadmissibility in any proceedings before any court, tribunal or body in respect of oral or documentary evidence obtained in a mediation session,¹¹⁸⁰ confidentiality¹¹⁸¹ and privilege from defamation actions in respect of certain matters.¹¹⁸² These protections do not apply to disputes that are the subject of a referring order made by a Magistrates Court in respect of a civil action.¹¹⁸³ In regard to these matters, other legislation and court rules provide similar protections.¹¹⁸⁴

10.115 The *Dispute Resolution Centres Act 1990* (Qld) also provides for exoneration from liability in certain circumstances in respect of any matter or thing done by specified people, including the mediator.¹¹⁸⁵

10.116 The Commission has been informed by the Dispute Resolution Branch of the Department of Justice and Attorney-General that less than 5 per cent of the total number of matters dealt with by the Branch on a yearly basis relate to peace and good behaviour matters.¹¹⁸⁶ Any significant increase in the number of referrals received in relation to peace and good behaviour matters would likely be accompanied by increased demands on the resources of the Branch.

10.117 A consideration of who should conduct a mediation raises the possibility that the mediation of matters under the Personal Protection Bill 2007 may be conducted by other mediation service providers. For example, some courts and tribunals are empowered to engage suitably qualified and experienced persons to conduct alternative dispute resolution processes,

¹¹⁸⁰ *Dispute Resolution Centres Act 1990* (Qld) s 36(4)–(6).

¹¹⁸¹ *Dispute Resolution Centres Act 1990* (Qld) s 37.

¹¹⁸² *Dispute Resolution Centres Act 1990* (Qld) s 36(1)–(3). In addition, a mediation agreement generally is not legally enforceable unless the parties agree in writing that the agreement is to be enforceable: *Dispute Resolution Centres Act 1990* (Qld) s 31(3).

¹¹⁸³ *Magistrates Court Act 1921* (Qld) s 29; *Dispute Resolution Centres Act 1990* (Qld) ss 2 (definition of ‘referring order’, (c)), 27A, 36(7), (8), 37(7), (8).

¹¹⁸⁴ *Magistrates Courts Act 1921* (Qld) pt 5 (ADR Processes); *Uniform Civil Procedure Rules 1999* (Qld) ch 9 pt 4 (Alternative dispute resolution processes).

¹¹⁸⁵ *Dispute Resolution Centres Act 1990* (Qld) s 35(1)(c).

¹¹⁸⁶ Submission 24.

including mediation.¹¹⁸⁷ If a privately funded mediation service provided mediation services, it may have costs implications for the parties.

Submissions

10.118 The Dispute Resolution Branch of the Department of Justice and Attorney-General considered itself well placed, particularly in comparison to other service providers, to mediate peace and good behaviour matters. The Dispute Resolution Branch outlined various factors in favour of its enhanced involvement in conducting such referrals:

- the Branch retains its own trained and accredited mediators, many of whom are experienced in managing peace and good behaviour matters;
- the Branch is experienced in conducting mediations and already plays a significant role within the civil and criminal justice administration system in Queensland;
- the facilitative model typically adopted by the Branch is suited to addressing the various underlying relationship issues that accompany the types of disputes associated with peace and good behaviour applications.¹¹⁸⁸ For example, since it began operating, the Branch has completed in excess of 15 000 mediations involving community or neighbourhood disputes;
- as part of the court infrastructure, the Branch has established strong links with those local courthouses that make referrals to the Branch. Likewise, procedures have been established and are understood by mediators and staff; and
- the Branch maintains State-wide coverage which allows a high level of consistency in regard to service provision to clients across the state.

10.119 However, the Dispute Resolution Branch acknowledged that because it is unable to readily service some more remote court regions, it may be more appropriate for other service providers to cover these areas. Alternatively, the Dispute Resolution Branch suggested managing peace and good behaviour applications in these areas through the expansion of its videoconferencing or telephone mediation services.

¹¹⁸⁷ See, for example, *Administrative Appeals Tribunal Act 1975* (Cth) s 34H. This provision also provides that the registrar of the Administrative Appeals Tribunal must not engage a person to conduct an alternative dispute resolution process unless he or she is satisfied that, having regard to the person's qualifications and experience, the person is a suitable person to conduct the relevant kind of alternative dispute resolution process.

¹¹⁸⁸ In its submission, the Dispute Resolution Branch noted that the mediators engaged by the Branch typically adopt a facilitative style of mediation which allows them to maintain impartiality in conducting the mediation process: submission 24. The Dispute Resolution Branch noted that the process is controlled, while parties are encouraged to accept responsibility for the content of their discussions.

10.120 Two submissions to the Discussion Paper preferred the Dispute Resolution Branch as the provider for mediation services in relation to peace and good behaviour disputes.¹¹⁸⁹ In particular, the Women's Legal Service considered that the Dispute Resolution Branch offered 'the best available processes and procedures of all the mediation services available in Queensland'.¹¹⁹⁰

10.121 The Citizens Advice Bureau and Gold Coast Legal Service suggested that prompt dispute resolution is essential to avoid an escalation of the dispute.¹¹⁹¹

The Commission's view

10.122 The mediation of the matter of a complaint referred under the *Peace and Good Behaviour Act 1982* (Qld) is conducted under the *Dispute Resolution Centres Act 1990* (Qld). The mediation of such matters is conducted externally to the court by a Dispute Resolution Centre.

10.123 The Commission has recommended earlier in this chapter that the provisions of the *Dispute Resolution Centres Act 1990* (Qld) should generally apply, subject to some exceptions,¹¹⁹² to referrals to mediation made under the Bill.¹¹⁹³ The consequence of making that recommendation is that the Dispute Resolution Branch of the Department of Justice and Attorney-General would conduct the mediations through its Dispute Resolution Centres.

10.124 The Commission has considered whether the Personal Protection Bill 2007 should instead provide for the referral of matters to any mediation service provider.

10.125 One of the matters considered by the Commission is that, in many cases, mediation may be the most effective way for people to resolve a dispute, particularly where they have an ongoing relationship. For this reason, the Commission considers it important to facilitate the use of mediation services by disputants by making such services financially accessible to them.

10.126 In this regard, the Commission notes that the Dispute Resolution Branch generally provides free mediation services.¹¹⁹⁴ If another mediation service provider (in particular, a privately funded provider) provided mediation

¹¹⁸⁹ Submissions 8, 14.

¹¹⁹⁰ Submission 8.

¹¹⁹¹ Submission 5.

¹¹⁹² See para 10.81, 10.103 of this Report.

¹¹⁹³ See para 10.75 of this Report.

¹¹⁹⁴ Note that Dispute Resolution Centres currently provide facilitations and workplace mediations on a fee for service basis: Department of Justice and Attorney-General, *Mediation* <<http://www.justice.qld.gov.au/18.htm>> at 16 March 2008.

services for such matters, the costs of the mediation may fall on the parties. The possibility that a party may bear the cost for mediation is an important consideration in deciding who should provide mediation services.¹¹⁹⁵ This is particularly relevant when the parties may be referred to mediation whether or not they agree to the referral.¹¹⁹⁶

10.127 The Commission also notes that the Dispute Resolution Branch has considerable expertise and experience in the mediation of peace and good behaviour disputes. The Commission considers that, subject to some resource constraints on readily servicing more remote areas in Queensland, the Dispute Resolution Branch, which administers the Dispute Resolution Centres, is generally well placed in terms of its processes and infrastructure to provide mediation services in relation to disputes of the kind covered by the Personal Protection Bill 2007.

10.128 The *Dispute Resolution Centres Act 1990* (Qld) provides a uniform range of protections for people who are involved in the mediation process. These protections include confidentiality of information obtained in connection with the conduct of a mediation session and privilege with respect to defamation. The Act also provides for exoneration from liability in certain circumstances in respect of any matter or thing done by specified people, including the mediator.¹¹⁹⁷

10.129 The *Dispute Resolution Centres Act 1990* (Qld) further provides that evidence of anything said, or of any document produced, in mediation is inadmissible in subsequent proceedings before a court, tribunal or body.¹¹⁹⁸ However, the Commission has recommended elsewhere in this Report that, where an agreement reached by the parties at the mediation has been filed in the court, the agreement is admissible in a proceeding under the Bill relating to the protection order, or proposed protection order, which is the subject of the application.¹¹⁹⁹

10.130 The Commission considers that, consistent with the general application of the provisions of the *Dispute Resolution Centres Act 1990* (Qld) to the mediation of issues referred under the Personal Protection Bill 2007, and for the reasons set out above, it is appropriate for the mediation of an issue or issues referred under the Personal Protection Bill 2007 to be mediated by a Dispute Resolution Centre.

¹¹⁹⁵ The cost of mediation is discussed at para 10.132–10.144 of this Report. The Commission has recommended at para 10.144 of this Report that mediation services for matters referred to mediation under the Personal Protection Bill 2007 should be provided at no cost to the parties.

¹¹⁹⁶ See para 10.79 of this Report.

¹¹⁹⁷ See para 10.114–10.115 of this Report.

¹¹⁹⁸ *Dispute Resolution Centres Act 1990* (Qld) s 36(4)–(6).

¹¹⁹⁹ See para 10.184 of this Report.

10.131 The inclusion of a provision in the Personal Protection Bill 2007 to empower a court to refer a matter to mediation under the *Dispute Resolution Centres Act 1990* (Qld) would not prevent the parties from agreeing between themselves to use a mediation service provider other than the Dispute Resolution Branch.

THE COST OF MEDIATION

10.132 The cost of mediation is often determined by who is providing the service. Services provided by a judicial officer or court staff usually do not incur a fee. External mediators may be unpaid volunteers, or their cost may be partly subsidised (by the court or government), or parties may have to pay full professional fees.

10.133 Currently, the Dispute Resolution Branch of the Department of Justice and Attorney-General provides mediation services in regard to matters referred under the *Peace and Good Behaviour Act 1982* (Qld) at no cost to parties or to the courts.¹²⁰⁰

10.134 In contrast, parties to a civil action in the Magistrates Court must bear the cost of alternative dispute resolution processes.¹²⁰¹

10.135 The imposition of a cost for mediation may be prohibitive, particularly for people who are financially disadvantaged. This concern might be overcome if the cost could be waived or reduced for an impecunious party. Payment for mediation may also be a disincentive to participation in the mediation process, particularly for someone who is a respondent to an application for a protection order.

10.136 The introduction of a means test may overcome the difficulty associated with requiring a financially disadvantaged party to pay for mediation. On the other hand, the costs of mediation could be a disincentive to participation in mediation by a person who does not qualify to have the payment reduced or waived.

10.137 Any increase in the rate of referral of applications, including those applications referred under the Personal Protection Bill 2007, to a government funded mediation service is likely to 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.

¹²⁰⁰ Submission 24.

¹²⁰¹ See para 10.14 of this Report.

Submissions

10.138 All the submissions received by the Commission in relation to this issue generally expressed concern that the imposition of a fee for mediation might be a disincentive to participation or financially prohibitive for some parties.¹²⁰² Several submissions suggested that this possibility could be overcome with the introduction of a system of means testing, so that any fee payable for mediation might be reduced or waived for a person of limited financial means.¹²⁰³

10.139 The Dispute Resolution Branch of the Department of Justice and Attorney-General observed that the introduction of fees for mediation is counter to its policy of providing mediation services free of charge to the public.¹²⁰⁴

10.140 The Dispute Resolution Branch also considered that the introduction of a fee for mediation services would prove a disincentive to clients who had already paid an application fee.¹²⁰⁵ The Branch suggested that, if the parties were required to contribute to mediation costs at all, this could be done as part of an augmented court filing fee payable upon the filing of an application under the *Peace and Good Behaviour Act 1982* (Qld).

10.141 The Dispute Resolution Branch further observed that increased administration costs arising from any significant increase in the number of referrals would likely create resourcing issues for the Branch.¹²⁰⁶

It is suggested that a reallocation of resources may need to be investigated to reflect the decreased demands upon court time and the increased resource demands placed upon the Dispute Resolution Branch in delivering these services.

...

Even though the Dispute Resolution Branch offers its service free of charge to the community, there are still costs associated with the provision of these services. Resourcing implications will no doubt arise if the number of matters being referred to the Branch was to significantly increase ...

10.142 Legal Aid Queensland and a number of community legal services expressed concern about the notion of imposing a fee for mediation on the parties to a peace and good behaviour dispute.¹²⁰⁷ The Women's Legal Service observed that 'most people, particularly respondents, are more likely to

¹²⁰² Submissions 5, 8, 13, 14, 15, 19, 20, 24.

¹²⁰³ Submissions 8, 15, 20.

¹²⁰⁴ Submission 24.

¹²⁰⁵ Ibid.

¹²⁰⁶ Ibid.

¹²⁰⁷ Submissions 5, 8, 13, 14, 19, 20.

participate in mediation if it is free'.¹²⁰⁸ This submission suggested that, if the parties were required to pay for mediation, there would need to be some mechanism for taking into account the income of the parties and enabling the waiver of the fee in appropriate circumstances. The South West Brisbane Community Legal Centre Inc and Queensland Advocacy Inc expressed similar views.¹²⁰⁹ Caxton Legal Centre Inc was also concerned that the costs implications of referrals to private mediators could discourage legitimate complainants from taking action under the Act.¹²¹⁰

The Commission's view

10.143 Currently, mediation services for peace and good behaviour matters are provided at no cost to the parties.¹²¹¹

10.144 The main purpose of the proposed Personal Protection Bill 2007 is to provide for the protection of people who feel unsafe as a consequence of another person's behaviour. The imposition of a cost for mediation on the parties may impede their ability to participate in mediation. The Commission is therefore of the view that mediation services for matters referred to mediation under the Personal Protection Bill 2007 should continue to be provided at no cost to the parties.

PRELIMINARY CONFERENCES

10.145 Some disputes of the kind covered by the Personal Protection Bill 2007 may not be appropriate or suitable for mediation, or may perhaps be more appropriately dealt with by another dispute resolution mechanism. It may therefore be desirable for the court to be able to utilise a greater range of dispute resolution processes in addition, or as an alternative, to mediation. The ability to utilise another dispute resolution process, such as a preliminary conference, may also enable the court to better manage the progress of those applications.

10.146 In the ACT, the objects of a preliminary conference include finding out whether the matter may be settled by consent before the hearing of the application and working out and limiting the issues to be decided in the proceeding.¹²¹² The preliminary conference must try to identify facts agreed on, issues not agreed on, and also any unusual or urgent factors that require

¹²⁰⁸ Submission 8.

¹²⁰⁹ Submissions 15, 20.

¹²¹⁰ Submission 19.

¹²¹¹ The Commission has recommended at para 10.130 of this Report that the Dispute Resolution Branch of the Department of Justice and Attorney-General, which currently provides these services, should provide mediation services for matters referred to mediation under the Personal Protection Bill 2007.

¹²¹² See para 10.17 of this Report.

special attention. This process may also assist self-represented litigants to be more aware of the hearing process and what will be required of them.

10.147 The adoption of a model similar to that which operates in the ACT, 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 the parties are better prepared for the hearing. This model also provides that, if at any time during the preliminary conference for an application for a protection order, the registrar is satisfied that the application is likely to be more effectively resolved by mediation than by a hearing, the registrar must refer the parties to mediation.¹²¹³

Submissions

10.148 With the exception of the Dispute Resolution Branch and the Magistrates Court Branch of the Department of Justice and Attorney-General, the submissions received by the Commission in relation to this issue generally considered that the *Peace and Good Behaviour Act 1982* (Qld) should specifically provide for the court to be able to conduct preliminary conferences between the parties prior to the hearing of a matter.

10.149 The Chief Magistrate of Queensland supported making preliminary conference or directions hearings available, subject to the training requirements of court officers:¹²¹⁴

[C]onsistent with making the court the avenue of last resort to resolve such matters, ... a preliminary conference/directions hearing should be available. The conference/directions hearing should not be the subject of a court order but should be within the power of a registrar in the same manner as the Registrar's Conference under the ACT model

As in the case of mediation, it is considered that an outcome reached as a result of such a preliminary conference is likely to be more accepted by the parties than one that is made after adversarial litigation before a court.

It is accepted that such a proposal would depend on registrars, including those in country areas, receiving proper training to give them the skills to undertake this role.

10.150 The Citizens Advice Bureau and Gold Coast Legal Service supported the introduction of mandatory preliminary conferencing.¹²¹⁵

¹²¹³ See para 10.18 of this Report.

¹²¹⁴ Submission 12C.

¹²¹⁵ Submission 5.

10.151 Queensland Advocacy Inc also supported the incorporation of a preliminary conference in the application process. This submission perceived that in relation to a complaint involving a person with a disability it was more likely that a preliminary conference would reveal the issues and merits of the complaint.¹²¹⁶

10.152 The Women's Legal Service considered that, ideally, parties ought to be given numerous opportunities before the matter goes to hearing to reach agreement.¹²¹⁷ However, in acknowledgement that some procedures work for some people and not others, this submission suggested the dispute resolution process needed to be sufficiently flexible to enable the most appropriate procedure to be applied in any particular case. This submission also suggested the use of similar assessment procedures for both mediation and preliminary conferences.

10.153 The Townsville Community Legal Service Inc considered that preliminary conferences would be beneficial both in matters where mediation has been attempted but has failed, as well as in matters proceeding without mediation.¹²¹⁸

10.154 The South West Brisbane Community Legal Centre Inc expressed the view that it is beneficial to conduct preliminary conferences, subject to any consideration of actual or threatened violence.¹²¹⁹ However, this submission cautioned against mandatory conferences in cases where a power imbalance existed between the parties, unless the conference was well controlled and clarified the relevant issues in the case.

10.155 The Queensland Public Tenants Association Inc suggested that, because the relationship between neighbouring tenants is ongoing, there should be an attempt to resolve the dispute before initiating a court process which might accelerate the breakdown of the relationship.¹²²⁰ This submission considered that it would be appropriate to conduct mandatory mediation prior to filing an application, and, in the event of a failed attempt at mediation, to later conduct a preliminary conference.

10.156 On the other hand, the Dispute Resolution Branch and the Magistrates Court Branch of the Department of Justice and Attorney-General opposed the introduction of preliminary conferences as an alternative dispute resolution mechanism to manage peace and good behaviour disputes.¹²²¹

¹²¹⁶ Submission 20.

¹²¹⁷ Submission 8.

¹²¹⁸ Submission 14.

¹²¹⁹ Submission 15.

¹²²⁰ Submission 6.

¹²²¹ Submissions 24, 28.

10.157 The Dispute Resolution Branch considered mediation is the preferred mechanism for the resolving complaints made under the *Peace and Good Behaviour Act 1982* (Qld), subject to the availability of appropriate resources.¹²²² It suggested that although preliminary conferences enabled courts to track the progress of an application in a more efficient manner, the preliminary conference process was better suited to civil cases, where legal issues, rather than relationship and communication issues, form a greater part of the dispute. The Dispute Resolution Branch also suggested that if preliminary conferences were conducted prior to mediations taking place, it would almost certainly create a duplication of service as well as unnecessary delays.

10.158 The submission of the Magistrates Court Branch, which was informed by the views of a group of registrars, was also opposed to making provision in the *Peace and Good Behaviour Act 1982* (Qld) for a registrar to conduct a preliminary conference or directions hearing in relation to a proceeding for a peace and good behaviour order.¹²²³ This submission focussed on safety concerns, the role of mediation and resource implications:¹²²⁴

Of prime concern is the safety of officers of the court. These matters are emotionally charged and given the ‘usual’ allegations of threats of violence there would be little benefit in ordering the parties attend a conference. Alternatives are to leave the current provisions as they are ‘with the consent of the complainant’ or if this line of thought was progressed then have the matter proceed before fully accredited mediators who are trained to handle these situations (Dispute Resolution Branch).

...

If this provision was added a major impact would be felt amongst the registries. Larger registries would see a large increase in workload in catering these conferences which would have a flow on effect of strain on resources. The additional impact would then be training staff to handle these situations. This would require mediation training that would normally be supplied by the Dispute Resolution Branch (DRB) (usually a 5 day course) and cost associated with delivery of this training and down-time when staff are receiving training. Given that DRB provide mediation services it would seem more prudent to refer the matters to mediation instead of additional cost and impact on court resources when this service is already available.

The Commission’s view

10.159 The Commission considers that specific provision should be made in the Personal Protection Bill 2007 to provide that a court hearing a proceeding on an application to make, vary or set aside a protection order may direct an applicant and a respondent to attend a preliminary conference for the

1222 Submission 24.

1223 Submission 28.

1224 Ibid.

proceeding.¹²²⁵ The Commission also considers it appropriate that the court have discretion in exercising the power to make such a direction. This would increase the court's ability to appropriately manage protection order applications.

10.160 The Commission acknowledges the concerns expressed by the Dispute Resolution Branch and the Magistrates Court Branch of the Department of Justice and Attorney-General in relation to the interplay between the processes of a preliminary conference and mediation. However, because each of these dispute resolution processes has particular objectives and processes, the Commission considers it desirable to ensure the availability of both processes in the management of applications.

10.161 Although preliminary conferences are usually conducted at an early stage of proceedings, the Commission considers that the court should have discretion as to when a preliminary conference may be held in relation to an application for a protection order.

10.162 The Commission is of the view that the Personal Protection Bill 2007 should provide that the court may conduct a preliminary conference or direct the registrar of the court to conduct a conference.

10.163 The Commission acknowledges that the involvement of judicial and court officers in the conduct of preliminary conferences in proceedings under the Personal Protection Bill 2007 would likely have significant resource implications for the Magistrates Court. Nonetheless, the Commission considers it appropriate to use preliminary conferences to assist the courts to effectively manage proceedings on applications under the proposed Bill.

10.164 The Commission also considers that the Personal Protection Bill 2007 should provide that the objects of a preliminary conference are:

- finding out whether the proceeding may be settled by consent before it is heard by the court; and
- working out and limiting the issues to be decided in the proceeding.

10.165 The Personal Protection Bill 2007 should also include a provision to specify that, without limiting how the issues to be decided in the proceeding may be worked out and limited at a preliminary conference, the court or registrar conducting the conference must try to identify:

- facts agreed on;
- issues not agreed on; and

1225

This does not apply to an ex parte application for an interim order made by telephone or other electronic means heard by a magistrate. Such applications are intended to assist a person who needs immediate, temporary protection. See para 9.113–9.114 of this Report.

- any unusual or urgent factors requiring special attention.
- 10.166 The Personal Protection Bill 2007 should further provide that evidence about anything done or said at a preliminary conference that is related to a question to be decided by the court in the proceeding is not admissible unless:
- the applicant and respondent agree; or
 - the court is satisfied there are substantial reasons why, in the interests of justice, the evidence should be admitted.

PROCEDURES FOLLOWING DISPUTE RESOLUTION PROCESSES

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

10.167 The *Peace and Good Behaviour Act 1982* (Qld) does not presently contain provisions dealing with procedures following dispute resolution processes. 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. There may also need to be procedures in place to assist parties who have agreed at mediation to seek a consent order from the court.¹²²⁶

The position in other jurisdictions – New South Wales, Northern Territory and Victoria

10.168 Section 562N of the *Crimes Act 1900* (NSW) empowers a court, at any time when considering whether to make an apprehended personal violence order or after making such an order, to refer suitable matters to mediation.¹²²⁷

10.169 Section 562N(3)–(7) provides:

562N Referral of matters to mediation

...

- (3) Nothing in this section affects section 24 of the *Community Justice Centres Act 1983*.

¹²²⁶ Note that the Commission has recommended at para 10.182 of this Report that the Personal Protection Bill 2007 should include a provision to the effect that a party to an application for a protection order that has been referred to mediation may apply to the court for a protection order by consent giving effect to an agreement reached at mediation.

¹²²⁷ Section 21 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) replicates s 562N of the *Crimes Act 1900* (NSW). As to the application of the legislation in New South Wales, see note 1088 of this Report.

Note. Section 24 of the *Community Justice Centres Act 1983* enables the Director of Community Justice Centres to decline to consent to the acceptance of a dispute for mediation and enables the Director or a mediator to terminate a mediation session at any time.

- (4) The Director of Community Justice Centres is to provide a written report on the outcome of the mediation or attempted mediation to the court that referred the matter for mediation.
- (5) On receiving a report under subsection (4), the court is to take such action in accordance with this Act as it considers appropriate in relation to the matter concerned and in doing so may take into account the contents of the report.
- (6) If a matter is referred to mediation under this section without an order having been made, any proceedings in relation to the application are taken to have been stayed until a report is provided under subsection (4).
- (7) If the Director of Community Justice Centres provides a report under subsection (4) or a mediator conducts a mediation of a matter referred under this section, the Director or the mediator is taken, for the purposes of the provisions of the *Community Justice Centres Act 1983*, to be exercising those functions for the purpose of executing that Act.

10.170 Under recent enactments to the civil restraining order legislation in the Northern Territory, a referral to mediation stays the proceeding until the court is given a written report on the outcome of the mediation or attempted mediation.¹²²⁸ In deciding the application, the court must take account of the report.¹²²⁹

10.171 In Victoria, the Magistrates' Court may refer a proceeding to mediation.¹²³⁰ Within 7 days of the mediation being completed, the mediator must file a mediation report stating whether the mediation was held, whether the matter was resolved and whether any orders will be sought.¹²³¹ A copy of the report must also be given to the parties.

Submissions

10.172 The submissions received by the Commission in relation to this issue generally expressed the view that, if a complaint for a peace and good

1228 *Justices Act* (NT) s 86(3), as amended by the *Domestic and Family Violence Act* (NT). The Director of the Community Justice Centre must give the court a written report on the outcome of the mediation or attempted mediation: *Justices Act* (NT) s 86(6), as amended by the *Domestic and Family Violence Act* (NT). Section 86 of the *Justices Act* (NT) is a new provision. As to the amendment of the *Justices Act* (NT), see note 1096 of this Report.

1229 *Justices Act* (NT) s 86(8), as amended by the *Domestic and Family Violence Act* (NT). The court may also refer the matter back to the Director of the Community Justice Centre with directions: *Justices Act* (NT) s 86(7), as amended by the *Domestic and Family Violence Act* (NT).

1230 *Magistrates' Court Act 1989* (Vic) s 108(1). Section 126A of that Act empowers the court to make an order binding a person to keep the peace or be of good behaviour.

1231 *Magistrates' Court Civil Procedure Rules 1999* (Vic) r 22A.07, Form 22AA.

behaviour order is not resolved by mediation, the matter should be referred back to the court to proceed to a hearing.¹²³²

10.173 The Dispute Resolution Branch of the Department of Justice and Attorney-General noted the purpose of the *Peace and Good Behaviour Act 1982* (Qld) is the protection of community members from certain behaviour. This submission suggested that if a matter is considered to be inappropriate for mediation because of issues relating to violence or threats of violence or if the matter remains unresolved, the matter ought not be dismissed or disregarded. The Branch considered that these matters may even be in more urgent need of resolution by an authoritative court procedure.¹²³³

10.174 Three community legal services also expressed the view that the matter should be referred to the court for hearing if the matter is unresolved by mediation.¹²³⁴

10.175 The Townsville Community Legal Service Inc also considered that, if the matter was unsuitable for mediation or if the mediation of the matter was unsuccessful, it would be appropriate for the presiding magistrate to exercise his or her discretion as to whether the matter should then be set down for hearing.¹²³⁵

The Commission's view

10.176 The course of a proceeding in court subsequent to a dispute resolution process will depend on the circumstances of each case.

10.177 In the Commission's view, the Personal Protection Bill 2007 should be flexible enough to provide for three outcomes after a dispute resolution process.

10.178 The first outcome is that the proceeding may not have resolved. In that case, the proceeding will need to be continued in court for the application to simply proceed to a determination in the usual way.

10.179 Under the second outcome, the proceeding may have resolved and the parties agreed to seek a court order in particular terms to finalise the proceeding. An example might be that the parties agree to seek an order that prohibits stated behaviour of the respondent or even that the proceeding be dismissed.

¹²³² Submissions 5, 8, 14, 15, 24.

¹²³³ Submission 24. This submission also considered that court hearings should not be based on the requirement that the parties have demonstrated that they have previously tried and failed mediation. See para 10.65 of this Report.

¹²³⁴ Submissions 5, 8, 15.

¹²³⁵ Submission 14.

10.180 The third outcome is that the proceeding may have resolved but the parties do not seek any court order (although the court may exercise its discretion to adjourn or dismiss the proceeding). For example, the parties may be happy that their future conduct be covered by the terms of an agreement between them and consider there does not need to be a court order regulating that conduct.

10.181 In the Commission's view, the Personal Protection Bill 2007 should provide that, if the court has referred an application to make, vary or set aside a protection order to mediation, within 7 days of the mediation being completed, the mediator must file with the referring court a written report stating whether the mediation was held, whether any of the issues were resolved and whether any orders will be sought because of the mediation. In the event that the parties have reached an agreement at mediation, the mediator must also file a copy of the agreement, in a sealed envelope, with the referring court.

10.182 In the particular case where the mediation report states that the parties are agreed that a protection order should be made, the Commission is of the view that the Bill should facilitate such an outcome and that parties should be able to apply to the court for a protection order by consent in the terms they have agreed upon. Such an application should be made under the provisions the Commission has recommended elsewhere in this Report that would apply in relation to consent orders generally.¹²³⁶ This would ensure that consent orders are not made in relation to matters beyond the scope of the legislation.

10.183 One issue with which the Personal Protection Bill 2007 should deal is the use which can be made of the agreement reached at mediation, a copy of which has been filed with the referring court. The Commission considers that the terms of a mediation agreement should be admissible in a proceeding under the Personal Protection Bill 2007 between the parties and the court should be permitted to give such weight to the agreement the court thinks appropriate. Putting the agreement in evidence might occur in the second type of outcome if there are ever any subsequent proceedings in relation to a protection order made by consent to fulfil the agreement (for example, an application to vary or set aside the protection order). It might occur in the third type of outcome if a matter, which was previously adjourned, is re-enlivened for some reason (for example, because a party thinks the agreement has been breached and now wishes to obtain a protection order). In either case, the fact that the agreement might eventually come before the court will, it seems to the Commission, operate to encourage people to strike agreements at mediation to which they can and will adhere. The Personal Protection Bill 2007 should therefore provide that a mediation agreement filed with the referring court in respect of an application to make, vary or set aside a protection order is admissible in a proceeding under the Bill relating to the protection order, or proposed protection order, which is the subject of the application.

¹²³⁶ See para 12.77–12.93 of this Report.

10.184 The Commission notes that the *Dispute Resolution Centres Act 1990* (Qld) provides under section 31(3) that '[n]otwithstanding any rule of law or equity, any agreement reached at, or drawn up pursuant to, a mediation session is not enforceable in any court, tribunal or body, unless the parties agree in writing that the agreement is to be enforceable'. Section 36(4)–(6) of that Act also provides that documents made pursuant to mediation are inadmissible in subsequent proceedings before a court, tribunal or body, unless the parties otherwise consent. These provisions currently apply to matters referred under the *Peace and Good Behaviour Act 1982* (Qld) to mediation. The Commission considers that the Personal Protection Bill 2007 should specifically override those sections of the *Dispute Resolution Centres Act 1990* (Qld) in relation to a mediation agreement filed in respect of a proceeding under the Bill relating to the protection order, or proposed protection order, which is the subject of the application.

RECOMMENDATIONS

10.185 The Commission makes the following recommendations:

A new mechanism for referring matters to mediation

10-1 Provision should be made in the Personal Protection Bill 2007 for a new mechanism for the referral of matters to mediation.¹²³⁷

An express power to refer to mediation

10-2 The Personal Protection Bill 2007 should provide that if a court hearing a proceeding for an application to make, vary or set aside a protection order and it considers it appropriate, the court may refer any of the issues arising in the proceeding to mediation under the *Dispute Resolution Centres Act 1990* (Qld). In referring the matters to mediation, the court must identify the parties to the application who must attend the mediation sessions conducted for the mediation.¹²³⁸

See Personal Protection Bill 2007 cl 84(1), (4).

¹²³⁷ See para 10.40 of this Report.

¹²³⁸ See para 10.75 of this Report.

- 10-3 The provisions of the *Dispute Resolution Centres Act 1990* (Qld) should generally apply, subject to some exceptions, to referrals made under the Bill.¹²³⁹

See Personal Protection Bill 2007 cl 84(1), (3).

Mediation at the court's discretion

- 10-4 The court's power under the Personal Protection Bill 2007 to refer an issue to mediation should be discretionary rather than mandatory.¹²⁴⁰

See Personal Protection Bill 2007 cl 84(1).

Referral in the absence of consent

- 10-5 The Personal Protection Bill 2007 should provide that the court may refer the issues to mediation whether or not any of the parties identified by the court as parties who must attend the mediation sessions agree to the referral.¹²⁴¹

See Personal Protection Bill 2007 cl 84(2)(b)

- 10-6 The requirement of voluntariness under the *Dispute Resolution Centres Act 1990* (Qld) should not apply in respect of a referral to mediation made under the Personal Protection Bill 2007.¹²⁴² The Bill should provide that, despite the *Dispute Resolution Centres Act 1990* (Qld), a person identified by the court on a referral to mediation as a party who must attend the mediation sessions must attend at and participate in a mediation session conducted for the mediation.

See Personal Protection Bill 2007 cl 85.

1239 Ibid.

1240 See para 10.77 of this Report.

1241 See para 10.79 of this Report.

1242 See para 10.81 of this Report.

Mediation where one of the parties is a child

10-7 The court should be able to exercise its discretion as to whether to refer a matter under the Personal Protection Bill 2007 to mediation in all cases, regardless of whether the relevant party is an adult or a child.¹²⁴³

Criteria for referral to dispute resolution

10-8 The Chief Magistrate should consider formulating a practice direction or guidelines, in consultation with the Dispute Resolution Branch of the Department of Justice and Attorney-General, in respect of appropriate factors for referral to mediation of matters under the Personal Protection Bill 2007, and, in particular, the appropriateness of referral to mediation in matters involving serious violence.¹²⁴⁴

10-9 In relation to Recommendation 10-8, suitable criteria for consideration may include the following factors:¹²⁴⁵

- (a) an evaluation of any underlying issues in the application;
- (b) whether there exists between the parties a sense of willingness to communicate and negotiate in good faith;
- (c) the relative bargaining positions of the parties (so far as it is likely to affect the conduct of the mediation process);
- (d) whether there is a history of violence between the parties or there is ongoing violence between them;
- (e) the capacity of the parties to achieve resolution of the dispute;
- (f) any delay that may be occasioned by the mediation of the application;
- (g) whether there has been a previous failed attempt at mediation in relation to the same issue, or whether the dispute has been previously assessed as unsuitable for mediation by a mediation service provider.

¹²⁴³ See para 10.82 of this Report.

¹²⁴⁴ See para 10.100 of this Report.

¹²⁴⁵ See para 10.102 of this Report.

10-10 The Personal Protection Bill 2007 should provide that the issues referred to mediation under the Bill are taken to be a dispute accepted for mediation by the director of the Dispute Resolution Centre under the *Dispute Resolution Centres Act 1990* (Qld).¹²⁴⁶

See Personal Protection Bill 2007 cl 84(3).

Timing of referral

10-11 The Personal Protection Bill 2007 should provide that the court may refer an issue to mediation on a proceeding for an application to make, vary or set aside a protection order at any time before the court decides the application.¹²⁴⁷

See Personal Protection Bill 2007 cl 84(2)(a).

Who should conduct the mediation

10-12 Consistent with the general application of the provisions of the *Dispute Resolution Centres Act 1990* (Qld) to the mediation of issues referred under the Personal Protection Bill 2007, the mediation of an issue or issues referred under the Bill is to be mediated by a Dispute Resolution Centre.¹²⁴⁸

10-13 See Personal Protection Bill 2007 cl 84(1).

The cost of mediation

10-14 Mediation services for matters referred to mediation under the Personal Protection Bill 2007 should be provided at no cost to the parties.¹²⁴⁹

Preliminary conferences

10-15 The Personal Protection Bill 2007 should provide that a court hearing a proceeding on an application to make, vary or set aside a protection order may direct an applicant and a respondent to attend a preliminary conference for the proceeding.¹²⁵⁰

¹²⁴⁶ See para 10.103 of this Report.

¹²⁴⁷ See para 10.110 of this Report.

¹²⁴⁸ See para 10.130 of this Report.

¹²⁴⁹ See para 10.144 of this Report.

¹²⁵⁰ See para 10.159 of this Report.

See Personal Protection Bill 2007 cl 81(1).

10-16 The Personal Protection Bill 2007 should provide that the court may conduct a preliminary conference or direct the registrar of the court to conduct a conference.¹²⁵¹

See Personal Protection Bill 2007 cl 81(2).

10-17 The Personal Protection Bill 2007 should provide that the objects of a preliminary conference are:¹²⁵²

- (a) finding out whether the proceeding may be settled by consent before it is heard by the court; and
- (b) working out and limiting the issues to be decided in the proceeding.

See Personal Protection Bill 2007 cl 82(1).

10-18 The Personal Protection Bill 2007 should also include a provision to specify that, without limiting how the issues to be decided in the proceeding may be worked out and limited at a preliminary conference, the court or registrar conducting the preliminary conference must try to identify:¹²⁵³

- (a) facts agreed on;
- (b) issues not agreed on; and
- (c) any unusual or urgent factors requiring special attention.

See Personal Protection Bill 2007 cl 82(2).

10-19 The Personal Protection Bill 2007 should provide that evidence about anything done or said at a preliminary conference that is related to a question to be decided by the court in the proceeding is not admissible unless:¹²⁵⁴

- (a) the applicant and respondent agree; or

1251 See para 10.162 of this Report.

1252 See para 10.164 of this Report.

1253 See para 10.165 of this Report.

1254 See para 10.166 of this Report.

- (b) the court is satisfied there are substantial reasons why, in the interests of justice, the evidence should be admitted.

See Personal Protection Bill 2007 cl 83.

Procedures following dispute resolution processes

- 10-20 The Personal Protection Bill 2007 should provide that, if the court has referred an application to mediation, within 7 days after the mediation ends, the mediator must file with the registrar of the referring court a written report on the mediation stating whether the mediation was held, whether any of the issues referred to mediation were resolved and whether any orders will be sought because of the mediation. Further, if an agreement is reached at the mediation, the mediator must file a copy of the agreement, in a sealed envelope, with the registrar of the referring court.¹²⁵⁵

See Personal Protection Bill 2007 cl 86.

- 10-21 The Personal Protection Bill 2007 should provide that a mediation agreement filed with the court in respect of an application to make, vary or set aside a protection order is admissible in a proceeding under the Bill relating to the protection order, or proposed protection order, which is the subject of the application.¹²⁵⁶

See Personal Protection Bill 2007 cl 87(1).

- 10-22 The Personal Protection Bill 2007 should specifically override sections 31(3) and 36(4)–(6) of the *Dispute Resolution Centres Act 1990* (Qld) in relation to a mediation agreement filed in a proceeding under the Bill relating to the protection order, or proposed protection order, which is the subject of the application.¹²⁵⁷

See Personal Protection Bill 2007 cl 87(2).

¹²⁵⁵ See para 10.181 of this Report.

¹²⁵⁶ See para 10.183 of this Report.

¹²⁵⁷ See para 10.184 of this Report.

Chapter 11

Hearings and evidence

INTRODUCTION	297
THE PROCEDURE AT THE HEARING	297
ISSUES FOR CONSIDERATION.....	298
THE APPEARANCE OR NON-APPEARANCE OF THE PARTIES	299
The appearance of the respondent.....	299
The non-appearance of the respondent.....	300
The Commission's view	302
EXPLAINING THE CONSEQUENCES OF THE APPLICATION.....	303
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	303
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	303
The position in other jurisdictions.....	304
The Commission's view	304
THE STANDARD OF PROOF.....	306
Submissions	306
The Commission's view	307
REQUIRING WITNESSES TO ATTEND AND GIVE EVIDENCE	307
The Commission's view	310
EVIDENCE PROVISIONS.....	310
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	311
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	311
The position in other jurisdictions.....	312
Submissions	314
The Commission's view	315
VULNERABLE WITNESSES, INCLUDING CHILDREN.....	316
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	317
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	318
The position in other jurisdictions.....	319
Submissions	321
The Commission's view	323
WITHDRAWAL OF AN APPLICATION.....	324
The position in Queensland	324
The Commission's view	325
RECOMMENDATIONS	325

INTRODUCTION

11.1 The Commission's terms of reference require it to consider, as part of its review, whether the *Peace and Good Behaviour Act 1982* (Qld) provides an 'easily accessible' mechanism for the protection of the community from breaches of the peace.¹²⁵⁸ In particular, the Commission is required to have regard to the procedures in the Act for a complainant to seek a peace and good behaviour order from the Magistrates Court.

11.2 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.¹²⁵⁹ 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.¹²⁶⁰

11.3 After the defendant has been served with the summons or apprehended pursuant to the warrant, the matter proceeds to a hearing.¹²⁶¹ This chapter considers the procedures on the hearing and provisions on evidence.

THE PROCEDURE AT THE HEARING

11.4 The *Peace and Good Behaviour Act 1982* (Qld) provides that the court is to 'hear and determine the matter of the complaint'.¹²⁶² 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 provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications.¹²⁶³

11.5 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.¹²⁶⁴ However, if the defendant appears, either in

1258 The terms of reference are set out in Appendix 1 to this Report.

1259 *Peace and Good Behaviour Regulation 1999* (Qld) s 4. See para 9.7 of this Report.

1260 *Peace and Good Behaviour Act 1982* (Qld) s 8; *Justices Act 1886* (Qld) ss 54(1A), 56(1); *Peace and Good Behaviour Regulation 1999* (Qld) s 7.

1261 *Peace and Good Behaviour Act 1982* (Qld) s 6(1).

1262 *Peace and Good Behaviour Act 1982* (Qld) s 6(1).

1263 *Peace and Good Behaviour Act 1982* (Qld) s 8.

1264 *Peace and Good Behaviour Act 1982* (Qld) s 7(1)(b).

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.¹²⁶⁵

11.6 Where the defendant appears, evidence including, but not limited to, evidence that the complaint 'is made from malice or for vexation only', may be given by or on behalf of the defendant.¹²⁶⁶

11.7 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'.¹²⁶⁷ However, where a party giving evidence or another witness is a 'special witness',¹²⁶⁸ the court may exclude persons and may make orders about the conditions under which the witness is to give evidence.¹²⁶⁹

11.8 The court's decision is to be made 'upon a consideration of the evidence' given at the hearing.¹²⁷⁰

11.9 Having heard the evidence, the court may either dismiss the complaint or make an order requiring the defendant to keep the peace and be of good behaviour.¹²⁷¹

ISSUES FOR CONSIDERATION

11.10 In its Discussion Paper, the Commission sought submissions in relation to procedural matters arising at the hearing of an application under the *Peace and Good Behaviour Act 1982* (Qld), including:¹²⁷²

- the standard of proof;
- the application of the rules of evidence and the way evidence is given;
- provisions to support witnesses in giving evidence.

¹²⁶⁵ *Justices Act 1886* (Qld) s 141.

¹²⁶⁶ *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, 50, 51 (McPherson JA).

¹²⁶⁷ *Justices Act 1886* (Qld) s 70(1), (2).

¹²⁶⁸ A 'special witness' is a child under the age of 16 years, or a person who in the court's opinion would, as a result of certain factors, be likely to be disadvantaged as a witness, to suffer severe emotional trauma or to be so intimidated as to be disadvantaged as a witness: *Evidence Act 1977* (Qld) s 21A(1).

¹²⁶⁹ *Evidence Act 1977* (Qld) s 21A(2).

¹²⁷⁰ *Peace and Good Behaviour Act 1982* (Qld) s 6(3).

¹²⁷¹ *Peace and Good Behaviour Act 1982* (Qld) s 6(3).

¹²⁷² Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 77–8 (Questions 7-3–7-4, 7-8–7-12).

11.11 This chapter also considers:

- procedures on the appearance or non-appearance of the parties;
- the explanation of the consequences of an application to the parties;
- provisions requiring witnesses to attend and give evidence;
- when children may give evidence; and
- the withdrawal of an application.

THE APPEARANCE OR NON-APPEARANCE OF THE PARTIES

The appearance of the respondent

The Peace and Good Behaviour Act 1982 (Qld)

11.12 Section 6 of the *Peace and Good Behaviour Act 1982* (Qld) provides for the appearance of the respondent before the court that is to hear and determine the complaint for a peace and good behaviour order. That section provides:

6 Magistrates Court may make order

(1) The Magistrates Court before which the defendant appears in obedience to the summons or is brought pursuant to the warrant, as the case may be, shall hear and determine the matter of the complaint.

...

(3) Upon a consideration of the evidence, the Court may—

(a) dismiss the complaint; or

(b) make an 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.

...

11.13 Section 6 does not expressly provide for the adjournment of a hearing. However, under the *Justices Act 1886* (Qld), the Magistrates Court is empowered to adjourn a hearing.¹²⁷³

¹²⁷³ *Justices Act 1886* (Qld) ss 4 (definition of 'justice'), 88.

The Domestic and Family Violence Protection Act 1989 (Qld)

11.14 Section 48 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that, on the appearance of a respondent before the court that is to hear and determine the matter of an application for a protection order, the court may do one of the following:¹²⁷⁴

- hear and determine the application;
- adjourn the matter of the application (whether or not it makes a temporary protection order);
- dismiss the application.

11.15 However, the court may not dismiss the application unless:¹²⁷⁵

- the applicant has not appeared and, if the applicant was a police officer, no other police officer or Crown prosecutor requests an adjournment; and
- no other person eligible to apply appears.

11.16 The applicant's right to make a further application against the respondent is not affected by the dismissal of the application.¹²⁷⁶

11.17 The appearance of the respondent is evidence that the respondent has been served.¹²⁷⁷

The non-appearance of the respondent

The Peace and Good Behaviour Act 1982 (Qld)

11.18 Section 7 of the *Peace and Good Behaviour Act 1982* (Qld) provides for the non-appearance of the respondent before the court that is to hear and determine the complaint for a peace and good behaviour order. That section provides:

7 Where defendant does not appear

- (1) If at the time and place appointed by summons for the hearing of the complaint the defendant does not appear when called and proof is made to the Court of due service of the summons in accordance with section 56 of the *Justices Act 1886*, the Court may—

¹²⁷⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 48(1), (2).

¹²⁷⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 48(3).

¹²⁷⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 48(4).

¹²⁷⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 48(5).

- (a) issue its warrant to apprehend the defendant and to bring the defendant before a Magistrates Court to answer the complaint and to be further dealt with according to law; or
 - (b) proceed in the absence of the defendant to hear and determine the matter of the complaint as fully and effectually to all intents and purposes as if the defendant had personally appeared before the Court in obedience to the summons and may make an order referred to in section 6; or
 - (c) for any reason appearing to it to be a sufficient reason, adjourn the hearing to a time and place determined by it before a Magistrates Court.
- (2) Where the Court makes an order, a copy thereof shall be served on the defendant in the same manner as a summons may be served under the *Justices Act 1886*.

The Domestic and Family Violence Protection Act 1989 (Qld)

11.19 Section 49 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that, if the respondent fails to appear before the court that is to hear and determine the matter of an application for a protection order, and the court is satisfied that the respondent has been given certain documents,¹²⁷⁸ the court may do one of the following:¹²⁷⁹

- hear and determine the application in the absence of the respondent;
- adjourn the matter of the application (whether or not it makes a temporary protection order);
- subject to certain requirements,¹²⁸⁰ order the issue of a warrant for the respondent to be taken into custody by a police officer and brought before the court.

11.20 In this last circumstance, any justice may issue a warrant for the apprehension of the respondent.¹²⁸¹

1278 These documents are: a copy of the application and any summons issued on the application under s 47; a copy of the application and the temporary protection order made because of the application; or a copy of the application and a copy of the conditions on which the person was released from the watch-house under s 71 setting out the time and place for the hearing of the application. For the purposes of the court being satisfied, on the non-appearance of the respondent, that he or she has been given these documents, a notice mentioned in s 47(8) (in the form of a notice to appear under the *Police Powers and Responsibilities Act 2000* (Qld) and issued by a police officer) is taken to be a summons: *Domestic and Family Violence Protection Act 1989* (Qld) s 47(9)(b).

1279 *Domestic and Family Violence Protection Act 1989* (Qld) s 49(1), (2).

1280 See *Domestic and Family Violence Protection Act 1989* (Qld) s 59 (Provisions concerning warrants).

1281 *Domestic and Family Violence Protection Act 1989* (Qld) s 49(3).

The Commission's view

11.21 The procedures under the *Peace and Good Behaviour Act 1982* (Qld) and the *Domestic and Family Violence Protection Act 1989* (Qld) relating to the appearance and non-appearance of the respondent are generally similar. The *Domestic and Family Violence Protection Act 1989* (Qld) provisions, however, provide a greater level of detail in relation to the court's powers.

11.22 The Commission considers that the provisions for the appearance and non-appearance of the respondent on an application for a protection order in the Personal Protection Bill 2007 should be generally similar to sections 48 and 49 of the *Domestic and Family Violence Protection Act 1989* (Qld).¹²⁸²

11.23 The Commission notes that section 48 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that, if there is no appearance for the applicant (and no other person eligible to apply appears) the court may dismiss the application. Section 48(4) expressly provides that the dismissal of the application does not affect the right of the applicant to make a further application against the respondent.

11.24 The Commission has considered whether, in these circumstances, there should be some limitation under the Personal Protection Bill 2007 on the applicant's ability to bring a subsequent application in relation to the same respondent (for example, a requirement for the applicant to seek leave).

11.25 However, the Commission considers that such a limitation may hinder or prevent an applicant, who is in genuine need of protection, from making a subsequent application. Further, the imposition of a barrier on the making of subsequent applications undermines the policy of *prima facie* acceptance of the application. As the Commission has noted earlier, the acceptance of an application on its face removes the risk of a meritorious application being wrongly rejected before the allegations made in the application can be tested at the hearing.¹²⁸³

11.26 The Commission has also recommended that a court may order costs against an applicant in respect of an application which has been dismissed as malicious, false, frivolous or vexatious.¹²⁸⁴

¹²⁸² See para 11.14–11.17, 11.19, 11.20 of this Report.

¹²⁸³ See para 9.83 of this Report.

¹²⁸⁴ See para 20.175 of this Report.

EXPLAINING THE CONSEQUENCES OF THE APPLICATION

The Peace and Good Behaviour Act 1982 (Qld)

11.27 The *Peace and Good Behaviour Act 1982* (Qld) does not require the court to explain the purpose and effect of making an application for a peace and good behaviour order to the parties.

The Domestic and Family Violence Protection Act 1989 (Qld)

11.28 When an aggrieved or respondent to the application for the order is first before the court, section 14A of the *Domestic and Family Violence Protection Act 1989* (Qld) requires the court to explain the consequences of the application and of an order made because of the application. That section provides:

14A Court to explain order to aggrieved or respondent before the court

- (1) When an aggrieved or respondent is first personally before a court, the court must satisfy itself that the aggrieved or respondent understands—
 - (a) the nature, purpose and legal implications of the application; and
 - (b) the legal implications of the court making a domestic violence order because of the application.
- (2) If a person's first presence before a court is at the time the court is about to make a domestic violence order, the court may comply with subsection (1) and section 50,¹²⁸⁵ at the same time.
- (3) Failure to comply with this section does not affect the validity of the domestic violence order. [original note]

11.29 Section 50 of the *Domestic and Family Violence Protection Act 1989* (Qld) also requires the court, when it is about to make a domestic violence order, to ensure that the aggrieved and the respondent, if they are present in court, understand certain matters about the order.¹²⁸⁶ In this Report, the Commission has recommended the inclusion in the Personal Protection Bill 2007 of a similar provision that, in certain circumstances, alternatively provides for information about the order to be given to a person who has applied for an order on behalf of an aggrieved person.¹²⁸⁷

¹²⁸⁵ Section 50 (Court to ensure respondents and aggrieveds understand domestic violence orders).

¹²⁸⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 50(1), (2).

¹²⁸⁷ See para 14.23–14.27 of this Report.

The position in other jurisdictions

11.30 In the ACT, New South Wales, Victoria and Western Australia, a court that makes an order must, if the person against whom the order is made is present in court, explain to the person the terms of the order, the consequences of breaching the order and how to apply for the variation or discharge of the order.¹²⁸⁸ In the ACT, New South Wales and Western Australia, an explanation must also be given to the protected person, if that person is present.¹²⁸⁹

11.31 However, in contrast to the Queensland domestic violence legislation, the civil restraining order legislation in these jurisdictions does not require a court to provide an explanation to the parties when they first appear before the court in relation to the proceedings.

The Commission's view

11.32 The Commission considers that requiring a court to explain the consequences of an application for a protection order has several advantages. It ensures that the parties are provided with information early in the proceedings about the nature and consequences of a protection order. The provision of such information before the matter is heard may inform the parties in their approach to, and participation in, the proceedings.

11.33 The Commission is of the view that a provision, generally similar to section 14A of the *Domestic and Family Violence Protection Act 1989* (Qld), should be included in the Personal Protection Bill 2007. Such a provision should require a court to explain the nature, purpose and legal implications of the proceeding and the legal implications of the court making a protection order to the following persons when they are first before the court:

- each respondent to the order; and
- each aggrieved person.

¹²⁸⁸ *Domestic Violence and Protection Orders Act 2001* (ACT) s 24; *Crimes Act 1900* (NSW) s 562ZZ(1); *Crimes (Family Violence) Act 1987* (Vic) s 15; *Restraining Orders Act 1997* (WA) s 8(1)(a), (c)–(h). The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Section 562ZZ(1) of the *Crimes Act 1900* (NSW) is substantially replicated in s 76(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

¹²⁸⁹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 25; *Crimes Act 1900* (NSW) s 562ZZ(1); *Restraining Orders Act 1997* (WA) s 8(1)(b)(i), (c)–(h). In Western Australia, the court may alternatively give the explanation to a parent or guardian of a protected person if the parent or guardian made the application for the order on behalf of that person. As to the application of the legislation in New South Wales, see note 1288 of this Report.

11.34 Furthermore, if the applicant is not an aggrieved person or a police officer, and the court considers it appropriate to do so, the court must also give the explanation to that person if the applicant is before the court.

11.35 This is broader than the position under the *Domestic and Family Violence Protection Act 1989* (Qld) whereby the court is obliged to give information to the aggrieved and the respondent only. The expansion of the range of potential recipients of an explanation to include a person who has sought the order on the aggrieved person's behalf would enable the court, if it considers it appropriate, to explain the order to an authorised person, a person acting under another Act for an aggrieved, a parent of the aggrieved or some other person who has brought the application on the aggrieved person's behalf.¹²⁹⁰ This circumstance might arise, for example, where the aggrieved lacks the capacity to understand the proceedings.

11.36 The Commission also considers that the Personal Protection Bill 2007 should provide that the explanation should be given in English or a language in which the person is fluent and in a way that ensures, as far as practicable, the person understands the explanation. For example, if the person cannot hear the explanation, it might be given by someone who can communicate with the person other than by speaking.

11.37 The Commission has also recommended in this Report that, if the court is making a protection order and it is practicable to do so, the court must give an explanation about the purposes and terms of an order and other matters to each aggrieved person and respondent for the order who is present when the order is made.¹²⁹¹ The Commission therefore considers that the Personal Protection Bill 2007 should provide that, if an aggrieved person or respondent for the protection order applied for is first before the court when the court is about to make the order, the court may comply, at the same time, with both the requirement to give an explanation when each of those persons is first before the court and the requirement to give an explanation to each of those persons before a protection order is made.

11.38 The Commission also considers that, similar to section 14A of the *Domestic and Family Violence Protection Act 1989* (Qld), the Bill should provide that failure to comply with the requirement to give an explanation does not invalidate or otherwise affect the protection order.

¹²⁹⁰ The persons who may apply for a personal protection order on behalf of an aggrieved person are set out in Chapter 6 of this Report.

¹²⁹¹ See para 14.23, 14.26 of this Report.

THE STANDARD OF PROOF

11.39 The *Peace and Good Behaviour Act 1982* (Qld) does not specifically refer to the standard of proof required to support a complaint made under the Act. This omission has previously resulted in some uncertainty as to whether the criminal or civil standard of proof applies in proceedings under the *Peace and Good Behaviour Act 1982* (Qld).¹²⁹²

11.40 However, the Queensland Court of Appeal has held that it is not necessary for a complaint under the *Peace and Good Behaviour Act 1982* (Qld) to be proved to the criminal standard of beyond a reasonable doubt.¹²⁹³ Consequently, 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.¹²⁹⁴

11.41 The Court of Appeal decision is consistent with the civil restraining order legislation in other jurisdictions¹²⁹⁵ and with the position under the *Domestic and Family Violence Protection Act 1989* (Qld), which provides that, if a court is to be satisfied of a matter, it need only be satisfied on the balance of probabilities.¹²⁹⁶

Submissions

11.42 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should specify the standard of proof required for the hearing of a complaint under the Act and, if

¹²⁹² Note that s 8 of the *Peace and Good Behaviour Act 1982* (Qld) provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications.

¹²⁹³ *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45, 50– 52 (McPherson JA), 55 (Shepherdson J). The Court of Appeal noted the following factors in the reasons for its decision: first, 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; second, is it not necessary under the Act that the behaviour complained of amount to a criminal offence; and third, 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.

¹²⁹⁴ 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: *Laidlaw v Hulett, Ex parte Hulett* [1998] 2 Qd R 45, 49 (Fitzgerald P), 52 (McPherson JA), 55 (Shepherdson J). See also *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Rejzek v McElroy* (1965) 112 CLR 517, 521.

¹²⁹⁵ *Domestic Violence and Protection Orders Act 2001* (ACT) s 19; *Crimes Act 1900* (NSW) s 562K(1); *Summary Procedure Act 1921* (SA) s 99K; *Justices Act 1959* (TAS) s106B(1); *Crimes (Family Violence) Act 1987* (Vic) s 4(1); *Restraining Orders Act 1997* (WA) ss 3 (definition of 'satisfied'), 11A, 34. Section 562K(1) of the *Crimes Act 1900* (NSW) is replicated in s 19(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales and Victoria, see note 1288 of this Report.

¹²⁹⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 9.

so, whether the standard of proof should be the civil standard of the balance of probabilities, or the higher criminal standard of beyond a reasonable doubt.¹²⁹⁷

11.43 Almost all of the submissions received by the Commission in relation to the requisite standard of proof applicable to the hearing of a complaint under the *Peace and Good Behaviour Act 1982* (Qld) considered that the standard of proof should be expressed in the Act.¹²⁹⁸ All of the submissions considered that the requisite standard of proof should be on the balance of probabilities.¹²⁹⁹

11.44 It was also suggested in some submissions that the requirement of a civil, rather than criminal, standard of proof facilitated the accessibility of the remedy of a peace and good behaviour order.¹³⁰⁰

The Commission's view

11.45 The Commission considers that the civil standard of proof should apply in a proceeding under the Personal Protection Bill 2007. The Personal Protection Bill 2007 should therefore provide that, if a court must be satisfied of a matter, the court need only be satisfied of the matter on the balance of probabilities.

11.46 This provision is not intended to apply to a proceeding for an offence against the Personal Protection Bill 2007. The Commission has recommended elsewhere in this Report, that a proceeding for an offence under the Bill must be taken in a summary way under the *Justices Act 1886* (Qld).¹³⁰¹

REQUIRING WITNESSES TO ATTEND AND GIVE EVIDENCE

11.47 The *Peace and Good Behaviour Act 1982* (Qld) contains no express provision requiring a witness to attend court to give oral or documentary evidence. However, section 8 of the Act provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications.

¹²⁹⁷ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 77–8 (Questions 7-3, 7-4).

¹²⁹⁸ Submissions 5, 8, 12, 14, 15, 19, 20.

¹²⁹⁹ Submissions 5, 8, 12, 13, 14, 15, 19, 20.

¹³⁰⁰ Submissions 13, 19.

¹³⁰¹ See para 14.74 of this Report. Note that the criminal standard of proof beyond a reasonable doubt applies in a proceeding taken in a summary way under the *Justices Act 1886* (Qld). In relation to the standard of proof that applies in criminal proceedings, see generally *Brown v The King* (1913) 17 CLR 570, 584-5 (Barton ACJ), 595 (Isaacs and Powers JJ); *Woolmington v DPP* [1935] AC 462, 481.

11.48 The *Justices Act 1886* (Qld) generally empowers a justice to summons a person to give evidence as a witness at the hearing of a complaint.¹³⁰² A justice may impose a fine on a person who fails, without just excuse, to appear in answer to a summons.¹³⁰³ If, for various reasons, the person is unlikely to appear without being compelled under a warrant, the justice may issue a warrant to apprehend the person.¹³⁰⁴ The Act also provides that, in the case of an indictable offence, a custodial sentence may be imposed on a witness who fails to answer questions.¹³⁰⁵ However, it is uncertain whether this provision applies to proceedings under the *Peace and Good Behaviour Act 1982* (Qld).¹³⁰⁶

11.49 In contrast, the *Domestic and Family Violence Protection Act 1989* (Qld) makes specific provision for the summoning of witnesses to attend court to give evidence or to produce documentary evidence:

39 Court may summons person to attend

- (1) A justice may, by notice given to a person, summons the person to attend the hearing of an application for a protection order at a time and place specified in the summons—
 - (a) to give evidence; and
 - (b) to produce any record in the person's possession and specified in the notice.
- (2) A person served with a summons to attend as a witness must not fail, without reasonable excuse—
 - (a) to attend as required by the summons; or
 - (b) to attend from time to time in the course of the hearing as required by the court; or
 - (c) to produce any record that the person was required to produce by the summons served on the person.

Maximum penalty—10 penalty units.

1302 *Justices Act 1886* (Qld) s 78.

1303 *Justices Act 1886* (Qld) s 79(1).

1304 *Justices Act 1886* (Qld) ss 79(2), 81.

1305 *Justices Act 1886* (Qld) s 82.

1306 Section 8 of the *Peace and Good Behaviour Act 1982* (Qld) provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications.

- (3) A person attending as a witness at a hearing must not fail—
 - (a) to be sworn or to make an affirmation; or
 - (b) without reasonable excuse, to answer a question that the person is required to answer by the court.
- Maximum penalty—10 penalty units.
- (4) If a person served with a summons fails to attend as mentioned in subsection (2)(a) or (b), the court may order the issue of a warrant for the person to be taken into custody by a police officer and to be brought before the court.
- (5) Any justice may issue a warrant for the purposes of subsection (4).
- (6) Subsection (4) does not limit any other powers of the court.

11.50 Section 39AA of the *Domestic and Family Violence Protection Act 1989* (Qld) empowers the court, on the application of the person served with a summons or on its own initiative, to set aside the summons on the grounds of privilege, oppressiveness, or want of relevance. If a court sets aside a summons, the court may make an order for costs for the benefit of the person on whom the summons was served:

39AA Court may set aside a summons

- (1) A court may set aside a summons issued under section 39 if the court is satisfied there are sufficient grounds for setting the summons aside, including—
 - (a) want of relevance; or
 - (b) privilege; or
 - (c) oppressiveness.
- (2) The court may act on the application of the person served with the summons or on its own initiative.
- (3) If a court sets aside a summons under subsection (1), the court may make an order for costs for the benefit of the person on whom the summons was served.

11.51 Section 39AA was inserted in the Act in response to concerns that summons were being issued, not for the genuine purpose of eliciting relevant evidence or documents, but ‘to harass the witness or the applicant for the order or to obtain information or documents for other proceedings’.¹³⁰⁷

¹³⁰⁷

Explanatory Notes, Domestic Violence Legislation Amendment Bill 2001 (Qld) 15.

The Commission's view

11.52 The *Peace and Good Behaviour Act 1982* (Qld) currently applies the *Justices Act 1886* (Qld) provisions for the summoning of witnesses. The *Domestic and Family Violence Protection Act 1989* (Qld), on the other hand, includes specific provisions, namely sections 39 and 39AA, which govern the summoning of witnesses in relation to the hearing of an application for a protection order.

11.53 The Commission considers that the Personal Protection Bill 2007 should specifically provide for the issue, and setting aside, of a summons requiring a person to attend the hearing of an application to make, vary or set aside a protection order to give evidence, or to produce a document in the person's possession.

11.54 This would assist unrepresented parties in the identification and application of the relevant provisions. It would also resolve any ambiguity associated with the application of the *Justices Act 1886* (Qld) provisions to the Personal Protection Bill 2007.¹³⁰⁸

11.55 In the Commission's view, the provisions of the Personal Protection Bill 2007 for summoning witnesses to attend the hearing of an application to make, vary or set aside a protection order should be generally similar to sections 39 and 39AA of the *Domestic and Family Violence Protection Act 1989* (Qld).

11.56 This would provide a consistency of approach in the summoning of witnesses, and in the available penalties for failure to comply with a summons and to answer questions as a witness, in relation to proceedings under the Personal Protection Bill 2007 and domestic violence proceedings. It would also clarify the circumstances in which a summons may be set aside and an order for costs made.

EVIDENCE PROVISIONS

11.57 The law of evidence governs the nature and form of evidence that can be brought before a court. The reception of evidence in proceedings in Queensland courts is governed by Queensland legislation, primarily the *Evidence Act 1977* (Qld),¹³⁰⁹ court rules and the common law.

¹³⁰⁸ In Chapter 20 of this Report, the Commission has recommended that, except where it is inconsistent with the Personal Protection Bill 2007, the *Justices Act 1886* (Qld) should apply, with any necessary changes, to proceedings before a court under the Bill: see para 20.155 of this Report.

¹³⁰⁹ Other relevant Queensland legislation includes the *Criminal Code* (Qld), the *Oaths Act 1867* (Qld) and the *Police Powers and Responsibilities Act 2000* (Qld). There are also some miscellaneous provisions in the *Evidence Act 1995* (Cth) that apply in all courts within Australia, including State courts. See generally, Queensland Law Reform Commission, Report, *A Review of the Uniform Evidence Acts* (R 60, September 2005).

The Peace and Good Behaviour Act 1982 (Qld)

Application of the rules of evidence

11.58 Neither the *Peace and Good Behaviour Act 1982 (Qld)* nor the *Justices Act 1886 (Qld)* specifies whether a court may depart from the rules of evidence. In the absence of such a provision, and to the extent not otherwise provided under the *Justices Act 1886 (Qld)*, a court must follow the usual rules of evidence at a hearing of a complaint for an order under the *Peace and Good Behaviour Act 1982 (Qld)*.

The way in which evidence is given

11.59 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 that Act. Generally, it is necessary for evidence in a proceeding to be given orally by a witness.¹³¹⁰ 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.¹³¹¹

Malicious or vexatious complaint

11.60 Section 6(2) of the *Peace and Good Behaviour Act 1982 (Qld)* provides that, without limiting the evidence given by or on behalf of the defendant, ‘the defendant may produce evidence that the complaint is made from malice or for vexation only’.¹³¹²

The Domestic and Family Violence Protection Act 1989 (Qld)

Application of the rules of evidence

11.61 Section 84(2) of the *Domestic and Family Violence Protection Act 1989 (Qld)* provides that, in any proceedings with a view to making, varying or revoking a domestic violence order, ‘the court or magistrate may inform itself, himself or herself in such manner as it or the magistrate thinks fit and is not bound by the rules or practice as to evidence’.

¹³¹⁰ *Justices Act 1886 (Qld)* s 73.

¹³¹¹ Section 8 of the *Peace and Good Behaviour Act 1982 (Qld)* provides that the provisions of and proceedings and procedures under the *Justices Act 1886 (Qld)* that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982 (Qld)*, subject to any necessary or prescribed modifications. 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.

¹³¹² Also see note 1266 of this Report.

The way in which evidence is given

11.62 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that the court or magistrate is not required to have the personal evidence of the aggrieved person before making an order.¹³¹³ This relieves an aggrieved from the requirement to attend court to give his or her evidence in person unless the person is summoned.

The position in other jurisdictions

Application of the rules of evidence

11.63 Under the civil restraining order legislation in the ACT, Victoria and Western Australia, a court can inform itself in any way it considers appropriate.¹³¹⁴ In Victoria and Western Australia, the relevant provisions governing the reception of evidence apply only in certain circumstances. In Victoria, the rules of evidence do not apply to proceedings where the aggrieved family member is a child or where a person other than an aggrieved family member applies for an interim intervention order.¹³¹⁵ In Western Australia, the rules of evidence do not apply in an ex parte hearing on an application for a violence restraining order.¹³¹⁶

The way in which evidence is given

11.64 In the ACT, New South Wales, Tasmania, Victoria and Western Australia, the legislation provides for evidence in support of an application to be given by affidavit in certain circumstances.¹³¹⁷

11.65 The ACT legislation provides that evidence may be given by affidavit in any proceeding under the Act if the parties agree or with leave of the court.¹³¹⁸

11.66 In proceedings for an interim apprehended violence order under the New South Wales legislation, the evidence of the person seeking the order may

1313 *Domestic and Family Violence Protection Act 1989* (Qld) s 84(3).

1314 *Domestic Violence and Protection Orders Regulation 2002* (ACT) s 21; *Crimes (Family Violence) Act 1987* (Vic) s 13A; *Restraining Orders Act 1997* (WA) s 44A.

1315 *Crimes (Family Violence) Act 1987* (Vic) s 13A. For the application of the legislation in Victoria, see note 1288 of this Report.

1316 *Restraining Orders Act 1997* (WA) s 44A.

1317 *Domestic Violence and Protection Orders Regulation 2002* (ACT) s 20(2); *Crimes Act 1900* (NSW) s 562ZA(4); *Justices Act 1959* (Tas) s 106E(1B)–(1D); *Crimes (Family Violence) Act 1987* (Vic) s 21A; *Restraining Orders Act 1997* (WA) s 28.

1318 *Domestic Violence and Protection Orders Regulation 2002* (ACT) s 20(2).

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.¹³¹⁹

11.67 The Tasmanian legislation provides that, at the hearing of an 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.¹³²⁰ 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.¹³²¹ 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.¹³²²

11.68 In Victoria, the court generally may admit evidence on affidavit except in proceedings for which the complaint is based on an allegation of stalking in circumstances where there is no family relationship between the complainant and the person sought to be restrained.¹³²³

11.69 Under the Western Australian legislation, 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,¹³²⁴ the court may accept affidavit evidence from the applicant in support of the matters alleged in the application and may determine the application on that evidence.¹³²⁵ If the applicant has filed an affidavit, the court is to hear the matter even if the applicant does not attend.¹³²⁶ At the hearing, the court may dismiss 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.¹³²⁷

¹³¹⁹ *Crimes Act 1900* (NSW) s 562ZA(4). Section 562ZA(4) of the *Crimes Act 1900* (NSW) is replicated in s 22(4) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1288 of this Report.

¹³²⁰ *Justices Act 1959* (Tas) s 106E(1B)–(1D).

¹³²¹ *Justices (Restraint Orders) Rules 2003* (Tas) r 8(1), (2).

¹³²² *Justices (Restraint Orders) Rules 2003* (Tas) r 8(3).

¹³²³ *Crimes (Family Violence) Act 1987* (Vic) s 21A. For the application of the legislation in Victoria, see note 1288 of this Report.

¹³²⁴ *Restraining Orders Act 1997* (WA) s 26(1), (2).

¹³²⁵ *Restraining Orders Act 1997* (WA) s 28(1).

¹³²⁶ *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 must, if satisfied that the applicant was notified of the hearing, dismiss the application, or otherwise, adjourn the hearing: *Restraining Orders Act 1997* (WA) s 27(2).

¹³²⁷ *Restraining Orders Act 1997* (WA) s 29(1), (2).

Submissions

Application of the rules of evidence

11.70 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should provide that the court, in hearing an application, need not be bound by the rules of evidence.¹³²⁸

11.71 The majority of the submissions received by the Commission in relation to this issue considered that it should be possible for the rules of evidence to be relaxed at the hearing of a complaint for an order under the *Peace and Good Behaviour Act 1982* (Qld).¹³²⁹

11.72 Two community legal services considered that the court should be able to satisfy itself of any matter in the way it thinks appropriate, in line with section 84(2) of the *Domestic and Family Violence Protection Act 1989* (Qld).¹³³⁰

11.73 Queensland Advocacy Inc suggested that the court should not be bound by the rules of evidence and should take a more active approach in eliciting information from the parties.¹³³¹ A Queensland magistrate expressed a similar view:¹³³²

There should not be a requirement that the court is bound by the rules of evidence. Often there are no lawyers involved in what is often a neighbourhood dispute. To ascertain the information needed to make a decision it is often necessary for the court to intervene much more than it would if lawyers were engaged, and for the magistrate to be actively involved in asking questions.

11.74 A submission from the Women's Legal Service suggested that the hearsay rule should be relaxed in relation to matters going to issues of safety in order to 'best preserve the safety of aggrieved'.¹³³³

11.75 The Townsville Community Legal Service Inc, however, considered that the rules of evidence should not be dispensed with at a hearing of a complaint.¹³³⁴

1328 Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 78 (Question 7-12).

1329 Submissions 5, 8, 12B, 15, 20.

1330 Submissions 5, 15.

1331 Submission 20.

1332 Submission 12B.

1333 Submission 8.

1334 Submission 14.

The way in which evidence is given

11.76 In its Discussion Paper, the Commission sought submissions on whether it should be possible for evidence at the hearing of a complaint under the *Peace and Good Behaviour Act 1982* (Qld) to be given by affidavit, and, if so, in what circumstances.¹³³⁵

11.77 The majority of the submissions received by the Commission in relation to this issue considered that it should be possible to give evidence by affidavit at the hearing of a complaint under the *Peace and Good Behaviour Act 1982* (Qld).¹³³⁶

11.78 Legal Aid Queensland commented in this regard:¹³³⁷

Evidence should be able to be given by affidavit subject to the other party's right to cross examination. This would be particularly appropriate in cases where there are allegations of serious threats or intimidation by one party against another, such that the giving of evidence orally might amount to an experience of further distress.

11.79 A community legal service suggested that only persons other than the parties to the application should be able to provide evidence on affidavit.¹³³⁸

11.80 In light of the difficulty some parties might face in preparing an affidavit, two submissions considered that the receipt of evidence by affidavit should be possible but not required.¹³³⁹

11.81 Queensland Advocacy Inc also suggested it would be of assistance to people with a disability if they were not required to present their evidence in affidavit form.¹³⁴⁰

The Commission's view

11.82 In the Commission's view, the Personal Protection Bill 2007 should provide that in a proceeding under the Bill, a court is not bound by the rules of evidence but may inform itself in the way the court considers appropriate. This is also consistent with the *Domestic and Family Violence Protection Act 1989* (Qld) and the civil restraining order legislation in several other Australian jurisdictions. This clearly provides for a court to dispense with the application of the rules of evidence generally and avoids any ambiguity associated with the

¹³³⁵ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 78 (Question 7-8).

¹³³⁶ Submissions 5, 8, 12B, 13, 14, 15, 19.

¹³³⁷ Submission 13.

¹³³⁸ Submission 5.

¹³³⁹ Submissions 12B, 13.

¹³⁴⁰ Submission 20.

term ‘practice as to evidence’ which is used in the *Domestic and Family Violence Protection Act 1989* (Qld).¹³⁴¹ Most of the submissions received by the Commission in relation to this issue supported this approach. The Commission is of the view that, where parties represent themselves in proceedings under the Act, the power to depart from the rules of evidence may help to facilitate the reception of evidence in the proceedings.

11.83 The Commission also considers, however, that the Personal Protection Bill 2007 should clarify that the application of the ‘special witness’ provisions of the *Evidence Act 1977* (Qld) to proceedings under the legislation is not limited by the provision that the court is not bound by the rules of evidence.¹³⁴²

11.84 The Commission is further of the view that the Personal Protection Bill 2007 should specify that, in a proceeding under the Bill, a court may receive evidence orally, in writing or in another way. This would obviously include evidence given in the form of oral testimony, or by way of a written affidavit, statutory declaration or photograph. A provision to this effect would clarify, particularly for unrepresented persons, that a court may receive evidence in a variety of forms.

VULNERABLE WITNESSES, INCLUDING CHILDREN

11.85 Proceedings under the *Peace and Good Behaviour Act 1982* (Qld) may involve, from time to time, children and adults who may need support in giving evidence. An applicant or defendant in proceedings under the Act may also seek to call evidence from a child.

11.86 There are a variety of contexts in which children may appear as witnesses in court or tribunal proceedings. The Australian Law Reform Commission has noted in its Report, *Seen and heard: Priority for children in the legal process*.¹³⁴³

[W]hatever the jurisdiction, the structures, procedures and attitudes to child witnesses within all these legal processes frequently discount, inhibit and silence children as witnesses. In cases where the child is very young or has had a close relationship with one of the parties or where the subject of the evidence is particularly sensitive, children often become so intimidated or distressed by the process that they are unable to give evidence satisfactorily or at all.

¹³⁴¹ The ‘rules of evidence’ govern the reception of evidence and deal with procedural matters, witnesses, the admissibility of particular types of evidence, and questions of proof: JD Heydon, *Cross on Evidence* (Jan 2008) [1005], [1020].

¹³⁴² See para 11.118–11.120 of this Report.

¹³⁴³ Australian Law Reform Commission, *Seen and heard: Priority for children in the legal process*, Report No 84 (1997) [14.2].

11.87 As well as children, some adult witnesses, such as those with an intellectual disability, may require support to help them give their evidence effectively.¹³⁴⁴

The Peace and Good Behaviour Act 1982 (Qld)

Support for witnesses when giving evidence

11.88 The *Peace and Good Behaviour Act 1982* (Qld) does not specifically provide for measures to support vulnerable witnesses, including children, in giving evidence in proceedings under the Act.

11.89 However, the *Evidence Act 1977* (Qld) contains detailed provisions related to the giving of evidence by 'special witnesses'.¹³⁴⁵

11.90 A 'special witness' is:¹³⁴⁶

- (a) a child under 16 years; or
- (b) a person who, in the court's opinion—
 - (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter,¹³⁴⁷ be likely to be disadvantaged as a witness; or
 - (ii) would be likely to suffer severe emotional trauma; or
 - (iii) would be likely to be so intimidated as to be disadvantaged as a witness;

if required to give evidence in accordance with the usual rules and practice of the court. [note added]

11.91 Where a party or another witness giving evidence is a special witness, the court can make certain orders to facilitate the giving of evidence.¹³⁴⁸ For example, the court may close the court, allow the presence of a support person

¹³⁴⁴ See, for example, New South Wales Law Reform Commission, *People with an intellectual disability and the criminal justice system: Courts and sentencing issues*, Discussion Paper No 35 (1994) [7.20], [7.42]; New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* Report No 80 (1996) [7.12]. Also see generally Supreme Court of Queensland, *Equal Treatment Benchbook* (2005).

¹³⁴⁵ *Evidence Act 1977* (Qld) s 21A. Note also s 9E of the *Evidence Act 1977* (Qld) which enunciates several general principles that are to apply when dealing with a child witness in a proceeding.

¹³⁴⁶ *Evidence Act 1977* (Qld) s 21A(1) (definition of 'special witness'). Under s 21A(2)(e) of the *Evidence Act 1977* (Qld), the court may order that a video-taped recording of the evidence of a special witness be substituted for the witness's direct testimony in any proceeding.

¹³⁴⁷ A 'relevant matter' includes the person's age, education, level of understanding, cultural background, relationship to any party to the proceeding and the nature of the subject matter of the evidence: *Evidence Act 1977* (Qld) s 21A(1) (definition of 'relevant matter').

¹³⁴⁸ *Evidence Act 1977* s 21A(1B), (2).

when the person gives evidence, or order or direct the evidence be given by way of video recording.¹³⁴⁹

11.92 The special witness provisions of the *Evidence Act 1977* (Qld) apply generally in proceedings, including proceedings under the *Peace and Good Behaviour Act 1982* (Qld).¹³⁵⁰

When children may give evidence

11.93 There is no specific provision in the *Peace and Good Behaviour Act 1982* (Qld) or the *Justices Act 1886* (Qld) in relation to when a child may give direct or affidavit evidence in proceedings for an application for a peace and good behaviour order.

11.94 While the ‘special witness’ provisions of the *Evidence Act 1977* (Qld) will apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld),¹³⁵¹ those provisions facilitate the giving of evidence by such a witness and do not limit the circumstances in which a child may be called to give evidence.

The Domestic and Family Violence Protection Act 1989 (Qld)

Support for witnesses when giving evidence

11.95 The *Domestic and Family Violence Protection Act 1989* (Qld) generally provides that an application is to be heard in a closed court unless the court otherwise specifies the proceedings are open to the public or to specific persons.¹³⁵² In addition, the Act expressly provides that an aggrieved is entitled to the presence of a support person throughout the proceedings.¹³⁵³

When children may give evidence

11.96 Section 81A of the *Domestic and Family Violence Protection Act 1989* (Qld) restricts the circumstances in which a child may give evidence (other than a child who is the aggrieved or respondent in the relevant proceedings under the Act). That section provides:

81A Child not to be witness or swear affidavit

- (1) This section applies to a child, other than a child who is the aggrieved or respondent in the relevant proceedings under this Act.

¹³⁴⁹ *Evidence Act 1977* s 21A(2)(b), (d), (e).

¹³⁵⁰ *Evidence Act 1977* ss 21A(2), 3, sch 3 (definition of ‘proceeding’ para (b)).

¹³⁵¹ See para 11.92 of this Report.

¹³⁵² *Domestic and Family Violence Protection Act 1989* (Qld) s 81(1), (2).

¹³⁵³ *Domestic and Family Violence Protection Act 1989* (Qld) s 81(3).

- (2) Subject to an order of a court, a person must not—
 - (a) call a child as a witness in the proceedings; or
 - (b) ask a child to remain in a court during the proceedings; or
 - (c) ask a child to swear an affidavit for the proceedings.
- (3) If a court orders a child may be called as a witness, the court must consider whether the child's evidence should be given by way of video or other electronic means and may make an order accordingly.
- (4) A sworn affidavit of a child is not admissible in the proceedings unless the court ordered the child may be asked to swear the affidavit before the affidavit was sworn.¹³⁵⁴ [note added]

11.97 Section 81A(3), which is directed at the giving of evidence by video or other electronic means, applies only to a child witness other than a child who is an aggrieved or a respondent. The Commission notes that section 21A(2)(e) of the *Evidence Act 1977* (Qld), which provides for video-taped evidence to be given, applies to *any* child witness, including a child who is a party to the relevant proceedings,¹³⁵⁵ and is therefore of broader application than the *Domestic and Family Violence Protection Act 1989* (Qld) provision.

11.98 Section 81A(4) of the *Domestic and Family Violence Protection Act 1989* (Qld) is intended to provide that a necessary requirement for the admissibility of a child's affidavit is that the court has given permission for the affidavit to be sworn. Only if such permission is obtained prior to the swearing of the affidavit, will the affidavit be admissible.

The position in other jurisdictions

Support for witnesses when giving evidence

11.99 The civil restraining order legislation in New South Wales, the Northern Territory, Victoria and Western Australia contains provisions to assist vulnerable witnesses.

New South Wales

11.100 The New South Wales legislation contains provisions to support and protect children and others in proceedings to make, vary or revoke an apprehended violence order. 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 the court may order any

¹³⁵⁴ An affidavit used in proceedings under the *Domestic and Family Violence Protection Act 1989* (Qld) may be sworn or affirmed: *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'swear'); *Oaths Act 1867* (Qld) s 17.

¹³⁵⁵ *Evidence Act 1977* (Qld) s 21A(1) (definition of 'special witness' para (a), (1B).

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.¹³⁵⁶

11.101 Further, a complainant or a defendant who gives evidence is entitled to the presence of a support person,¹³⁵⁷ 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 to provide the person with other support.¹³⁵⁸ Provision is also made for a child to give evidence by way of recording or closed circuit television.¹³⁵⁹

Victoria

11.102 In Victoria, 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 or to exclude persons from proceedings.¹³⁶⁰

Western Australia

11.103 In Western Australia, provision is made in relation to child witnesses in proceedings for a violence or misconduct restraining order. Where the respondent is a child, with no adult present at the proceedings, the court is to enquire into the reason a ‘responsible adult’ is not present and, unless the court considers that there is a valid reason to excuse attendance of a responsible adult or it is not reasonable to delay proceedings for the attendance of a responsible adult, the court is to require a responsible adult to attend during all stages of the proceedings.¹³⁶¹

11.104 Provided the necessary facilities are available, if a child is to give oral evidence, the evidence is to be given outside the courtroom and transmitted by video link and visually recorded.¹³⁶² A child is also entitled to the presence of a

1356 *Crimes Act 1900* (NSW) s 562ZH(1)–(3), 562A (definition of ‘child’). Section 562ZH of the *Crimes Act 1900* (NSW) is replicated in s 41 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1288 of this Report.

1357 *Crimes Act 1900* (NSW) s 562ZN(2). For who may act as a support person see s 562ZN(3)(a). Section 562ZN of the *Crimes Act 1900* (NSW) is replicated in s 46 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

1358 *Crimes Act 1900* (NSW) s 562ZN(3)(b).

1359 *Crimes Act 1900* (NSW) s 562ZZH(5); *Criminal Procedure Act 1986* (NSW) ch 6, pt 6, div 3, 4.

1360 *Magistrates’ Court Act 1989* (Vic) ss 125(1), 126(1)–(2). Under s 126A of that Act, the Court may order a person to enter into a bond to keep the peace or be of good behaviour.

1361 *Restraining Orders Act 1997* (WA) s 51; *Young Offenders Act 1994* (WA) s 45(1). A ‘responsible adult’, in relation to a young person, is a parent, guardian, or other person having responsibility for the day to day care of the young person: *Young Offenders Act 1994* (WA) s 3 (definition of ‘responsible adult’). This definition is expressed not to include a person whom the *Young Offenders Regulations 1995* (WA) may provide is not a responsible adult.

1362 *Restraining Orders Act 1997* (WA) s 53B.

support person when giving oral evidence.¹³⁶³

When children may give evidence

11.105 The civil restraining order legislation in New South Wales, the Northern Territory, Victoria and Western Australia also contains provisions about when a child may give evidence.

11.106 In New South Wales, a child under 16 years is not required to give evidence in proceedings for an apprehended violence order, or the variation or revocation of an order, unless the court is of the opinion that it is in the interests of justice for the child to do so.¹³⁶⁴

11.107 In Victoria, a child (other than a child who is a party to proceedings) must not give evidence by affidavit unless the court makes an order allowing the child to do so. A child who is an applicant or a family member of the applicant or the defendant must not be present during, or called as a witness in, the proceedings unless the court allows the child to be present or to give evidence.¹³⁶⁵

11.108 The Western Australian legislation has extensive provisions governing the evidence of children in violence and misconduct restraining order proceedings, including the provision of support, cross-examination and admissibility.¹³⁶⁶ In Western Australia, a child is not to give oral evidence unless the court makes an order in the interests of justice and on the basis of exceptional circumstances, or the evidence is given in the Children's Court.¹³⁶⁷

Submissions

11.109 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should include provisions to protect or assist a person who is giving evidence and, if so, what those provisions should be. The Discussion Paper also asked whether provision should be made for the court to be closed for all or part of a hearing.¹³⁶⁸

¹³⁶³ *Restraining Orders Act 1997* (WA) s 53C(1). Under s 53C(2), the support person cannot be a person who is witness or a party for the proceedings and must be approved by the court.

¹³⁶⁴ *Crimes Act 1900* (NSW) ss 562ZH(4), 562A (definition of 'child'). Section 562ZH of the *Crimes Act 1900* (NSW) is replicated in s 41 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1288 of this Report.

¹³⁶⁵ *Crimes (Family Violence) Act 1987* (Vic) s 21B. For the application of this legislation, see note 1288 of this Report.

¹³⁶⁶ *Restraining Orders Act 1997* (WA) ss 53B–53F.

¹³⁶⁷ *Restraining Orders Act 1997* (WA) s 53A.

¹³⁶⁸ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 78 (Questions 7–9–7–11).

11.110 Almost all of the submissions received by the Commission in relation to this issue considered the *Peace and Good Behaviour Act 1982* (Qld) should include specific provisions to protect a person who is giving evidence or to assist the person to give evidence.¹³⁶⁹

11.111 Queensland Advocacy Inc suggested that people who are not cognitively impaired but who have difficulty communicating should be assisted to give evidence.¹³⁷⁰

11.112 Numerous submissions also considered that the *Peace and Good Behaviour Act 1982* (Qld) should provide that the court may be closed for all or part of the hearing of an application.¹³⁷¹ One submission considered the hearing of an application generally should be conducted in open court.¹³⁷²

11.113 Two community legal services considered that the court should be closed when children are involved in an application.¹³⁷³

11.114 Caxton Legal Centre Inc also suggested that the Act should specify that the court may be closed where one of the parties appears with a large number of support persons in such a way that this intimidates the other party during the hearing.¹³⁷⁴

11.115 On the other hand, the Women's Legal Service suggested that it was unnecessary to include specific provisions in the *Peace and Good Behaviour Act 1982* (Qld) as a consequence of the application of the provisions of the *Evidence Act 1977* (Qld) relating to vulnerable witnesses.¹³⁷⁵

11.116 Another submission also noted that the special witness provisions of the *Evidence Act 1977* (Qld) are sufficient.¹³⁷⁶

11.117 A submission from the Youth Advocacy Centre Inc also considered that appropriate procedural rules dealing with children's evidence should be provided for.¹³⁷⁷ This submission considered the procedures that apply in the

1369 Submissions 5, 14, 15, 20.

1370 Submission 20.

1371 Submissions 5, 13, 14, 15, 19.

1372 Submission 5.

1373 Submissions 5, 15.

1374 Submission 19.

1375 Submission 8.

1376 Submission 20.

1377 Submission 11.

Children Services Tribunal provide a good example.¹³⁷⁸

The Commission's view

11.118 The Commission considers that, in appropriate circumstances, it should be possible for a person who gives evidence in a proceeding under the Personal Protection Bill 2007 to receive support when giving evidence.

11.119 The 'special witness' provisions in the *Evidence Act 1977* (Qld) apply where a party or a witness in a proceeding for a protection order is a 'special witness' within the meaning of the *Evidence Act 1977* (Qld). These provisions confer on the court discretionary powers to make various orders to facilitate the giving of evidence by these witnesses, including closing the court and allowing the presence of an approved support person when the witness gives evidence.

11.120 In the Commission's view, the 'special witness' provisions in the *Evidence Act 1977* (Qld) will provide sufficient protection to vulnerable witnesses, including children, in giving their evidence in proceedings under the Personal Protection Bill 2007. The Commission therefore considers it unnecessary to include separate provisions in the Personal Protection Bill 2007 dealing with the giving of evidence by vulnerable people. Earlier in this Chapter, the Commission has recommended that the Personal Protection Bill 2007 should provide that the application of the 'special witness' provisions of the *Evidence Act 1977* (Qld) to proceedings under Bill is not limited by the provision that the court is not bound by the rules of evidence.¹³⁷⁹

11.121 Section 81A of the *Domestic and Family Violence Protection Act 1989* (Qld) addresses concerns in the domestic violence context about children being inappropriately drawn in to disputes between parents, or other adults. The Commission considers similar concerns are unlikely to arise in the majority of protection order proceedings under the Personal Protection Bill 2007. The Commission considers the appropriate weight to be given to a child's evidence, in particular, where the evidence has been unfairly obtained, will be determined in the court's discretion in each case.

11.122 The Commission therefore considers it unnecessary to include a specific provision in the Personal Protection Bill 2007 to limit the circumstances in which a child may give evidence.

1378

See *Children Services Tribunal Act 2000* (Qld) ss 49, 91, 93(1), 94(1). That Act provides, for example, that for proceedings before the Children Services Tribunal, only certain persons are entitled to be present when a child gives evidence, including a support person for the child, and that a child must not be compelled to give evidence and is not to be cross-examined.

1379

See para 11.83 of this Report.

WITHDRAWAL OF AN APPLICATION

11.123 Elsewhere in this Report, the Commission has made recommendations about the court's powers to dismiss an application for a protection order.

11.124 For example, the Commission has recommended that where the respondent appears on an application for a protection order, the court may hear and decide the application, adjourn the application or, if the applicant has not appeared and no other person eligible to apply appears, dismiss the application.¹³⁸⁰

11.125 In addition, in Chapter 5 of this Report, the Commission recommended that the court may summarily dismiss an application for a protection order if it considers the application is malicious, false, frivolous or vexatious.¹³⁸¹

11.126 A related issue, which was not specifically raised in the Discussion Paper, is whether provision should also be made for ending proceedings when an applicant wishes to withdraw his or her application.

The position in Queensland

11.127 Neither the *Peace and Good Behaviour Act 1982* (Qld) nor the *Domestic and Family Violence Protection Act 1989* (Qld) includes provisions dealing with the withdrawal of an application. The *Justices Act 1886* (Qld) is also silent on the withdrawal of a complaint by the complainant.¹³⁸² However, it appears a person may withdraw a complaint provided the complaint is not of a public nature.¹³⁸³ It would be within the court's discretion to allow a complaint to be withdrawn or to dismiss the complaint with or without costs.

11.128 The *Uniform Civil Procedure Rules 1999* (Qld) include provisions for the discontinuance or withdrawal of proceedings. Under those rules, an applicant may discontinue a proceeding or withdraw part of it before being served with the first affidavit in reply from a respondent by filing and serving a notice in the approved form.¹³⁸⁴

¹³⁸⁰ See para 11.14–11.15, 11.22 of this Report. Note also the Commission's recommendation that the dismissal of an application in those circumstances should not prevent the applicant making a further application for a protection order against the respondent: see para 11.23–11.25 of this Report.

¹³⁸¹ See para 5.188 of this Report.

¹³⁸² That Act does provide, however, that if the defendant appears on the day appointed by the summons for the hearing of the complaint, but the complainant does not appear, the justices shall dismiss the complaint 'unless for some reason they think proper to adjourn the hearing': *Justices Act 1886* (Qld) s 141. A provision of similar effect is contained in *Domestic and Family Violence Protection Act 1989* (Qld) s 48(2)(c), (3). Similar provision has also been recommended for inclusion in the Personal Protection Bill 2007: see para 11.124 of this Report.

¹³⁸³ *Besgrove v Larson* (2001) 22 Qld Lawyer Reps 82, [15] (McGill DCJ); *Turner v Randall* [1988] 1 Qd R 726, 728 (Kneipp, Demack and Carter JJ); *Hill v Pinnock* (1879) 1 QLJ (Supp) 45, 50 (Harding J).

¹³⁸⁴ *Uniform Civil Procedure Rules 1999* (Qld) rr 304(1)(b), 309(1).

11.129 After being served with the first affidavit in reply, however, the applicant may discontinue a proceeding or withdraw part of it only with the court's leave or the consent of the other parties.¹³⁸⁵ In that case, the discontinuance or withdrawal is effected by the order giving leave.¹³⁸⁶ The *Uniform Civil Procedure Rules 1999* (Qld) also provide for the award of costs against a party who discontinues or withdraws proceedings.¹³⁸⁷

11.130 The *Uniform Civil Procedure Rules 1999* (Qld) apply to civil proceedings in the Magistrates Court.¹³⁸⁸

The Commission's view

11.131 The Commission considers it desirable for the Personal Protection Bill 2007 to contain a specific provision about the withdrawal of an application. While there may be circumstances in which it is appropriate to allow an applicant to withdraw his or her application, this will not always be the case. Once the application has been made and the respondent served, the application is within the jurisdiction of the court.

11.132 The Commission is of the view, therefore, that a provision should be included in the Bill to the effect that, at any time during proceedings, an applicant may withdraw an application made under the Bill only with the court's leave. The court may give leave to withdraw the application if it considers it appropriate to do so in the circumstances.¹³⁸⁹ In this Report, the Commission has also recommended that the Bill should provide that an interim protection order ends if the application to which the interim order relates (the final order application) has been withdrawn with leave.¹³⁹⁰ These provisions would ensure that where an application is withdrawn, the proceedings, including any interim order made on the application, are appropriately finalised.

RECOMMENDATIONS

11.133 The Commission makes the following recommendations:

1385 *Uniform Civil Procedure Rules 1999* (Qld) r 304(2).

1386 *Uniform Civil Procedure Rules 1999* (Qld) r 309(2).

1387 *Uniform Civil Procedure Rules 1999* (Qld) r 307.

1388 *Uniform Civil Procedure Rules 1999* (Qld) r 3.

1389 See, for example, para 5.188, 20.175 of this Report.

1390 See Chapter 13 of this Report in which the Commission has recommended that an interim protection order ends when the court decides or summarily dismisses the final order application, the order is set aside, the period stated in the order expires, or the application is withdrawn with leave, whichever is the first. See para 13.48 of this Report.

The appearance or non-appearance of the parties

- 11-1 The Personal Protection Bill 2007 should include provisions for the appearance and non-appearance of the respondent on an application for a protection order. These provisions should be generally similar to sections 48 and 49 of the *Domestic and Family Violence Protection Act 1989* (Qld).¹³⁹¹

See Personal Protection Bill 2007 cl 52, 53, 95.

Explaining the consequences of the application

- 11-2 A provision, generally similar to section 14A of the *Domestic and Family Violence Protection Act 1989* (Qld), should be included in the Personal Protection Bill 2007. Such a provision should require a court to explain the nature, purpose and legal implications of the proceeding and the legal implications of the court making a protection order to the following persons when they are first before the court:¹³⁹²

- (a) each aggrieved person for the protection order applied for; and
- (b) each respondent for the protection order applied for.

See Personal Protection Bill 2007 cl 54(1).

- 11-3 The court must also explain those matters mentioned in recommendation 11-2 to the applicant if:

- (a) if the applicant is not an aggrieved person for the protection order applied for or a police officer;
- (b) the applicant is before the court; and
- (c) and the court considers it appropriate.¹³⁹³

See Personal Protection Bill 2007 cl 54(2).

¹³⁹¹ See para 11.22 of this Report.

¹³⁹² See para 11.33 of this Report.

¹³⁹³ See para 11.34 of this Report.

- 11-4 The Personal Protection Bill 2007 should provide that the explanation should be given in English or a language in which the person is fluent and in a way that ensures, as far as practicable, the person understands the explanation.¹³⁹⁴

See Personal Protection Bill 2007 cl 54(3).

- 11-5 The Personal Protection Bill 2007 should provide that, if an aggrieved person or respondent for the protection order applied for is first before the court when the court is about to make the order, the court may, at the same time, comply with the requirement to give an explanation when each of those persons is first before the court and the requirement to give an explanation to each of those persons before a protection order is made.¹³⁹⁵

See Personal Protection Bill 2007 cl 54(4).

- 11-6 The Personal Protection Bill 2007 should provide that failure to comply with the requirement to give an explanation to each respondent or aggrieved person, when he or she is first before the court, does not invalidate or otherwise affect the protection order.¹³⁹⁶

See Personal Protection Bill 2007 cl 54(5)

The standard of proof

- 11-7 The Personal Protection Bill 2007 should provide that, other than in relation to a charge of an offence against the Bill, if a court is to be satisfied of a matter, the court need only be satisfied of the matter on the balance of probabilities.¹³⁹⁷

See Personal Protection Bill 2007 cl 88.

1394 See para 11.36 of this Report.

1395 See para 11.37 of this Report.

1396 See para 11.38 of this Report.

1397 See para 11.45–11.46 of this Report.

Requiring witnesses to attend and give evidence

- 11-8 A provision should be included in the Personal Protection Bill 2007, generally consistent with sections 39 and 39AA of the *Domestic and Family Violence Protection Act 1989* (Qld), to provide for the issue, and setting aside, of a summons requiring a person to attend the hearing of an application to make, vary or set aside a protection order to give evidence, or to produce a document.¹³⁹⁸

See Personal Protection Bill 2007 cl 93–95.

Evidence provisions

- 11-9 A provision should be included in the Personal Protection Bill 2007 to the effect that a court is not bound by the rules of evidence but may inform itself in the way the court considers appropriate.¹³⁹⁹

See Personal Protection Bill 2007 cl 89(1).

- 11-10 A provision should be included in the Personal Protection Bill 2007 to the effect that the application of the special witness provisions in section 21A of the *Evidence Act 1977* (Qld) to proceedings under the Bill is not limited by the provision that the court is not bound by the rules of evidence.¹⁴⁰⁰

See Personal Protection Bill 2007 cl 89(2)(a).

- 11-11 A provision should be included in the Personal Protection Bill 2007 to the effect that, in proceedings under the Bill, the court may receive evidence orally, in writing or in another way.¹⁴⁰¹

See Personal Protection Bill 2007 cl 89(3).

1398 See para 11.53 and 11.55 of this Report.

1399 See para 11.82 of this Report.

1400 See para 11.83, 11.120 of this Report.

1401 See para 11.84 of this Report.

Withdrawal of an application

11-12 A provision should be included in the Personal Protection Bill 2007 to the effect that an applicant may withdraw an application to make, vary or set aside a protection order, or an application to register a corresponding order only with the court's leave. The court may grant leave to withdraw the application if it considers it appropriate to do so in the circumstances.¹⁴⁰²

See Personal Protection Bill 2007 cl 106.

¹⁴⁰² See para 11.132 of this Report.

Chapter 12

Powers to make interim orders and consent orders etc

INTRODUCTION	331
INTERIM PROTECTION ORDERS.....	331
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	332
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	332
The position in other jurisdictions.....	335
Submissions	336
The Commission's view	338
CONSENT ORDERS	341
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	341
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	341
The position in other jurisdictions.....	342
Issues for consideration	343
Submissions	344
The Commission's view	346
PROTECTION ORDERS MADE IN CRIMINAL PROCEEDINGS	350
The <i>Penalties and Sentences Act 1992</i> (Qld).....	350
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	351
The <i>Criminal Code</i> (Qld)	351
The position in other jurisdictions.....	352
Issues for consideration	353
The Commission's view	353
RECOMMENDATIONS	354

INTRODUCTION

12.1 As part of its review of the *Peace and Good Behaviour Act 1982* (Qld), the Commission is required by its terms of reference to consider whether the Act provides an 'effective' mechanism for the protection of the community from breaches of the peace.¹⁴⁰³

12.2 The Act provides for the court to make a peace and good behaviour order for the protection of a complainant. However, it does not specifically provide for interim (or temporary) orders or consent orders. This raises the issue of the effectiveness of this mechanism in providing protection.

12.3 This chapter considers the court's powers under the Personal Protection Bill 2007 to make interim protection orders and protection orders by consent, in addition to the power to make protection orders in criminal proceedings.

INTERIM PROTECTION ORDERS

12.4 An interim (or temporary) order is an order which is of effect for a limited period. In civil restraining order legislation, the purpose of an interim order is to enable the court to protect persons seeking the remedy of a restraining order pending the determination of their application.

12.5 Similar orders, made prior to the final hearing and of limited duration, are sometimes made in civil litigation. Superior courts have the power to grant 'interlocutory injunctions' as a way of maintaining the status quo until the court makes its final determination.¹⁴⁰⁴ For example, an injunction may be granted to preserve property the subject of the litigation so that the claim for final relief is not frustrated.¹⁴⁰⁵ The Supreme Court has statutory power to grant an interlocutory injunction 'in all cases in which it shall appear to the court to be just or convenient' to do so.¹⁴⁰⁶

¹⁴⁰³ The terms of reference are set out in Appendix 1 to this Report.

¹⁴⁰⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [9]–[10] (Gleeson CJ); and see ICF Spry, *The Principles of Equitable Remedies* (6th ed, 2001) 453. Note the difference between an 'interlocutory' and 'interim' injunction as explained in ICF Spry, *The Principles of Equitable Remedies* (6th ed, 2001) 508:

An interim injunction is one whereby the defendant is restrained, not until the final hearing or further order, as in the case of an ordinary interlocutory injunction, but rather until a named date or further order, from performing the acts in question. ... It is ordinarily contemplated that at the named date the applicant will approach the court and seek a further order restraining the defendant until the final hearing or further order, that is, an ordinarily interlocutory injunction. If, for example, an injunction is issued before a writ or other such process has been taken out, it is ordinarily issued in the form of an interim injunction. [note omitted]

¹⁴⁰⁵ ICF Spry, *The Principles of Equitable Remedies* (6th ed, 2001) 454.

¹⁴⁰⁶ *Supreme Court Act 1995* (Qld) s 246. Note that the general equitable principles governing the granting of interlocutory injunctions continue to operate: see *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [87]–[88] (Gummow and Hayne JJ).

12.6 An interlocutory injunction may be granted if there is a serious question to be tried and the balance of convenience favours that it be granted.¹⁴⁰⁷ That is, it must be demonstrated first, that ‘if the facts alleged are shown to be true, there will be a sufficiently plausible ground for the granting of final relief’¹⁴⁰⁸ and second, that ‘the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted’.¹⁴⁰⁹

12.7 In urgent circumstances, application for an ‘interim injunction’ may be made ex parte.¹⁴¹⁰ The *Uniform Civil Procedure Rules 1999* (Qld) allow a court to hear and decide an application ex parte if it considers it is just to do so and that the ‘delay caused by giving notice of the application would cause irreparable or serious mischief to the applicant or another person’.¹⁴¹¹

The Peace and Good Behaviour Act 1982 (Qld)

12.8 The *Peace and Good Behaviour Act 1982* (Qld) does not expressly empower a court to make an interim peace and good behaviour order. Neither does the *Justices Act 1886* (Qld) contain provisions for the court to make an interim order. This means that the court is unable to protect a person who applies for an order under the *Peace and Good Behaviour Act 1982* (Qld) before the application is finally disposed of.

The Domestic and Family Violence Protection Act 1989 (Qld)

12.9 In contrast to the *Peace and Good Behaviour Act 1982* (Qld), the *Domestic and Family Violence Protection Act 1989* (Qld) makes provision for a court to make a ‘temporary protection order’ for a short period until the court decides whether to make a protection order for the benefit of an aggrieved.¹⁴¹²

1407 *Mincom Ltd v Oniqua Pty Ltd* [2006] QSC 155, [6] (Atkinson J); *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Limited* [1991] 1 Qd R 301, 303 (Shepherdson J), 311 (Cooper J); *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153 (Mason ACJ).

1408 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [8] (Gleeson CJ).

1409 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 623. *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [65] (Gummow and Hayne JJ), [19] (Gleeson CJ and Crennan J agreeing).

1410 ICF Spry, *The Principles of Equitable Remedies* (6th ed, 2001) 505–6, 511; RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002) [21-425]. Note that an interim injunction is ‘best viewed as a type of interlocutory injunction’: RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002) [21-420]. See note 1404 of this Report as to the difference between an interim and interlocutory injunction.

1411 *Uniform Civil Procedure Rules 1999* (Qld) r 27(3)(a). Rule 27(3)(b)–(c) provides two other grounds for hearing and deciding an application ex parte where the court considers it just to do so: if the court is satisfied the respondents will suffer no significant prejudice, or if the respondents consent.

1412 *Domestic and Family Violence Protection Act 1989* (Qld) s 13(3). A temporary protection order may be made under pt 3 div 2 or s 54 of the *Domestic and Family Violence Protection Act 1989* (Qld).

12.10 The Act specifies two separate bases for obtaining a temporary protection order: the commission of an act of domestic violence, and the danger of personal injury or substantial damage to property.¹⁴¹³

The commission of an act of domestic violence

12.11 Section 39A(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a court may make a ‘temporary protection order’ ‘only if it appears to the court ... that an act of domestic violence has been committed against the aggrieved by the respondent’. ‘Domestic violence’ is defined under the Act to include wilful injury, wilful damage, harassment or intimidation or a threat to commit one of those acts.¹⁴¹⁴

12.12 The court may make a temporary order based on the commission of an act of domestic violence in various circumstances specified in the Act, including:

- if the court adjourns the hearing of an application for a protection order in circumstances where the respondent appears before the court, or fails to appear before the court but the court is satisfied the respondent has been served with specified documents in relation to the application;¹⁴¹⁵
- if the court adjourns the making of a protection order on its own initiative in a sentencing proceeding;¹⁴¹⁶
- if the court is hearing an application for the variation of a protection order or temporary protection order and it appears necessary to protect the aggrieved or a named person pending the court’s decision in the variation proceedings;¹⁴¹⁷
- if a magistrate hears an application made by a police officer by telephone or other electronic means or a temporary protection order if it appears that, because of distance, time or other circumstances of the case, it is not practicable to apply to the court for a protection order and for it to be heard and decided quickly;¹⁴¹⁸ and
- if the hearing of a cross-application for a domestic violence order is adjourned and there is a danger of personal injury or substantial damage to property.¹⁴¹⁹

¹⁴¹³ *Domestic and Family Violence Act 1989* (Qld) ss 39A(1), 39D(c)

¹⁴¹⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1).

¹⁴¹⁵ *Domestic and Family Violence Protection Act 1989* (Qld) ss 39C(a), 48, 49.

¹⁴¹⁶ *Domestic and Family Violence Protection Act 1989* (Qld) ss 39C(b), 53(1)(b).

¹⁴¹⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 39F.

¹⁴¹⁸ *Domestic and Family Violence Protection Act 1989* (Qld) ss 39G, 54(1).

¹⁴¹⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 39E.

Danger of personal injury or substantial property damage

12.13 In circumstances of urgency, the *Domestic and Family Violence Protection Act 1989* (Qld) provides another basis for obtaining a temporary protection order – the danger of personal injury or substantial property damage in relation to the aggrieved or a named person.

12.14 Section 39D of the Act specifies that, if an application for a protection order (or variation of a domestic violence order) is made, and the court does not begin to hear, or has decided not to begin to hear, the application because it is not satisfied that the respondent has been served with the relevant court documents, the court may make a temporary protection order if the aggrieved or named person is in danger of personal injury or substantial damage to his or her property.¹⁴²⁰

12.15 This provision enables a person, who has applied for a protection order and is in apparent danger, to obtain an urgent temporary protection order before the respondent becomes aware of the application.

The evidence required to support a temporary protection order

12.16 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that a temporary protection order ‘need only be supported by evidence the court considers sufficient and appropriate having regard to the temporary nature of the order’.¹⁴²¹ Consequently, when deciding whether to make a temporary protection order, the court is not required to conduct a full hearing of the evidence.¹⁴²²

The form of a temporary protection order

12.17 The *Domestic and Family Violence Protection Act 1989* (Qld) specifies that a court may make a temporary protection order against a respondent in the same terms as a protection order.¹⁴²³

Matters that must be stated in a temporary protection order

12.18 The *Domestic and Family Violence Protection Act 1989* (Qld) requires the temporary protection order to state the time and place at which the order is returnable before the court.¹⁴²⁴

¹⁴²⁰ Note that s 39A(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) is expressed not to apply to temporary protection orders made under s 39D.

¹⁴²¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 39A(2).

¹⁴²² *BB v Liebsanft* [2003] QSC 326, [16] (MacKenzie J).

¹⁴²³ *Domestic and Family Violence Protection Act 1989* (Qld) s 39B(1).

¹⁴²⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 39B(2).

A temporary protection order as a summons

12.19 The *Domestic and Family Violence Protection Act 1989* (Qld) also provides that a temporary protection order is a summons ‘directing the respondent to appear at the time and place at which the order is returnable’.¹⁴²⁵

The position in other jurisdictions

12.20 In the ACT, New South Wales, South Australia, Tasmania, Victoria and Western Australia, there is provision for the court to make an interim order pending the hearing and determination of the application for a restraint order.¹⁴²⁶ 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.

12.21 In the ACT, an interim order may be made at any time during the proceeding on an application for a final order.¹⁴²⁷ The court may make an interim order ‘if satisfied that it is necessary’ to make the order to ‘ensure the safety of the aggrieved person or a child of the aggrieved person’, or to ‘prevent substantial damage to the property of the aggrieved person or a child of the aggrieved person’, until the application for the final order is decided.¹⁴²⁸

12.22 Similarly, in Victoria, an interim intervention order may be made, in the absence of the defendant, ‘if the court is satisfied that it is necessary to ensure the safety of the aggrieved family member or to preserve any property of the aggrieved family member pending the hearing and determination of the complaint’.¹⁴²⁹

12.23 In New South Wales, the court may make an interim order on an application ‘if it appears to the court that it is necessary or appropriate to do so

¹⁴²⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 39B(3).

¹⁴²⁶ *Domestic Violence and Protection Orders Act 2001* (ACT) s 48; *Crimes Act 1900* (NSW) s 562ZA; *Summary Procedure Act 1921* (SA) ss 99B, 99C; *Justices Act 1959* (Tas) ss 106D, 106DA; *Crimes (Family Violence) Act 1987* (Vic) s 8; *Restraining Orders Act 1997* (WA) ss 23, 29. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Section 562ZA of the *Crimes Act 1900* (NSW) is replicated in s 22 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

¹⁴²⁷ *Domestic Violence and Protection Orders Act 2001* (ACT) s 48(1)–(2).

¹⁴²⁸ *Domestic Violence and Protection Orders Act 2001* (ACT) s 49. If the application is for a workplace order, the court may make an interim workplace order if it is satisfied it is necessary to ensure the safety of the aggrieved person at the workplace or an employee of an aggrieved person or other people at the workplace, until the application for the final order is decided: s 49(b).

¹⁴²⁹ *Crimes (Family Violence) Act 1987* (Vic) s 8(1). For the application of this legislation, see note 1426 of this Report.

in the circumstances'.¹⁴³⁰ The court must require the defendant to appear at a further hearing as soon as practicable after an interim order is made.¹⁴³¹

12.24 In South Australia, a restraining order may be made in the absence of the defendant with effect until the conclusion of a further hearing to which the defendant must be summoned.¹⁴³² Provision is also made for the court to make a restraining order ex parte, in urgent circumstances, on a telephone application with effect until the conclusion of a further hearing.¹⁴³³

12.25 In Tasmania, an interim restraint order can be made 'at any stage of the proceedings' in respect of an application for a final order. The justices may make an interim restraint order if they 'see sufficient cause to do so' and whether or not they are satisfied of any of the grounds for a final restraint order.¹⁴³⁴ A magistrate may also make an interim restraint order, on the same grounds, on a telephone application made by a police officer.¹⁴³⁵

12.26 In Western Australia, an interim violence restraining order may be made in the absence of the respondent on the hearing of an application for a final order, or on a telephone application for an order.¹⁴³⁶ The legislation does not specify any particular matters of which the court must be satisfied before making such an order.

Submissions

12.27 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should provide for interim orders to protect a person until the complaint is determined.¹⁴³⁷ It also raised the related issue of the basis on which an interim order should be granted if such an order is provided for in the Act.¹⁴³⁸

¹⁴³⁰ *Crimes Act 1900* (NSW) s 562ZA(1). For the application of the legislation in New South Wales, see note 1426 of this Report.

¹⁴³¹ *Crimes Act 1900* (NSW) s 562ZA(5)(a).

¹⁴³² *Summary Procedure Act 1921* (SA) s 99C(2), (6).

¹⁴³³ *Summary Procedure Act 1921* (SA) s 99B(1), (5).

¹⁴³⁴ *Justices Act 1959* (Tas) s 106D(1).

¹⁴³⁵ *Justices Act 1959* (Tas) s 106DA(4).

¹⁴³⁶ *Restraining Orders Act 1997* (WA) ss 23(3), 29(3). Also see pt 2 div 4 (Procedure when interim order made). Similar provision is not made for misconduct restraining orders.

¹⁴³⁷ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 77 (Question 7-1).

¹⁴³⁸ *Ibid* (Question 7-2).

The availability of interim orders

12.28 Almost all of the submissions received by the Commission on this issue considered that the Act should enable the court to make interim orders.¹⁴³⁹ Two submissions further considered that interim orders should be available in situations of urgency.¹⁴⁴⁰

12.29 One community legal service commented that often the only real difference between a neighbourhood dispute (in which a peace and good behaviour order might be sought) and a domestic violence situation (in which a domestic violence order might be sought) is that the complainant and respondent are not in a domestic relationship.¹⁴⁴¹ This submission suggested that people in peace and good behaviour disputes should be able to access a similar protective mechanism, including temporary protection, as that available to people in domestic relationships.

12.30 The Queensland Public Tenants Association Inc generally opposed the inclusion in peace and good behaviour legislation of powers to make interim orders.¹⁴⁴²

The basis of a grant of an interim order

12.31 The submissions received by the Commission suggested slightly different bases for granting an interim order.

12.32 A Queensland magistrate considered 'a high likelihood of injury or damage to property' should form the basis of an interim order.¹⁴⁴³

12.33 In Legal Aid Queensland's view, an interim order should be available ex parte in exceptional circumstances 'where there is a high risk of imminent danger' to the complainant.¹⁴⁴⁴

12.34 The Women's Legal Service considered relevant issues in granting an interim order included urgency and safety.¹⁴⁴⁵ The South West Brisbane Community Legal Centre Inc suggested similar grounds.¹⁴⁴⁶

1439 Submissions 5, 8, 12A, 12B, 13, 14, 15, 19, 20, 23.

1440 Submissions 15, 19.

1441 Submission 5.

1442 Submission 6. This submission, which supported compulsory mediation for parties in a peace and good behaviour dispute, considered that an interim order should be made only if the parties had unsuccessfully attempted mediation.

1443 Submission 12A.

1444 Submission 13.

1445 Submission 8.

1446 Submission 15.

12.35 The Townsville Community Legal Service Inc considered the grounds for granting an interim order should mirror those contained in section 39A of the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁴⁴⁷

The evidence required to grant an interim order

12.36 A number of submissions addressed this issue.¹⁴⁴⁸ These submissions generally considered the grant of an interim order should be based on the evidence given by the complainant on oath in the application form.

12.37 The Townsville Community Legal Service Inc considered that, similar to section 39A(2) of the *Domestic and Family Violence Protection Act 1989* (Qld), an interim order should only need to be supported by the evidence the court considers sufficient and appropriate having regard to the temporary nature of the order.¹⁴⁴⁹

12.38 The Women's Legal Service considered an interim order should be available 'on a preliminary assessment of the application'.¹⁴⁵⁰

The Commission's view

12.39 The existing mechanism for obtaining protection under the *Peace and Good Behaviour Act 1982* (Qld) does not empower the court to make interim peace and good behaviour orders. The absence of such a power creates a significant gap in the protective mechanism provided under that Act. Accordingly, the Commission considers that the Personal Protection Bill 2007 should provide for the court (or a magistrate) to make interim protection orders that have effect for a short period in certain circumstances.

When the court may make an interim protection order

12.40 The Commission considers the circumstances in which a court may make an interim protection order under the Bill should be generally consistent with the circumstances in which interlocutory and interim injunctions are granted by superior courts.¹⁴⁵¹ The formulation of those circumstances must also, however, be consistent with the nature of the applications and orders made under the Personal Protection Bill 2007.

12.41 The Commission is of the view that provisions modelled on the temporary order provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) would be unnecessarily detailed and complex. In contrast, the

¹⁴⁴⁷ Submission 14.

¹⁴⁴⁸ Submissions 5, 6, 8, 13, 14.

¹⁴⁴⁹ Submission 14.

¹⁴⁵⁰ Submission 8.

¹⁴⁵¹ See para 12.6 of this Report.

Commission considers the interim order provisions of the civil restraining order legislation in the ACT, New South Wales and Victoria provide a more appropriate model with greater flexibility for the court.

12.42 The Commission considers that, consistent with the legislation in those other jurisdictions, the Personal Protection Bill 2007 should provide that the court may make an interim protection order at any time during the proceeding on an application for a protection order, and whether or not the respondent for the order appears before the court when the order is made or has been served with the application.

12.43 The Bill should also specify that the court may make an interim protection order only if it is satisfied there are grounds for making the order. Given that such an order is interlocutory, it is appropriate that the grounds for making an interim order are:¹⁴⁵²

- there is a *prima facie* case that a respondent for the order has engaged in prohibited conduct (ie, ‘personal violence’ or ‘workplace violence’); and
- it is necessary and appropriate to make the order –
 - for an interim personal protection order, to ensure the safety of an aggrieved person or a relative or an associate of an aggrieved person, or to prevent substantial damage to property of an aggrieved person or a relative or an associate of an aggrieved person; or
 - for an interim workplace protection order, to ensure the safety of an aggrieved person or an employee of an aggrieved person or to prevent substantial damage to property at the workplace to which the order relates.

12.44 The Commission considers the test that there is a *prima facie* case that the respondent has engaged in prohibited conduct is an appropriate substitution, given the nature of the jurisdiction, for the principle that there must be a serious question to be tried which applies for the grant of an interlocutory injunction.¹⁴⁵³ The Commission also considers the additional requirement that the interim protection order be ‘necessary and appropriate’ adequately incorporates considerations of justice and convenience as is also required when an interlocutory application is granted.¹⁴⁵⁴

¹⁴⁵² For what constitutes personal violence and workplace violence, see para 5.66, 5.81, 5.110, 5.113 and 8.30 of this Report.

¹⁴⁵³ See para 12.6 of this Report.

¹⁴⁵⁴ *Ibid.*

12.45 The Commission has also made recommendations elsewhere in this Report for a police officer to make an application by telephone, facsimile or another form of electronic communication for an interim protection order to provide immediate temporary protection.¹⁴⁵⁵ The Commission considers that the Personal Protection Bill 2007 should provide that a magistrate may make an interim protection order if:

- a police officer applies, by phone, facsimile, radio, email, videoconferencing or another form of electronic communication, to the magistrate for the order;¹⁴⁵⁶ and
- the magistrate is satisfied that, because of distance, time or other circumstances, it is not possible for a court to make an interim protection order on the related application quickly; and
- the magistrate is satisfied that there are grounds for making the order.

12.46 The grounds for a magistrate making an interim protection order should be the same as the grounds on which a court may make an interim protection order, as set out at paragraph 12.43 above.

12.47 The Bill should also provide that the magistrate may presume the police officer has complied with the requirement to prepare and file an application for a final protection order.¹⁴⁵⁷

The evidence required to support an interim protection order

12.48 The Commission considers that the Personal Protection Bill 2007 should provide that the evidence required for making an interim protection order is the evidence the court or a magistrate considers adequate and appropriate having regard to the interim nature of the order and the nature of the proposed conditions of the order.

The form of an interim protection order

12.49 In the Commission's view, the Personal Protection Bill 2007 should specify that a court or magistrate may include the conditions in an interim protection order that the court may include in a final protection order.

¹⁴⁵⁵ See para 9.114 of this Report.

¹⁴⁵⁶ The Commission has recommended at para 9.122 of this Report that a police officer may make an application, by electronic means, for an interim protection order if the police officer reasonably believes that:

- a person has engaged in prohibited conduct; and
- because of distance, time or other circumstances, it is not possible for a court to make an interim protection order quickly; and
- having regard to the nature of the prohibited conduct of the person, it is necessary and appropriate for an interim protection order to be made against the person immediately to ensure someone else's safety or prevent substantial damage to property.

¹⁴⁵⁷ See para 9.142 of this Report for the Commission's recommendations about the procedures on a telephone application for an interim protection order.

Matters that must be stated in an interim protection order

12.50 The Commission also considers the Personal Protection Bill 2007 should provide that an interim protection order must state when and where the court that is to hear the application for the final order will hear the application.

An interim protection order as a summons

12.51 Further, the Commission considers that the Personal Protection Bill 2007 should provide that an interim protection order is taken to be a summons requiring the respondent to appear before the stated court on the stated day and at the stated time and place to be heard on the application.

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

12.52 The *Peace and Good Behaviour Act 1982 (Qld)* empowers the court to make a peace and good behaviour order only after a consideration of the evidence.¹⁴⁵⁸ 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 unless the complainant gives evidence and the court considers that the evidence meets the required standard of proof.

The Domestic and Family Violence Protection Act 1989 (Qld)

12.53 The *Domestic and Family Violence Protection Act 1989 (Qld)* empowers a court to make a domestic violence protection order in a form agreed to by, or on behalf of, the aggrieved and the respondent.¹⁴⁵⁹ This is subject to the proviso that the order includes only matters that may be dealt with under the Act.¹⁴⁶⁰ Further, a police officer or an authorised person who appears on behalf of an aggrieved must not agree to a consent order without the specific approval of the aggrieved.¹⁴⁶¹

12.54 Under the *Domestic and Family Violence Protection Act 1989 (Qld)*, an application to make a consent order may be dealt with by a Magistrates Court

¹⁴⁵⁸ *Peace and Good Behaviour Act 1982 (Qld)* s 6(3).

¹⁴⁵⁹ *Domestic and Family Violence Protection Act 1989 (Qld)* s 33(1).

¹⁴⁶⁰ *Domestic and Family Violence Protection Act 1989 (Qld)* s 33(2).

¹⁴⁶¹ *Domestic and Family Violence Protection Act 1989 (Qld)* ss 33(3), 60(1).

constituted by a magistrate or two or more justices.¹⁴⁶² However, the Act does not expressly provide for a registrar of the Magistrates Court to make an order by consent.

12.55 The *Magistrates Act 1991* (Qld) has been recently amended to allow the appointment of judicial registrars and to allow the Chief Magistrate of Queensland to make practice directions conferring various powers on judicial registrars, including powers under the *Domestic and Family Violence Protection Act 1989* (Qld) to determine applications for domestic violence adjournments, temporary protection orders and domestic violence orders by consent.¹⁴⁶³

12.56 These legislative arrangements underpin a two year pilot program, to begin on 1 January 2008 at the Brisbane Magistrates Court, the Beenleigh Magistrates Court and the Southport Magistrates Court, to trial the appointment of judicial registrars to the Magistrates Courts.¹⁴⁶⁴

The position in other jurisdictions

12.57 The civil restraining order legislation in most of the other Australian jurisdictions allows the court to make a restraining order with the agreement of the parties.

12.58 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.¹⁴⁶⁵ In the ACT, 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

1462 *Domestic and Family Violence Protection Act 1989* (Qld) s 4(2), (3)(a). The justices must be justices of the peace who are justices of the peace (magistrates court) and/or justices of the peace (qualified): *Domestic and Family Violence Protection Act 1989* (Qld) ss 3, sch (definition of 'justice'), 4(4); *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) ss 3 (definition of 'procedural action or order'), 19, 29. Note that a clerk of the court or registrar of a Magistrates Court, not being a police officer, is, for so long as the person holds that office, a justice of the peace (qualified) or, if the person is an Australian lawyer, a justice of the peace (magistrates court): *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 19(2).

1463 The *Justice and Other Legislation Amendment Act 2007* (Qld), which amends the *Magistrates Act 1991* (Qld) and other Acts, was assented to on 29 August 2007. Part 24 of the *Justice and Other Legislation Amendment Act 2007* (Qld) inserted in the *Magistrates Act 1991* (Qld) a new pt 9A containing new ss 53–53S which provide for the new position of judicial registrar in the Magistrates Court. These provisions will commence on 1 January 2008.

1464 The Premier and Minister for Trade, Hon Peter Beattie MP and the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, Hon Kerry Shine MP, *Magistrates Courts to benefit from judicial registrar pilot program* (Ministerial Media Statement, 3 June 2007). The Department of Justice and Attorney-General is allocating \$0.66 million in 2007–08 (\$2.4 million over three years) towards the program: Department of Justice and Attorney-General, Ministerial Portfolio Statement, 2007–08 Queensland State Budget 1–5.

1465 *Summary Procedure Act 1921* (SA) s 99C(6)(b)(i).

the alleged conduct.¹⁴⁶⁶ In 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.¹⁴⁶⁷

12.59 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,¹⁴⁶⁸ whereas in the ACT, 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.¹⁴⁶⁹

12.60 In the ACT, the court's ability to make a consent order is restricted if one of the parties is under a legal disability.¹⁴⁷⁰ The court must not make a consent order in relation to a party who is under a legal disability if that person is not separately represented by someone else, and it appears to the court that he or she should be separately represented by someone else.

12.61 There is also some variation between the jurisdictions as to the authority of the registrar of a Magistrates Court to make consent orders. In the ACT, the jurisdiction of the Magistrates Court is conferred on the registrar or a deputy registrar named by the Chief Magistrate for the purpose of conducting preliminary conferences and making consent orders.¹⁴⁷¹ In New South Wales, a registrar is empowered to make an interim order with the consent of the parties.¹⁴⁷²

Issues for consideration

12.62 In its Discussion Paper, the Commission sought submissions on the following issues in relation to the making of peace and good behaviour orders by consent:¹⁴⁷³

- whether the *Peace and Good Behaviour Act 1982* (Qld) should provide for the making of consent orders and, if so;

¹⁴⁶⁶ *Domestic Violence and Protection Orders Act 2001* (ACT) s 29(2)(b), (c); *Crimes Act 1900* (NSW) s 562ZW(1), (2); *Justices Act 1959* (Tas) s 106E(3); *Crimes (Family Violence) Act 1987* (Vic) s 14(1); *Restraining Orders Act 1997* (WA) s 43(2), (3). Section 562ZW of the *Crimes Act 1900* (NSW) is replicated in s 78 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales and Victoria, see note 1426 of this Report.

¹⁴⁶⁷ *Crimes (Family Violence) Act 1987* (Vic) s 14(2). New South Wales has a similar provision which applies where the order to made by the court is a final order: *Crimes Act 1900* (NSW) s 562ZW(3).

¹⁴⁶⁸ *Justices Act 1959* (Tas) s 106E(3).

¹⁴⁶⁹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 29(4).

¹⁴⁷⁰ *Domestic Violence and Protection Orders Act 2001* (ACT) s 30.

¹⁴⁷¹ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 93, 94.

¹⁴⁷² *Crimes Act 1900* (NSW) s 562ZB(1).

¹⁴⁷³ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 78 (Questions 7-5-7-7).

- whether it is necessary for the grounds of complaint to be made out;
- whether it is necessary for the person against whom the order is sought to admit to some or all of the alleged behaviour; and
- whether the court should be able to enquire into the particulars of the complaint and, if so, in what circumstances;
- if the *Peace and Good Behaviour Act 1982* (Qld) is amended to empower the court to make consent orders, should there be any restrictions on the court's ability to make a consent order and, if so, what should those restrictions be.

12.63 The issues of a person's ability to agree to a consent order on the aggrieved person's behalf and whether a registrar of the Magistrates Court should be able to make a consent order were not specifically raised in the Discussion Paper but are considered in this chapter.

Submissions

The power to make consent orders

12.64 The Commission received numerous submissions in relation to the threshold issue of whether the *Peace and Good Behaviour Act 1982* (Qld) should make provision for the making of consent orders.¹⁴⁷⁴ These submissions generally supported making provision in the Act to allow the court to make consent orders.¹⁴⁷⁵

The grounds of the application

12.65 The Commission received three submissions in relation to the issue of whether it should be necessary for the grounds of the complaint to be made out.

12.66 Both the Townsville Community Legal Service Inc and the Women's Legal Service expressed the view that there should be no requirement for the complainant to prove the grounds of the complaint for the purpose of making a consent order.¹⁴⁷⁶ On the other hand, the South West Brisbane Community Legal Centre Inc considered there should be a requirement, when making a consent order, for the grounds of the complaint to be made out.¹⁴⁷⁷

¹⁴⁷⁴ Submissions 5, 8, 12 12B, 13, 14, 15, 19, 20.

¹⁴⁷⁵ Submissions 8, 12, 12B, 13, 14, 15, 19, 20.

¹⁴⁷⁶ Submissions 8, 14.

¹⁴⁷⁷ Submission 15.

Admissions by the respondent to the alleged behaviour

12.67 The Commission received numerous submissions in relation to the issue of whether it should be necessary for the person against whom the order is sought to admit to some or all of the alleged behaviour.

12.68 The Chief Magistrate of Queensland, Legal Aid Queensland and three community legal services all considered that it should not be necessary for the person against whom the order is sought to admit some or all of the alleged behaviour.¹⁴⁷⁸

12.69 In relation to neighbourhood disputes, Caxton Legal Centre Inc observed:¹⁴⁷⁹

the opportunity to enter into mutually binding consent orders that are made without admissions may encourage parties to resolve their disputes.

Enquiries by the court into the particulars of the application

12.70 Three community legal services considered that the court should be able to enquire into the particulars of the complaint.¹⁴⁸⁰

12.71 In particular, the South West Brisbane Community Legal Centre Inc considered that the court should be able to enquire into the particulars of the complaint:¹⁴⁸¹

to ensure that in circumstances where there is no personal (for want of a better term) relationship between the parties, that the complainant is not against say a homeless person or those people considered to be undesirable simply because of their presence, or against persons with disabilities that may affect their ability to enter into consent orders.

12.72 Caxton Legal Centre Inc considered that consent orders should be ratified by the court ‘to ensure that one party has not been bullied by another party into agreeing to an unworkable arrangement’. Further, this submission considered it desirable to make provision in the *Peace and Good Behaviour Act 1982* (Qld) for the court to carry out a hearing into the particulars of the complaint before ratifying the consent order if it appears necessary in the interests of justice.¹⁴⁸²

¹⁴⁷⁸ Submissions 8, 12, 12C, 13, 14, 15.

¹⁴⁷⁹ Submission 19.

¹⁴⁸⁰ Submissions 14, 15, 19.

¹⁴⁸¹ Submission 15.

¹⁴⁸² Submission 19.

Restrictions on the court's ability to make an order

12.73 In the view of the Women's Legal Service, the magistrate should be able to 'query the appropriateness of particular conditions in a consent order to ensure the safety needs of the aggrieved person are met'. This submission suggested that where there are safety concerns, the order should contain provisions which prohibit the respondent from engaging in specified conduct in relation to an aggrieved person (for example, non-contact provisions).¹⁴⁸³

12.74 A Queensland magistrate considered that the duration of consent orders should be shorter than for contested orders. The magistrate considered that a maximum duration of one year should apply to consent orders with provision for an automatic extension if there is a proven breach of the order.¹⁴⁸⁴

Authorisation of a registrar to make a consent order

12.75 A submission from a group of registrars of the Magistrates Court Branch of the Department of Justice and Attorney-General considered whether the *Peace and Good Behaviour Act 1982* (Qld) should specifically allow a registrar of the court to make interim or final orders by consent. Some registrars considered it would be unproblematic to allow registrars to make consent orders and suggested it would help expedite the resolution of matters. Others considered, however, that the position should be similar to the position under the *Domestic and Family Violence Protection Act 1989* (Qld) which does not specifically empower registrars to make consent orders.¹⁴⁸⁵

12.76 This submission also suggested that if registrars were to be empowered to make consent orders under the *Peace and Good Behaviour Act 1982* (Qld), it would require registrars to be appropriately trained.

The Commission's view

The power to make consent orders

12.77 The power of the court to make protection orders by consent would assist in the expedition of proceedings for those parties who can agree on the form of an order. It would also enable the court to concentrate its resources on dealing with contested protection order applications, in addition to other matters.

12.78 The Commission therefore considers that the Personal Protection Bill 2007 should provide that on an application to make a protection order, a court

¹⁴⁸³ Submission 8.

¹⁴⁸⁴ Submission 12B.

¹⁴⁸⁵ Submission 28. Note, however, the recent amendments to the *Magistrates Act 1991* (Qld) allowing for the appointment of judicial registrars who may be authorised, by the Chief Magistrate, to make consent orders under the *Domestic and Family Violence Protection Act 1989* (Qld). See para 12.55 of this Report.

may make a protection order, including an interim protection order, in a form agreed to by each applicant and respondent (a 'consent order').

12.79 The Commission considers that the Personal Protection Bill 2007 should provide that the court may not make a consent order if the applicant is not an aggrieved person and the applicant does not have the aggrieved person's express written approval to agree to the order. The Commission considers that the Bill should also provide that, if an aggrieved person or a respondent for a protection order is an adult with impaired capacity¹⁴⁸⁶ or a child, the court may not make a consent order.

The grounds of the application

12.80 The Commission considers that the Personal Protection Bill 2007 should provide that the court may make a consent order whether or not any ground of the application is established. This would empower the court to make a consent order without the need to hear the evidence of the aggrieved person beforehand. This would facilitate the making of consent orders and reduce the number of court appearances required by the parties.

Admissions by the respondent to the alleged behaviour

12.81 In the Commission's view, the court should be empowered under the Personal Protection Bill 2007 to make a consent order whether or not a respondent for the order makes an admission about conduct to which the application relates. The Commission considers that a provision to this effect might encourage a respondent to more readily agree to an order because he or she is not required to make any admission in relation to the application.

Consent order may only include matters dealt with under the Personal Protection Bill 2007

12.82 The Commission considers that the Personal Protection Bill 2007 should specify that a consent order may only include matters that may be dealt with under the Bill. This would safeguard against the making of an order beyond the jurisdiction of the Bill. It would also ensure that the provisions relating to the duration of both final orders and interim orders also apply to orders made by consent. A similar approach is taken in the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁴⁸⁷

¹⁴⁸⁶ The Commission has recommended at para 20.58 of this Report that 'impaired capacity', for the Personal Protection Bill 2007, should have the meaning given in schedule 4 of the *Guardianship and Administration Act 2000* (Qld). Schedule 4 of the *Guardianship and Administration Act 2000* (Qld) provides that 'impaired capacity', for a person for a matter, means the person does not have capacity for the matter. 'Capacity', for a person for a matter, is defined in sch 4 of that Act to mean that the person is capable of understanding the nature and effect of decisions about the matter, freely and voluntarily making decisions about the matter, and communicating the decisions in some way.

¹⁴⁸⁷ See *Domestic and Family Violence Protection Act 1989* (Qld) s 33(2).

Enquiries by the court into the particulars of the application

12.83 The Commission considers that the Personal Protection Bill 2007 should provide that the court is not prevented from conducting a hearing if the court considers it is in the interests of justice to do so. This would allow the court to make enquiries about whether the substance of the application justifies the making of the consent order.

Court's power to make other protection orders on the application

12.84 The Commission also considers that the Personal Protection Bill 2007 should provide that the making of a consent order does not limit the court's power to make other protection orders on an application, if the application to which the consent order relates was made by an applicant who is not a party to the consent order or sought a protection order against a respondent who is not a party to the consent order.

Authorisation of a registrar to make a consent order

12.85 The Commission considers that the conferral of the power to make consent orders on registrars in Queensland Magistrates Courts may assist the Magistrates Court to make optimal arrangements in dealing with both simple and more complex or contested matters. For example, the conferral of such jurisdiction may expedite the determination of more complex or contested matters by magistrates. It may also assist in rural and remote areas which would otherwise be dependent on visiting magistrates.

12.86 The Commission is therefore of the view that the Personal Protection Bill 2007 should provide that on an application to make a protection order, an authorised registrar may make a protection order, including an interim protection order, in a form agreed to by each applicant and respondent for the order (a 'consent order'). The Commission further considers that the Personal Protection Bill 2007 should provide that the Chief Magistrate of Queensland may appoint a person who is a registrar of the Magistrates Court as an authorised registrar, for the purpose of making a protection order with the consent of the parties, if the Chief Magistrate is satisfied the person has had appropriate training and experience to be able to exercise the power to make consent orders. The Commission also considers that, for making a consent order, an authorised registrar should have the powers of a court under the Bill (other than the power to punish a person for contempt of court).

12.87 The Commission considers that the Personal Protection Bill 2007 should provide that the provisions applicable for the making of protection orders by consent generally should also apply, with any necessary changes, to the making of a consent order by an authorised registrar. Further, the Bill should

also provide that a consent order made by an authorised registrar is taken to have been made by the court.¹⁴⁸⁸

12.88 However, the Commission also considers that the Personal Protection Bill 2007 should provide that an authorised registrar must not make a consent order if:

- the court directs the authorised registrar to set the application for the protection order down for hearing before the court; or
- the authorised registrar considers that, in the interests of justice, the matter of the application should be heard before the court, or that it would otherwise be more appropriate for the application to be considered by the court.

12.89 If the authorised registrar decides not to make a consent order, he or she must set the matter down for hearing by the court as soon as practicable.

12.90 The Commission recognises that the conferral of jurisdiction on registrars to make consent orders is likely to raise resource and training issues for the Magistrates Court. The Commission therefore recommends that, if necessary, resources should be made available to enable registrars of the Queensland Magistrates Court to receive adequate and appropriate training to perform the function of exercising the jurisdiction to make consent orders under the Personal Protection Bill 2007.

12.91 The Commission notes that the two year pilot program to trial the appointment of judicial registrars is proposed to begin in early 2008 in a limited number of Magistrates Courts in metropolitan areas.¹⁴⁸⁹ The legislative scheme underpinning the program enables the Chief Magistrate of Queensland to confer specific powers on judicial registrars, including powers under the *Domestic and Family Violence Protection Act 1989* (Qld) to determine applications for domestic violence adjournments, temporary protection orders and domestic violence orders by consent.

12.92 The Commission has recommended that the Personal Protection Bill 2007 should provide that a registrar, who has been authorised by the Chief Magistrate to do so, has a limited power under the Bill to make consent orders.

12.93 The Commission considers that if, at the conclusion of the judicial registrar pilot program, it is determined that there should continue to be a role for judicial registrars in the Magistrates Court, then the role of judicial registrars and registrars should be reviewed to determine whether it is appropriate and

¹⁴⁸⁸ Note that under the *Domestic Violence and Protection Orders Act 2001* (ACT), the jurisdiction of the Magistrates Court is conferred on the Magistrates Court registrar for the purpose of making consent orders: *Domestic Violence and Protection Orders Act 2001* (ACT) s 93(1)(a).

¹⁴⁸⁹ See para 12.55–12.56 of this Report.

desirable for a judicial registrar and/or a registrar to have power to make certain orders, including consent orders, under the Personal Protection Bill 2007.

PROTECTION ORDERS MADE IN CRIMINAL PROCEEDINGS

12.94 In Queensland, a court, when dealing with an offender for certain criminal offences, may, on its own initiative, make an order to prohibit a person from engaging in particular conduct towards another person.¹⁴⁹⁰

The *Penalties and Sentences Act 1992* (Qld)

12.95 The *Penalties and Sentences Act 1992* (Qld) empowers a court that convicts a person of an indictable offence involving personal violence to make a non-contact order, in specified circumstances, to restrain the offender from contact with, or physical proximity to, the victim or someone who was with the victim when the offence was committed (an ‘associate’).¹⁴⁹¹

12.96 The purpose of a non-contact order is to alleviate the fear that may be held by the victim, or someone who was with the victim when the offence was committed, that, notwithstanding the offender’s conviction, the offender could injure or harass them, damage their property or otherwise cause them detriment.¹⁴⁹²

12.97 A court may make a non-contact order if it is satisfied that, unless the order is made, there is an unacceptable risk that the offender would:¹⁴⁹³

- injure the victim or associate, including, for example, by injuring the victim or associate psychologically;
- harass the victim or associate;
- damage the property of the victim or associate; or
- act in a way that could reasonably be expected to cause a detriment to the victim or associate, including, for example, by acting in a way that—

¹⁴⁹⁰ *Penalties and Sentences Act 1992* (Qld) ss 43A–43C; *Criminal Code* (Qld) s 359F (Court may restrain unlawful stalking). In certain circumstances (when a forensic order is revoked by the Mental Health Tribunal or when a forensic order is not made by the Mental Health Court), the Mental Health Tribunal or Mental Health Court may make a non-contact order to require a person who is charged with a personal offence to refrain from contact with the victim of the offence, or if the victim has died, a relative of the victim, or a person who was with the victim when the alleged offence was committed: *Mental Health Act 2000* (Qld) ss 228A–228G, 313A–313G.

¹⁴⁹¹ *Penalties and Sentences Act 1992* (Qld) ss 43B, 43C(1). A ‘personal offence’ means an indictable offence committed against the person of someone: *Penalties and Sentences Act 1992* (Qld) s 43B(4).

¹⁴⁹² Explanatory Notes, *Penalties and Sentences (Non-contact orders) Amendment Bill 2001* (Qld) 1.

¹⁴⁹³ *Penalties and Sentences Act 1992* (Qld) s 43C(3).

- makes the victim or associate fear that he or she may be injured;
- makes the victim or associate fear that his or her property may be damaged;
- hinders or stops the victim or associate doing something he or she is lawfully entitled to do; or
- makes the victim or associate do something he or she is lawfully entitled not to do.

12.98 A non-contact order may be made for a period of up to two years.¹⁴⁹⁴

12.99 However, the court must not make a non-contact order if an order may be made under section 30 of the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁴⁹⁵ The reason for this exception is 'to avoid any potential for inconsistency or for the non-contact order to be interpreted as over-riding or invalidating the conditions of a domestic violence order'.¹⁴⁹⁶

The *Domestic and Family Violence Protection Act 1989* (Qld)

12.100 Section 30 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a court before which a person pleads guilty to, or is found guilty of, an offence that involves domestic violence may, on its own initiative, make a domestic violence order against the offender, if the court is satisfied that a protection order could be made under the Act against the offender as the respondent. Further, if a court has already made a domestic violence order against the offender and the order is still in force, the sentencing court may vary the order.¹⁴⁹⁷

12.101 Section 53 of the *Domestic and Family Violence Protection Act 1989* (Qld) specifies the procedures that apply when the court, on its own initiative, makes a domestic violence order against a person who has been convicted of an offence that involves domestic violence.

The *Criminal Code* (Qld)

12.102 The stalking provisions in the *Criminal Code* (Qld) also enable a court, on the hearing of a charge of unlawful stalking against an alleged offender, to make a restraining order to protect any person or any property if it considers it

¹⁴⁹⁴ *Penalties and Sentences Act 1992* (Qld) s 43C(2). If the offender is sentenced to a term of imprisonment and the sentence is not suspended, the time stated in the order must be a period ending no later than two years after the day on which the term of imprisonment ends: *Penalties and Sentences Act 1992* (Qld) s 43C(2)(a).

¹⁴⁹⁵ *Penalties and Sentences Act 1992* (Qld) s 43B(3).

¹⁴⁹⁶ Explanatory Notes, *Penalties and Sentences (Non-contact orders) Amendment Bill 2001* (Qld) 2.

¹⁴⁹⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 30(2).

desirable to do so having regard to the evidence.¹⁴⁹⁸ Under these provisions, the restraining order can be made on the application of the prosecution or an interested person or on the court's own initiative.¹⁴⁹⁹

12.103 Sometimes, behaviour that constitutes grounds for making a peace and good behaviour order may also constitute a criminal offence. There is no legislative provision that enables a court, that convicts a person of an indictable offence involving personal violence and in respect of which grounds exist for making a peace and good behaviour order, to make a peace and good behaviour order on its own initiative. In such circumstances, the court would be limited to making a non-contact order under the *Penalties and Sentences Act 1992* (Qld).

The position in other jurisdictions

12.104 In New South Wales, South Australia and Western Australia, the courts are also empowered to make civil restraining orders in other proceedings.

12.105 In New South Wales, the court must make an apprehended violence order if a person is convicted of an offence of stalking or intimidating another person with the intention of causing fear of physical or mental harm,¹⁵⁰⁰ unless it is satisfied the order is not required, for example, because an order has already been made.¹⁵⁰¹

12.106 In South Australia, on finding a person guilty of an offence or on sentencing a person for an offence, a court may issue a restraining order or a domestic violence order against the person as if a complaint for such an order had been made in relation to the matters alleged in the proceedings for the offence.¹⁵⁰² If the whereabouts of the person to be protected are unknown to the defendant, the court must consider whether the order would be counter-productive before issuing the order.¹⁵⁰³

12.107 In Western Australia, a restraining order may be made during other proceedings, including criminal and child welfare proceedings, on the court's own initiative or at a person's request, including a party to the proceedings or a

¹⁴⁹⁸ *Criminal Code* (Qld) s 359F. The order can be made whether the person is found guilty, not guilty or the prosecution ends in some other way: *Criminal Code* (Qld) s 359F(2).

¹⁴⁹⁹ *Criminal Code* (Qld) s 359F(2), (3).

¹⁵⁰⁰ *Crimes Act 1900* (NSW) s 545AB. The definition of stalking contained in this provision is replicated in s 8 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1426 of this Report.

¹⁵⁰¹ *Crimes Act 1900* (NSW) s 562ZU. This provision is replicated in s 39 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

¹⁵⁰² *Criminal Law (Sentencing) Act 1988* (SA) s 19A.

¹⁵⁰³ *Criminal Law (Sentencing) Act 1988* (SA) s 19A(1a).

witness who gives evidence in the proceeding.¹⁵⁰⁴ If a court convicts a person of a violent personal offence, the court must make a violence restraining order for the life of the person who committed the offence unless the victim of the offence objects to the order being made.¹⁵⁰⁵

Issues for consideration

12.108 The Discussion Paper did not specifically consider whether the *Peace and Good Behaviour Act 1982* (Qld) should empower the court to make a peace and good behaviour order on its own initiative. The power of a court to make a domestic violence order in relation to an offence involving domestic violence raises the issue of whether a court that finds a person guilty of an offence involving prohibited conduct, as defined under the Personal Protection Bill 2007, should also be empowered to make a protection order against the person.

The Commission's view

12.109 The Commission considers that the Personal Protection Bill 2007 should provide that a court that finds a person (an offender) guilty of an offence involving prohibited conduct may, on its own initiative, make a protection order against the offender, or vary a protection order that is already in force against the offender in the way it considers appropriate (including, for example, by varying the period for which the order is in force), and in the terms in which a protection order may be made by a court under the Bill. This provision should be generally similar to section 30 of the *Domestic and Family Violence Protection Act 1989* (Qld).

12.110 The Commission considers that the proposed provision which empowers a sentencing court to make or vary a protection order in criminal proceedings, should not limit the orders the sentencing court may make under the *Penalties and Sentences Act 1992* (Qld) or any other Act when sentencing the offender. The Commission considers it important that, a court, when sentencing an offender for an offence involving prohibited conduct, has flexibility to make appropriate orders, including a protection order under the Personal Protection Bill 2007, or a non-contact order under the *Penalties and Sentences Act 1992* (Qld), against an offender.

1504 *Restraining Orders Act 1997* (WA) s 63. If the person seeking to be protected is a child, the request for a restraining order may be made by various people on behalf of a child, including the child's parent or guardian, a child welfare officer during child protection proceedings, or the child: *Restraining Orders Act 1997* (WA) s 63(3a)(c). If the person seeking to be protected is a person for whom a guardian has been appointed under the *Guardianship and Administration Act 1990* (WA), the request for a restraining order may be made by the guardian on behalf of the person: *Restraining Orders Act 1997* (WA) s 63(3a)(d). Section 63(1) of the Act also allows a judicial officer who is considering a bail application to make an order.

1505 *Restraining Orders Act 1997* (WA) s 63A. If a violence restraining order is already in force against the offender, the court must vary the order by extending its duration: *Restraining Orders Act 1997* (WA) s 63A(1)(b). A 'violent personal offence' means an offence against ss 283, 297, 325, 326, 327 or 328 of *The Criminal Code* (WA): *Restraining Orders Act 1997* (WA) s 63A(5).

12.111 The procedure for making a protection order in criminal proceedings is in the court's discretion. The Commission therefore considers it is unnecessary to include in the Personal Protection Bill 2007 a provision, generally similar to section 53 of the *Domestic and Family Violence Protection Act 1989* (Qld), in relation to the procedures that apply when a court makes a protection order in criminal proceedings.

RECOMMENDATIONS

12.112 The Commission makes the following recommendations:

Interim protection orders

- 12-1 **The Personal Protection Bill 2007 should provide for the court (or a magistrate) to make interim protection orders, that have effect for a short period, in certain circumstances.¹⁵⁰⁶**
- 12-2 **The Personal Protection Bill 2007 should provide that the court may make an interim protection order at any time during the proceeding on an application for a protection order.¹⁵⁰⁷**

See Personal Protection Bill 2007 cl 39(1).
- 12-3 **The Personal Protection Bill 2007 should provide that an interim protection order may be made whether or not the respondent for the order appears before the court when the order is made or has been served with the application for a protection order.¹⁵⁰⁸**

See Personal Protection Bill 2007 cl 39(2).
- 12-4 **The Personal Protection Bill 2007 should provide that a court may make an interim protection order only if satisfied there are grounds for making the order.¹⁵⁰⁹**

See Personal Protection Bill 2007 cl 39(3).
- 12-5 **The Personal Protection Bill 2007 should provide that the grounds for making an interim personal protection order are that:¹⁵¹⁰**

¹⁵⁰⁶ See para 12.39 of this Report.

¹⁵⁰⁷ See para 12.42 of this Report.

¹⁵⁰⁸ Ibid.

¹⁵⁰⁹ See para 12.43 of this Report.

¹⁵¹⁰ Ibid.

- (a) there is a **prima facie case** that a respondent for the order has engaged in prohibited conduct (ie, personal violence); and
- (b) it is necessary and appropriate to make the order to ensure the safety of an aggrieved person or a relative or an associate of an aggrieved person, or to prevent substantial damage to property of an aggrieved person or a relative or an associate of an aggrieved person.

See Personal Protection Bill 2007 cl 38(1)(a), (b)(i), (2)(a).

12-6 The Personal Protection Bill 2007 should provide that the grounds for making an interim workplace protection order are that:¹⁵¹¹

- (a) there is a **prima facie case** that a respondent for the order has engaged in prohibited conduct (ie, workplace violence); and
- (b) it is necessary and appropriate to make the order to ensure the safety of an aggrieved person or an employee of an aggrieved person or to prevent substantial damage to property at the workplace to which the order relates.

See Personal Protection Bill 2007 cl 38(1)(a), (b)(ii), (2)(b).

12-7 The Personal Protection Bill 2007 should provide that a magistrate may make an interim protection order if:¹⁵¹²

- (a) a police officer applies, by phone, facsimile, radio, email, videoconferencing or another form of electronic communication, to the magistrate for the order; and
- (b) the magistrate is satisfied that, because of distance, time or other circumstances, it is not possible for a court to make an interim protection order on the related application quickly; and
- (c) the magistrate is satisfied that there are grounds for making the order.

¹⁵¹¹ Ibid.

¹⁵¹² See para 12.45 of this Report.

The Bill should also provide that the magistrate may presume that the police officer will prepare and file an application as soon as practicable after applying for the interim protection order, if he or she has not already done so.¹⁵¹³

See Personal Protection Bill 2007 cl 40.

- 12-8 The Personal Protection Bill 2007 should provide that the grounds for a magistrate to make an interim protection order should be the same as the grounds on which a court may make an interim protection order, as set out in recommendation 12-5 and 12-6.¹⁵¹⁴

See Personal Protection Bill 2007 cl 38.

- 12-9 The Personal Protection Bill 2007 should provide that the evidence required for making an interim protection order is the evidence the court or a magistrate considers adequate and appropriate having regard to the interim nature of the order and the nature of the proposed conditions of the order.¹⁵¹⁵

See Personal Protection Bill 2007 cl 41.

- 12-10 The Personal Protection Bill 2007 should provide that an interim protection order may include the same conditions as a protection order.¹⁵¹⁶

See Personal Protection Bill 2007 cl 42.

- 12-11 The Personal Protection Bill 2007 should provide that an interim protection order must state when and where the court that is to hear the application for the final order will hear the application.¹⁵¹⁷

See Personal Protection Bill 2007 cl 43.

¹⁵¹³ See para 12.47 of this Report.

¹⁵¹⁴ See para 12.46 of this Report.

¹⁵¹⁵ See para 12.48 of this Report.

¹⁵¹⁶ See para 12.49 of this Report.

¹⁵¹⁷ See para 12.50 of this Report.

12-12 The Personal Protection Bill 2007 should provide that an interim protection order is taken to be a summons requiring the respondent to appear before the stated court on the stated day and at the stated time and place to be heard on the application.¹⁵¹⁸

See Personal Protection Bill 2007 cl 44.

Consent orders

12-13 The Personal Protection Bill 2007 should provide that on an application to make a protection order, a court may make a protection order, including an interim protection order, in a form agreed to by each applicant and respondent (a 'consent order').¹⁵¹⁹

See Personal Protection Bill 2007 cl 48(1).

12-14 The Personal Protection Bill 2007 should provide that the court may not make a consent order if the applicant is not the aggrieved person and the applicant does not have the aggrieved person's express written approval to agree to the order.¹⁵²⁰

See Personal Protection Bill 2007 cl 48(3).

12-15 The Personal Protection Bill 2007 should provide that, if an aggrieved person or a respondent for a protection order is an adult with impaired capacity or a child, the court may not make a consent order.¹⁵²¹

See Personal Protection Bill 2007 cl 48(2).

12-16 The Personal Protection Bill 2007 should provide that the court may make a consent order whether or not any ground of the application is established.¹⁵²²

See Personal Protection Bill 2007 cl 48(4)(a).

¹⁵¹⁸ See para 12.51 of this Report.

¹⁵¹⁹ See para 12.78 of this Report.

¹⁵²⁰ See para 12.79 of this Report.

¹⁵²¹ Ibid.

¹⁵²² See para 12.80 of this Report.

12-17 The court should be empowered under the Personal Protection Bill 2007 to make a consent order whether or not a respondent for the order makes an admission about conduct to which the application relates.¹⁵²³

See Personal Protection Bill 2007 cl 48(4)(b).

12-18 The Personal Protection Bill 2007 should specify that a consent order may only include matters that may be dealt with under the Bill.¹⁵²⁴

See Personal Protection Bill 2007 cl 48(5).

12-19 The Personal Protection Bill 2007 should provide that the court is not prevented from conducting a hearing if the court considers it is in the interests of justice to do so.¹⁵²⁵

See Personal Protection Bill 2007 cl 48(6).

12-20 The Personal Protection Bill 2007 should provide that the making of a consent order does not limit the court's power to make other protection orders on an application, if the application for a protection order to which a consent order relates was made by an applicant who is not a party to the consent order or sought a protection order against a respondent who is not a party to the consent order.¹⁵²⁶

See Personal Protection Bill 2007 cl 48(7), (8).

12-21 The Personal Protection Bill 2007 should provide that on an application to make a protection order an 'authorised registrar' may make a protection order, including an interim protection order, in a form agreed to by each applicant and respondent for the order (a 'consent order').¹⁵²⁷

See Personal Protection Bill 2007 cl 49(1).

¹⁵²³ See para 12.81 of this Report.

¹⁵²⁴ See para 12.82 of this Report.

¹⁵²⁵ See para 12.83 of this Report.

¹⁵²⁶ See para 12.84 of this Report.

¹⁵²⁷ See para 12.86 of this Report.

12-22 The Personal Protection Bill 2007 should provide that the Chief Magistrate of Queensland may appoint a person who is a registrar of the Magistrates Court as an authorised registrar, for the purpose of making a protection order with the consent of the parties, if the Chief Magistrate is satisfied the person has had appropriate training and experience to be able to exercise the power to make consent orders.¹⁵²⁸

See Personal Protection Bill 2007 cl 50.

12-23 The Personal Protection Bill 2007 should provide that an authorised registrar must not make a consent order under the Personal Protection Bill 2007, if:¹⁵²⁹

- (a) the court directs the authorised registrar to set the application for the protection order down for hearing before the court; or
- (b) the authorised registrar considers that:
 - (i) in the interests of justice, the matter of the application should be heard before the court; or
 - (ii) it would otherwise be more appropriate for the application to be considered by the court.

See Personal Protection Bill 2007 cl 49(3).

12-24 The Personal Protection Bill 2007 should provide that if the authorised registrar decides not to make a consent order for the reasons set out in recommendation 12-23, paragraph (b) above, he or she must set the matter down for hearing by the court as soon as practicable.¹⁵³⁰

See Personal Protection Bill 2007 cl 49(4).

1528 Ibid.

1529 See para 12.88 of this Report.

1530 See para 12.89 of this Report.

12-25 The Personal Protection Bill 2007 should provide that, for making a consent order, an authorised registrar has the powers of a court under the Bill (other than the power to punish a person for contempt of court).¹⁵³¹

See Personal Protection Bill 2007 cl 49(5).

12-26 The Personal Protection Bill 2007 should provide that the provisions applicable for the making of protection orders by consent generally apply, with any necessary changes, to the making of a consent order by an authorised registrar.¹⁵³²

See Personal Protection Bill 2007 cl 49(2).

12-27 The Personal Protection Bill 2007 should provide that a consent order made by an authorised registrar is taken to have been made by the court.¹⁵³³

See Personal Protection Bill 2007 cl 49(6).

12-28 If necessary, resources should be made available to enable registrars of the Queensland Magistrates Court to receive adequate and appropriate training to perform the function of exercising the jurisdiction to make consent orders under the Personal Protection Bill 2007 effectively and efficiently.¹⁵³⁴

12-29 If, at the conclusion of the judicial registrar pilot program at the Magistrates Court at Brisbane, Beenleigh and Southport, it is determined that there should continue to be a role for judicial registrars in the Magistrates Court, then the role of judicial registrars and registrars should be reviewed to determine whether it is appropriate and desirable for a judicial registrar and/or a registrar to have power to make certain orders, including consent orders, under the Personal Protection Bill 2007.¹⁵³⁵

¹⁵³¹ See para 12.86 of this Report.

¹⁵³² See para 12.87 of this Report.

¹⁵³³ Ibid.

¹⁵³⁴ See para 12.90 of this Report.

¹⁵³⁵ See para 12.93 of this Report.

Protection orders made in criminal proceedings

12-30 The Personal Protection Bill 2007 should provide that a court that finds a person (an offender) guilty of an offence involving prohibited conduct may, on its own initiative, make a protection order against the offender, or vary a protection order that is already in force against the offender in the way it considers appropriate (including, for example, by varying the period for which the order is in force) and in the terms in which a protection order may be made by a court under the Bill. Such a provision should be generally similar to section 30 of the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁵³⁶

See Personal Protection Bill 2007 cl 47(1)–(4), (6).

12-31 The proposed provision under the Personal Protection Bill 2007 to empower a sentencing court to make or vary a protection order in criminal proceedings should not limit the orders the sentencing court may make under the *Penalties and Sentences Act 1992* (Qld),¹⁵³⁷ or any other Act, when sentencing the offender for the offence.

See Personal Protection Bill 2007 cl 47(5).

¹⁵³⁶ See para 12.109 of this Report.

¹⁵³⁷ See para 12.110 of this Report.

Chapter 13

Duration of protection orders

INTRODUCTION	363
WHEN A PROTECTION ORDER COMMENCES	363
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	363
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	363
The Commission's view	364
DURATION OF FINAL PROTECTION ORDERS	364
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	364
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	364
The position in other jurisdictions.....	365
Submissions	366
The Commission's view	367
DURATION OF INTERIM PROTECTION ORDERS.....	369
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	369
The position in other jurisdictions.....	370
The Commission's view	372
DURATION OF PROTECTION ORDERS MADE BY CONSENT	375
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	375
The position in other jurisdictions.....	375
Submissions	375
The Commission's view	376
RECOMMENDATIONS	376

INTRODUCTION

13.1 The terms of reference require the Commission to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an ‘effective mechanism for protection of the community from breaches of the peace’.¹⁵³⁸ One issue that is relevant to this consideration is the period for which an order remains in force.

13.2 This chapter considers when a protection order made under the Commission’s proposed Personal Protection Bill 2007 should commence, the duration of final and interim protection orders and the duration of protection orders made by consent.

WHEN A PROTECTION ORDER COMMENCES

13.3 The issue of when an order comes into effect has relevance to the enforceability of the order. In particular, if one or more interim protection orders have been made in relation to an application, it is necessary to ensure continuity of protection for the aggrieved and other protected persons to avoid difficulties in enforcement.¹⁵³⁹

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

13.4 The *Peace and Good Behaviour Act 1982* (Qld) is silent in relation to when a peace and good behaviour order commences.

The *Domestic and Family Violence Protection Act 1989* (Qld)

13.5 Section 34 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a domestic violence order takes effect:

- on the day it is made; or
- if it is made while an existing domestic violence order against the respondent for the benefit of the same aggrieved is in force, at the end of the existing order.

13.6 The commencement of a domestic violence order does not depend on the service of the order on the respondent.

¹⁵³⁸ The terms of reference are set out in Appendix 1 to this Report.

¹⁵³⁹ Note that the Commission has recommended, at para 12.39 of this Report, that the Personal Protection Bill 2007 should enable the court to make interim protection orders.

The Commission's view

13.7 It is important to clarify when an order takes effect for the continuity and enforcement of the order. The Commission considers that section 34 of the *Domestic and Family Violence Protection Act 1989* (Qld) is an appropriate model on which to base a provision in the Personal Protection Bill 2007. The Commission therefore considers the Personal Protection Bill 2007 should provide that an interim or final protection order comes into effect:

- on the day it is made; or
- if it is made while an existing protection order against the same respondent and for the benefit of the same aggrieved person is in force, when the existing order ends.

DURATION OF FINAL PROTECTION ORDERS

The Peace and Good Behaviour Act 1982 (Qld)

13.8 The *Peace and Good Behaviour Act 1982* (Qld) does not specify any particular limitations or restrictions in relation to the duration of a peace and good behaviour order.

13.9 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'¹⁵⁴⁰ and that the order may contain 'such other stipulations or conditions' as the court considers appropriate.¹⁵⁴¹

13.10 It has been suggested that '[i]n practice, one or two year periods are commonly specified' in orders.¹⁵⁴²

The Domestic and Family Violence Protection Act 1989 (Qld)

13.11 The *Domestic and Family Violence Protection Act 1989* (Qld) specifies that a protection order may continue for a period no longer than two years.¹⁵⁴³ 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.¹⁵⁴⁴ An order continues in force for the period ordered by the court and

¹⁵⁴⁰ *Peace and Good Behaviour Act 1982* (Qld) s 6(3)(b).

¹⁵⁴¹ *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

¹⁵⁴² R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002) 137.

¹⁵⁴³ *Domestic and Family Violence Protection Act 1989* (Qld) s 34A(1).

¹⁵⁴⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 34A(2).

stated in the order unless it is revoked or varied.¹⁵⁴⁵

The position in other jurisdictions

13.12 In the ACT, a personal protection order remains in force for one year or a shorter period if stated in the order.¹⁵⁴⁶

13.13 The Western Australian legislation specifies that a final violence restraining order remains in force for the period specified in the order, or if no period is specified, two years.¹⁵⁴⁷ A misconduct restraining order remains in force for the period specified in the order or, if no period is specified, one year.¹⁵⁴⁸

13.14 In New South Wales, an apprehended 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.¹⁵⁴⁹ If the court fails to specify a period of operation, the order remains in force for a period of 12 months.¹⁵⁵⁰

13.15 The Tasmanian civil restraining order legislation specifies that a restraint order shall remain in force for such period as the justices consider necessary to protect the person for whose benefit the order is made or until an order is made revoking the restraint order.¹⁵⁵¹

13.16 A restraining order made under the South Australian legislation may impose such restraints on the defendant as are necessary or desirable to prevent the defendant acting in the apprehended manner.¹⁵⁵² There are no particular limitations or restrictions in relation to the duration of the order.

¹⁵⁴⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 34A(3). See also *Domestic and Family Violence Protection Act 1989* (Qld) ss 35, 36.

¹⁵⁴⁶ *Domestic Violence and Protection Orders Act 2001* (ACT) s 36.

¹⁵⁴⁷ *Restraining Orders Act 1997* (WA) s 16(5)(a), (c).

¹⁵⁴⁸ *Restraining Orders Act 1997* (WA) s 37.

¹⁵⁴⁹ *Crimes Act 1900* (NSW) s 562ZY(1), (2). The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Section 562ZY of the *Crimes Act 1900* (NSW) is replicated in s 79 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

¹⁵⁵⁰ *Crimes Act 1900* (NSW) s 562ZY(3).

¹⁵⁵¹ *Justices Act 1959* (Tas) s 106B(6).

¹⁵⁵² *Summary Procedure Act 1921* (SA) s 99(3).

13.17 In the Northern Territory¹⁵⁵³ and Victoria,¹⁵⁵⁴ there are also no particular limitations or restrictions included in the legislation in relation to the duration of an order. However, in Victoria, if the behaviour complained of consists of stalking, and an order is made under family violence legislation,¹⁵⁵⁵ the court may specify the period for which an intervention order is to remain in force.¹⁵⁵⁶ An intervention order remains in force unless it is revoked, reversed, or set aside on appeal.¹⁵⁵⁷

Submissions

13.18 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) specify a maximum period of time during which an order remains in force, and, if so, what should be the maximum period.¹⁵⁵⁸

13.19 Several of the submissions received by the Commission in response to the Discussion Paper, considered it desirable to specify a maximum period for an order made under the *Peace and Good Behaviour Act 1982* (Qld).¹⁵⁵⁹

13.20 Three of the submissions supported a maximum period of two years, to align the legislation with the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁵⁶⁰ However, the Chief Magistrate of Queensland was of the view that a final order under the *Peace and Good Behaviour Act 1982* (Qld) should last only for one year.¹⁵⁶¹

13.21 Two community legal services believed that the duration of an order under the Act should be at the discretion of the magistrate.¹⁵⁶²

¹⁵⁵³ Justices Act (NT) s 99, as amended by the *Domestic and Family Violence Act* (NT). The *Domestic and Family Violence Act* (NT), which repeals and replaces pt IV div 7 of the Justices Act (NT), introducing a new scheme for the making of personal violence restraining orders, was assented to on 12 December 2007 and will commence on a date to be proclaimed. Section 99 of the Justices Act (NT) is a new provision.

¹⁵⁵⁴ *Magistrates' Court Act 1989* (Vic) s 126A. The court is empowered under that Act to make an order binding a person to keep the peace or be of good behaviour.

¹⁵⁵⁵ In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

¹⁵⁵⁶ *Crimes (Family Violence) Act 1987* (Vic) s 6(1).

¹⁵⁵⁷ *Crimes (Family Violence) Act 1987* (Vic) s 6(2).

¹⁵⁵⁸ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 107 (Questions 10-7, 10-8).

¹⁵⁵⁹ Submissions 5, 6, 8, 12C, 15.

¹⁵⁶⁰ Submissions 5, 8, 15.

¹⁵⁶¹ Submission 12C.

¹⁵⁶² Submissions 14, 19.

13.22 Caxton Legal Centre Inc noted that orders 'should not last any longer than is genuinely necessary to protect individual safety'. This submission commented that the simplicity of the Act and 'the flexibility of section 6 [of the *Peace and Good Behaviour Act 1982* (Qld)] allows the court to make whatever orders are necessary in individual circumstances'.¹⁵⁶³

The Commission's view

13.23 The *Peace and Good Behaviour Act 1982* (Qld) does not specify any limitation in relation to the duration of a peace and good behaviour order. The Act empowers the court to make an order 'for such time ... as the court thinks fit'.¹⁵⁶⁴ This enables the magistrate to exercise his or her discretion to determine the appropriate length of an order in the circumstances.

13.24 In light of the range of circumstances under which a dispute of the kind covered by the Personal Protection Bill 2007 might arise, and the recommendations made by the Commission earlier in this Report in relation to the grounds for making a protection order,¹⁵⁶⁵ the Commission considers it desirable that the court has the flexibility to make an order for the duration it considers appropriate to ensure the protection of the persons for whose benefit the order is made.¹⁵⁶⁶

13.25 However, the Commission further considers that the Personal Protection Bill 2007 should specify that, subject to special circumstances,¹⁵⁶⁷ a final protection order may continue in force for a period no longer than two years. This is consistent with section 34A(1) of the *Domestic and Family Violence Protection Act 1989* (Qld).

13.26 There are a number of advantages in generally imposing a maximum period for the duration of a protection order. For example, it limits the period for which a protection order infringes on the rights of a respondent. It provides the parties to an order with certainty as to the maximum period for which the order can be imposed. The general imposition of a maximum period also gives rise to the opportunity for the court to review the basis of the order in the event that the aggrieved person wishes to obtain a further order before the existing order

¹⁵⁶³ Submission 19.

¹⁵⁶⁴ *Peace and Good Behaviour Act 1982* (Qld) s 6(4).

¹⁵⁶⁵ See note 1568 of this Report.

¹⁵⁶⁶ The Victorian Law Reform Commission in its recent Report on family violence laws recommended (in relation to intervention orders to restrain domestic violence) that magistrates retain their discretion under the current Victorian family violence legislation to determine the appropriate length of an order. The Commission considered that, due to the wide variety of relationships and forms of violence covered by the current family violence legislation, it was not appropriate to include a prescribed minimum or maximum length for an order: Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006) [9.6]. For the application of the family violence legislation to stalking, see note 1555 of this Report.

¹⁵⁶⁷ See para 13.29 of this Report.

expires. It is also likely to assist in developing a consistent approach between magistrates in relation to deciding the duration of an order.

13.27 The Commission considers that the general imposition of a maximum period of two years is appropriate, having regard to the range of circumstances under which a dispute of the kind covered by the Personal Protection Bill 2007 might arise. Further, the Commission considers it appropriate to align the maximum duration of protection orders and domestic violence orders, given the recommendations made by the Commission in this Report for the inclusion of grounds for the making a protection order under the Personal Protection Bill 2007 that are generally similar to the grounds provided under the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁵⁶⁸

13.28 In the Commission's view, the imposition of a shorter maximum timeframe is likely to increase the burden on the parties to the order, particularly those who are not legally represented, in relation to the making of further applications at the expiration of the existing order.

13.29 The Commission considers however that, in limited circumstances, it may be appropriate to empower a magistrate to make an order for a period longer than two years. In the Commission's view, the circumstances in which such an order may be made should be limited to where there are 'special reasons' for doing so. The Commission considers that the term 'special reasons' should not be defined in the Personal Protection Bill 2007. This would enable the court to exercise its discretion to make an order for a longer period provided there are justifiable grounds for doing so. This is consistent with the approach taken in section 34A(2) of the *Domestic and Family Violence Protection Act 1989* (Qld).

13.30 The Commission also considers that specific provision should be made in the Personal Protection Bill 2007 in relation to when a protection order ceases. In the Commission's view, the Bill should provide that unless the order is earlier set aside or the period for which the order is in force is varied, a protection order that is not an interim order continues in force:

- for the period of not more than two years fixed by the court and stated in the order; or
- if the court is satisfied there are special reasons for fixing a longer period, the period of more than two years fixed by the court and stated in the order.

13.31 This is consistent with the approach taken in section 34A(3) of the *Domestic and Family Violence Protection Act 1989* (Qld).

1568

The Commission has recommended the inclusion of grounds for the making of a protection order similar to those provided for under the *Domestic and Family Violence Protection Act 1989* (Qld), with the exception of indecent behaviour which the Commission has not recommended. See para 5.66, 5.81, 5.110, 5.113, 8.30 of this Report.

DURATION OF INTERIM PROTECTION ORDERS

13.32 The Commission has recommended in this Report that the Personal Protection Bill 2007 should enable the court to make interim protection orders.¹⁵⁶⁹ Accordingly, there is a need to consider the duration of such orders.

The *Domestic and Family Violence Protection Act 1989* (Qld)

13.33 Section 34B of the *Domestic and Family Violence Protection Act 1989* (Qld) makes specific provision for the duration of a temporary protection order.

13.34 Section 34B(1) provides that a temporary protection order continues in force until the order is returnable before a court (unless the court extends the order) or the order is revoked by the court, whichever happens first.

13.35 Section 34B(2)–(6) provides:

- (2) Subsection (3) applies if—
 - (a) a temporary protection order is made and has not been revoked by a court; and
 - (b) a court makes a relevant protection order relating to the temporary protection order on the day the temporary protection order is returnable before the court.
- (3) If the respondent is not before the court when the court makes the relevant protection order, despite subsection (1)(a), the court may order that the temporary protection order continues in force until the respondent is served with the relevant protection order.
- (4) The temporary protection order continued in force under subsection (3) is binding on the respondent even though it is not served on the respondent.
- (5) To remove doubt, it is declared that a court may find the respondent contravened—
 - (a) the temporary protection order continued in force under subsection (3); and
 - (b) the relevant protection order relating to the temporary protection order to the extent the respondent contravened a condition of the protection order about which a police officer told the respondent.

1569

See para 12.39 of this Report.

(6) In this section—

relevant protection order, relating to a temporary protection order, means the protection order made by a court on an application for a protection order, being the application that allowed a court to make the temporary protection order.

13.36 The provisions of section 34B(2)–(6) were inserted in the *Domestic and Family Violence Protection Act 1989* (Qld) in 2002.¹⁵⁷⁰ Their purpose is to enable the court, if a respondent is not present in court when a domestic violence order is made, to order that the temporary protection order continues in force until the respondent is served with the domestic violence order:¹⁵⁷¹

These new provisions allow a court to order that a temporary protection order continue[s] to apply to a respondent who is not present in court when a domestic violence order is made. Because the temporary protection order continues to apply, the respondent can be found to have breached the order. The temporary protection order will end when the respondent has been served with a copy of the domestic violence order.

...

A respondent cannot currently be charged with breaching the protection order unless they are present in court, they have been served with a copy of the order or they have been advised by a police officer of the conditions of the order. This meant that some aggrieved were unprotected from the time the temporary protection order ended to the time the resulting protection order was served on the respondent.

13.37 In its current form, section 34B(3) requires the court to exercise its discretion to order that the temporary order continue in force until the respondent is served with the domestic violence order. If the court does not exercise its discretion to make the order, the temporary protection order ceases when the new domestic violence order is made. This creates a gap in protection for the persons seeking an order until the new order is served.

The position in other jurisdictions

13.38 The civil restraining order legislation in most of the other jurisdictions includes provisions limiting the duration of interim protection orders.

13.39 In the ACT, interim orders made under the *Domestic Violence and Protection Orders Act 2001* (ACT)¹⁵⁷² remain in force for a period of up to eight weeks¹⁵⁷³ or until the order is revoked, the application is dismissed or a final

¹⁵⁷⁰ *Domestic Violence Legislation Amendment Act 2002* (Qld) s 24. See also Explanatory Notes, Domestic Violence Legislation Amendment Bill (Qld) 2001, 14–15.

¹⁵⁷¹ Explanatory Notes, Domestic Violence Legislation Amendment Bill 2001 (Qld), 14–15.

¹⁵⁷² *Domestic Violence and Protection Orders Act 2001* (ACT) ss 48, 49.

¹⁵⁷³ *Domestic Violence and Protection Orders Act 2001* (ACT) s 52(1). Note that an order may be extended for up to 16 weeks under s 58 of the Act.

order is made or served on the respondent if the respondent was not present when the final order was made.¹⁵⁷⁴ An emergency order made under the Act¹⁵⁷⁵ remains in force until the close of business on the second day after it is made, or until the order is revoked or a final or interim order is made and served on the respondent.¹⁵⁷⁶

13.40 In New South Wales, an interim order made by a court remains in force until it is revoked, or a final order is made or served on the defendant if the defendant was not present when the order is made, or the application is withdrawn or dismissed.¹⁵⁷⁷ The New South Wales Law Reform Commission has recommended that an interim apprehended violence order should remain in force for six months or until it has been revoked, confirmed as a final apprehended violence order or the complaint is withdrawn or dismissed.¹⁵⁷⁸ That Commission considered that the imposition of a time limit may have the effect of requiring the courts to deal with matters more expeditiously.¹⁵⁷⁹

13.41 An interim restraint order in Tasmania operates for a period that may be specified by the justices, but not exceeding 60 days.¹⁵⁸⁰

13.42 In Victoria, interim intervention orders apply to stalking.¹⁵⁸¹ An interim order made in the absence of the defendant only operates until the time specified in the order or the further order of the court.¹⁵⁸²

13.43 Interim orders can also be made under the legislation in Western Australia.¹⁵⁸³ An interim violence restraining order remains in force until a final order comes into force, a hearing is concluded, the order is cancelled or

1574 *Domestic Violence and Protection Orders Act 2001* (ACT) s 53.

1575 *Domestic Violence and Protection Orders Act 2001* (ACT) pt 7.

1576 *Domestic Violence and Protection Orders Act 2001* (ACT) s 70(1).

1577 *Crimes Act 1900* (NSW) s 562ZC(1). This provision is replicated in s 24(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1549 of this Report.

1578 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [7.53], rec 27.

1579 *Ibid* [7.53].

1580 *Justices Act 1959* (Tas) s 106D(2). Note, however, that if it appears to the justices that the interim restraint order will expire before the conclusion of the relevant proceedings, they may extend the interim restraint order until a final restraint order is served on the person against whom it is sought, or the proceedings are otherwise terminated: *Justices Act 1959* (Tas) s 106D(3).

1581 See note 1555 of this Report.

1582 *Crimes (Family Violence) Act 1987* (Vic) s 8(3). The Victorian Law Reform Commission recently recommended that interim orders should be made for a minimum of 21 days: Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006) 278.

1583 Interim orders are orders made under ss 23, 29(1)(a), (3), 43A(7)(a) and 63(4b) of the *Restraining Orders Act 1997* (WA), the duration of which is longer than 72 hours: *Restraining Orders Act 1997* (WA) s 3 (definition of 'interim order').

expires, or, in the case of a telephone order, three months elapse from the date the order came into force.¹⁵⁸⁴

The Commission's view

13.44 Earlier in this Report, the Commission has recommended that the Personal Protection Bill 2007 should provide for the making of interim protection orders.¹⁵⁸⁵ The Commission considers that in light of this recommendation, the Personal Protection Bill 2007 should also make specific provision for the duration of interim orders. Elsewhere in this chapter, the Commission has recommended that, generally, final protection orders should continue for no longer than two years.¹⁵⁸⁶ An interim order, by contrast, is one made for a short period.

13.45 The Commission is of the view that the provision for the duration of interim protection orders should be generally similar to section 34B of the *Domestic and Family Violence Protection Act 1989* (Qld).

13.46 As mentioned earlier in this chapter, section 34B(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a temporary protection order continues in force until the happening of the first of two specified events namely, the order is returnable before a court (unless the court extends the order) or the order is revoked by the court.

13.47 The Commission also contemplates that, under the Personal Protection Bill 2007, more than one interim protection order might be made by the court before the application for the final protection order is heard and decided.

13.48 In the Commission's view, the Personal Protection Bill 2007 should include a provision to the effect that an interim protection order made by a court is in force until whichever of the following first happens:

- the court decides or summarily dismisses the application for the final order;
- the application for the protection order in relation to which the interim order was made is withdrawn with the court's leave;
- if the court fixes a period for which the order is to have effect and states the period in the order – the period expires; or
- the order is set aside by a court.

¹⁵⁸⁴ *Restraining Orders Act 1997* (WA) s 16(4).

¹⁵⁸⁵ See para 12.39 of this Report.

¹⁵⁸⁶ See para 13.30 of this Report.

13.49 An interim protection order made by a magistrate is made by telephone or other electronic means on ex parte application by a police officer.¹⁵⁸⁷ An order obtained in these circumstances should be in force only until the hearing date, or another earlier event, rather than for a 'fixed' period. Elsewhere in this Report, the Commission has recommended that an interim protection order made by a magistrate must state the date the court will hear the application for the final protection order.¹⁵⁸⁸

13.50 The Commission therefore considers that the Personal Protection Bill 2007 should specify that an interim protection order made by a magistrate on an application by a police officer by telephone or other electronic means is in force until the date stated in the order or, if any of the following happens earlier, when the first of the following happens:

- the application for a protection order in relation to which the interim order was made is withdrawn with a court's leave;
- the order is set aside by a court.

13.51 The continuation in force of an interim protection order in specified circumstances is discussed below in paragraphs 13.53 to 13.56.

13.52 The Commission also considers that the Personal Protection Bill 2007 should include a provision to the effect that when a court varies an interim protection order to increase the period for which the order continues in force, the court must specify in the order the time and place for the further hearing of the matter. This would ensure that the order is subject to the operation of the proposed general provision relating to the duration of interim protection orders. The Commission notes its recommendation to this effect in Chapter 12 of this Report.¹⁵⁸⁹

13.53 Section 34B(2)–(6) of the *Domestic and Family Violence Protection Act 1989* (Qld) gives the court discretion to allow a temporary protection order to remain in force in circumstances where the court has made a protection order in the absence of the respondent and the respondent has not been served with that order.

13.54 In the Commission's view, the Personal Protection Bill 2007 should include a provision generally similar in effect to section 34B(2)–(6) of the *Domestic and Family Violence Protection Act 1989* (Qld), but subject to some modification of section 34B(3).

¹⁵⁸⁷ See para 9.114 of this Report.

¹⁵⁸⁸ See para 12.50 of this Report.

¹⁵⁸⁹ Ibid.

13.55 The Commission considers the provision in the Personal Protection Bill 2007, which is equivalent to section 34B(3) in the *Domestic and Family Violence Protection Act 1989* (Qld), should specify that, if the respondent is not before the court when the court makes a final order or further interim order, the interim order continues in force until the respondent is served with the final order or further interim order. The Bill should also provide, however, that this does not apply to the extent the respondent contravenes the final order or further interim order if the respondent has been told of the order by a police officer.

13.56 In contrast to the situation under section 34B(3) of the *Domestic and Family Violence Protection Act 1989* (Qld), the provision proposed by the Commission for inclusion in the Personal Protection Bill 2007 does not give the court discretion in making an order that the interim order continues. The Commission considers that a provision to this effect would ensure the continued protection of the persons for whose benefit the order is made until the new order is served on the respondent.

13.57 The Commission has also considered whether the Personal Protection Bill 2007 should impose time limits on the duration for which an interim protection order can continue in force, for example, a certain number of days, weeks or months.

13.58 The equivalent legislation in the ACT and Tasmania imposes time limits on the duration for which interim orders can be made. As mentioned earlier in paragraph 13.40, the New South Wales Law Reform Commission has recommended that an interim apprehended violence order should remain in force for six months or until it has been revoked, confirmed as a final apprehended violence order or the complaint is withdrawn or dismissed.¹⁵⁹⁰

13.59 The imposition of a particular time limit on the duration of an interim protection order would require the court to expedite the conduct of the proceedings. This would assist the parties to litigate their dispute relatively quickly. On the other hand, the imposition of a time limit would reduce the flexibility of the court to make longer orders in appropriate circumstances, for example, where there are difficulties with service. It might also give rise to the situation where the expiration of an interim protection order before a protection order or further interim protection order is made exposes the aggrieved and other persons protected by the interim order to further risk from the respondent.

13.60 The Commission is of the view that it is not appropriate to impose particular limitations on the period for which an interim protection order can remain in force. In the Commission's view, it is important that the court retain flexibility in dealing with applications for orders under the Personal Protection Bill 2007. This would enable the court to determine the appropriate length of an

¹⁵⁹⁰

New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [7.53], rec 27.

interim protection order in light of the circumstances of the parties, the operational needs of the court and other relevant matters.

DURATION OF PROTECTION ORDERS MADE BY CONSENT

13.61 In this Report, the Commission has recommended that the court should be able to make a protection order with the consent of the parties under the Personal Protection Bill 2007.¹⁵⁹¹ Accordingly, there is a need to consider the duration of such orders.

The *Domestic and Family Violence Protection Act 1989* (Qld)

13.62 In Queensland, there is no specific provision in the *Domestic and Family Violence Protection Act 1989* (Qld) regulating the duration of an order made by consent. However, section 33 of the *Domestic and Family Violence Protection Act 1989* (Qld) empowers the court to make consent orders subject to the proviso that the order include only matters that may be dealt with under the Act.

The position in other jurisdictions

13.63 In the ACT, the court is limited to making an order by consent for a period that is no longer than the period permitted by the Act.¹⁵⁹²

13.64 The civil restraining order legislation in most of the other Australian jurisdictions makes no specific provision for the duration of orders made by consent.¹⁵⁹³

Submissions

13.65 In its Discussion Paper, the Commission sought submissions on whether there should be any restrictions, and if so, what restrictions there should be on the court's ability to make a consent order under the *Peace and Good Behaviour Act 1982* (Qld).¹⁵⁹⁴

¹⁵⁹¹ See para 12.78 of this Report.

¹⁵⁹² *Domestic Violence and Protection Orders Act 2001* (ACT) s 29(4).

¹⁵⁹³ *Crimes Act 1900* (NSW); *Summary Procedure Act 1921* (SA); *Justices Act 1959* (Tas); *Crimes (Family Violence) Act 1987* (Vic); *Restraining Orders Act 1997* (WA). Neither does the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) contain a specific provision dealing with the duration of a consent order. As to the application of the legislation in New South Wales and Victoria, see notes 1549, 1555 of this Report.

¹⁵⁹⁴ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 78 (Question 7-7).

13.66 A Queensland magistrate considered that the duration of consent orders should be shorter than for contested orders. This submission considered that a maximum duration of one year should apply to consent orders with provision for an automatic extension if there is a proven breach of the order.¹⁵⁹⁵

The Commission's view

13.67 The Commission is of the view that it is desirable for the duration of a protection order made by consent to be for a period no longer than permitted under the Personal Protection Bill 2007. This is consistent with the position under the *Domestic and Family Violence Protection Act 1989* (Qld) and with the Commission's recommendation elsewhere in this Report that the court's ability to make a consent order be limited to matters under the Personal Protection Bill 2007.¹⁵⁹⁶

RECOMMENDATIONS

13.68 The Commission makes the following recommendations:

When a protection order commences

13-1 The Personal Protection Bill 2007 should provide that a protection order takes effect:¹⁵⁹⁷

- (a) on the day it is made; or
- (b) if it is made while an existing protection order, made against a respondent for the order and for the protection of an aggrieved person for order, is in force, when the existing order ends.

See Personal Protection Bill 2007 cl 57.

¹⁵⁹⁵ Submission 12B. The Commission has recommended, at para 12.78 of this Report, that the court be empowered to make a protection order in a form agreed to by the parties.

¹⁵⁹⁶ See para 12.82 of this Report

¹⁵⁹⁷ See para 13.7 of this Report.

Duration of protection orders other than interim protection orders

- 13-2 The Personal Protection Bill 2007 should provide that a protection order that is not an interim protection order is in force for the period fixed by the court and stated in the order, unless the order is earlier set aside or the period for which it is in force is varied. The period must not be more than two years unless the court is satisfied there are special reasons for fixing a longer period.¹⁵⁹⁸

See Personal Protection Bill 2007 cl 58.

Duration of interim protection orders

- 13-3 A provision should be included in the Personal Protection Bill 2007 to the effect that an interim protection order is in force until whichever of the following first happens:¹⁵⁹⁹

- (a) the court decides or summarily dismisses the application for the protection order in relation to which the interim order was made;
- (b) the application for a protection order in relation to which the interim order was made is withdrawn with the court's leave;
- (c) if the court fixes a period for which the order is to have effect and states the period in the order, the period expires; or
- (d) the order is set aside by a court.

See Personal Protection Bill 2007 cl 59(1).

- 13-4 The Personal Protection Bill 2007 should specify that an interim protection order made by a magistrate on an application by a police officer by telephone or other electronic means is in force until the date stated in the order or, if any of the following happens earlier, when the first of the following happens:¹⁶⁰⁰

- (a) the application for a protection order in relation to which the interim order was made is withdrawn with a court's leave;

¹⁵⁹⁸ See para 13.30 of this Report.

¹⁵⁹⁹ See para 13.48 of this Report.

¹⁶⁰⁰ See para 13.50 of this Report.

(b) the order is set aside by a court.

See Personal Protection Bill 2007 cl 59(4).

13-5 Provision should be included in the Personal Protection Bill 2007, generally similar in effect to section 34B(2)–(6) of the *Domestic and Family Violence Protection Act 1989* (Qld) but subject to modification of section 34B(3), to provide that if an interim protection order is in force when a court makes a final order or further interim order or further interim order on the application and a respondent for the order is not before the court when the court makes a final order or further interim order, the interim protection order continues in force until the respondent is served with the final order or further interim order. The Bill should also provide, however, that this does not apply to the extent the respondent contravenes the final or further interim order if the respondent has been told of the order by a police officer.¹⁶⁰¹

See Personal Protection Bill 2007 cl 59(2), (3).

1601

See para 3.54–13.55 of this Report.

Chapter 14

The consequences of granting and breaching an order

INTRODUCTION	380
EXPLAINING THE ORDER	380
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	381
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	381
The position in other jurisdictions.....	382
Submissions	383
The Commission's view	383
BREACH OF AN ORDER	386
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	386
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	386
The position in other jurisdictions.....	387
Submissions	390
The Commission's view	391
DEFENCES TO A BREACH OF AN ORDER	394
Consent as a defence to breach	394
Other defences.....	394
The Commission's view	395
PROSECUTION OF OFFENCES	396
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	396
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	396
The Commission's view	396
THE ROLE OF THE POLICE IN ENFORCEMENT OF ORDERS.....	396
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	397
The position in other jurisdictions.....	397
Submissions	398
The Commission's view	401
RECOMMENDATIONS	402

INTRODUCTION

14.1 The Commission's terms of reference require it to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an 'effective' mechanism for protection of the community from breaches of the peace and, in particular, to have regard to the difficulty of enforcing orders made under the Act.¹⁶⁰²

14.2 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 no use to the person for whose benefit it was granted, and may even encourage the person responsible for the conduct complained of to believe that he or she can continue to engage in that conduct with impunity.¹⁶⁰³

14.3 The Discussion Paper raised the enforcement of orders as an issue for consideration and, in particular, sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should provide for an explanation of the order to be given to the parties and whether specific provisions should be included in the Act in relation to the role of police in the enforcement of orders.¹⁶⁰⁴ This chapter also considers the liability and penalty for breach of an order, defences to breach, liability for aiding and abetting a breach, and responsibility for the prosecution of an offence under the Act.

EXPLAINING THE ORDER

14.4 In some cases where a respondent to a peace and good behaviour order is in breach of the order, the reason for the breach may be that the respondent does not understand the implications of the order. Similarly, a person in whose favour an order has been made will face difficulties in enforcing the order if the person does not understand whether and how an order has been breached. These issues may be of particular relevance if one or more of the parties is self-represented. Ensuring that both parties to an application for an order understand what the grant of an order will mean may help secure compliance.

14.5 It may be that one or more of the parties may consent to an order without fully comprehending the consequences of granting or breaching the order. It is also possible that where one or more of the parties is self-represented, the applicant and/or respondent might have limited knowledge

¹⁶⁰² The terms of reference are set out in Appendix 1 to this Report.

¹⁶⁰³ A number of submissions received by the Commission made similar observations: submissions 5, 13, 14, 15, 20, 25. See also, for example, H Katzen, 'It's a Family Matter, not a Police Matter: The Enforcement of Protection Orders' (2004) 14 *Australian Family Law Journal* 1, 3–4; Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006) [10.76]; Crime and Misconduct Commission, *Policing domestic violence in Queensland: Meeting the challenges* (March 2005) 66; and New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [10.12], [10.41].

¹⁶⁰⁴ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 99–100 (Questions 9-4–9-7).

about the court's powers relating to protection order matters, including variation and revocation.

14.6 An explanation might also have a wider effect in relation to compliance. The New South Wales Law Reform Commission was told:¹⁶⁰⁵

... 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.

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

14.7 The *Peace and Good Behaviour Act 1982* (Qld) does not require the court to explain the purpose and effect of a peace and good behaviour order or the consequences of breaching the order to the parties.

The *Domestic and Family Violence Protection Act 1989* (Qld)

14.8 When an aggrieved or respondent is first personally before a court, section 14A of the *Domestic and Family Violence Protection Act 1989* (Qld) requires the court to explain the consequences of the application and of an order made because of the application.

14.9 Section 50 of the Act also requires the court, when it is about to make a domestic violence order, to ensure that the aggrieved and the respondent for the proposed order, if they are present in court, understand the following matters about the order:¹⁶⁰⁶

- the purpose, terms and effect of the order (including, for example, that the order may be enforceable in other States, Territories and New Zealand without further notice to the respondent);¹⁶⁰⁷ and
- that the aggrieved or respondent may apply for revocation or variation of the order.

14.10 The court is further required to explain to the respondent the possible consequences of non-compliance with the terms of the proposed order.¹⁶⁰⁸

¹⁶⁰⁵ New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [3.45], n 80 (Submission from the Multicultural Disability Advocacy Association).

¹⁶⁰⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 50(1), (2).

¹⁶⁰⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 50(1)(a)(i), 50(2)(a). Another example relates to the circumstance where, if the respondent has a weapons licence, or is a body's representative as mentioned in s 10(3) of the *Weapons Act 1990* (Qld), the licence or endorsement as the body's representative is dealt with by ss 27A or 28A of the *Weapons Act 1990* (Qld).

¹⁶⁰⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 50(1)(b).

14.11 Section 50 also specifies that the process adopted by the court to ensure that an aggrieved 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.¹⁶⁰⁹

14.12 Failure to comply with section 50 does not affect the validity of the domestic violence order.¹⁶¹⁰

The position in other jurisdictions

14.13 The civil restraining order legislation in a number of Australian jurisdictions contains provisions about explaining an order and the consequences of non-compliance.

14.14 In the ACT, New South Wales, Victoria and Western Australia, a court that makes an order must, if the person against whom the order is made is present in court, explain to the person the terms of the order, the consequences of breaching the order and how the order may be varied or discharged.¹⁶¹¹

14.15 In the ACT, New South Wales and Western Australia, the explanation must also be given to the person protected by the order if he or she is present.¹⁶¹² Furthermore, the explanation is to be made in a way that the person to whom it is given is likely to understand.¹⁶¹³

1609 *Domestic and Family Violence Protection Act 1989* (Qld) s 50(3). The Act provides the following examples of services or help the court may consider appropriate:

- the court may arrange for the clerk or a public service employee at the court, to explain the order to an aggrieved or respondent;
- a local interpreter or the telephone interpreter service may be used to explain the order to an aggrieved or respondent;
- explanatory notes prepared for aggrieveds or respondents, including non-English speakers, may be given to an aggrieved or respondent; and
- the court may arrange with a community government under the *Local Government (Community Government Areas) Act 2004* (Qld), Torres Strait Islander local government, community justice group or group of elders for someone to explain the order to an aggrieved or respondent.

1610 *Domestic and Family Violence Protection Act 1989* (Qld) s 50(4).

1611 *Domestic Violence and Protection Orders Act 2001* (ACT) s 24; *Crimes Act 1900* (NSW) s 562ZZ(1); *Crimes (Family Violence) Act 1987* (Vic) s 15; *Restraining Orders Act 1997* (WA) s 8(1)(a), (c)–(h). The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Section 562ZZ of the *Crimes Act 1900* (NSW) is replicated in s 76 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

1612 *Domestic Violence and Protection Orders Act 2001* (ACT) s 25; *Crimes Act 1900* (NSW) s 562ZZ(1); *Restraining Orders Act 1997* (WA) s 8(1)(b)(i), (c)–(h). In Western Australia, the court alternatively may give the explanation to a parent or guardian of a protected person if the parent or guardian made the application for the order on behalf of that person.

1613 *Domestic Violence and Protection Orders Act 2001* (ACT) ss 24(2), (3), 25(2), (3); *Crimes Act 1900* (NSW) s 562ZZ(3); *Restraining Orders Act 1997* (WA) s 8(2).

14.16 In New South Wales, a written explanation must be given to the person protected by the order and the person against whom the order is made.¹⁶¹⁴ In Western Australia, if the person protected by the restraining order or the person against whom the order is made is not present in court when the order is made, or it is not practicable to give the explanation to the person at the time the order is made, the registrar must arrange for a written explanation to be given to the person.¹⁶¹⁵

14.17 In the ACT, New South Wales and Western Australia, the failure to explain the order as prescribed does not affect the validity of the order.¹⁶¹⁶

Submissions

14.18 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should provide for an explanation of an order to be given to the parties.¹⁶¹⁷

14.19 The majority of submissions received in relation to this issue considered that the *Peace and Good Behaviour Act 1982* (Qld) should require a court that is about to make 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 certain matters about the order.¹⁶¹⁸

14.20 The Women's Legal Service proposed that magistrates receive training in relation to communicating information about the order to a range of parties to an order.¹⁶¹⁹

14.21 However, Queensland Advocacy Inc considered that the parties are unlikely to recollect in any detail an explanation about an order given by the court.¹⁶²⁰

The Commission's view

14.22 The Commission is of the view that an aggrieved person and a respondent for a protection order may be assisted to understand their rights or obligations under the order by having the order explained to them.

1614 *Crimes Act 1900* (NSW) s 562ZZ(2).

1615 *Restraining Orders Act 1997* (WA) s 8(3).

1616 *Domestic Violence and Protection Orders Act 2001* (ACT) ss 24(4), 25(4); *Crimes Act 1900* (NSW) s 562ZZ(4); *Restraining Orders Act 1997* (WA) s 8(4).

1617 Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 99 (Question 9-1).

1618 Submissions 5, 6, 8, 13, 14, 15.

1619 Submission 8.

1620 Submission 20.

Court to explain matters about the order to the parties

14.23 The Commission therefore considers that the Personal Protection Bill 2007 should provide that, if an aggrieved person or a respondent is present when a protection order is being made, and it is practicable for the court to do so, the court must explain certain matters about the order to each of those persons when making the protection order.

14.24 In addition, the Commission considers the Personal Protection Bill 2007 should provide that, if another person (other than a police officer) has applied for the protection order for an aggrieved person, the court may, if it considers it appropriate, give the explanation to the applicant instead of the aggrieved person.

14.25 This range of potential recipients is broader than that provided under the *Domestic and Family Violence Protection Act 1989* (Qld). Under that Act, the court is obliged to give the explanation only to the aggrieved and the respondent for the order applied for. However, the Commission is of the view that the court may also consider it appropriate in the circumstances to give the explanation to a person who has sought the order on an aggrieved person's behalf.

14.26 The Commission considers that the explanation the court is required to give should include the following matters:

- the purposes and terms of the order;
- the effect of any condition of the order about possession of a weapon;
- the consequences of contravening the order;
- that an aggrieved person or a respondent may apply to the court for the variation or setting aside of the order; and
- that the order may be registered in another State or New Zealand without further notice to the respondent.¹⁶²¹

1621

See para 17.11 of this Report. In their present form, the relevant legislative provisions in the ACT, New South Wales, Tasmania and Western Australia are of sufficient generality to apply to an order made under the Personal Protection Bill 2007 proposed by the Commission: *Domestic Violence and Protection Orders Act 2001* (ACT) pt 9, s 84 (definition of 'recognised order'); *Crimes Act 1900* (NSW) pt 15A div 10, s 562ZZS (definition of 'external protection order'); *Justices Act 1959* (Tas) ss 106A(1) (definition of 'external restraint order'), 106B(1), 106GA–106GD; *Restraining Orders Act 1997* (WA) ss 3 (definition of 'corresponding law'), 74–79. In South Australia, the *Summary Procedure Act 1921* (SA) specifically recognizes an order made under the *Peace and Good Behaviour Act 1982* (Qld); *Summary Procedure Act 1921* (SA) ss 4 (definition of 'foreign restraining order'), 99H; *Summary Procedure (Restraining Orders) Regulations 2006* (SA) s 5. The external protection order provisions of the *Crimes Act 1900* (NSW) are replicated in pt 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). As to the application of the legislation in New South Wales, see note 1611 of this Report.

14.27 The Commission also considers that the Personal Protection Bill 2007 should provide that the explanation should be given in English or a language in which the person is fluent and in a way that ensures, as far as practicable, the person understands the explanation.

Registrar to give a written explanation to the parties

14.28 In addition to the explanation given to the parties when the court is about to make an order, the Commission considers that the Personal Protection Bill 2007 should provide that, if a person to whom the court is required to explain the order is not present in court when the order is being made, or it is not practicable for the court to give the explanation at the time the order is being made, the registrar must ensure that a written statement containing the explanation is given to the person as soon as practicable.

14.29 The Commission considers that this written explanation could take the form of a standard document containing general information about the effect of an order and particular conditions and information about how the person may obtain further information about the specific order made in relation to that person.

Use of other persons to explain order

14.30 The *Domestic and Family Violence Protection Act 1989* (Qld) makes provision for the court to use the services of, or help from, other people, to the extent the court considers appropriate, to ensure that persons understand the prescribed matters about the order.¹⁶²² For example, this may involve engaging the services of court staff, an interpreter or another specified person to explain an order, or providing explanatory notes to non-English speaking parties.¹⁶²³

14.31 In the Commission's view, the degree of formality associated with the court providing an explanation of an order emphasises the seriousness of the order. Making the court responsible for explaining an order would also ensure the consistency of the information given to the parties to the proceedings.¹⁶²⁴

14.32 In the Commission's view, it is unnecessary to include a legislative provision clarifying that the court may use the services of other people to ensure a person understands its explanation about the order.

¹⁶²² *Domestic and Family Violence Protection Act 1989* (Qld) s 50(3).

¹⁶²³ See note 1609 of this Report.

¹⁶²⁴ The court may appoint an interpreter to assist in the proceedings, if the interests of justice so require. Section 8 of the *Peace and Good Behaviour Act 1982* (Qld) provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications. Section 131A of the *Evidence Act 1977* (Qld) provides that the court, in a criminal proceeding, may order the State to provide an interpreter for a complainant, defendant or witness, if the court is satisfied that the interests of justice so require. A 'criminal proceeding' is defined to include a proceeding wherein a person is charged with a simple offence: *Evidence Act 1977* (Qld) s 3, sch 3 (definition of 'criminal proceeding').

Explanation not to affect the validity of the order

14.33 The Commission also considers that the Personal Protection Bill 2007 should specify that the failure to comply with the provisions about explaining the protection order to the parties does not invalidate or otherwise affect the order.

BREACH OF AN ORDER

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

14.34 The *Peace and Good Behaviour Act 1982* (Qld) provides that it is an offence to contravene or to fail to comply with an order, including a condition or stipulation in the order, made under the Act. The maximum penalty for each contravention or failure to comply is currently \$7500 or imprisonment for one year.¹⁶²⁵

14.35 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.¹⁶²⁶

The *Domestic and Family Violence Protection Act 1989* (Qld)

14.36 Section 80 of the *Domestic and Family Violence Protection Act 1989* (Qld) deals with breach of a domestic violence order, including a registered interstate order, or a condition in an order. That section relevantly provides:

80 Breach of order or conditions

- (1) A respondent must not contravene a protection order,¹⁶²⁷ temporary protection order or any other order made under this Act, including a condition imposed by the order, if—
 - (a) the respondent was present in court when the order was made; or
 - (b) the respondent was served with a copy of the order; or
 - (c) a police officer told the respondent about the existence of the order.

¹⁶²⁵ *Peace and Good Behaviour Act 1982* (Qld) s 10; *Penalties and Sentences Act 1992* (Qld) s 5.

¹⁶²⁶ *Peace and Good Behaviour Act 1982* (Qld) s 11.

¹⁶²⁷ Note that s 44 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a registered interstate order has the same effect as, and may be enforced against a person as if it were, a protection order made under the Act.

Maximum penalty—

(a) if—

(i) the respondent has previously been convicted on at least 2 different occasions of an offence against this subsection; and

(ii) at least 2 of those offences were committed not earlier than 3 years before the present offence was committed;

2 years imprisonment; or

(b) otherwise—40 penalty units or 1 year's imprisonment.

(2) However, a court may not find a respondent contravened an order merely because a police officer told the respondent about the existence of the order, unless the court is satisfied the police officer told the respondent about the condition that it is alleged the respondent contravened.

(3) It is not a defence in proceedings for an offence involving an interstate order that a person did not know the interstate order—

(a) could be registered in Queensland; or

(b) was registered in Queensland.

... [note added]

The position in other jurisdictions

New South Wales

14.37 In New South Wales, it is an offence to knowingly contravene a prohibition or restriction in an apprehended violence order if the person was served with a copy of the order or was present in court when the order was made.¹⁶²⁸ 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.¹⁶²⁹ Where the court does not impose a term of imprisonment, it must give reasons for not doing so.¹⁶³⁰

¹⁶²⁸ *Crimes Act 1900* (NSW) s 562ZG(1)–(2). Section 562ZG of the *Crimes Act 1900* (NSW) is replicated in s 14 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1611 of this Report.

¹⁶²⁹ *Crimes Act 1900* (NSW) s 562ZG(1), (4), (5).

¹⁶³⁰ *Crimes Act 1900* (NSW) s 562ZG(6).

14.38 The New South Wales Law Reform Commission, in its review of the apprehended violence order legislation in New South Wales, has recommended against making provision in the legislation for an offence of aiding and abetting in relation to the person for whose benefit the order was made.¹⁶³¹

The Northern Territory

14.39 Under recent amendments to the *Justices Act* (NT) in the Northern Territory, a person commits an offence if a personal violence restraining order is in force against the person and the person engages in conduct that results in a contravention of the order, provided the person has been given a copy of the order or, for an order that has been varied, the person has been given a copy of the order as varied or the person's conduct also constitutes a contravention of the order last given to the person.¹⁶³² On conviction, a person is liable to a fine not exceeding \$44 000 or to imprisonment for a period not exceeding two years.¹⁶³³

South Australia

14.40 In South Australia, it is an offence to contravene or fail to comply with a restraining order.¹⁶³⁴ 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.¹⁶³⁵ The person must be brought before the court as soon as practicable.¹⁶³⁶

Tasmania

14.41 The Tasmanian legislation provides that a respondent who contravenes or fails to comply with an order commits an offence and is liable on conviction to a fine not exceeding \$1200 or to imprisonment for a period not exceeding six

1631 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [10.46] rec 45. The Commission considered, however, that there may be other circumstances when the offence is applicable in relation to persons other than the protected person. Recommendation 45 has been implemented by s 562ZG(8) of the *Crimes Act 1900* (NSW) and, subsequently, s 14(7) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (which was assented to on 7 December 2007 and will commence on a date to be proclaimed) which provide that a person is not guilty of an offence of aiding, abetting, counselling or procuring the commission of an offence of contravening an apprehended violence order if the person is a protected person under the order concerned.

1632 *Justices Act* (NT) s 92(1), (2), as amended by the *Domestic Violence Act* (NT). Section 92 of the *Justices Act* (NT) is a new provision introduced by amendments, made by the *Domestic and Family Violence Act* (NT), which introduce a scheme for the making of personal violence restraining orders. The *Domestic and Family Violence Act* (NT), which repeals and replaces pt IV div 7 of the *Justices Act* (NT), was assented to on 12 December 2007 and will commence on a date to be proclaimed.

1633 *Justices Act* (NT) s 92(1), as amended by the *Domestic and Family Violence Act* (NT); *Penalty Units Act* (NT) s 3(1).

1634 *Summary Procedure Act 1921* (SA) s 99l(1).

1635 *Summary Procedure Act 1921* (SA) s 99l(2).

1636 *Summary Procedure Act 1921* (SA) s 99l(3).

months.¹⁶³⁷ Provision is also made for the arrest without warrant and detention of a person suspected of committing such an offence.¹⁶³⁸

Victoria

14.42 In Victoria, 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.¹⁶³⁹

14.43 If a person against whom an intervention order has been made under the Victorian family violence legislation in relation to a complaint of stalking, 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 \$26 428 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.¹⁶⁴⁰

Western Australia

14.44 In Western Australia, breach of a restraining order is an offence.¹⁶⁴¹ 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.¹⁶⁴² The maximum penalty for breach of a misconduct restraining order is \$1000.¹⁶⁴³ It is taken to be an aggravating factor if, in committing an offence, a child with whom the offender is in a family or domestic relationship is exposed to an act of abuse.¹⁶⁴⁴

1637 *Justices Act 1959* (Tas) s 106(1); *Penalty Units and Other Penalties Act 1987* (Tas) s 4.

1638 *Justices Act 1959* (TAS) s 106(2).

1639 *Magistrates' Court Act 1989* (Vic) s 126A(4). Under that Act, the court may make an order binding a person to keep the peace or be of good behaviour.

1640 *Crimes (Family Violence) Act 1987* (Vic) s 22(1); *Crimes Act 1958* (Vic) s 21A(5); *Monetary Units Act 2004* (Vic) ss 5(2), 7; Victoria Government Gazette, 10 May 2007, 804. For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 1611 of this Report.

1641 *Restraining Orders Act 1997* (WA) s 61(1)–(2a).

1642 *Restraining Orders Act 1997* (WA) s 61(1), (2a); *Sentencing Act 1995* (WA) s 9(2).

1643 *Restraining Orders Act 1997* (WA) s 61(2); *Sentencing Act 1995* (WA) s 9(2).

1644 *Restraining Orders Act 1997* (WA) s 61(4). The term 'act of abuse' means an act of family and domestic violence or an act of personal violence and includes assault or causing personal injury, kidnapping, intimidation, and threats to commit such acts: *Restraining Orders Act 1997* (WA) ss 3 (definition of 'act of abuse'), s 6 (Meaning of 'act of family and domestic violence' and 'act of personal violence').

Submissions

14.45 In its Discussion Paper, the Commission sought submissions on whether a breach of a peace and good behaviour order should be an offence.¹⁶⁴⁵

14.46 The Commission also sought submissions on whether there should be a separate offence, attracting a more serious penalty, for breach of an order in aggravated circumstances.¹⁶⁴⁶

14.47 A number of submissions expressed the view that a breach of a peace and good behaviour order should constitute an offence under the *Peace and Good Behaviour Act 1982* (Qld).¹⁶⁴⁷

14.48 In the view of the Chief Magistrate of Queensland, the *Peace and Good Behaviour Act 1982* (Qld) should be amended to include a provision similar in effect to section 80 of the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁶⁴⁸ The Townsville Community Legal Service Inc expressed a similar view.¹⁶⁴⁹

14.49 A number of submissions received by the Commission also considered whether the *Peace and Good Behaviour Act 1982* (Qld) should make provision for a separate offence, which attracts a more serious penalty, for a breach of an order in aggravated circumstances.

14.50 Two community legal services supported the inclusion of such a provision in the Act.¹⁶⁵⁰ In contrast, another community legal service considered the existing penalty provision sufficient.¹⁶⁵¹

14.51 Caxton Legal Centre Inc and another submission expressed the view that a broad range of options should be utilised when sentencing an offender for a breach of an order made under the *Peace and Good Behaviour Act 1982* (Qld).¹⁶⁵² Caxton Legal Centre Inc considered this was particularly important in the case of persons with mental health problems or borderline intellectual impairments who could be disadvantaged under the criminal justice system.¹⁶⁵³

¹⁶⁴⁵ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 100 (Question 9-9).

¹⁶⁴⁶ Ibid (Question 9-10).

¹⁶⁴⁷ Submissions 5, 8, 12, 12C, 13, 14, 15.

¹⁶⁴⁸ Submissions 12, 12C.

¹⁶⁴⁹ Submission 14.

¹⁶⁵⁰ Submissions 8, 15.

¹⁶⁵¹ Submission 5.

¹⁶⁵² Submissions 1, 19.

¹⁶⁵³ Submission 19.

14.52 The Chief Magistrate of Queensland also considered that, because some applicants may encourage respondents to breach their order, the *Peace and Good Behaviour Act 1982* (Qld) should provide that it is an offence for an applicant to aid or abet the breach of an order made for his or her protection.¹⁶⁵⁴

The Commission's view

Liability for breach

14.53 In the Commission's view, the Personal Protection Bill 2007 should make it an offence to contravene a protection order made under the Bill.

14.54 The Commission considers that, similar to section 80(1) of the *Domestic and Family Violence Protection Act 1989* (Qld), it should be specified in the Personal Protection Bill 2007 that liability arises in relation to a charge of breach of an order in the following circumstances:

- the respondent was present in court when the order was made; or
- the respondent was served with a copy of the order; or
- a police officer told the respondent about the existence of the order.

14.55 The Commission also considers that, similar to section 80(2) of the *Domestic and Family Violence Protection Act 1989* (Qld), where a police officer has told the respondent about the existence of the order, the respondent must not be found liable for the breach unless the court is satisfied the police officer told the respondent about the condition the respondent is alleged to have contravened.

14.56 Given that the Commission has recommended that a court may vary or set aside a protection order with effect from the day the order was originally made,¹⁶⁵⁵ the Commission considers that the Personal Protection Bill 2007 should also provide that a person does not commit an offence by doing an act or making an omission that did not constitute an offence when the act was done or the omission was made.

14.57 The Commission has recommended elsewhere in this Report that the same principles in relation to enforceability should apply in respect of a corresponding order registered under the Personal Protection Bill 2007.¹⁶⁵⁶ The Commission has recommended that a registered corresponding order, which is to have effect as a protection order made under the Personal Protection Bill 2007, should be enforceable if the respondent was present in court when the order was made, the respondent was served with a copy of the registered order

¹⁶⁵⁴ Submission 12B.

¹⁶⁵⁵ See para 15.52 of this Report.

¹⁶⁵⁶ See para 17.50 of this Report.

or the respondent was told by a police officer about the order. If notice of the registration has been withheld, the order should be enforceable as if the respondent had been served with a copy of the order.¹⁶⁵⁷ This would ensure that a registered corresponding order is enforceable despite an order by the court that the respondent is not to be notified of the registration of the order. Because section 80(3) of the *Domestic and Family Violence Protection Act 1989* (Qld) is essentially declaratory, the Commission does not consider it necessary to include a similar provision in the Personal Protection Bill 2007.

14.58 The Commission also notes that in several other Australian jurisdictions, the court is required, when making an order, to explain the consequences of an order. In particular, in the ACT, the court is specifically required to explain to the respondent to a protection order that the order may be registered and enforced in another State, Territory or New Zealand without notice of the registration being given to the respondent.¹⁶⁵⁸ In Western Australia, the court must also explain that an order may be registered and enforced in another Australian jurisdiction.¹⁶⁵⁹

Penalty

14.59 The *Penalties and Sentences Act 1992* (Qld) empowers a court, when it sentences a person for an offence, to utilise a number of sentencing options including imprisonment, a fine, a fine option order, a community based order and an absolute or conditional release.¹⁶⁶⁰ This ensures that a court has sufficient flexibility when dealing an offender for a breach of an order to impose an appropriate sentence in the circumstances. For example, a court may make a probation order that requires the offender to take part in counselling and satisfactorily attend other programs¹⁶⁶¹ during the period of the order or to submit to medical, psychiatric or psychological treatment.¹⁶⁶²

14.60 The Queensland domestic violence legislation enables the court to impose a higher penalty in relation to a breach of a domestic violence order committed in circumstances of aggravation.¹⁶⁶³ The imposition of a tiered

¹⁶⁵⁷ Note that the Commission has recommended that when a corresponding order is registered in Queensland, a copy of the registered order must be served on the respondent, unless the Court otherwise orders. See para 17.46 of this Report.

¹⁶⁵⁸ *Domestic Violence and Protection Orders Act 2001* (ACT) s 24(2)(d).

¹⁶⁵⁹ *Restraining Orders Act 1997* (WA) s 8(1)(c).

¹⁶⁶⁰ *Penalties and Sentences Act 1992* (Qld) pts 3 (Releases, restitution and compensation), 4 (Fines), 5 (Intermediate orders), 6 (Intensive correction orders), 7 (Other provisions relating to community based orders), 8 (Orders of suspended imprisonment), 9 (Imprisonment). A 'community based order' means any community service order, intensive correction order or probation order: *Penalties and Sentences Act 1992* (Qld) s 4 (definition of 'community based order').

¹⁶⁶¹ *Penalties and Sentences Act 1992* (Qld) ss 91, 93(1)(d).

¹⁶⁶² *Penalties and Sentences Act 1992* (Qld) ss 91, 94(1)(a).

¹⁶⁶³ *Domestic and Family Violence Protection Act 1989* (Qld) s 80(1). See para 14.36 of this Report.

penalty system reflects the complex nature of domestic violence disputes which generally involve cyclical patterns of violence.

14.61 Given that the proposed Personal Protection Bill 2007 does not apply to persons in domestic relationships, the Commission considers that the Bill should not provide for a separate offence, which attracts a more serious penalty, for a breach of a protection order in circumstances of aggravation. Where a breach of an order involves serious criminal behaviour, the criminal law provides an appropriate remedy for dealing with that conduct.

14.62 The Commission considers that the maximum penalty for a breach of a protection order should be set at a similar level to the penalty imposed under section 80(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) for a breach of a domestic violence order that does not involve a circumstance of aggravation.

The power to make a further order

14.63 In the Commission's view, the Personal Protection Bill 2007 should provide that, if a court finds a person guilty of an offence of breach of a protection order, the court may, in addition to any penalty the court may impose for the offence, vary the existing protection order in the way the court considers appropriate or make another protection order against the person. This would enable a court to make appropriate changes to ensure the future safety of a person protected by an order.

Aiding and abetting a breach

14.64 The Commission also concurs with the Chief Magistrate's view that an offence for aiding and abetting the respondent's breach of a protection order should be available where appropriate. Circumstances may arise where a respondent breaches an order as a consequence of being deliberately encouraged or assisted to do so by another person, such as a friend or an associate or by a person protected by the order.¹⁶⁶⁴ The Commission notes that section 7 of the *Criminal Code* (Qld), which extends criminal responsibility to a person who is a party to an offence, will ordinarily apply.¹⁶⁶⁵ It is not necessary therefore to include a specific offence provision for aiding and

¹⁶⁶⁴ Liability for aiding a person to commit an offence will arise if the person knew of the essential matters of the principal offence and intended to assist or encourage the commission of the offence: *Giorgianni v The Queen* (1985) 156 CLR 473, 487–8 (Gibbs CJ), 494 (Mason J), 500, 506–7 (Wilson, Deane and Dawson JJ). A person may aid the commission of an offence, for example, by intentionally encouraging its commission by the person's words or by the person's presence and behaviour: *R v Sherrington* [2001] QCA 105, [12] (McPherson JA); *R v Lowery (No 2)* [1972] VR 560, 561 (Smith J).

¹⁶⁶⁵ Section 7 of the *Criminal Code* (Qld) is generally consistent with the common law and applies to all offences against the statute law of Queensland, including simple offences: see *Osland v The Queen* (1998) 197 CLR 316, [70]–[71] (McHugh J); *Renwick v Bell* [2002] 2 Qd R 326. Section 7 deems guilty of an offence a person who actually does the punishable act, and a person who does an act that aids another to do the punishable act, or who aids, or counsels or procures, another to do the punishable act: *Criminal Code* (Qld) s 7(1). Section 7(1) also encompasses an omission to do an act. In the case of counselling or procuring an offence, the person charged may be charged either with committing the offence or with counselling or procuring its commission: *Criminal Code* (Qld) s 7(2).

abetting, or counselling or procuring, in the Personal Protection Bill 2007. The Commission also notes that prosecutorial discretion will be exercised in each case given that, particularly where the person who encouraged the respondent's breach is the person protected by the order, it may not always be appropriate for an aiding and abetting offence to be charged.¹⁶⁶⁶

DEFENCES TO A BREACH OF AN ORDER

Consent as a defence to breach

14.65 The issue of consent as a defence to a breach of an order made under civil restraining order legislation has been considered in separate reviews by the New South Wales Law Reform Commission and the former Western Australian Department of Justice. Each of those bodies generally considered it undesirable to provide consent as a defence to a breach of a condition in a restraining order. It was perceived that making the defence available could undermine the status of a restraining order as a court order by enabling the parties to vary their arrangement at will.¹⁶⁶⁷ It was also considered that the appropriate avenue for changing some aspect of the order is to make an application for variation or revocation of the order.¹⁶⁶⁸

14.66 The Western Australian legislation was amended in 2004 to remove consent as a defence to the breach of a restraining order.¹⁶⁶⁹

Other defences

14.67 The Western Australian legislation was amended in 2004 to provide a number of new defences to a charge of breaching a restraining order.¹⁶⁷⁰

¹⁶⁶⁶ Note also that there is some authority for construing an offence provision to exclude the operation of aiding and abetting provisions, like s 7 of the *Criminal Code* (Qld), to a person of a class for whose protection the offence provision is designed, for example, a sexual offence victim: *Giorgianni v The Queen* (1985) 156 CLR 473, 491 (Mason J), citing *Mallan v Lee* (1949) 80 CLR 198, 216 (Dixon J); *R v Tyrrell* [1894] 1 QB 710; and *R v Whitehouse* [1977] 1 QB 868. Also see *R v Maroney* [2002] 1 Qd R 285, [6] (Davies JA).

¹⁶⁶⁷ New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [10.45]; Western Australian Department of Justice, *Report on a Review of Legislation Relating to Domestic Violence*, Final Report (June 2004) 31. Also see The Domestic Violence Legislation Working Group, *Model Domestic Violence Laws*, Report (April 1999) 215.

¹⁶⁶⁸ New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [10.45]; Western Australian Department of Justice, *Report on a Review of Legislation Relating to Domestic Violence*, Final Report (June 2004) 31.

¹⁶⁶⁹ *Acts Amendment (Family and Domestic Violence) Act 2004* (WA) s 42. The former Western Australian Department of Justice recommended that consent be removed as a defence to the offence of breach under the *Restraining Orders Act 1997* (WA): Western Australian Department of Justice, *Report on a Review of Legislation Relating to Domestic Violence*, Final Report (June 2004) 31.

¹⁶⁷⁰ *Acts Amendment (Family and Domestic Violence) Act 2004* (WA) s 42. The former Western Australian Department of Justice recommended the inclusion of these various defences in the *Restraining Orders Act 1997* (WA): Western Australian Department of Justice, *Report on a Review of Legislation Relating to Domestic Violence*, Final Report (June 2004) 31.

14.68 The circumstances specified in section 62 of the *Restraining Orders Act 1997* (WA) as a defence include that, in carrying out the act that constituted the offence, the person was:¹⁶⁷¹

- using a process of family dispute resolution; or
- acting as a result of such an emergency that an ordinary person in similar circumstances would have acted in the same way.

The Commission's view

14.69 Later in this chapter, the Commission has recommended that the prosecution of an offence under the Personal Protection Bill 2007 be taken in a summary way under the *Justices Act 1886* (Qld).¹⁶⁷² One of the consequences of prosecuting a breach of a protection order in a summary way under the *Justices Act 1886* (Qld) is that the defences available under the *Criminal Code* (Qld) apply to a person charged with the offence so that he or she is not liable to punishment for the offence.¹⁶⁷³ These defences include, for example, the defence of an act or omission that occurs independently of the exercise of the person's will or an event that occurs by accident, the defence of mistake of fact and the defence of emergency.¹⁶⁷⁴ The Commission therefore considers it unnecessary to make specific provision for the *Criminal Code* (Qld) defences in the Personal Protection Bill 2007.

14.70 The Commission is also concerned that, if particular circumstances that may absolve the respondent to a protection order from liability for breach are specified in the Personal Protection Bill 2007, some respondents could be encouraged to misrepresent behaviour that contravenes an order in the guise of a particular defence. In particular, the Commission has considered whether, following the making of a protection order that includes a contact prohibition, contact between the parties for the purpose of facilitating and/or engaging in mediation may constitute a circumstance in which a defence applies to a charge of a breach of an order. It is possible that a defence based on the use of a dispute resolution method such as mediation, may be used by one party as a means of further harassing the other. The Commission does not wish to undermine the importance of genuine attempts by the parties to mediate their dispute but considers that, in these circumstances, the parties may apply to vary an order by consent to allow contact for the purposes of attempting mediation.

¹⁶⁷¹ *Restraining Orders Act 1997* (WA) s 62. The other defences specified in s 62 are that in carrying out the act, the person was instructing or acting through a legal practitioner or acting in accordance with an action taken by a person or authority under a child welfare law.

¹⁶⁷² See para 14.74 of this Report.

¹⁶⁷³ *Criminal Code* (Qld) ch 5 (Criminal responsibility). The provisions of ch 5 apply to all persons charged with any criminal offence against the statute law of Queensland: *Criminal Code* (Qld) s 36. Criminal offences comprise crimes, misdemeanours and simple offences: *Criminal Code* (Qld) s 3(2).

¹⁶⁷⁴ See, for example, *Criminal Code* (Qld) ss 23, 24, 25.

PROSECUTION OF OFFENCES

14.71 One of the critical factors that determines the effectiveness of the peace and good behaviour legislation in protecting persons from violence is the prosecution of breaches.

The Peace and Good Behaviour Act 1982 (Qld)

14.72 Section 12 of the *Peace and Good Behaviour Act 1982* (Qld) specifies that proceedings for an offence of breach of a peace and good behaviour order may be taken in a summary way under the *Justices Act 1886* (Qld).

The Domestic and Family Violence Protection Act 1989 (Qld)

14.73 Consistent with the position under the *Peace and Good Behaviour Act 1982* (Qld), section 83(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) specifies that a prosecution for an offence against the Act shall be taken in a summary manner under the *Justices Act 1886* (Qld).

The Commission's view

14.74 The Commission considers that the Personal Protection Bill 2007 should specify that a proceeding for an offence against the Bill must be taken in a summary way under the *Justices Act 1886* (Qld).

THE ROLE OF THE POLICE IN ENFORCEMENT OF ORDERS

14.75 There is no provision in the *Peace and Good Behaviour Act 1982* (Qld) that confers specific powers on police officers in relation to suspected or alleged breaches of peace and good behaviour orders.

14.76 However, 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), proceedings under the *Police Powers and Responsibilities Act 2000* (Qld) (including arrest without warrant) or, in the case of a child, proceedings under the *Juvenile Justice Act 1992* (Qld). The Manual states:¹⁶⁷⁵

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.

14.77 However, information provided to the Commission by the Queensland Police Service suggests that, although quantitative data are not available, the

¹⁶⁷⁵

Queensland Police Service, *Operational Procedures Manual* [13.4.1].

frequency of prosecution proceedings commenced by the Queensland Police Service for offences under the *Peace and Good Behaviour Act 1982* (Qld) is very low.¹⁶⁷⁶

14.78 This information is consistent with other anecdotal material provided to the Commission.¹⁶⁷⁷ Legal Aid Queensland noted:¹⁶⁷⁸

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 themselves 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.

The *Domestic and Family Violence Protection Act 1989* (Qld)

14.79 Section 83(2) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a complaint for an offence against the Act shall be laid by a police officer.¹⁶⁷⁹

The position in other jurisdictions

14.80 In New South Wales, South Australia and Tasmania, the civil restraining order legislation confers specific powers on police officers in relation to suspected or alleged breaches of orders. These powers include arrest without warrant and detention.

14.81 In New South Wales, a person believed on reasonable grounds by a police officer to have committed an offence under an Act may be arrested without warrant before being brought as soon as practicable before an authorised officer to be dealt with for the offence.¹⁶⁸⁰ If a police officer decides

¹⁶⁷⁶ Information provided by the Acting Commissioner, Queensland Police Service, 6 September 2004.

¹⁶⁷⁷ Information provided by the Chief Magistrate of Queensland, Judge MP Irwin, 25 August 2004 and by Caxton Legal Centre Inc, 23 August 2004; Submission 5.

¹⁶⁷⁸ Information provided by Legal Aid Queensland, 8 September 2004; Submission 13.

¹⁶⁷⁹ Section 83(2) of the *Domestic and Family Violence Protection Act 1989* (Qld) further specifies that, in the case of an offence defined in s 82 (Restriction on publication of proceedings) of the Act, the Minister's consent must be obtained before a complaint can be laid.

¹⁶⁸⁰ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99.

not to initiate or proceed with criminal proceedings in respect of a reasonably suspected contravention of an apprehended violence order, the police officer must make a written record of the reasons for the decision.¹⁶⁸¹ Similarly, 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, the officer must make a written record of the reasons for the decision.¹⁶⁸²

14.82 In South Australia, 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.¹⁶⁸³ The person must be brought before the court as soon as practicable to be dealt with for the offence.¹⁶⁸⁴

14.83 The Tasmanian legislation specifies that, 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. For the purpose of arresting and detaining such a person, the police officer may enter, by force if necessary, any premises on which the police officer has reasonable cause to believe the person is present and search those premises for the person.¹⁶⁸⁵

Submissions

14.84 In its Discussion Paper, the Commission sought submissions on whether the *Peace and Good Behaviour Act 1982* (Qld) should provide for enforcement of orders made under the Act by police.¹⁶⁸⁶

14.85 The majority of submissions received by the Commission in relation to this issue considered that the *Peace and Good Behaviour Act 1982* (Qld) should contain specific provisions relating to the obligations and powers of police officers in enforcing orders made under the Act.¹⁶⁸⁷

14.86 The Chief Magistrate of Queensland considered that the *Peace and Good Behaviour Act 1982* (Qld) should be amended to include a provision similar in effect to section 83 of the *Domestic and Family Violence Protection*

¹⁶⁸¹ *Crimes Act 1900* (NSW) s 562ZG(7). This provision is replicated in s 14(8) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1611 of this Report.

¹⁶⁸² *Crimes Act 1900* (NSW) s 562ZG(7).

¹⁶⁸³ *Summary Procedure Act 1921* (SA) s 99I(2).

¹⁶⁸⁴ *Summary Procedure Act 1921* (SA) s 99I(3).

¹⁶⁸⁵ *Justices Act 1959* (Tas) s 106I(2).

¹⁶⁸⁶ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 100 (Question 9-4).

¹⁶⁸⁷ Submissions 5, 8, 12, 12C, 13, 14, 15, 19, 20, 22, 23, 25, 28.

Act 1989 (Qld) to enable a police officer to lay a complaint for the offence of breach of an order. The Chief Magistrate observed that:¹⁶⁸⁸

This will ensure that the police will prosecute the offences with the same consequences as prosecuting the application for the order.

14.87 Queensland Legal Aid noted that there are difficulties in the enforcement of peace and good behaviour orders because the individual has responsibility for enforcing the orders:¹⁶⁸⁹

Breach of a Peace and Good Behaviour Order must be one of very few examples where an individual (as opposed to an organisation, company or government department or agency) is left with the responsibility of taking legal proceedings to have a perpetrator held accountable for an offence against them. This makes Peace and Good Behaviour Orders useless in many instances.

14.88 A submission from the Townsville Community Legal Service Inc stated:¹⁶⁹⁰

We consider that one of the most frequently heard complaints regarding the Act is the perception by the community that the police won't follow up a breach of the Act. ... the Act is one of the few left (in any jurisdiction) where an individual is left to take their own legal action for a breach of the order.

14.89 The South West Brisbane Community Legal Centre Inc noted that:¹⁶⁹¹

Clients have reported to us that they have had no success in having police prosecute breaches and one of our clients reports being told by police that if the client did not stop ringing them reporting continued breaches that they would prosecute the client for being a nuisance. The issue was taken up by a senior police officer on complaint and an indication by our client that the matter would be referred to the CMC. The client (whom we had assisted in obtaining an order) was in an extremely vulnerable position and was caring for an extremely ill spouse. We submit that the obligation is required in the Act, not in a manual.

14.90 Caxton Legal Centre Inc has observed:¹⁶⁹²

We do not consider that individual complainants are appropriately equipped to prosecute a breach of an order made under the Act. It would be desirable for the QPS to be in charge of prosecutions, especially given that breaches are treated as criminal acts. Given the resources of the QPS and its internal networking and communications, it would be more efficient for orders made under the Act to be able to be registered with QPS so that the Police could immediately act upon a complaint, knowing exactly the terms of the order.

¹⁶⁸⁸ Submission 12C.

¹⁶⁸⁹ Submission 13.

¹⁶⁹⁰ Submission 14.

¹⁶⁹¹ Submission 15.

¹⁶⁹² Submission 19.

They could investigate breach complaints and make any prosecution deemed appropriate.

14.91 Submissions from the Citizens Advice Bureau and Gold Coast Legal Service and two individuals also commented on the difficulty of enforcement of peace and good behaviour orders in the absence of police involvement.¹⁶⁹³

14.92 Queensland Advocacy Inc commented that if a breach is not followed up because the aggrieved is not equipped to enforce the order, it is an invitation to the respondent to continue to breach the order.¹⁶⁹⁴

14.93 Three submissions raised the issue of potential resource implications for the Queensland Police Service in carrying out an increased role in the enforcement of peace and good behaviour orders, particularly in light of the existing role of police under the Queensland domestic violence legislation.¹⁶⁹⁵ For example, the Women's Legal Service expressed the view that:¹⁶⁹⁶

The difficulty in mandating a police role in enforcement is that there are insufficient police resources to handle the current demands of the [Domestic and Family Violence Protection Act 1989 (Qld)] without adding to those responsibilities under other legislation.

14.94 On the other hand, the Queensland Police Service has informed the Commission that, in light of the inclusion in the Operational Procedures Manual of a policy on police enforcement of breaches of peace and good behaviour orders, it considers that the *Peace and Good Behaviour Act 1982* (Qld) contains adequate enforcement mechanisms.¹⁶⁹⁷

14.95 The Queensland Police Service has also informed the Commission that considering the level of involvement of police officers in the enforcement of the domestic violence legislation, it does not support any increased involvement of officers in the enforcement of the *Peace and Good Behaviour Act 1982* (Qld).¹⁶⁹⁸ It therefore considered that the *Peace and Good Behaviour Act 1982* (Qld) should not include specific provisions in relation to the obligations of police officers in enforcing peace and good behaviour order.¹⁶⁹⁹

¹⁶⁹³ Submissions 1, 5, 31.

¹⁶⁹⁴ Submission 20.

¹⁶⁹⁵ Submissions 5, 8, 26.

¹⁶⁹⁶ Submission 8.

¹⁶⁹⁷ Submission 21.

¹⁶⁹⁸ Information provided by the Acting Commissioner, Queensland Police Service, 6 September 2004.

¹⁶⁹⁹ Submission 21.

The Commission's view

14.96 The Commission concurs with the view expressed in many of the submissions received by the Commission that the *Peace and Good Behaviour Act 1982* (Qld) does not provide an adequate mechanism for prosecuting a breach of an order.

14.97 The Commission considers that, in order to facilitate the prosecution of offences for the breach of a protection order, the Personal Protection Bill 2007 should provide that a proceeding for an offence against the Bill must be started by a police officer.¹⁷⁰⁰

14.98 The Commission acknowledges that making police responsible for laying complaints would likely have resource implications for the Queensland Police Service, members of which already have substantial responsibilities in relation to policing domestic violence orders. Nonetheless, the Commission considers it necessary for police to assume an active role in the enforcement of protection orders in order to ensure the effectiveness of the protective mechanism provided under the proposed Personal Protection Bill 2007. This prosecutorial role is consistent with the existing role of police in the enforcement of the criminal law.

14.99 One of the benefits of making police responsible for the enforcement of protection orders is that the prosecution of a breach does not depend on the ability of a person protected by an order to prosecute the breach himself or herself. Another benefit is that the involvement of police in the enforcement of protection orders is likely to give members of the community confidence in the effectiveness of such orders. As noted earlier in this Report, the Queensland Police Service also has an important role in community policing and crime prevention. Police involvement in the enforcement of orders made under the Bill is consistent with that role, particularly given the significance of protection orders in preventing disputes from escalating into violent crime.

14.100 In light of the Commission's recommendation that the police be given responsibility for starting proceedings for breach of a protection order, the Commission further recommends that consideration be given by the Commissioner of Police to revising the procedures contained in the Operational Procedures Manual in relation to the role of police in enforcing a breach of a protection order if the Personal Protection Bill 2007 is implemented.

1700

Note that s 382 of the *Police Powers and Responsibilities Act 2000* (Qld) enables a police officer to issue a notice to appear for an offence instead of issuing a complaint and summons under the *Justices Act 1886* (Qld). Section 382(2) of the Act provides that if a police officer reasonably suspects that a person has committed or is committing an offence, the police officer may issue and serve a notice (notice to appear) on the person. Section 388(1), (2) of that Act further provides that a notice to appear is taken to be a complaint and summons under the *Justices Act 1886* (Qld).

14.101 In the Commission's view, it is appropriate for a police officer to use his or her discretion to decide, based on various considerations,¹⁷⁰¹ whether to start a proceeding for an offence of breach of an order. Consequently, the Commission does not consider that the Personal Protection Bill 2007 should include specific provisions relating to the obligation of a police officer to act in the enforcement of an order in particular circumstances.¹⁷⁰²

14.102 Nonetheless, the Commission further considers that the role of police in the enforcement of protection orders should be reviewed in five years from the date of implementation of the proposed Personal Protection Bill 2007 in order to gauge the effectiveness and efficiency of police in enforcing orders. If it is apparent that the role or function of the police in enforcing orders is ineffective or inefficient, then consideration should be given to addressing those deficiencies through appropriate mechanisms, including the amendment of the Personal Protection Bill 2007 to impose specific duties and obligations on police officers in relation to the enforcement of orders.

14.103 The Commission also considers it appropriate for police to exercise prosecutorial discretion in relation to offences for contravention of a non-publication order made under the Bill.¹⁷⁰³ The Commission therefore does not consider it necessary to include a special requirement for Ministerial consent for publication offences as is provided by the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁷⁰⁴

RECOMMENDATIONS

14.104 The Commission makes the following recommendations:

¹⁷⁰¹ See generally the considerations outlined in the General Prosecution Policy set out in the Queensland Police Service, *Operational Procedures Manual* [3.4].

¹⁷⁰² Note that the *Police Powers and Responsibilities Act 2000* (Qld) consolidates the powers and responsibilities police officers have for investigating offences and law enforcement. The *Police Service Administration Act 1990* (Qld) and the *Crime and Misconduct Act 2001* (Qld) also contain provisions relating to allegations of police misconduct.

¹⁷⁰³ Note that elsewhere in this Report, the Commission has recommended that the court be empowered to make a non-publication order in relation to information about a proceeding under the Personal Protection Bill 2007 and that contravention of a non-publication order is an offence: see para 18.46, 18.64, 18.75 of this Report.

¹⁷⁰⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 83(2). See note 1679 of this Report.

Explaining the order

- 14-1 The Personal Protection Bill 2007 should provide that, if an aggrieved person or a respondent is present in court when a protection order is being made, and it is practicable to do so, the court must explain the following matters about the order to the person when making the protection order:¹⁷⁰⁵
- (a) the purposes and terms of the order;
 - (b) the effect of any condition of the order about possession of a weapon;
 - (c) the consequences of contravening the order;
 - (d) that an aggrieved person or a respondent may apply to the court for the variation or setting aside of the order; and
 - (e) that the order may be registered in another State or New Zealand without further notice to the respondent.

See Personal Protection Bill 2007 cl 55(1), (2).

- 14-2 The Personal Protection Bill 2007 should provide that, if another person (other than a police officer) has applied for the protection order for an aggrieved person, the court, if it considers it appropriate, may give the explanation to the applicant instead of the aggrieved person for whom the application was made.¹⁷⁰⁶

See Personal Protection Bill 2007 cl 55(5).

- 14-3 The Personal Protection Bill 2007 should provide that the explanation must be given in English or in a language in which the person is fluent, and in a way that ensures, as far as practicable, the person understands the explanation.¹⁷⁰⁷

See Personal Protection Bill 2007 cl 55(3).

¹⁷⁰⁵ See para 14.23, 14.26 of this Report.

¹⁷⁰⁶ See para 14.24 of this Report.

¹⁷⁰⁷ See para 14.27 of this Report.

14-4 The Personal Protection Bill 2007 should specify that if a person to whom the court is required to explain the order is not present in court when the order is being made, or it is not practicable for the court to give the explanation at the time the order is made, the registrar must ensure a written statement explaining the matters the court is to explain is given to the person as soon as practicable.¹⁷⁰⁸

See Personal Protection Bill 2007 cl 55(4).

14-5 The Personal Protection Bill 2007 should specify that failure to comply with the provisions about explaining the order does not invalidate or otherwise affect the protection order.¹⁷⁰⁹

See Personal Protection Bill 2007 cl 55(6).

Breach of an order

14-6 The Personal Protection Bill 2007 should make it an offence to contravene a protection order made under the Bill.¹⁷¹⁰

See Personal Protection Bill 2007 cl 115(1).

14-7 The Personal Protection Bill 2007 should provide that liability arises in relation to a charge of breach of a protection order made under the Bill in the following circumstances:¹⁷¹¹

- (a) the respondent was present in court when the order was made; or
- (b) the respondent was served with a copy of the order; or
- (c) a police officer told the respondent about the existence of the order.

See Personal Protection Bill 2007 cl 115(1).

¹⁷⁰⁸ See para 14.28 of this Report.

¹⁷⁰⁹ See para 14.33 of this Report.

¹⁷¹⁰ See para 14.53 of this Report.

¹⁷¹¹ See para 14.54 of this Report.

14-8 The Personal Protection Bill 2007 should provide that, where a police officer has told the respondent about the existence of the protection order, the respondent must not be found liable for the breach unless the court is satisfied the police officer told the respondent about the condition the respondent is alleged to have contravened.¹⁷¹²

See Personal Protection Bill 2007 cl 115(2).

14-9 The Personal Protection Bill 2007 should provide that a person does not commit an offence by doing an act or making an omission that was not an offence when the act was done or the omission was made.¹⁷¹³

See Personal Protection Bill 2007 cl 115(3).

14-10 The maximum penalty for a breach of a protection order made under the Bill should be set at a similar level to the penalty imposed under section 80(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) for a breach of a domestic violence order that does not involve a circumstance of aggravation.¹⁷¹⁴

See Personal Protection Bill 2007 cl 115(1).

14-11 The Personal Protection Bill 2007 should provide that, if a court finds a person guilty of an offence of breach of a protection order, the court may, in addition to any penalty the court may impose for the offence, vary the existing protection order in the way the court considers appropriate or make another protection order against the person.¹⁷¹⁵

See Personal Protection Bill 2007 cl 115(4).

Prosecution of offences

14-12 The Personal Protection Bill 2007 should provide that a proceeding for an offence against the Bill must be taken in a summary way under the *Justices Act 1886* (Qld).¹⁷¹⁶

¹⁷¹² See para 14.55 of this Report.

¹⁷¹³ See para 14.56 of this Report.

¹⁷¹⁴ See para 14.62 of this Report.

¹⁷¹⁵ See para 14.63 of this Report.

¹⁷¹⁶ See para 14.74 of this Report.

See Personal Protection Bill 2007 cl 117(b).

The role of the police in enforcement of orders

14-13 The Personal Protection Bill 2007 should specify that a proceeding for an offence against the Bill must be started by a police officer.¹⁷¹⁷

See Personal Protection Bill 2007 cl 117(a).

14-14 Consideration should be given by the Commissioner of Police to revising the procedures contained in the Operational Procedures Manual in relation to the role of police in enforcing a breach of a protection order made under the Personal Protection Bill 2007 if the Bill is implemented.¹⁷¹⁸

14-15 The role of police in the enforcement of protection orders should be reviewed in five years from the date of implementation of the Personal Protection Bill 2007 in order to gauge the effectiveness and efficiency of police in enforcing orders. If it is apparent that the role or function of the police in enforcing orders is ineffective or inefficient, then consideration should be given to addressing those deficiencies through appropriate mechanisms, including the amendment of the Personal Protection Bill 2007 to impose specific duties and obligations on police officers in relation to the enforcement of orders.¹⁷¹⁹

¹⁷¹⁷ See para 14.97 of this Report.

¹⁷¹⁸ See para 14.100 of this Report.

¹⁷¹⁹ See para 14.102 of this Report.

Chapter 15

Varying and setting aside protection orders

INTRODUCTION	408
POWER TO VARY AND SET ASIDE	408
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	409
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	409
The position in other jurisdictions	412
Issues for consideration	415
Submissions	415
The Commission's view	416
WHO MAY APPLY TO VARY OR SET ASIDE AN EXISTING ORDER	419
<i>Domestic and Family Violence Protection Act 1989</i> (Qld)	419
The position in other jurisdictions	420
The Commission's view	421
PROCEDURAL PROVISIONS FOR VARIATION AND SETTING ASIDE	422
<i>Domestic and Family Violence Protection Act 1989</i> (Qld)	422
The Commission's view	423
RECOMMENDATIONS	423

INTRODUCTION

15.1 As part of its review of the *Peace and Good Behaviour Act 1982* (Qld), the Commission is required by its terms of reference to consider whether the Act provides an ‘effective’ mechanism for the protection of the community from breaches of the peace.¹⁷²⁰

15.2 The Act provides for the court to make a peace and good behaviour order for the protection of a complainant. The question of whether this mechanism is effective raises a number of issues for consideration, including whether the Personal Protection Bill 2007 should empower the court to vary or set aside protection orders. This chapter considers the court’s power to vary or set aside protection orders, who may apply to vary or set aside an order and the procedures on an application for varying and setting aside an order.

POWER TO VARY AND SET ASIDE

15.3 Once a protection order has been made, there may be circumstances in which one or more parties to the proceeding wish to amend or bring an end to a protection order.

15.4 First, since the existing order was made, there may have been a material change in circumstances or there may be some other matter that has arisen in relation to the operation of the order that warrants a change to the order. If there has been a material change in the circumstances since the existing order was made, it may be appropriate to accommodate those changes by varying or setting aside the order. For example, a respondent for a personal protection order made in relation to a neighbourhood dispute may seek to have the order varied or set aside if the parties to the dispute resolve some or all of the issues underlying the dispute or if one of the parties moves away. Additionally, if some other matter in relation to the operation or effectiveness of the order has come to light since the existing order was made, for example, where the existing order does not adequately protect a person protected by the order or where the respondent cannot reasonably comply with the conditions imposed in the order, it may also be appropriate to vary or set aside the order accordingly.

15.5 Second, a party may wish to challenge the order, or an aspect of it, on the basis that it was erroneous or wrongly made. That is a matter generally to be addressed by a right of appeal. The Commission has made recommendations elsewhere in this Report about the right of appeal against decisions under the Personal Protection Bill 2007, including the conferral on the appeal court of broad powers to vary or set aside the order.¹⁷²¹

¹⁷²⁰ The terms of reference are set out in Appendix 1 of this Report.

¹⁷²¹ See para 16.40, 16.43 of this Report.

15.6 Third, there may be circumstances where a party may wish to challenge an order, or an aspect of it, on the basis of an error in the order or in its making that is sufficiently manifest to warrant being dealt with by the court of first instance, rather than on appeal. This might arise where there was an error of fact or misdescription in the form of the order, where there was a fraud or deception that vitiated the decision-making process, or where there was some demonstrable unfairness in making the order associated with a failure by the respondent to appear. In order to respond to such circumstances, it may be appropriate to empower the court that made the order to vary or set aside the order accordingly. This might include, for example, setting aside the order from the beginning as if it had never been made.

15.7 This section of the chapter considers the court's power to vary or set aside a protection order. Later sections of the chapter then consider who may apply to have a protection order varied or set aside and the procedural provisions for such applications.

The Peace and Good Behaviour Act 1982 (Qld)

15.8 The *Peace and Good Behaviour Act 1982* (Qld) makes no specific provision for the variation or setting aside of a peace and good behaviour order.

15.9 However, section 8 of the Act incorporates relevant provisions of the *Justices Act 1886* (Qld) which include limited powers to vary and set aside orders in particular circumstances.¹⁷²²

15.10 Additionally, section 11 of the *Peace and Good Behaviour Act 1982* (Qld) gives the court a limited power to make a further order on the conviction of a person for a breach of a peace and good behaviour order.¹⁷²³

The Domestic and Family Violence Protection Act 1989 (Qld)

15.11 Section 17A of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that if circumstances change after a domestic violence order is

¹⁷²² Section 8 of the *Peace and Good Behaviour Act 1982* (Qld) provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications. Section 147A of the *Justices Act 1886* (Qld) provides for an order based on or containing an error of fact to be vacated or varied in the case of proceedings for simple offences and breaches of duty. Section 147A(3) specifies that the circumstances in which an order may be vacated or varied under section 147A include where the order was recorded or made against the wrong person or where the order was incorrectly ordered or made because of someone's deceit. Section 142(6)–(7) of the *Justices Act 1886* (Qld) also provides, in the case of proceedings for simple offences and breaches of duty, for an order made on the defendant's failure to appear to be set aside and the matter the subject of the complaint to be reheard.

¹⁷²³ See para 14.34–14.35 of this Report in relation to the consequences of breaching an order. The same provisions of law and procedures applicable for making an original peace and good behaviour order also apply to the making of a further order following conviction for breach of the original order: *Peace and Good Behaviour Act 1982* (Qld) s 11.

made, a person may apply for a ‘variation’ or ‘revocation’ of the order.¹⁷²⁴ The *Domestic and Family Violence Protection Act 1989* (Qld) empowers the court to ‘vary’ or ‘revoke’ a domestic violence order. These powers are dealt with in separate provisions under the Act as outlined below.

15.12 The *Domestic and Family Violence Protection Act 1989* (Qld) does not contain any specific provision allowing the court to set aside, or ‘revoke’, a domestic violence order with effect from the beginning, as if the order had never been made, or empowering the court to set aside or vary an order in the case of a mistake of fact or fraud. However, section 38(2) of the Act may incorporate relevant provisions of the *Justices Act 1886* (Qld), which include limited powers to vary and set aside orders in particular circumstances.¹⁷²⁵

Variation of orders

15.13 Section 35 of the *Domestic and Family Violence Protection Act 1989* (Qld) empowers the court to vary a domestic violence order, the discretionary conditions imposed by an order and the duration of an order.¹⁷²⁶

15.14 The court may vary a domestic violence order on an application to vary or revoke the order, on its own initiative (when it deals with a person who pleads, or is found guilty of, an offence that involves domestic violence)¹⁷²⁷ or when dealing with a contravention of the order.¹⁷²⁸ The application, however, must be made while the order is in force.¹⁷²⁹

1724 When the Domestic Violence (Family Protection) Amendment Bill 1992 (Qld) was introduced into the Queensland Parliament, the Hon Anne Warner MP, Minister for Family Services and Aboriginal and Islander Affairs, in the second reading of the Bill, explained that the Bill included a new Part 1A (enacted as Part 2) called ‘Understanding Domestic Violence Under This Act’ which ‘sets out clearly the purpose of the Act and how people may obtain protection under it’ and sought to ‘clarify the powers of the court to vary or revoke domestic violence orders’: Queensland, *Parliamentary Debates*, Legislative Assembly, 18 June 1992, 5934. Part 2 of the Act was subsequently amended by the *Domestic Violence (Family Protection) Amendment Act 1999* (Qld) s 8, to include s 17A (What happens if circumstances change after domestic violence order is made?).

1725 See note 1722 of this Report in relation to sections 142 and 147A of the *Justices Act 1886* (Qld). Section 38(2)(a), (b)(i) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that for proceedings under that Act, the provisions of the *Justices Act 1886* (Qld) will apply unless the application of that Act is inconsistent with the *Domestic and Family Violence Protection Act 1989* (Qld). Section 147A may apply to proceedings under the *Domestic and Family Violence Protection Act 1989* (Qld) since there are no specific provisions in that Act allowing the court to vacate an order which was recorded or made against the wrong person or was incorrectly ordered or made because of someone’s deceit. Section 142(6)–(7) may apply to proceedings under the *Domestic and Family Violence Protection Act 1989* (Qld) since there are no specific provisions in that Act allowing the court to reheat an application for a domestic violence order that was made on the respondent’s failure to appear.

1726 *Domestic and Family Violence Protection Act 1989* (Qld) s 35(1). Section 51 of the *Domestic and Family Violence Protection Act 1989* (Qld) sets out the procedural requirements for making an application for variation.

1727 See *Domestic and Family Violence Protection Act 1989* (Qld) s 30 (Power of court if person pleads or is found guilty of related offences).

1728 *Domestic and Family Violence Protection Act 1989* (Qld) s 35(3).

1729 *Domestic and Family Violence Protection Act 1989* (Qld) s 35(2).

15.15 Before a court varies a domestic violence order, it must consider:¹⁷³⁰

- the grounds set out in the application for the protection order; and
- the findings of the court that made the domestic violence order.

15.16 As mentioned above, a court may vary the duration of a domestic violence order. The maximum period of time for which a protection order can be made is two years, unless the court is satisfied there are special reasons for making the order for a longer period.¹⁷³¹ However, the Act provides for the circumstance that a person who is already protected by a domestic violence order may wish to seek another order to take effect immediately on the first order expiring.¹⁷³²

Revocation of orders

15.17 Section 36 of the *Domestic and Family Violence Protection Act 1989* (Qld) empowers a court to 'revoke' a domestic violence order.¹⁷³³

15.18 In considering an application for the revocation of a domestic violence order, the court must have regard to:¹⁷³⁴

- any expressed wishes of the aggrieved;
- any current contact between the aggrieved and respondent;
- whether any pressure has been applied, or threat has been made, to the aggrieved by the respondent or someone else for the respondent; and
- any other relevant matter.

15.19 The court may revoke the order only if the court considers the safety of the aggrieved or a named person would not be compromised by the revocation.¹⁷³⁵ If the court refuses to revoke the order, the court may vary the order in a way it considers does not compromise the safety of the persons protected by the order.¹⁷³⁶

1730 *Domestic and Family Violence Protection Act 1989* (Qld) s 35(4).

1731 *Domestic and Family Violence Protection Act 1989* (Qld) s 34A(1)–(2).

1732 *Domestic and Family Violence Protection Act 1989* (Qld) s 34(b).

1733 *Domestic and Family Violence Protection Act 1989* (Qld) s 36(1). Section 51 of the *Domestic and Family Violence Protection Act 1989* (Qld) sets out the procedural requirements for making an application for revocation.

1734 *Domestic and Family Violence Protection Act 1989* (Qld) s 36(2).

1735 *Domestic and Family Violence Protection Act 1989* (Qld) s 36(3).

1736 *Domestic and Family Violence Protection Act 1989* (Qld) s 36(4).

15.20 A revocation or variation to an order made on an application for revocation of the order takes effect on the day it is made.¹⁷³⁷

The position in other jurisdictions

15.21 The civil restraining order legislation of the other jurisdictions includes various provisions for the variation, extension or revocation of restraining orders.¹⁷³⁸

15.22 The ACT legislation gives the court power to amend or revoke a protection order.¹⁷³⁹ An application by the respondent to amend or revoke an order is subject to the requirement of obtaining the leave of the court.¹⁷⁴⁰ The court may give the respondent leave to apply only if satisfied that there may have been a substantial change in the circumstances surrounding the making of the original order.¹⁷⁴¹ Otherwise, a protection order may be amended if the court is satisfied the order as amended could be made on application for a protection order, and may be revoked, on application of the person who applied for the order, if the court is satisfied the order is no longer necessary for the person's protection.¹⁷⁴²

15.23 In addition, an application to extend a personal protection order may be made prior to the expiration of the original order.¹⁷⁴³ A magistrate may extend the order only if satisfied that a protection order is still necessary to protect the aggrieved person.¹⁷⁴⁴ However, an extension of the original order may be made by consent.¹⁷⁴⁵ An interim order may not be extended so that it is in force

¹⁷³⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 36(5).

¹⁷³⁸ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 30A, 31, 37; *Crimes Act 1900* (NSW) ss 562ZZC–562ZZH; *Justices Act* (NT) s 91, as amended by the *Domestic and Family Violence Act* (NT); *Summary Procedure Act 1921* (SA) s 99F; *Justices Act 1959* (Tas) s 106G; *Crimes (Family Violence) Act 1987* (Vic) s 16, 16A; *Restraining Orders Act 1997* (WA) pt 5. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Sections 562ZZC–562ZZH of the *Crimes Act 1900* (NSW) are substantially replicated in ss 72–77 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). In the Northern Territory, the *Domestic and Family Violence Act* (NT) repeals pt IV div 7 of the *Justices Act* (NT) introducing a new pt IVA which provides for the making of personal violence restraining orders. The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed. Section 91 of the *Justices Act* (NT) differs substantially from s 100(1) of the *Justices Act* (NT) which it replaces. In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

¹⁷³⁹ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 30A, 31.

¹⁷⁴⁰ *Domestic Violence and Protection Orders Act 2001* (ACT) s 30A(1).

¹⁷⁴¹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 30A(4).

¹⁷⁴² *Domestic Violence and Protection Orders Act 2001* (ACT) s 31(1)(a), (3).

¹⁷⁴³ *Domestic Violence and Protection Orders Act 2001* (ACT) s 37.

¹⁷⁴⁴ *Domestic Violence and Protection Orders Act 2001* (ACT) s 37(4).

¹⁷⁴⁵ *Domestic Violence and Protection Orders Act 2001* (ACT) s 37(5).

for more than 16 weeks.¹⁷⁴⁶

15.24 The New South Wales legislation provides that an application may be made at any time to revoke an order or to vary the terms or the operational period of the order.¹⁷⁴⁷ Generally, an order shall not be varied or revoked without notice of the application being served on the defendant.¹⁷⁴⁸ However, if the application is lodged before the day on which the order is due to expire, an order may be extended by the court, without notice to the defendant.¹⁷⁴⁹

15.25 The New South Wales legislation also provides that, if a court makes an apprehended violence order on the defendant's failure to appear, the defendant may apply under the *Crimes (Appeal and Review) Act 2001* (NSW) for an 'annulment' of the order upon which, if granted, the original matter will be dealt with afresh.¹⁷⁵⁰

15.26 Under that Act, the court must grant an annulment if satisfied the defendant was unaware of the original court proceedings until after the proceedings were completed, was otherwise hindered from taking part in the original proceedings by 'accident, illness, misadventure or other cause', or it is in the interests of justice to do so.¹⁷⁵¹

15.27 The effect of an 'annulment' under the New South Wales provisions is that the order 'ceases to have effect and any enforcement action previously taken is to be reversed'.¹⁷⁵² Thus, for example, enforcement action such as a prohibition on the possession of firearms, is reversed.¹⁷⁵³

15.28 If the order is annulled, the court 'must deal with the original matter afresh', as if no order had previously been made, either immediately or at a later date.¹⁷⁵⁴ The original matter need not be dealt with by the magistrate who

¹⁷⁴⁶ *Domestic Violence and Protection Orders Act 2001* (ACT) s 58(3).

¹⁷⁴⁷ *Crimes Act 1900* (NSW) ss 562ZZC(1), 562ZZD(2). Sections 562ZZC, 562ZZD are substantially replicated in ss 72, 73 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1738 of this Report.

¹⁷⁴⁸ *Crimes Act 1900* (NSW) s 562ZZD(5).

¹⁷⁴⁹ *Crimes Act 1900* (NSW) s 562ZZD(7).

¹⁷⁵⁰ *Crimes Act 1900* (NSW) s 562ZZN(1); *Crimes (Appeal and Review) Act 2001* (NSW) ss 4(1), 9(2). Section 562ZZN is substantially replicated in s 84 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

¹⁷⁵¹ *Crimes (Appeal and Review) Act 2001* (NSW) s 8.

¹⁷⁵² *Crimes (Appeal and Review) Act 2001* (NSW) s 10(1). If a fine is annulled, any amount paid towards the fine is repayable: *Crimes (Appeal and Review) Act 2001* (NSW) s 10(3).

¹⁷⁵³ New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [11.64].

¹⁷⁵⁴ *Crimes (Appeal and Review) Act 2001* (NSW) s 9(2), (3). The New South Wales Law Reform Commission has considered whether the right to seek an annulment under the New South Wales legislation should be extended to a complainant who, 'by reason of accident, misadventure, illness or such like', fails to appear at the hearing of the proceedings. In that Commission's view, an annulment would serve no useful purpose for the complainant given that he or she could simply lodge a new application for an order: New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003) [11.66], [11.77].

ordered the annulment and may be decided by the magistrate who made the original order.¹⁷⁵⁵

15.29 Under recent amendments to the *Justices Act* (NT) in the Northern Territory, an application may be made to the court for an order varying (including extending the period the order is in force) or revoking a personal violence restraining order.¹⁷⁵⁶ An application may be made by the protected person, a police officer or an adult for the protected person, the defendant or a person granted leave by the court.¹⁷⁵⁷ However, the defendant may only apply with the leave of the court.¹⁷⁵⁸ The court may grant leave to the defendant only if satisfied there has been a substantial change in the relevant circumstances since the order was made or last varied.¹⁷⁵⁹ In deciding whether to vary or revoke the order, the court must consider the safety and protection of the protected person and any affected child to be of paramount importance.¹⁷⁶⁰

15.30 In South Australia, an application may be made to vary or revoke a restraining order. An application can be made by a police officer, by a person for whose benefit the order was made or by the defendant.¹⁷⁶¹ The defendant is required to obtain the leave of the court to apply for a variation or revocation, which may be granted only if the court is satisfied that there has been a substantial change in the relevant circumstances since the order was made or last varied.¹⁷⁶² Before varying or revoking an order, the court must give all parties a reasonable opportunity to be heard and consider the same factors it is required to consider in deciding whether or not to make an order and in imposing the terms of the order.¹⁷⁶³

15.31 In Tasmania, an application may be made to vary, revoke or extend an order.¹⁷⁶⁴ An order may be extended for such period as the court considers necessary to protect the person for whose benefit the order was made or until an order is made revoking the restraint order.¹⁷⁶⁵

¹⁷⁵⁵ *Crimes (Appeal and Review) Act 2001* (NSW) s 9(4).

¹⁷⁵⁶ *Justices Act* (NT) s 91(1), as amended by the *Domestic and Family Violence Act* (NT). Section 91 of the *Justices Act* (NT) differs substantially from s 100(1) of the *Justices Act* (NT) which it replaces. As to the amendment of the *Justices Act* (NT), see note 1738 of this Report.

¹⁷⁵⁷ *Justices Act* (NT) s 91(1), as amended by the *Domestic and Family Violence Act* (NT).

¹⁷⁵⁸ *Justices Act* (NT) s 91(2), as amended by the *Domestic and Family Violence Act* (NT).

¹⁷⁵⁹ *Justices Act* (NT) s 91(3), as amended by the *Domestic and Family Violence Act* (NT).

¹⁷⁶⁰ *Justices Act* (NT) ss 91(4), 88(1), as amended by the *Domestic and Family Violence Act* (NT).

¹⁷⁶¹ *Summary Procedure Act 1921* (SA) s 99F(1).

¹⁷⁶² *Summary Procedure Act 1921* (SA) s 99F(1a).

¹⁷⁶³ *Summary Procedure Act 1921* (SA) s 99F(3).

¹⁷⁶⁴ *Justices Act 1959* (Tas) s 106G(1).

¹⁷⁶⁵ *Justices Act 1959* (Tas) s 106G(5).

15.32 In Victoria, if the behaviour complained of consists of stalking, and an order is made under the Victorian family violence legislation,¹⁷⁶⁶ the court may vary, revoke or extend an order on application.¹⁷⁶⁷ The Victorian legislation does not set out the matters a magistrate must take into account before granting either a revocation or variation of an order, except that in the case of an application by the defendant there must have been a change in circumstances in which the order was made.¹⁷⁶⁸

15.33 In Western Australia, a violence restraining order or a misconduct restraining order may be cancelled, varied or extended on application.¹⁷⁶⁹ A defendant may continue with an application only if granted leave.¹⁷⁷⁰

Issues for consideration

15.34 The Discussion Paper raised the issue of whether the *Peace and Good Behaviour Act 1982* (Qld) should make specific provision to empower the court to vary or revoke (set aside) a protection order.¹⁷⁷¹

15.35 A further issue for consideration, which was not specifically raised in the Discussion Paper, is whether the power of the court to vary or set aside an order should be subject to any limitation, for example, a requirement for a change in the circumstances since the original order was made.

Submissions

Variation of the conditions of an order

15.36 The Commission received a number of submissions in relation to whether the court should be able to vary the conditions of a peace and good behaviour order.¹⁷⁷² Each of these submissions considered that it should be possible for the court to vary the conditions of an order.

15.37 The Citizens Advice Bureau and Gold Coast Legal Service observed:¹⁷⁷³

¹⁷⁶⁶ For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 1738 of this Report.

¹⁷⁶⁷ *Crimes (Family Violence) Act 1987* (Vic) s 16(1).

¹⁷⁶⁸ *Crimes (Family Violence) Act 1987* (Vic) s 16(2).

¹⁷⁶⁹ *Restraining Orders Act 1997* (WA) ss 16(5), 45(1).

¹⁷⁷⁰ *Restraining Orders Act 1997* (WA) s 46.

¹⁷⁷¹ Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 107 (Questions 10-11-10-14).

¹⁷⁷² Submissions 5, 6, 6A, 8, 13, 14, 15, 19, 20.

¹⁷⁷³ Submission 5.

... in the context of neighbour disputes, why should a respondent to an order be prevented from seeking a variation of the order if they move out of the complainant's neighbourhood?

15.38 The Queensland Public Tenants Association Inc considered that, if the circumstances of the parties have changed since the original order was made, a party to an order should be able to seek a variation of the terms of the order.¹⁷⁷⁴

Variation of the duration of an order

15.39 The Commission received numerous submissions in relation to whether the court should be empowered under the *Peace and Good Behaviour Act 1982* (Qld) to vary the duration of a peace and good behaviour order.¹⁷⁷⁵ Each of these submissions considered that the court should be empowered to vary or extend the duration of a peace and good behaviour order.

15.40 The Chief Magistrate of Queensland considered that the court should be empowered to vary temporary orders.¹⁷⁷⁶

Setting aside an order

15.41 Numerous submissions received by the Commission specifically addressed the issue of whether the court should be empowered under the *Peace and Good Behaviour Act 1982* (Qld) to revoke, or set aside, a peace and good behaviour order.¹⁷⁷⁷ Each of these submissions considered it should be possible for the court to revoke a peace and good behaviour order.

The Commission's view

The power of the court to vary or set aside an existing order

15.42 In the Commission's view, the effectiveness of the protective mechanism provided by the Personal Protection Bill 2007 will be significantly reduced unless the court can regulate the operation of an existing protection order in appropriate circumstances.

15.43 The Commission has recommended in this Report that in proceedings under the Personal Protection Bill 2007, the provisions of the *Justices Act 1886* (Qld) will apply with any necessary changes unless the application of that Act is inconsistent with the Personal Protection Bill 2007.¹⁷⁷⁸ However, while the *Justices Act 1886* (Qld) includes limited powers to vary and set aside orders in

¹⁷⁷⁴ Submission 6A.

¹⁷⁷⁵ Submissions 5, 6, 6A, 8, 14, 15, 20.

¹⁷⁷⁶ Submission 12C.

¹⁷⁷⁷ Submissions 5, 6, 6A, 8, 13, 14, 15, 19.

¹⁷⁷⁸ See para 20.155 of this Report.

particular circumstances,¹⁷⁷⁹ that Act does not confer a general power to vary or set aside an order otherwise than on appeal. The Commission therefore considers that specific provision should be made in the Personal Protection Bill 2007 to empower the court to vary or set aside a protection order, including an interim order, that is in force (an 'existing order'). The Bill should also clarify that the court may vary the existing order by varying the conditions of the order or the period for which the order is in force.

15.44 The Commission further considers that the powers of the court to vary or set aside an order, and the procedures for making, and hearing, an application to vary or set aside an order, should be dealt with together in the Bill.

The grounds for varying or setting aside an existing order

15.45 The civil restraining order legislation in a number of jurisdictions limits the court's power to vary or set aside an order in certain circumstances. In the ACT, the Northern Territory, South Australia and Victoria, if a respondent for an order has applied to vary or set aside the order, a court cannot vary or set aside the order unless it is satisfied that there has been a change in circumstances since the existing order was made.¹⁷⁸⁰

15.46 In the event that no appeal has been lodged, the absence of the proof of any changed circumstance may well be a persuasive consideration in favour of the dismissal of the application to vary or set aside an order regularly made. However, there may be other circumstances, for example, where the respondent cannot reasonably comply with the conditions imposed in the order or where the order was obtained on the basis of fraud, in which it is appropriate for a party to seek to vary or set aside an order. The Commission is therefore of the view that the court's power to vary or revoke a protection order should not be restricted to situations when there has been a change in the circumstances since the original order was made.

15.47 Nonetheless, the Commission considers that there should be some limitations on the circumstances in which the court may vary or set aside a protection order. This would provide guidance as to the circumstances in which it is appropriate to vary or set aside an order and also distinguish the process for the variation or setting aside of an order at first instance from the remedy of appeal.

15.48 The Personal Protection Bill 2007 should therefore provide that the court may vary or set aside an existing order only if the court is satisfied that a ground to vary or set aside the order has been established. The Bill should

¹⁷⁷⁹ *Justices Act 1886* (Qld) ss 142 (Proceedings in absence of defendant), 147A (Power of justices to reopen proceedings and rectify orders). See note 1722 of this Report.

¹⁷⁸⁰ See para 15.22, 15.29, 15.30, 15.32 of this Report. See also, for example, s 17A of the *Domestic and Family Violence Protection Act 1989* (Qld) which provides that if circumstances change after a domestic violence order is made, a person may apply for a variation or revocation of the order. See para 15.11 of this Report.

provide that each of the following is a ground for varying or setting aside a protection order that is in force:

- there has been a material change of circumstances since the existing order was made;
- the respondent cannot reasonably comply with the existing order;
- the existing order does not adequately protect—
 - if the order is a personal protection order—the persons protected by the order or their property; or
 - if the order is a workplace protection order—the persons protected by the order or property at the workplace;
- there was a material error of fact or misdescription in the existing order;
- the existing order was made because of fraud;
- the existing order was made when a respondent was unable to be before the court, resulting in unfairness to the respondent.

Factors to which the court must have regard in considering an application to vary or set aside an order

15.49 The *Domestic and Family Violence Protection Act 1989* (Qld) requires the court to consider a range of specific factors in deciding an application to vary or to set aside a domestic violence order. These factors vary according to the type of application that has been made.

15.50 The Commission, however, considers it unnecessary for the Personal Protection Bill 2007 to prescribe a similar range, or mix, of factors for the court to consider when deciding an application to vary or to set aside a protection order.

15.51 Given that the purpose of a protection order is to ensure the safety of the persons protected by the order and to prevent property damage by prohibiting particular behaviour of the respondent, the Commission considers it appropriate for the Personal Protection Bill 2007 to provide that a court, in deciding whether to vary or to set aside a protection order, must have regard to:

- the safety of the persons protected by the order; and
- either—
 - for a personal protection order, the safety of property of the persons protected by the order; or

- for a workplace protection order, the safety of property at the workplace; and
- anything else the court considers relevant.

The time from when variation or setting aside takes effect

15.52 In order to respond appropriately to the different circumstances in which a variation or the setting aside of an existing protection order may be sought,¹⁷⁸¹ the Commission considers that the Personal Protection Bill 2007 should provide that an order varying or setting aside an existing order takes effect on the day fixed by the court and stated in the order, or, in default of no day being stated in the order, the day the order to vary or set aside is made. It may be that, in some circumstances, for example, where the order was obtained on the basis of fraud, it is appropriate and desirable for the court of first instance to set aside a protection order, or a condition of an order, from the day the existing order was made. The Bill should include a provision clarifying this.

WHO MAY APPLY TO VARY OR SET ASIDE AN EXISTING ORDER

The Domestic and Family Violence Protection Act 1989 (Qld)

15.53 Section 51(2) of the *Domestic and Family Violence Protection Act 1989* (Qld) specifies that the following persons may apply for the ‘revocation’ or variation of a domestic violence order:

- the aggrieved;
- the respondent;
- an authorised person; or
- a police officer who reasonably believes that it is for the benefit of the aggrieved and there is sufficient reason for taking the action.

15.54 Section 51(2) does not specifically provide for a person who is acting under another Act for an aggrieved – for example, a guardian appointed under the *Guardianship and Administration Act 2000* (Qld) – to apply for the revocation or variation of a domestic violence order on his or her behalf.¹⁷⁸²

15.55 However, section 14(5) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that, if a person is eligible to apply for a protection

¹⁷⁸¹ See para 15.3–15.6 of this Report.

¹⁷⁸² See *Domestic and Family Violence Protection Act 1989* (Qld) s 14(4).

order,¹⁷⁸³ the person may make other applications or bring other proceedings under the Act in relation to a domestic violence order made because of the application.

15.56 Neither section 14(5) nor section 51(2) enables a person who is a relative or associate of the aggrieved and who is specifically named in an order to seek a variation or revocation of the order.

The position in other jurisdictions

15.57 The civil restraining order legislation in New South Wales, the Northern Territory, South Australia, Western Australia and Tasmania allows a person protected by an order to make an application to vary or revoke the order.

15.58 In New South Wales, the protected person (whether or not the applicant), a police officer, or the defendant can apply to vary or revoke an apprehended violence order.¹⁷⁸⁴ Where one protected person has applied to vary or revoke an order, the court can vary or revoke the order in relation to another person protected by the order only if it is satisfied that the person is over 16 and has consented to the variation or revocation.¹⁷⁸⁵ If the protected person is a child, the application to vary or revoke must be made by a police officer.¹⁷⁸⁶

15.59 Under recent amendments to the *Justices Act* (NT) in the Northern Territory, an application to vary or revoke a personal violence restraining order may be made by the protected person, a police officer or an adult for the protected person, or a person granted leave by the court.¹⁷⁸⁷ The defendant may only apply with the leave of the court.¹⁷⁸⁸ The court may grant leave to the defendant only if satisfied there has been a substantial change in the relevant circumstances since the order was made or last varied.¹⁷⁸⁹

1783 Those persons eligible to apply for a protection order are an aggrieved; an adult who is authorised in writing by an aggrieved to appear on his or her behalf or whom the court believes is authorised by an aggrieved to appear on his or her behalf even though the authority is not in writing (an ‘authorised person’); a person acting under another Act for the aggrieved (a guardian/administrator appointed under the guardianship legislation, the Adult Guardian or an attorney appointed under an enduring power of attorney); and a police officer (in certain circumstances): *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1)–(4).

1784 *Crimes Act 1900* (NSW) s 562ZZC(2). Section 562ZZC of the *Crimes Act 1900* (NSW) is replicated in s 72 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1738 of this Report.

1785 *Crimes Act 1900* (NSW) s 562ZZE(3). Section 562ZZE of the *Crimes Act 1900* (NSW) is replicated in s 74 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

1786 *Crimes Act 1900* (NSW) s 562ZZC(3).

1787 *Justices Act* (NT) s 91(1), as amended by the *Domestic and Family Violence Act* (NT). Section 91 of the *Justices Act* (NT) differs substantially from s 100(1) of the *Justices Act* (NT) which it replaces. As to the amendment of the *Justices Act* (NT), see note 1738 of this Report.

1788 *Justices Act* (NT) s 91(1), (2), as amended by the *Domestic and Family Violence Act* (NT).

1789 *Justices Act* (NT) s 91(3), as amended by the *Domestic and Family Violence Act* (NT).

15.60 In South Australia and Western Australia, the court may vary or revoke a restraining order on application of a police officer, a person for whose benefit the order was made or the defendant.¹⁷⁹⁰ In Western Australia, if the person protected by the order is a child, the application can be made by a parent, a guardian or a child welfare officer on behalf of the child, or, if the person protected by an order is a person for whom a guardian has been appointed under guardianship legislation, by the guardian on behalf of the person.¹⁷⁹¹

15.61 In Tasmania, a person who may apply for a restraint order, including the person for whose benefit a restraint order may be sought, and a defendant may apply to vary, extend or revoke the order.¹⁷⁹² A person who is not otherwise eligible to make an application for the variation, extension or revocation of a restraint order may apply for leave to make an such an application.¹⁷⁹³

15.62 The Victorian Law Reform Commission, in its Report on family violence laws, has recommended that protected people should have the right to vary, revoke or extend their own intervention order, whether or not it was applied for by a guardian.¹⁷⁹⁴ However, the Commission also acknowledged that ‘to have a guardian appointed, the person’s capacity to make decisions about their own wellbeing must be in some way reduced’.¹⁷⁹⁵ Because of this, the Commission recommended that guardians must be informed by the court of an application for variation or revocation of an intervention order that has been taken out by a protected person for whom they are the guardian, so that the court can hear the guardian’s views on the issue.¹⁷⁹⁶

The Commission’s view

15.63 The Commission considers that the parties to an order, namely an applicant, a respondent, an aggrieved person and any other person protected by the order, should be eligible to apply to vary or set aside the order. These persons have a direct interest in the order, and in any subsequent proceedings.

15.64 Given the range of people who may be involved or have an interest in protection order proceedings, it may also be appropriate, in the particular circumstances of the proceedings, for the court to give a non-party leave to apply to vary or set aside an order. Such a person may be, for example,

¹⁷⁹⁰ *Summary Procedure Act 1921* (SA) s 99F(1); *Restraining Orders Act 1997* (WA) ss 3 (definition of ‘person protected’), 45(1).

¹⁷⁹¹ *Restraining Orders Act 1997* (WA) s 45(2).

¹⁷⁹² *Justices Act 1959* (TAS) ss 106G(1), 106B(2).

¹⁷⁹³ *Justices Act 1959* (Tas) s 106G(2).

¹⁷⁹⁴ Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006) [10.28]. For the application of the family violence legislation in Victoria, see note 1738 of this Report.

¹⁷⁹⁵ Ibid [10.28].

¹⁷⁹⁶ Ibid [10.28] rec 125.

someone who was eligible to apply for a protection order on behalf of an aggrieved but who did not make the application, the Chief Executive of the Department of Child Safety, the Adult Guardian or another statutory officer or another person.

15.65 The Commission therefore considers that the Personal Protection Bill 2007 should specifically provide that an application to vary or set aside an existing protection order, including a protection order made as an interim protection order, may be made by any of the following persons who believes there is a ground for varying or setting aside the order:

- a person protected by the existing order;
- a person who was an applicant for the existing order;
- a respondent for the existing order;
- another person given leave by the court to apply for an order varying or setting aside the existing order.

PROCEDURAL PROVISIONS FOR VARIATION AND SETTING ASIDE

Domestic and Family Violence Protection Act 1989 (Qld)

15.66 Section 51 of the *Domestic and Family Violence Protection Act 1989* (Qld) specifies various procedural requirements for making an application to vary or revoke a domestic violence order.

15.67 Section 51(4)–(5) sets out requirements associated with the service of applications for the variation or the revocation of an order.¹⁷⁹⁷ Those provisions generally require service of the application on the other parties to the order and, where the application is made by an aggrieved or named person for a variation to extend the protection, duration or scope of the order, that the clerk of the court arrange service on the respondent by a police officer.

15.68 Section 51(6)–(7) sets out procedures for dealing with the failure of a party to appear when required by the application, similar to those which apply when the court deals with the non-appearance of a respondent on an application for an original order.¹⁷⁹⁸ Those provisions generally allow the court, on proof of service, to hear and determine the matter, adjourn the matter, or issue a warrant for the respondent to be brought before the court.

¹⁷⁹⁷ These provisions are considered at para 19.20–19.21 of this Report.

¹⁷⁹⁸ See *Domestic and Family Violence Protection Act 1989* (Qld) s 49 (Non-appearance of respondent).

15.69 An application for a variation or a revocation under the *Domestic and Family Violence Protection Act 1989* (Qld) may be made at any time while the order is in force.¹⁷⁹⁹

The Commission's view

15.70 The Commission considers it desirable, in light of its recommendations to include specific provisions for the variation and setting aside of orders in the Personal Protection Bill 2007, to also provide ancillary procedural provisions in the legislation.

15.71 The Commission has recommended in this Report that the Personal Protection Bill 2007 should include procedures for making and hearing an application for a protection order.¹⁸⁰⁰ The Commission considers that the procedures for making and hearing an application to vary or set aside an existing protection order should be generally modelled on the procedures for making and hearing an application for a protection order.

15.72 The Commission has also recommended in this Report that the Personal Protection Bill 2007 should include simplified procedures for the service of documents.¹⁸⁰¹ The procedures proposed under those recommendations also apply in relation to applications to vary or set aside a protection order.¹⁸⁰²

RECOMMENDATIONS

15.73 The Commission makes the following recommendations:

Power to vary or set aside an existing order

15-1 The Personal Protection Bill 2007 should give the court power to vary or set aside a protection order, including an interim protection order, that is in force (an 'existing order').¹⁸⁰³

See Personal Protection Bill 2007 cl 66(1).

¹⁷⁹⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 35(2).

¹⁸⁰⁰ See Chapters 9 and 11 of this Report.

¹⁸⁰¹ See Chapter 19 of this Report.

¹⁸⁰² See para 19.49–19.51, 19.58–19.60, 19.64–19.70 of this Report.

¹⁸⁰³ See para 15.43 of this Report.

15-2 The Personal protection Bill 2007 should clarify that a court may vary an existing order by varying the conditions of the order or the period for which the order is in force.¹⁸⁰⁴

See Personal Protection Bill 2007 cl 66(3).

15-3 The Personal Protection Bill 2007 should provide that the court may vary or set aside an existing order only if the court is satisfied that a ground to vary or set aside the order has been established.¹⁸⁰⁵

See Personal Protection Bill 2007 cl 66(1).

15-4 The Personal Protection Bill 2007 should provide that each of the following is a ground for varying or setting aside an existing order:¹⁸⁰⁶

- (a) there has been a material change of circumstances since the existing order was made;
- (b) the respondent cannot reasonably comply with the existing order;
- (c) the existing order does not adequately protect—
 - (i) for a personal protection order, the persons protected by the order or their property; or
 - (ii) for a workplace protection order, the persons protected by the order or property at the workplace;
- (d) there was a material error of fact or misdescription in the existing order;
- (e) the existing order was made because of fraud;
- (f) the existing order was made when a respondent was unable to be before the court, resulting in unfairness to the respondent.

See Personal Protection Bill 2007 cl 62.

¹⁸⁰⁴ Ibid.

¹⁸⁰⁵ See para 15.48 of this Report.

¹⁸⁰⁶ Ibid.

15-5 The Personal Protection Bill 2007 should provide that a court, in deciding whether to vary or to set aside an existing order, must have regard to:¹⁸⁰⁷

- (a) the safety of the persons protected by the order; and
- (b) either—
 - (i) for a personal protection order, the safety of property of the persons protected by the order; or
 - (ii) for a workplace protection order, the safety of property at the workplace; and
- (c) anything else the court considers relevant.

See Personal Protection Bill 2007 cl 66(2).

15-6 The Personal Protection Bill 2007 should provide that an order varying or setting aside an existing order takes effect on the day fixed by the court and stated in the order, or, if no day is stated in the order, the day the order to vary or set aside is made. The day fixed by the court and stated in the order may be the day the existing order was made.¹⁸⁰⁸

See Personal Protection Bill 2007 cl 69.

Who may apply to vary or set aside an existing order

15-7 The Personal Protection Bill 2007 should specifically provide that an application to vary or set aside an existing order may be made by any of the following persons who believes there is a ground for varying or setting aside the order:¹⁸⁰⁹

- (a) a person protected by the existing order;
- (b) a person who was an applicant for the existing order;
- (c) a respondent for the existing order;

¹⁸⁰⁷ See para 15.51 of this Report.

¹⁸⁰⁸ See para 15.52 of this Report.

¹⁸⁰⁹ See para 15.65 of this Report.

- (d) another person given leave by the court to apply for an order varying or setting aside the existing order.

See Personal Protection Bill 2007 cl 63.

Procedural provisions for variation and setting aside

- 15-8 The procedures for making and hearing an application to vary or set aside an existing order should be generally modelled on the procedures for making and hearing an application for a protection order.¹⁸¹⁰

See Personal Protection Bill 2007 cll 64, 67, 68.

¹⁸¹⁰ See para 15.71 of this Report.

Chapter 16

Appeals

INTRODUCTION	428
THE <i>PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)</i>	428
THE <i>DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)</i>	429
THE POSITION IN OTHER JURISDICTIONS	431
Stay of the operation of the order	432
Appeal of refusal to make an interim order	432
Appeal of an award for costs.....	433
THE COMMISSION'S VIEW	433
Specific appeals provisions.....	435
Decisions appealed against	436
Powers on appeal	437
Entitlement to appear	437
Stay on the operation of the order	438
SELECTED ISSUES FOR CONSIDERATION	439
The refusal to make an interim protection order	439
Right to appeal award for costs.....	440
RECOMMENDATIONS	441

INTRODUCTION

16.1 The Discussion Paper did not specifically consider the issue of appeals under the *Peace and Good Behaviour Act 1982* (Qld). The inclusion of detailed appeal provisions in the *Domestic and Family Violence Protection Act 1989* (Qld) raises the issue of whether similar provisions should apply under the Personal Protection Bill 2007.

16.2 This chapter considers whether any changes should be made to the existing mechanism for appealing a peace and good behaviour order, and, in particular, whether the Personal Protection Bill 2007 should include specific appeal provisions.

16.3 Consideration is also given to whether the Personal Protection Bill 2007 should make provision for particular matters, including a right to appeal the refusal to make an interim protection order, the power to stay an order pending a decision on appeal, and a right to appeal an award of costs made in relation to a malicious, false, frivolous or vexatious application.

THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)

16.4 The *Peace and Good Behaviour Act 1982* (Qld) does not make specific provision for appeals. However, section 8 of the Act brings into operation the procedures, provisions and proceedings of the *Justices Act 1886* (Qld) that apply in the case of the prosecution of an offence in a summary way under that Act.¹⁸¹¹

16.5 Appeals from decisions of justices are dealt with under part 9 of the *Justices Act 1886* (Qld). Section 222(1) of that Act provides that, if a person 'feels aggrieved as a complainant, defendant or otherwise by an order¹⁸¹² made by justices or a justice in a summary way on a complaint for an offence', he or she may appeal within one month after the date of the order to a District Court judge.¹⁸¹³

16.6 Therefore, an order made by the Magistrates Court under the *Peace and Good Behaviour Act 1982* (Qld) is appealable under section 222(1) of the *Justices Act 1886* (Qld).

¹⁸¹¹ Section 8 of the *Peace and Good Behaviour Act 1982* (Qld) provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications.

¹⁸¹² For the purposes of the *Justices Act 1886* (Qld), an 'order' is defined to include 'any order, adjudication, grant or refusal of any application, and any determination of whatsoever kind made by a Magistrates Court, and any refusal by a Magistrates Court to hear and determine any complaint or to entertain any application made to it ...': *Justices Act 1886* (Qld) s 4 (definition of 'order').

¹⁸¹³ Prior to amendments made to the *Justices Act 1886* (Qld) in 1997, s 209 of that Act provided for an appeal of a conviction or order of any justice or justices to the Court of Appeal or a Supreme Court judge by way of order to review.

16.7 To commence an appeal under that section, the appellant must file a notice of appeal in a specified District Court registry.¹⁸¹⁴ The relevant registrar is required to give notice of the appeal to the respondent.¹⁸¹⁵

16.8 A District Court judge is empowered to extend the time for filing a notice of appeal, make orders or give directions about the service of any notice or procedure, amend the notice of appeal or the statement of grounds for appeal¹⁸¹⁶ or adjourn the appeal for the time decided by the judge.¹⁸¹⁷

16.9 An appeal is by way of rehearing on the original evidence given in the proceeding. However, the court may give leave to adduce fresh, additional or substituted evidence if it is satisfied there are special grounds for giving leave.¹⁸¹⁸

16.10 The District Court judge hearing the appeal may confirm, set aside or vary the appealed order or 'make any other order in the matter' he or she 'considers just'.¹⁸¹⁹

16.11 The judge is also empowered to make such order as to costs to be paid by either party 'as the judge may think just'.¹⁸²⁰

THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)

16.12 The provisions relating to the appeal of an order of a court or a decision of a magistrate made under the *Domestic and Family Violence Protection Act 1989* (Qld) are located in part 5 of that Act.

16.13 The *Domestic and Family Violence Protection Act 1989* (Qld) specifies that a person 'who is aggrieved by an order' of a Magistrates Court or the

¹⁸¹⁴ *Justices Act 1886* (Qld) s 222(3); *District Court of Queensland Act 1967* (Qld) s 116 (Venue of appeals). Note that the appellant is taken to have filed the notice of appeal in the District Court registry if the District Court registry is more than 50 km from the place where the order was made and the appellant gives the notice of appeal to the relevant clerk of the court: *Justices Act 1886* (Qld) s 222(4).

¹⁸¹⁵ *Justices Act 1886* (Qld) s 222D(1). If the respondent is a police officer, the notice may be given to the Commissioner of Police: *Justices Act 1886* (Qld) s 222D(4).

¹⁸¹⁶ For example, in *Rogers v Rogers* [1995] QDC 375, Forde DCJ gave the appellant leave to amend his grounds of appeal against the making of a domestic violence order.

¹⁸¹⁷ *Justices Act 1886* (Qld) s 224(1).

¹⁸¹⁸ *Justices Act 1886* (Qld) s 223.

¹⁸¹⁹ *Justices Act 1886* (Qld) s 225(1).

¹⁸²⁰ *Justices Act 1886* (Qld) s 226. No order as to costs can be made on the hearing or determination of an appeal in relation to an indictable offence that was dealt with summarily by justices: *Justices Act 1886* (Qld) s 232(4). Costs may be ordered in accordance with the scale of costs set out in the *Justices Regulation 2004* (Qld) sch 2: *Justices Act 1886* (Qld) s 232A(1); *Justices Regulation 2004* (Qld) s 18. These costs are set at a rate 20 per cent higher than for a complaint: *Justices Regulation 2004* (Qld) sch 2 pt 1 cl 4.

Childrens Court constituted by a Childrens Court magistrate, or a decision of a magistrate:¹⁸²¹

- to refuse an application for—
 - a protection order; or
 - a revocation or variation of a domestic violence order (including a refusal to vary conditions imposed by the order); or
- to make a domestic violence order;¹⁸²² or
- to revoke or vary a domestic violence order (including a variation of the conditions imposed by the order);

may appeal to the District Court.

16.14 In addition, a person who is aggrieved by a decision of a court to make or vary a domestic violence order against a person who has been found guilty of an offence involving domestic violence,¹⁸²³ may appeal that decision to the Court of Appeal.¹⁸²⁴

16.15 An appeal must be lodged within 28 days after the day on which the order or decision was made or, if the order was made in the absence of the person aggrieved by the order, within 28 days after the day on which a copy of the order was served on, or given to, the person.¹⁸²⁵

16.16 For an appeal to the District Court, the appellant is required to lodge a written notice of appeal, specifying the grounds of appeal and made in the approved form, with the registrar of the relevant District Court and to serve a copy of the notice on the respondent to the appeal and the clerk of the court which made the order or decision.¹⁸²⁶ A copy of the notice must also be given to the Commissioner of Police.¹⁸²⁷

¹⁸²¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 63(1). The appeal is to be made to the District Court at or nearest to the place where the order or decision was made.

¹⁸²² Note, a 'domestic violence order' includes a protection order and a temporary protection order: *Domestic and Family Violence Protection Act 1989* (Qld) s 3, sch. s 13(2) (definition of 'domestic violence order').

¹⁸²³ *Domestic and Family Violence Protection Act 1989* (Qld) s 30 (Power of court if person pleads or is found guilty of related offences).

¹⁸²⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 63(2).

¹⁸²⁵ *Domestic and Family Violence Protection Act 1989* (Qld) s 63(3).

¹⁸²⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 64(1)(a), (b), (2). If it appears to a District Court judge to whom application is made that it is not reasonably practicable to effect service on a particular person, the judge may order that service on that person be effected by such means of substituted service as the judge thinks fit: *Domestic and Family Violence Protection Act 1989* (Qld) s 64(3).

¹⁸²⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 64(1)(c).

16.17 The Commissioner of Police has a right to appear and be heard before the District Court on an appeal.¹⁸²⁸

16.18 An appeal before the District Court proceeds by way of rehearing on the record and also under the rules applying to the District Court or in accordance with the directions given by a District Court judge.¹⁸²⁹

16.19 An appeal against an order does not stay the operation of the order. However, the court that made the order may stay the operation of the order, or a condition imposed by the order, until the appeal is dealt with.¹⁸³⁰

16.20 The District Court may, on allowing an appeal, discharge or vary the order, or make such order or decision as it considers should have been made.¹⁸³¹ The decision of the District Court upon an appeal is final and conclusive.¹⁸³²

16.21 A District Court judge may make such order as to the costs of an appeal as he or she thinks proper.¹⁸³³

THE POSITION IN OTHER JURISDICTIONS

16.22 The civil restraining order legislation in the ACT, Tasmania and Victoria also includes appeal provisions.¹⁸³⁴ The civil restraining order legislation in New South Wales and Western Australia includes limited appeal provisions and also applies specified provisions of the relevant general appeals legislation.¹⁸³⁵

¹⁸²⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 64A.

¹⁸²⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 65(1).

¹⁸³⁰ *Domestic and Family Violence Protection Act 1989* (Qld) s 65(2). If the order was a temporary protection order made by a magistrate, the order may be stayed by a Magistrates Court.

¹⁸³¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 66(1).

¹⁸³² *Domestic and Family Violence Protection Act 1989* (Qld) s 66(5). However, see *Bell v Bay-Jespersen* [2004] 2 Qd R 235, [4] in which McPherson JA referred to an avenue of appeal being available under s 118(3) of the *District Court of Queensland Act 1967* (Qld).

¹⁸³³ *Domestic and Family Violence Protection Act 1989* (Qld) s 66(3).

¹⁸³⁴ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 77–83; *Justices Act 1959* (Tas) ss 116–125; *Crimes (Family Violence) Act 1987* (Vic) ss 20, 21. In Tasmania, appeals from restraining orders made under the *Justices Act 1959* (Tas) are appealable under the general appeals provisions in that Act. In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

¹⁸³⁵ *Crimes Act 1900* (NSW) ss 562ZZN–562ZZO; *Restraining Orders Act 1997* (WA) s 64. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW).

In the Northern Territory and South Australia, appeals are governed by general appeal provisions.¹⁸³⁶

Stay of the operation of the order

16.23 In New South Wales and Victoria, the lodgement of a notice of appeal is presumed not to stay the operation of the order.¹⁸³⁷ However, on the application of the defendant, the court that originally made the order may stay the operation of the order.¹⁸³⁸ The New South Wales legislation also requires the court to be satisfied it is safe to stay the order, having regard to the need to ensure the safety and protection of the protected person or any other person.¹⁸³⁹

Appeal of refusal to make an interim order

16.24 The civil restraining order legislation in some of the jurisdictions does not permit the appeal of a refusal to make an interim order.

16.25 The ACT legislation does not permit the appeal of a decision by the court to make, amend or revoke, or the refusal of the court to make, amend or revoke, an interim order or emergency order.¹⁸⁴⁰ Similarly, in New South Wales, there is no right of appeal under the civil restraining order legislation against the refusal to make an interim apprehended violence order.¹⁸⁴¹

16.26 In Western Australia, however, a person may appeal against the refusal to make an interim violence restraining order.¹⁸⁴²

¹⁸³⁶ *Justices Act* (NT) s 163; *Magistrates Court Act* 1991 (SA) ss 42, 43. The *Domestic and Family Violence Act* (NT) repeals pt IV div 7 of the *Justices Act* (NT) introducing a new pt IVA which provides for the making of personal violence restraining orders. The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed.

¹⁸³⁷ *Crimes Act 1900* (NSW) s 562ZZO(1); *Crimes (Family Violence) Act 1987* (Vic) s 20(2). Section 562ZZO of the *Crimes Act 1900* (NSW) is replicated in s 85 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales and Victoria, see note 1834, 1835 of this Report.

¹⁸³⁸ *Crimes Act 1900* (NSW) s 562ZZO(2); *Crimes (Family Violence) Act 1987* (Vic) s 20(2).

¹⁸³⁹ *Crimes Act 1900* (NSW) s 562ZZO(2).

¹⁸⁴⁰ *Domestic Violence and Protection Orders Act 2001* (ACT) s 78(a)–(b).

¹⁸⁴¹ See, generally, *Crimes Act 1900* (NSW) s 562ZZN. This provision is substantially replicated in s 84 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

¹⁸⁴² *Restraining Orders Act 1997* (WA) s 64(1)(a). This provision does not apply in relation to a misconduct restraining order.

Appeal of an award for costs

16.27 In New South Wales, a court in proceedings in respect of an apprehended violence order may award costs to the applicant or defendant.¹⁸⁴³ However, the court cannot award costs against an applicant who is the person for whose protection an order is sought unless satisfied that the application was frivolous or vexatious.¹⁸⁴⁴

16.28 The New South Wales civil restraining order legislation provides for an appeal against an order for costs.¹⁸⁴⁵ This right of appeal was included, and later abolished, in superseded versions of the legislation.¹⁸⁴⁶ However, following a review of the legislation by the New South Wales Law Reform Commission,¹⁸⁴⁷ the legislation was amended to provide again for the right to appeal an award of costs. In its review, the Commission observed that '[a]lthough appeals against costs awarded in [apprehended violence order] proceedings were not lodged very often, they did occur and often involved large sums of money'.¹⁸⁴⁸ That Commission referred to the albeit small possibility that some injustice may arise through the absence of a provision in the New South Wales legislation in relation to an appeal against an order for costs and, for that reason, recommended that legislation should be amended to provide a right to appeal against an award of costs.¹⁸⁴⁹

THE COMMISSION'S VIEW

16.29 As explained earlier, the *Peace and Good Behaviour Act 1982* (Qld), in its present form, applies the relevant appeal provisions under the *Justices Act 1886* (Qld).¹⁸⁵⁰ These provisions are necessarily provisions of general application because they provide an avenue of appeal in relation to a complaint or breach of duty that has been summarily dealt with. These appeal provisions

¹⁸⁴³ *Crimes Act 1900* (NSW) s 562ZZM(1). Section 562ZZM is replicated in s 99 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1835 of this Report.

¹⁸⁴⁴ *Crimes Act 1900* (NSW) s 562ZZM(2).

¹⁸⁴⁵ *Crimes Act 1900* (NSW) s 562ZZN(4). Section 562ZZN is substantially replicated in s 84 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

¹⁸⁴⁶ The right to appeal an award of costs was previously provided for under the now repealed *Justices Act 1902* (NSW) pt 5A, ss 117, 120. Section 562WA of the *Crimes Act 1900* (NSW), which was enacted in 1999, subsequently omitted that right to appeal: *Crimes Amendment (Apprehended Violence) Act 1999* (NSW) s 3, sch 1 [45]. Section 562WA was then repealed and re-enacted as s 562ZZN by the *Crimes Amendment (Apprehended Violence) Act 2006* (NSW) s 3, sch 1 reintroducing the right to appeal an award of costs. That section has now been repealed and replaced with s 84 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) which is of similar effect. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) was assented to on 7 December 2007 and will commence on a date to be proclaimed (see generally note 1835 of this Report).

¹⁸⁴⁷ New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (October 2003).

¹⁸⁴⁸ Ibid [11.73].

¹⁸⁴⁹ Ibid [11.79].

¹⁸⁵⁰ See para 16.4 of this Report.

are applied in many pieces of legislation.¹⁸⁵¹ The procedure for appeals to the District Court under the *Uniform Civil Procedure Rules 1999* (Qld) is of a similarly general application.¹⁸⁵²

16.30 There are many similarities between the appeal provisions in the *Justices Act 1886* (Qld) and the appeal provisions in the *Domestic and Family Violence Protection Act 1989* (Qld).

16.31 Nonetheless, there are a number of provisions in the appeal provisions under the *Domestic and Family Violence Protection Act 1989* (Qld) that are not included in the *Justices Act 1886* (Qld) appeal provisions and are not covered by the *Uniform Civil Procedure Rules 1999* (Qld).

16.32 For example, the appeal provisions in the *Domestic and Family Violence Protection Act 1989* (Qld) take into account the role of police in domestic violence proceedings.¹⁸⁵³ Section 64 specifies that one of the requirements of commencing an appeal is to give a copy of the notice of appeal to the Commissioner of Police.¹⁸⁵⁴ This provision facilitates the operation of section 64A which gives the Commissioner of Police the right to appear and be heard on an appeal. This enables the Commissioner to participate in an appeal where a police officer applied for the order appealed against, where the appeal raises an issue of law or where it is in the interests of justice to do so.

16.33 The *Domestic and Family Violence Protection Act 1989* (Qld) also takes into account that, in certain circumstances, a court (including a court other than a Magistrates Court) may initiate the making of a domestic violence order in sentencing proceedings, and provides an avenue of appeal against such an order.¹⁸⁵⁵ Section 63(2) makes provision for a person who is aggrieved by a decision of a court in relation to the making of a domestic violence order against a person who has been found guilty of an offence involving domestic violence to appeal that decision to the Court of Appeal.

16.34 A further example relates to the stay of the operation of an order.¹⁸⁵⁶ Section 65(2) of the *Domestic and Family Violence Protection Act 1989* (Qld) specifically provides that an appeal against an order does not stay the operation of the order, but that the court that made the order may stay the operation of the order, or a condition imposed by the order, pending a decision on appeal.

¹⁸⁵¹ See, for example, *Adoption of Children Act 1964* (Qld) s 26A(5); *Hire-purchase Act 1959* (Qld) s 45(3); *Juvenile Justice Act 1992* (Qld) s 117(1); and *Maintenance Act 1965* (Qld) s 134(1).

¹⁸⁵² *Uniform Civil Procedure Rules 1999* (Qld) ch 18 pt 3.

¹⁸⁵³ See para 16.16–16.17 of this Report.

¹⁸⁵⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 64(1)(c). This provision, in conjunction with other notification provisions in the Act, provides a mechanism to give the Commissioner of Police the necessary information for the effective policing and enforcement of domestic violence orders.

¹⁸⁵⁵ See para 16.14 of this Report.

¹⁸⁵⁶ See para 16.19 of this Report.

16.35 In addition, the time limit for instituting an appeal under the domestic violence legislation takes into account the possibility that an order may be made in the absence of one of the parties. Section 63(3) provides that an appeal must be instituted within 28 days after the day the order was made or, if the person was absent from court when the order was made, within 28 days after the day the order was served on or given to the person.¹⁸⁵⁷

16.36 The Commission notes that section 64 of the *Domestic and Family Violence Protection Act 1989* (Qld) is of similar effect to the provisions for the institution of an appeal to the District Court under the *Uniform Civil Procedure Rules 1999* (Qld) that would otherwise apply.¹⁸⁵⁸ However, the *Uniform Civil Procedure Rules 1999* (Qld) do not provide for a copy of the notice of appeal to be given to the Commissioner of Police as is provided by section 64(1)(c) of the *Domestic and Family Violence Protection Act 1989* (Qld). The Commission has also made recommendations elsewhere in this Report to include in the Personal Protection Bill 2007 a provision in relation to the court's power to order substituted service of a notice of appeal.¹⁸⁵⁹ That provision is generally similar to rule 116 of the *Uniform Civil Procedure Rules 1999* (Qld).

Specific appeals provisions

16.37 The appeal provisions of specific application included in the *Domestic and Family Violence Protection Act 1989* (Qld) are of particular relevance to the operation of that Act. The Commission considers that the inclusion of specific appeal provisions in the Personal Protection Bill 2007 is necessary for the development of a comprehensive and effective mechanism for obtaining protection orders. It would also simplify, for unrepresented persons in particular, the process of identifying those provisions.

16.38 The Commission is therefore of the view that specific appeal provisions should be included in the Personal Protection Bill 2007.

16.39 In the Commission's view, the appeal provisions of the Personal Protection Bill 2007 should be generally similar to the provisions of part 5 of the *Domestic and Family Violence Protection Act 1989* (Qld), set out at paragraphs 16.13–16.21 above, subject to some modification. This would also ensure that the practices and procedures governing appeals under the Personal Protection Bill 2007 are generally consistent with the Queensland domestic violence legislation.

¹⁸⁵⁷ Section 222(1) of the *Justices Act 1886* (Qld) provides that an appeal must be made within one month after the date of the order. Similarly, r 748(1) of the *Uniform Civil Procedure Rules 1999* (Qld) provides that a notice of appeal must be filed within 28 days after the date of the decision appealed from.

¹⁸⁵⁸ *Uniform Civil Procedure Rules 1999* (Qld) rr 116, 747(1), 752(1), 783(1)–(3). *Uniform Civil Procedure Rules 1999* (Qld) ch 18 pt 3 sets out the procedure for appeals to the District Court from a Magistrates Court. Rule 785(1) of the *Uniform Civil Procedure Rules 1999* (Qld) provides that ch 18 pt 1 of the rules applies to appeals under ch 18 pt 3.

¹⁸⁵⁹ See para 19.68 of this Report.

Decisions appealed against

16.40 The Commission considers that the Personal Protection Bill 2007 should provide an avenue of appeal to the District Court for a person who is dissatisfied with an order of a Magistrates Court or the Childrens Court constituted by a Childrens Court magistrate:

- to refuse an application for –
 - a protection order, other than an interim protection order;
 - the registration of a corresponding order;
 - the variation or setting aside of a protection order, including a registered corresponding order;
- to make a protection order;
- to vary or set aside a protection order or registered corresponding order;¹⁸⁶⁰
- to register a corresponding order;
- to make or refuse to make an order for costs made on the dismissal of application as malicious, false, frivolous or vexatious; or
- to make or refuse to make a non-publication order.¹⁸⁶¹

16.41 Given that the media may have an interest in publishing material the subject of a non-publication order, the Commission notes that a media organisation may also be a ‘person who is dissatisfied’ with a decision to make a non-publication order and would be entitled to appeal.¹⁸⁶²

¹⁸⁶⁰ The Commission has made recommendations in Chapter 17 of this Report about the court’s power to register corresponding orders made in another Australian jurisdiction or in New Zealand. Once a corresponding order has been registered, it has effect as a protection order made under the Personal Protection Bill 2007 and may be varied or set aside in the same way as a protection order.

¹⁸⁶¹ The Commission has made recommendations in Chapter 18 of this Report about the court’s power to restrict the publication of information about a proceeding under the Personal Protection Bill 2007 by making a non-publication order in certain circumstances.

¹⁸⁶² Note that the *Acts Interpretation Act 1954* (Qld) s 36 provides that a reference in an Act to a ‘person’ includes an individual and a corporation. It has been suggested that the expression ‘person dissatisfied’ is similar to ‘person aggrieved’ which is given a broad meaning: *Re Hunt and Commissioner for Superannuation* (2003) 78 ALD 775, [39]; *Bray v Workers Rehabilitation & Compensation Corporation* (1994) 62 SASR 218, 223 (Bollen J); *McCallum v Federal Commissioner of Taxation* (1997) 75 FCR 458, 466–7 (Hill J, dissenting). The expression ‘a person who is aggrieved’ is not to be given a rigid or inflexible meaning; it is not necessary that the affected rights or interests are confined to strictly legal rights or interests; and the question whether a person is a person who is aggrieved depends on the facts of the case and whether his or her grievance ‘is greater than or different from that which any member of the general public could claim’: see generally *McCarthy v Xiong* (1993) 2 Tas R 290, 295–7 (Green CJ).

16.42 The Commission also notes that, at common law, if a person has a 'special interest' in the subject matter of the appeal, he or she will have standing to appear.¹⁸⁶³

Powers on appeal

16.43 In the Commission's view, the Personal Protection Bill 2007 should make the following provisions in relation to the powers of the appeal court:

- the appeal court may confirm the order or decision appealed against, set aside or vary the order or decision appealed against as the court considers appropriate, or make the order or decision it considers should have been made;
- if the appeal court makes an order or decision that it considers should have been made, the order or decision should take effect from when it is made by the appeal court;
- the appeal court's powers on allowing an appeal include the power to vary or set aside the order or decision appealed against with effect from when the order was originally made.

16.44 In Chapter 18 of this Report, the Commission has also recommended that the appeal court may, in certain circumstances, make a non-publication order in relation to an appeal proceeding.¹⁸⁶⁴

Entitlement to appear

16.45 The Commission considers the Personal Protection Bill 2007 should specify the persons who are entitled to appear, and be heard, on an appeal under the Bill, including in the Court of Appeal. In particular, the Commission considers the Bill should provide that, without limiting the persons who may appear and be heard on an appeal, the following persons are entitled to appear and be heard:

- the Commissioner of Police;
- the appellant; and

¹⁸⁶³ *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* (1980) 146 CLR 493, 530–1 (Gibbs J). A person will have standing to appeal where the person is likely to gain some advantage if he or she succeeds or suffer a disadvantage if he or she is unsuccessful: *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* (1980) 146 CLR 493, 530–1 (Gibbs J). See also, *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36–7 (Gibbs CJ). Note, this general rule is a flexible one and determination of whether a person has an interest sufficient to give rise to standing will depend on the facts of the case: *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172, [11] (Chesterman J).

¹⁸⁶⁴ See para 18.47 of this Report.

- any other person who is required to be served with the notice of appeal.¹⁸⁶⁵

16.46 The conferral on the Commissioner of Police of a right to appear and be heard on an appeal is consistent with the position under the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁸⁶⁶ The Personal Protection Bill 2007 extends the Commissioner's right to appear to an appeal made to the Court of Appeal.¹⁸⁶⁷

Stay on the operation of the order

16.47 The domestic violence legislation appeal provisions also provide that the court that made an order may stay the operation of the order until an appeal is dealt with, as is provided by section 65(2) of the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁸⁶⁸

16.48 One of the purposes of a protection order under the proposed Personal Protection Bill 2007 is to ensure the safety of the persons protected by the order. In some circumstances, staying the operation of an order may compromise the safety of such persons.

16.49 To avoid this possibility, the Commission considers that the Personal Protection Bill 2007 should provide that an appeal does not stay the operation of the order or decision appealed against but that, without limiting any other power the court may have to stay the operation of the order, the court may stay the operation of the order or decision until the appeal is decided. The power to stay the order should be conferred on the first instance court or, if the order appealed against is an interim protection order made by a magistrate, a Magistrates Court. However, the court may not stay the operation of the order unless it:

- has regard to the need to ensure the safety of any persons who are protected by the order; and
- is satisfied it is safe to stay the operation of the order.

¹⁸⁶⁵ See para 19.49 of this Report.

¹⁸⁶⁶ *Domestic and Family Violence Protection Act 1989* (Qld) s 64A.

¹⁸⁶⁷ Note that the Commission has recommended elsewhere in this Report that a protection order may be made by a court in a proceeding in which a person pleads guilty to, or is found guilty of, an offence that involves behaviour that constitutes grounds for making a protection order. See para 12.109 of this Report. The Court of Appeal will have jurisdiction to hear appeals against an order made in those circumstances.

¹⁸⁶⁸ Note that r 761(2) of the *Uniform Civil Procedure Rules 1999* (Qld) provides that either the court that made the order appealed from, or the appeal court, may stay 'the enforcement of all or part of a decision subject to an appeal'.

16.50 This safety proviso is included in the New South Wales legislation.¹⁸⁶⁹ The Commission has recommended that the court, in deciding an application to vary or set aside a protection order under the Personal Protection Bill 2007, must take into account the safety of persons and property protected by the order.¹⁸⁷⁰

SELECTED ISSUES FOR CONSIDERATION

The refusal to make an interim protection order

16.51 The Commission has considered whether the appeal provisions under the Personal Protection Bill 2007 should provide for an appeal against the refusal of an application for an interim protection order.

16.52 As mentioned above, the matters that are appealable under the *Domestic and Family Violence Protection Act 1989* (Qld) include the making of a protection order and a temporary protection order.¹⁸⁷¹ The Commission notes that the making of either one of these orders impinges on the rights of a respondent named in an order.

16.53 There is also provision made under the *Domestic and Family Violence Protection Act 1989* (Qld) for the appeal of the refusal of an application for a protection order.¹⁸⁷² The Act does not provide for the appeal of the refusal of an application for a temporary protection order.

16.54 It may seem anomalous that the appeal provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) provide for an appeal against the refusal of an application for a protection order but not against the refusal of an application for a temporary protection order. However, in the Commission's view, an unsuccessful applicant for an interim order is unlikely to suffer a substantial disadvantage if he or she is unable to appeal the refusal of that application. The refusal to make an interim order does not affect the applicant's right to seek a final order, or, in appropriate circumstances, to make a fresh application for an interim order. Consequently, an unsuccessful applicant can continue with the original application for a final order or otherwise can bring a new application for an interim order. Generally, either approach would be simpler than bringing an appeal.

¹⁸⁶⁹ See para 16.23 of this Report.

¹⁸⁷⁰ See para 15.51 of this Report.

¹⁸⁷¹ See para 16.13 of this Report.

¹⁸⁷² *Domestic and Family Violence Protection Act 1989* (Qld) s 63(1)(a)(i).

16.55 The Commission is therefore of the view that, like the *Domestic and Family Violence Protection Act 1989* (Qld), the Personal Protection Bill 2007 should not make provision for an appeal against the refusal of an application for an interim protection order.

Right to appeal award for costs

16.56 Elsewhere in this Report, the Commission has recommended the inclusion of a provision in the Personal Protection Bill 2007 to the effect that costs may not be awarded on an application for a protection order, or an application to vary or set aside a protection order (including an interim protection order) unless the court dismisses the application as malicious, false, frivolous or vexatious.¹⁸⁷³ This is similar to the position under the Queensland domestic violence legislation.¹⁸⁷⁴

16.57 As mentioned above, the New South Wales Law Reform Commission has recommended the inclusion of a right to appeal an award of costs made under the civil restraining order legislation in that jurisdiction.¹⁸⁷⁵ The New South Wales legislation enables a court to make an award of costs in a broader range of circumstances than those recommended by this Commission, or under the Queensland domestic violence legislation.¹⁸⁷⁶

16.58 The Commission is concerned that the provision of a right to appeal an award of costs made in relation to the dismissal of a malicious, false, frivolous or vexatious application may frustrate one of the purposes of the general costs provision which is to discourage unmeritorious applications. In addition, the provision of such a right may lead to further inappropriate litigation, perhaps for the purpose of harassment or intimidation.

16.59 On the other hand, the denial of a right to appeal an award of costs may, in some cases, cause injustice.

16.60 As a general principle, decisions on costs are a matter for the discretion of the trial judge.¹⁸⁷⁷ Section 253 of the *Supreme Court Act 1995* (Qld), derived from section 9 of the *Judicature Act 1867* (Qld), limits appeals as to costs only by providing that leave of the judge that made the order is required. Leave will be given only if the applicant can identify an error in principle in the exercise of the trial judge's discretion.¹⁸⁷⁸ Section 253 provides:

¹⁸⁷³ See para 20.175 of this Report.

¹⁸⁷⁴ *Domestic and Family Violence Protection Act 1989* (Qld) s 61.

¹⁸⁷⁵ See para 16.28 of this Report.

¹⁸⁷⁶ See para 16.27 of this Report.

¹⁸⁷⁷ See *Uniform Civil Procedure Rules 1999* (Qld) r 681(1); *Emanuel Management Pty Ltd (In liq) v Foster's Brewing Group Ltd* [2003] QSC 484, [30] (Chesterman J).

¹⁸⁷⁸ *Emanuel Management Pty Ltd (In liq) v Foster's Brewing Group Ltd* [2003] QSC 484, [30] (Chesterman J).

253 What orders shall not be subject to appeal

No order made by any judge of the said court by the consent of parties or as to costs only which by law are left to the discretion of the judge shall be subject to any appeal except by leave of the judge making such order.

16.61 The Commission considers that the public benefit in limiting inappropriate proceedings under the Personal Protection Bill 2007 justifies restricting the right to appeal an order to make, or refuse to make, an order awarding costs on the dismissal of an application as malicious, false, frivolous or vexatious. The Commission does not, however, consider it appropriate to exclude altogether the possibility of a remedy for an erroneous costs order.

16.62 The Commission is therefore of the view that the Personal Protection Bill 2007 should include a provision of similar effect to section 253 of the *Supreme Court Act 1995* (Qld) limiting appeals as to costs only, by requiring leave of the court that made the order or a District Court judge. Given the Commission's general recommendations as to the appeal of orders and decisions made under the Personal Protection Bill 2007, a provision to that effect would not restrict the right to appeal against an order dismissing an application as malicious, false, frivolous or vexatious.¹⁸⁷⁹

RECOMMENDATIONS

16.63 The Commission makes the following recommendations:

- 16-1 The Personal Protection Bill 2007 should include specific appeal provisions, generally similar to the appeal provisions provided under part 5 of the *Domestic and Family Violence Protection Act 1989* (Qld). The following appeal provisions should be included in the Bill:¹⁸⁸⁰**
- (a) An appeal to the District Court may be made by a person who is dissatisfied with an order of a Magistrates Court or the Childrens Court constituted by a Childrens Court magistrate:
- (i) to refuse an application for—

¹⁸⁷⁹

See para 16.40 of this Report. The Commission has recommended that the refusal of an application for a protection order or an application to set aside or vary a protection order should be appealable under the Personal Protection Bill 2007. These appeal provisions would apply where a person disputes the dismissal of an application as malicious, false, frivolous or vexatious.

¹⁸⁸⁰

See para 16.38–16.40 of this Report.

- (A) a protection order, other than an interim protection order;¹⁸⁸¹
 - (B) the registration of a corresponding order;
 - (C) the variation or setting aside of a protection order, including a registered corresponding order;
- (ii) to make a protection order;
 - (iii) to vary or set aside a protection order or registered corresponding order;
 - (iv) to register a corresponding order;
 - (v) to make or refuse to make an order for costs made on the dismissal of application as malicious, false, frivolous or vexatious; or
 - (vi) to make or refuse to make a non-publication order;
- (b) An appeal to the District Court may be made by a person who is dissatisfied with a decision of a magistrate to make an interim protection order;
 - (c) A person who is dissatisfied with a decision of a court (other than a Magistrates Court) to make or vary a protection order against a person who has been found guilty of an offence involving personal violence or workplace violence, may appeal against the decision to the Court of Appeal;
 - (d) An appeal must be started within 28 days after:
 - (i) the day the order or decision appealed against was made; or
 - (ii) if the order or decision appealed against was made in the absence of the person dissatisfied with it and the person is required under the Bill to be served with the order or decision, the day on which a copy of the order or decision is served on the person;

1881

See para 16.55 of this Report.

- (e) An appeal is started by filing a notice of appeal with the registrar of the appeal court. The notice of appeal must state with particularity the grounds of appeal and facts relied on, and must be made in the approved form;
- (f) An appeal is by way of rehearing;
- (g) On appeal, the court may confirm the order or decision appealed against, set aside or vary the order or decision appealed against as the court considers appropriate, or make the order or decision it considers should have been made;¹⁸⁸²
- (h) The decision of the appeal court on appeal is final and conclusive; and
- (i) The appeal court may make orders about costs of the appeal as the court considers appropriate.

See Personal Protection Bill 2007 cl 108(1)–(3), 109, 110, 111(1), (2), 113(1), 114(1), (5), (6).

- 16-2 The Personal Protection Bill 2007 should provide that if the court hearing the appeal makes the order or decision it considers should have been made, that order or decision takes effect from when it is made. The Bill should also provide that the appeal court's powers on allowing an appeal include the power to vary or set aside the order or decision appealed against with effect from the time the order or decision was originally made.¹⁸⁸³

See Personal Protection Bill 2007 cl 114(3), (4).

- 16-3 The Personal Protection Bill 2007 should specify that, without limiting the persons who may appear and be heard on an appeal, the following people may appear and be heard on an appeal under the Personal Protection Bill 2007, including in the Court of Appeal:¹⁸⁸⁴

- (a) the Commissioner of Police;
- (b) the appellant; and

¹⁸⁸² See para 16.43 of this Report.

¹⁸⁸³ Ibid.

¹⁸⁸⁴ See para 16.45 of this Report.

- (c) any other person who is required to be served with the notice of appeal.

See Personal Protection Bill 2007 cl 112.

- 16-4 A provision should be included in the Personal Protection Bill 2007 to the effect that an appeal does not stay the operation of the order or decision appealed against, but that, without limiting any other power to stay the operation of the order, the first instance court or, if the order appealed against is an interim protection order made by a magistrate, a Magistrates Court, may stay the operation of the order or decision until the appeal is decided. The court may not, however, stay the operation of the order or decision unless it:¹⁸⁸⁵
- (a) has regard to the need to ensure the safety of any persons who are protected by the order; and
 - (b) is satisfied it is safe to stay the operation of the order.

See Personal Protection Bill 2007 cl 113.

- 16-5 A provision should be included in the Personal Protection Bill 2007 of similar effect to section 253 of the *Supreme Court Act 1995* (Qld) providing that a person may not appeal against an order making or refusing to make an award of costs on the dismissal of an application as malicious, false, frivolous or vexatious, without the leave of the court that made the order or a District Court judge.¹⁸⁸⁶

See Personal Protection Bill 2007 cl 108(4).

¹⁸⁸⁵ See para 16.49 of this Report.

¹⁸⁸⁶ See para 16.62 of this Report.

Chapter 17

Interjurisdictional recognition of orders

INTRODUCTION	446
THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)	446
THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)	447
THE POSITION IN OTHER JURISDICTIONS	449
Notification of registration to the respondent	450
Notification of registration to other persons or entities.....	450
Variation of a registered corresponding order.....	451
Effect of variation or revocation of the order in the original jurisdiction	451
THE COMMISSION'S VIEW	452
Procedure for registration, including notice of application	453
Notification of registration to the respondent	455
Enforceability of a registered corresponding order	457
Period of registration	458
Notification of registration to other persons or entities.....	458
Variation of a registered corresponding order.....	458
Effect of variation or revocation of the order in the original jurisdiction	460
RECOMMENDATIONS	461

INTRODUCTION

17.1 The Commission's terms of reference require it to consider whether the *Peace and Good Behaviour Act 1982* (Qld) provides an 'appropriate, easily accessible and effective mechanism for protection of the community against breaches of the peace'.¹⁸⁸⁷

17.2 There may be occasions where a person who is protected by a restraining order made in another Australian jurisdiction or in New Zealand, which is of equivalent effect to a peace and good behaviour order, wishes to have that protection continued in Queensland.

17.3 This might occur, for example, where a person protected by a restraining order made in another Australian jurisdiction or in New Zealand subsequently relocates to Queensland and wishes to register the order here to ensure that the protection continues to apply. This may be of particular relevance where the person seeks relief from harassing or intimidating behaviour (and, in particular, stalking behaviour).¹⁸⁸⁸ Further, where the parties to such an order frequent, reside or work in or around a place near the Queensland border, the behaviour that is sought to be prevented by the order may occur in more than one jurisdiction.

17.4 Presently, if a person for whose benefit a restraining order has been made in another jurisdiction seeks similar protection in Queensland, his or her remedy is to commence proceedings under the *Peace and Good Behaviour Act 1982* (Qld) for a peace and good behaviour order. This contrasts with the position under the Queensland domestic violence legislation and the civil restraining order legislation in other jurisdictions which provide for the reciprocal recognition and enforcement of orders through a system of registration.

17.5 This chapter considers whether the Personal Protection Bill 2007 should provide for the registration and enforcement of restraining orders made in another Australian jurisdiction or in New Zealand, having an equivalent effect to a protection order made under the Bill (a 'corresponding order').

THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)

17.6 The *Peace and Good Behaviour Act 1982* (Qld) does not provide for the recognition or enforcement of an order made in another jurisdiction having an equivalent effect to a peace and good behaviour order. This means that, as mentioned above, if a person for whose benefit an order has been made in another jurisdiction wishes to obtain similar protection in Queensland, he or she

¹⁸⁸⁷ The terms of reference are set out in Appendix 1 to this Report.

¹⁸⁸⁸ In this Report, the Commission has recommended the inclusion of harassing or intimidating behaviour in the grounds for obtaining an order under the Personal Protection Bill 2007. See para 5.110, 8.30 of this Report.

would be required to make an application under the *Peace and Good Behaviour Act 1982* (Qld) for a peace and good behaviour order.

THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)

17.7 The *Domestic and Family Violence Protection Act 1989* (Qld) includes a scheme for the registration and enforcement of 'interstate orders'.¹⁸⁸⁹ This scheme was included in the Act as part of a co-operative scheme between all Australian States and Territories to provide for portability of domestic violence orders.¹⁸⁹⁰

17.8 For the purposes of the Act, an 'interstate order' is an order made by a court of another State, Territory or New Zealand under a prescribed law of the other State, Territory or New Zealand.¹⁸⁹¹

17.9 A registered interstate order has the same effect as a protection order made under the *Domestic and Family Violence Protection Act 1989* (Qld) and may be enforced against a person as if it were a protection order made under the Act and served on the person.¹⁸⁹²

17.10 The scheme for the registration and enforcement of an interstate order under the *Domestic and Family Violence Protection Act 1989* (Qld) includes the following features:

- A person may apply to the clerk of the court of a Magistrates Court for the registration of an interstate order;¹⁸⁹³

¹⁸⁸⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 3, sch (definition of 'interstate order'), pt 3 div 3 (Registration of interstate orders) (ss 40–46).

¹⁸⁹⁰ See the Second Reading debate of the Domestic Violence (Family Protection) Amendment Bill 1992 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 4 August 1992, 6012 (Mr Raymond Hollis).

¹⁸⁹¹ *Domestic and Family Violence Protection Act 1989* (Qld) s 3, sch (definition of 'interstate order'). Section 7 of the *Domestic and Family Violence Protection Regulation 2003* (Qld) prescribes the following laws for the purposes of the definition of 'interstate orders':

- (a) the *Crimes Act 1900* (NSW);
- (b) the *Crimes (Family Violence) Act 1987* (Vic);
- (c) the *Domestic Violence Act (NT)*;
- (d) the *Domestic Violence Act 1994* (SA);
- (e) the *Domestic Violence Act 1995* (NZ);
- (f) the *Justices Act 1959* (Tas);
- (g) the *Protection Orders Act 2001* (ACT);
- (h) the *Restraining Orders Act 1997* (WA); and
- (i) the *Summary Procedure Act 1921* (SA).

Note that since the commencement of the *Domestic and Family Violence Protection Regulation 2003* (Qld), the *Protection Orders Act 2001* (ACT) has been amended and renamed the *Domestic Violence and Protection Orders Act 2001* (ACT) and the *Family Violence Act 2004* (Tas) has been enacted.

¹⁸⁹² *Domestic and Family Violence Protection Act 1989* (Qld) s 44.

¹⁸⁹³ *Domestic and Family Violence Protection Act 1989* (Qld) s 40.

- The clerk is required to register an interstate order if he or she is satisfied that the order is in force and that the order has been served on the person against whom the order was made.¹⁸⁹⁴ The order is registered for the period during which the order as originally made is in force.¹⁸⁹⁵ A court may vary the interstate order for the purposes of its registration by adapting or modifying it in a way it considers necessary or desirable for its effective operation in Queensland.¹⁸⁹⁶
- A person who has applied to register an interstate order need not notify the person against whom the order was made of an application to register the order.¹⁸⁹⁷ Further, a notice of the registration of an interstate order is not to be given to the person against whom the order was made without the written consent of the aggrieved.¹⁸⁹⁸ Similarly, notice need not be given in respect of an application to vary or revoke the registered interstate order.¹⁸⁹⁹
- A court may vary a registered interstate order as it applies in Queensland, vary the period during which a registered interstate order has effect in its operation in Queensland or cancel the registration of the order on the application of the following persons:¹⁹⁰⁰
 - the person who applied for the registration of the interstate order;
 - a person for whose benefit the interstate order has been made;
 - a person against whom the interstate order has been made;
 - an authorised person;¹⁹⁰¹ and
 - a police officer.
- A registered interstate order that has been adapted or modified (for the purpose of its registration) or that has been varied is enforceable in Queensland without notice of the adaptation, modification or variation

1894 *Domestic and Family Violence Protection Act 1989* (Qld) ss 41(1), 42(1)–(2).

1895 *Domestic and Family Violence Protection Act 1989* (Qld) s 42(6).

1896 *Domestic and Family Violence Protection Act 1989* (Qld) s 42(4). If the clerk believes it is necessary to do so, or the applicant requests it, the clerk must refer the interstate order to the Magistrates Court for adaptation or modification before registering it: *Domestic and Family Violence Protection Act 1989* (Qld) s 42(3).

1897 *Domestic and Family Violence Protection Act 1989* (Qld) s 46(1)(a).

1898 *Domestic and Family Violence Protection Act 1989* (Qld) s 43(2).

1899 *Domestic and Family Violence Protection Act 1989* (Qld) s 46(1)(b).

1900 *Domestic and Family Violence Protection Act 1989* (Qld) s 45.

1901 See *Domestic and Family Violence Protection Act 1989* (Qld) s 14(2).

being given to the person against whom the interstate order was originally made.¹⁹⁰²

- Within a specified period of registering an interstate order, the clerk must give a copy of the order and a certificate of registration to the person who applied for the registration of the order and the Commissioner of Police.¹⁹⁰³
- No fees or expenses are payable by the applicant in relation to the registration of an interstate order.¹⁹⁰⁴

THE POSITION IN OTHER JURISDICTIONS

17.11 The civil restraining order legislation in the majority of the other Australian jurisdictions provides for the recognition and enforcement of restraining orders made in other Australian jurisdictions and in New Zealand.¹⁹⁰⁵

17.12 These interstate legislative schemes are generally similar in their provisions and application.

17.13 In the domestic violence context, many of these schemes form a co-operative legislative framework for the reciprocal registration and enforcement of domestic violence orders.¹⁹⁰⁶ As mentioned earlier, the Queensland domestic violence legislation also forms part of this framework.¹⁹⁰⁷

1902 *Domestic and Family Violence Protection Act 1989* (Qld) s 46(3).

1903 *Domestic and Family Violence Protection Act 1989* (Qld) s 43(1). Section 52 of that Act requires the clerk of the court to give the Commissioner of Police notice of the application or the order made in relation to an application for a protection order, an application for a variation or revocation of a protection order, an application for registration of an interstate order or the variation or revocation of a registered interstate order.

1904 *Domestic and Family Violence Protection Act 1989* (Qld) s 43(4).

1905 *Domestic Violence and Protection Orders Act 2001* (ACT) pt 9 (ss 84–92); *Crimes Act 1900* (NSW) pt 15A, div 10 (ss 562ZZ–562ZZW); *Summary Procedure Act 1921* (SA) ss 4 (definition of ‘foreign restraining order’), 99H; *Summary Procedure (Restraining Orders) Regulations 2006* (SA) s 5; *Justices Act 1959* (Tas) ss 106A(1) (definition of ‘external restraint order’), 106GA–106GD; *Crimes (Family Violence) Act 1987* (Vic) ss 3(1) (definitions of ‘interstate summary protection order’ and ‘New Zealand protection order’), 18AA–18AAB; *Restraining Orders Act 1997* (WA) s 3 (definition of ‘corresponding law’), pts 7 (ss 74–79), 7A (ss 79A–79F). Note that the definition of ‘corresponding law’ under the *Restraining Orders Act 1997* (WA) also includes a foreign country.

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). The external protection order provisions of the *Crimes Act 1900* (NSW) are replicated in pt 13 (ss 94–98) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

1906 In South Australia, the *Domestic Violence Act 1994* (SA) s 14 and in Tasmania, the *Family Violence Act 2004* (Tas) ss 26–29 also form part of this scheme.

1907 See para 17.7 of this Report.

17.14 To an extent, these interstate legislative schemes also recognise restraining orders made in another Australian jurisdiction or in New Zealand that have the same or similar effect to peace and good behaviour orders.

17.15 In their present form, the relevant legislative provisions in the ACT, New South Wales, Tasmania and Western Australia are expressed in sufficiently general terms so as to apply to an order made under the *Peace and Good Behaviour Act 1982* (Qld) in its current form and under the Personal Protection Bill 2007 proposed by the Commission.¹⁹⁰⁸ In South Australia, the *Summary Procedure Act 1921* (SA) specifically recognizes an order made under the existing *Peace and Good Behaviour Act 1982* (Qld).¹⁹⁰⁹

Notification of registration to the respondent

17.16 In the ACT, there is no requirement to notify the respondent of the registration of a restraining order made in another jurisdiction.¹⁹¹⁰ In New South Wales, Tasmania and Western Australia, notice of the registration of a restraining order made in another jurisdiction is not to be given to the respondent to the order unless the person who applied for the registration has consented to,¹⁹¹¹ or requested,¹⁹¹² the notification.

Notification of registration to other persons or entities

17.17 In the ACT, New South Wales, South Australia, Victoria and Western Australia, the Commissioner of Police (or his or her equivalent) must be notified of the registration of the order.¹⁹¹³ The legislation in the ACT, Victoria and Western Australia, also requires that the court that made the original order must be notified of the registration of the order.¹⁹¹⁴

1908 *Domestic Violence and Protection Orders Act 2001* (ACT) s 84 (definition of 'recognised order'); *Crimes Act 1900* (NSW) s 562ZZS (definition of 'external protection order'); *Justices Act 1959* (Tas) s 106A(1) (definition of 'external restraint order'); *Restraining Orders Act 1997* (WA) ss 3 (definition of 'corresponding law'), 74 (definition of 'interstate order'). Section 562ZZS of the *Crimes Act 1900* (NSW) is replicated in s 94 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1905 of this Report.

1909 *Summary Procedure Act 1921* (SA) s 4 (definition of 'foreign restraining order'); *Summary Procedure (Restraining Orders) Regulations 2006* (SA) s 5.

1910 See *Domestic Violence and Protection Orders Act 2001* (ACT) s 86(2).

1911 *Crimes Act 1900* (NSW) s 562ZZU(5); *Justices Act 1959* (Tas) s 106GB(5). Section 562ZZU of the *Crimes Act 1900* (NSW) is replicated in s 96 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

1912 *Restraining Orders Act 1997* (WA) ss 76(2), 79C(4).

1913 *Domestic Violence and Protection Orders Act 2001* (ACT) s 86(2)(a); *Crimes Act 1900* (NSW) s 562ZZU(4); *Summary Procedure Act 1921* (SA) s 99H(5); *Crimes (Family Violence) Act 1987* (Vic) ss 18AA(2)(b), 18AAB(2)(b); *Restraining Orders Act 1997* (WA) ss 76(1)(b)(iii), 79C(3). For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 1905 of this Report.

1914 *Domestic Violence and Protection Orders Act 2001* (ACT) s 86(2)(b); *Crimes (Family Violence) Act 1987* (Vic) ss 18AA(2)(a), 18AAB(2)(a); *Restraining Orders Act 1997* (WA) ss 76(1)(b)(i), 79C(2)(b).

Variation of a registered corresponding order

17.18 In each of the other Australian jurisdictions, a court is empowered to vary or revoke a registered order.¹⁹¹⁵

17.19 In New South Wales and Victoria, a registered order is not to be varied or its registration revoked unless notice of the application has been served on the person against whom the order has been made.¹⁹¹⁶ Similarly, where the person against whom a registered order has been made applies to vary the order or revoke its registration, the order is not to be varied or revoked unless notice of the application has been served on the person for whose protection the order has been made.¹⁹¹⁷

17.20 In South Australia, Victoria and Western Australia, the Commissioner of Police (or his or her equivalent) must be notified of the variation of the registered order.¹⁹¹⁸ The legislation in the ACT and Victoria also requires that the court which made the original order must be notified of the variation of the registered order.¹⁹¹⁹

Effect of variation or revocation of the order in the original jurisdiction

17.21 The legislation in New South Wales and Victoria specifies that the variation or revocation of a restraining order by a court of the jurisdiction in which it was originally made has no effect after the order has been registered.¹⁹²⁰

17.22 In contrast, the legislation in the ACT and Western Australia makes provision to give effect to a variation or revocation of a restraining order made in the jurisdiction in which the order was originally made.¹⁹²¹ For example, in the

¹⁹¹⁵ *Domestic Violence and Protection Orders Act 2001* (ACT) s 87(b); *Crimes Act 1900* (NSW) s 562ZZW(3); *Summary Procedure Act 1921* (SA) s 99H(4); *Justices Act 1959* (Tas) s 106GD(2)–(3); *Crimes (Family Violence) Act 1987* (Vic) s 18AA(5); *Restraining Orders Act 1997* (WA) ss 77(1), 79D(1). Section 562ZZW of the *Crimes Act 1900* (NSW) is replicated in s 98 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales and Victoria, see note 1905 of this Report.

¹⁹¹⁶ *Crimes Act 1900* (NSW) s 562ZZW(4); *Crimes (Family Violence) Act 1987* (Vic) s 18AA(7).

¹⁹¹⁷ *Crimes Act 1900* (NSW) s 562ZZW(5); *Crimes (Family Violence) Act 1987* (Vic) s 18AA(8).

¹⁹¹⁸ *Summary Procedure Act 1921* (SA) s 99H(6); *Crimes (Family Violence) Act 1987* (Vic) s 18AA(10)(b); *Restraining Orders Act 1997* (WA) ss 79(b), 79F(b).

¹⁹¹⁹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 88; *Crimes (Family Violence) Act 1987* (Vic) s 18AA(10)(a). See also *Restraining Orders Act 1997* (WA) ss 49(3), 77.

¹⁹²⁰ *Crimes Act 1900* (NSW) s 562ZZV(2); *Crimes (Family Violence) Act 1987* (Vic) s 18AA(4). Note, however, that the registration of a New Zealand protection order that is varied, revoked or extended in New Zealand, is to be varied, revoked or extended accordingly in Victoria: *Crimes (Family Violence) Act 1987* (Vic) s 18AAB(4). Section 562ZZV of the *Crimes Act 1900* (NSW) is replicated in s 97 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

¹⁹²¹ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 89–90; *Restraining Orders Act 1997* (WA) ss 78, 79E.

ACT, if the registrar is told by a recognised court¹⁹²² that a recognised order¹⁹²³ has been revoked, the registrar must cancel the registration of the order and notify the chief police officer and the person for whose benefit the order was registered of the cancellation.¹⁹²⁴ Further, where a recognised order has been amended by a recognised court, the registrar must cancel the registration of the order and register the amended form of the order.¹⁹²⁵

THE COMMISSION'S VIEW

17.23 Because domestic violence disputes involve persons in domestic relationships, the relocation of one of the parties to a dispute to another jurisdiction might not remove the threat, or incidence, of domestic violence between the parties to that dispute. This situation has been recognised by Australian legislatures with the implementation of a co-operative legislative scheme for the portability of domestic violence orders.

17.24 Because the Personal Protection Bill 2007 will not apply to persons in domestic relationships, it may be that, if one of the parties to a dispute relocates to another place and there is no ongoing relationship between the parties, there will be no further need of an order. Nonetheless, there may be circumstances in which a person who is protected by a corresponding order will require similar protection in Queensland.¹⁹²⁶ For example, a person may be seeking relief from serious harassment or intimidation and, in particular, stalking behaviour.

17.25 The Commission therefore considers that there is sufficient justification for the inclusion of provisions in the Personal Protection Bill 2007 for the registration and enforcement of corresponding orders.

17.26 The effect of having no provisions for the registration of corresponding orders, as is presently the case under the *Peace and Good Behaviour Act 1982* (Qld), is that a person is required to make an application for a peace and good behaviour order. This requirement is likely to impose a greater burden on the parties involved in the application and on court resources, than the process of registering a corresponding order. Further, the process of commencing an application may be of particular concern in serious cases of harassment or intimidation (and, in particular, stalking behaviour), because the complainant

1922 *Domestic Violence and Protection Orders Act 2001* (ACT) s 84 (definition of 'recognised court'). The Act provides that a 'recognised court' means a court of a State, another Territory or New Zealand that may make a recognised order.

1923 *Domestic Violence and Protection Orders Act 2001* (ACT) s 84 (definition of 'recognised order'). The Act provides that a 'recognised order' means an order made, under a law of a State, another Territory or New Zealand that may correspond to a protection order.

1924 *Domestic Violence and Protection Orders Act 2001* (ACT) s 89.

1925 *Domestic Violence and Protection Orders Act 2001* (ACT) s 90(1)–(2).

1926 See para 17.3 of this Report.

person is required to notify the person against whom the order is sought of the application, thereby disclosing information about his or her whereabouts.

17.27 The inclusion in the Personal Protection Bill 2007 of provisions for the registration and enforcement of corresponding orders made in another Australian jurisdiction or in New Zealand would also be consistent with the position under the Queensland domestic violence legislation and in the civil restraining order legislation of the majority of other Australian jurisdictions.

17.28 The Commission is therefore of the view that provision should be made in the Personal Protection Bill 2007 for the registration and enforcement of corresponding orders. The Bill should also provide that a 'corresponding order' means an order made by a court of another State or New Zealand under a law prescribed under a regulation as a corresponding law.¹⁹²⁷

17.29 The Commission further considers that the Personal Protection Bill 2007 should include provisions for the registration and enforcement of corresponding orders generally similar to the provisions in the *Domestic and Family Violence Protection Act 1989* (Qld) for the registration and enforcement of interstate orders, subject to certain important modifications.

17.30 The following sections of this chapter discuss various features of the general legislative scheme for the registration of corresponding orders and note, where relevant, the modifications proposed by the Commission to the scheme.

Procedure for registration, including notice of application

17.31 Under the *Domestic and Family Violence Protection Act 1989* (Qld), an application to register an interstate order is made to the clerk of the court.¹⁹²⁸ The clerk of the court must be satisfied that the order is in force and that it has been served on the respondent. If satisfied of those matters, the clerk is either to register the order or, in certain circumstances, refer the order to the court for adaptation or modification for the purposes of its registration.

17.32 The Commission notes that the limited involvement of the court in the process of registration is likely to speed up the process of registration and involve fewer court resources. However, the Commission considers the significance of the registration of a corresponding order in Queensland, in providing the applicant with an order which has effect, and is enforceable, as a protection order made by a Queensland court, is such as to warrant the involvement of the court in the registration process.

¹⁹²⁷

Note that the *Acts Interpretation Act 1954* (Qld) provides that in an Act, a reference to a State (other than a reference to Queensland or a particular State by name) includes a reference to the Australian Capital Territory and the Northern Territory: *Acts Interpretation Act 1954* (Qld) s 33A.

¹⁹²⁸

The scheme for registration of interstate orders under the *Domestic and Family Violence Protection Act 1989* (Qld) is described at para 17.10 of this Report.

17.33 The Commission therefore considers that the Personal Protection Bill 2007 should provide that an application for registration of a corresponding order should be made to the Magistrates Court. The application should be filed with the corresponding order or a certified copy of the order. As with other applications made under the Bill, the application should be made in the approved form and, unless it is made by a police officer, verified by statutory declaration. However, the Commission does not consider it necessary, as is provided under the *Domestic and Family Violence Protection Act 1989* (Qld), to require proof that the corresponding order has been served, or is taken to have been served, on the respondent.¹⁹²⁹ The application should then be set down for hearing by the court.

17.34 The Commission considers provision should also be made in the Personal Protection Bill 2007 for the court to deal with an application ex parte, in some circumstances. This is consistent with the general scheme for registration of interstate orders under the *Domestic and Family Violence Protection Act 1989* (Qld). However, it will not be in every case that the withholding of notice from the respondent to the corresponding order, and the conduct of the hearing for registration ex parte, will be justified. The Commission considers that, generally, the registrar must serve a copy of the application to register a corresponding order and notice of the hearing on the person against whom the order was made and a person protected by the order, if he or she is not the applicant. The Commission has also recommended in this Report that the Bill should provide that the registrar of the court that hears an application to register a corresponding order must give the Commissioner of Police a copy of the application within a specified period after the application is made.¹⁹³⁰

17.35 However, provision should be made for the court to deal with an application ex parte if the court is satisfied it is necessary to do so to prevent the person against whom the order was made causing serious harm to the person protected by the corresponding order or substantial damage to property of the person protected by the corresponding order. If the court so decides, the requirement to notify the respondent to the order of the application for registration should not apply.

17.36 A hearing by the court would allow the court to decide whether the order should be registered, whether it needs to be modified in any way before it is registered, and whether notice of the registration should be withheld from the respondent to the order.

17.37 The Personal Protection Bill 2007 should also provide that after considering an application for registration, the court may make an order registering the corresponding order if it is satisfied the corresponding order is in

¹⁹²⁹ Note that the Commission has recommended that the respondent must be served with a copy of the registered corresponding order, unless the court otherwise directs: see para 17.46 of this Report.

¹⁹³⁰ See para 20.112 of this Report.

force in the original jurisdiction. The Bill should further provide that the court may vary the corresponding order for the purpose of its registration by modifying it to the extent the court considers necessary for the order to operate effectively in Queensland.

17.38 The Commission also considers that the Personal Protection Bill 2007 should include a provision dealing with the court's powers on the hearing of an application for registration (other than an ex parte hearing) in the absence of the respondent, on proof the respondent has been served.¹⁹³¹ Such provision should be similar to the provisions that apply on the hearing of an application to make, vary or set aside a protection order. The Bill should also provide that a person required to be served with a registration application is taken to have been served if he or she appears before the court.

17.39 Provision should also be made in the Personal Protection Bill 2007 for the following persons to appear on the hearing of an application for registration:

- the applicant;
- the person against whom the corresponding order was made (unless the court decides to deal with the application ex parte);
- the person protected by the corresponding order; and
- any other person given leave by the court to appear.

17.40 This is generally consistent with the provision the Commission has recommended for standing to appear on the hearing of a protection order application under the Bill.¹⁹³²

17.41 Provision should also be made in relation to the notification of the registration to the respondent. This is discussed below.

Notification of registration to the respondent

17.42 Under the *Domestic and Family Violence Protection Act 1989* (Qld), the respondent must not be notified of the registration of an interstate order without the aggrieved's written consent. Similarly, in the ACT, New South Wales, Tasmania and Western Australia, notification of registration is either not

¹⁹³¹

In Chapter 11 of this Report, the Commission has recommended that the Personal Protection Bill 2007 should provide that if the respondent fails to appear before the court on the hearing of a protection order application, and the court is satisfied that the respondent has been served, the court may hear and decide the application in the absence of the respondent, adjourn the application or, subject to certain requirements, order the issue of a warrant for the respondent to be taken into custody and brought before the court. See para 11.19, 11.22 of this Report.

¹⁹³²

See para 20.74 of this Report.

required by statute or is specifically prohibited without the consent of the aggrieved.¹⁹³³

17.43 Such provisions would enable a person who applies to register a corresponding order to have the order registered without informing the person against whom the order was made. The justification for not requiring notification is to prevent information about the location of the persons protected by the order from becoming known to the respondent. In some circumstances, this may compromise the safety of the persons protected by the order. This may particularly be the case where the aggrieved has been the victim of serious harassment or intimidation.

17.44 The Commission notes, however, that withholding notification will not always be necessary. For example, where an order is registered for convenience when the parties frequent, reside or work in or around a place near the Queensland border, there may be little additional risk to the person's safety in notifying the respondent of the registration.

17.45 When the original order is made, the respondent is entitled to be informed of the conditions and prohibitions in the order. Similarly, the Commission has recommended that the respondent to a protection order made under the Personal Protection Bill 2007 must be served with a copy of the order.¹⁹³⁴ Fairness to the respondent requires that he or she be notified of the existence, and terms, of an order in force against him or her, unless there is a strong justification to the contrary in the particular case. This is especially important given the respondent's potential criminal liability for breach of the order.

17.46 The Commission therefore considers that, contrary to the position under the Queensland domestic violence legislation, the registrar should be required to serve a copy of the registered corresponding order on the respondent, as soon as practicable after the order is registered, unless the court otherwise orders. The Commission considers it appropriate for the court to consider, at the hearing of an application for registration, whether notice of the registration, or particulars of the person protected by the order that are contained in the order, should be withheld from the respondent. The court is in the best position to weigh the competing considerations in each case. The Commission is therefore of the view that the Personal Protection Bill 2007 should provide that, if the court has dealt with the application ex parte, the court may direct that a copy of the registered order is not to be served on the respondent, or that information in the order about the person protected by the order must not be included in a copy of the order given to the respondent. The court may only give such a direction if the court is satisfied it is necessary to prevent serious harm to the person protected by the order or substantial damage to property of the person protected by the order.

1933 See para 17.16 of this Report.

1934 See para 19.49 of this Report.

17.47 The registrar should also be required to serve a copy of the registered order on the person protected by the order and any other person whom the court directs is to be served.

Enforceability of a registered corresponding order

17.48 Section 44 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a registered interstate order has the same effect as, and is enforceable as if it were, an order made, and served, under the Act.¹⁹³⁵ Section 80(3) of that Act also provides that it is not a defence in proceedings for an offence involving an interstate order that a person did not know the interstate order could be, or was, registered in Queensland.

17.49 The Commission has recommended elsewhere in this Report that the Personal Protection Bill 2007 include a provision to the effect that a respondent cannot be held in breach of an order unless the respondent was present in court when the order was made, was served with a copy of the order, or was told by a police officer about the order.¹⁹³⁶

17.50 The Commission considers that, generally, the same principle should apply in respect of a corresponding order registered under the Personal Protection Bill 2007. The Commission has earlier recommended that notification of the registration of a corresponding order must be given to the respondent, unless the Court otherwise directs.¹⁹³⁷ Consistent with this view, the Commission considers that a registered corresponding order should be enforceable as if it were a protection order made under the Personal Protection Bill 2007. If notice of the registration has been withheld, the order should be enforceable as if the respondent had been served with a copy of the order. The Commission considers that the enforceability of an order would form part of the Court's consideration, on the application for registration, of whether the withholding of notice is justified in the circumstances.

17.51 The Commission considers the inclusion of a provision to this effect in the Personal Protection Bill 2007 would ensure that a registered corresponding order is enforceable despite an order by the Court that the respondent is not to be notified of the registration of the order.¹⁹³⁸ The Commission does not consider it necessary that a provision to the effect of section 80(3) of the *Domestic and Family Violence Protection Act 1989* (Qld) be included in the Personal Protection Bill 2007 because it is essentially declaratory.

¹⁹³⁵ See para 17.9 of this Report.

¹⁹³⁶ See para 14.54 of this Report. The Commission's recommended provision is of similar effect as s 80(1) of the *Domestic and Family Violence Protection Act 1989* (Qld).

¹⁹³⁷ See para 17.46 of this Report.

¹⁹³⁸ The Commission notes that its recommendation to generally adopt the scheme provided in the *Domestic and Family Violence Protection Act 1989* (Qld) for the registration and enforcement of interstate orders (subject to certain modifications) encompasses the adoption of a provision to the effect of s 44 of the *Domestic and Family Violence Protection Act 1989* (Qld).

Period of registration

17.52 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that a registered interstate order is registered for the period during which the order, as originally made, is in force.¹⁹³⁹

17.53 The Commission considers that similar provision should be made in the Personal Protection Bill 2007 to the effect that, unless a registered corresponding order is earlier set aside or the period for which it is in force is varied, the order is in force for the period fixed by the court and stated in the order. The period fixed by the court must not be more than the period for which the corresponding order, as made in the original jurisdiction, is in force.

Notification of registration to other persons or entities

17.54 The *Domestic and Family Violence Protection Act 1989* (Qld) requires the clerk of the court to notify the applicant and the Commissioner of Police of the registration of an interstate order.¹⁹⁴⁰

17.55 Similar to the domestic violence legislation, the Commission considers the Personal Protection Bill 2007 should require the registrar to give a copy of a registered corresponding order to the person protected by the order and such other persons as the court may require as soon as practicable after the order is registered. The Commission also considers that the notification of the Commissioner of Police of the registration of a corresponding order under the Personal Protection Bill 2007 is necessary in light of the proposed role of the police in the enforcement of protection orders, and, in particular, the prosecution of breaches. In this regard, the Commission has recommended in this Report that the Bill should provide that the registrar of the court that hears an application to register a corresponding order must give the Commissioner of Police a copy of the order registering a corresponding order within a specified period after the order is made.¹⁹⁴¹

Variation of a registered corresponding order

17.56 The *Domestic and Family Violence Protection Act 1989* (Qld) provides for the court to vary a registered interstate order, as it applies in Queensland, on the application of particular persons.¹⁹⁴²

17.57 The Commission considers provision should also be made under the Personal Protection Bill 2007 for the variation or setting aside of a registered corresponding order. Earlier in this chapter, the Commission has

¹⁹³⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 42(6).

¹⁹⁴⁰ See para 17.10 of this Report.

¹⁹⁴¹ See para 20.112 of this Report.

¹⁹⁴² See para 17.10 of this Report.

recommended that a registered corresponding order should have the same effect as a protection order made under the Personal Protection Bill 2007.¹⁹⁴³ As such, the Commission considers a person should be entitled to apply to vary or set aside a registered corresponding order as it applies in Queensland in the same manner as provided for the variation and setting aside of a protection order under the Bill. This would maintain a consistency of approach in the manner in which protection orders are dealt with under the Bill.

17.58 The Commission is therefore of the view that the eligibility requirements for making an application to vary or set aside a registered corresponding order should be the same as for the making of an application to vary or set aside a protection order made under the Bill.

17.59 The Commission is also of the view that the provisions of the Personal Protection Bill 2007 dealing with applications and orders to vary or set aside protection orders, including the provisions about service of such applications and orders, should apply, with necessary changes, to registered corresponding orders.¹⁹⁴⁴ Consistent with those service provisions, an application to vary or set aside a registered corresponding order or an order varying or setting aside a registered corresponding order must be served on the person who applied for registration of the corresponding order, the person protected by the order, the person against whom the order was made and any other person whom the court directs is to be served.

17.60 In contrast, there is no requirement under the Queensland domestic violence legislation that the respondent for a registered interstate order be notified of variations to the order.¹⁹⁴⁵ However, the Commission considers that natural justice requires that notification of any application to vary a registered corresponding order be given to the person against whom the order was made so that he or she may defend the application. Notification of any variation to a registered corresponding order is also important so that the person is informed of what conduct may give rise to a breach. This is similarly important where a variation is sought by the respondent to the order. A person protected by a registered corresponding order is entitled to know of an application to vary, and any subsequent variation of, the order given that it may alter the level of protection afforded by the order.

17.61 The Commission has also recommended in this Report that the Bill should provide that the registrar of the court hearing an application to vary or set aside a registered corresponding order must give the Commissioner of

¹⁹⁴³ See para 17.50 of this Report.

¹⁹⁴⁴ See para 19.49 of this Report.

¹⁹⁴⁵ See para 17.10 of this Report.

Police a copy of the application and any order varying or setting aside the order within a specified period after the application or order is made.¹⁹⁴⁶

Effect of variation or revocation of the order in the original jurisdiction

17.62 The *Domestic and Family Violence Protection Act 1989* (Qld) does not include any provisions dealing with the effect, in Queensland, of a change to the interstate order in the jurisdiction in which it was originally made. In the ACT and Western Australia, however, provision is made for changes to a corresponding order in the original jurisdiction to take effect in the jurisdiction in which the order has been registered.¹⁹⁴⁷

17.63 The Commission considers that it may cause unnecessary confusion to enable variations by a court in the jurisdiction in which the corresponding order was made to have effect in Queensland after the order is registered. There are numerous reasons why a variation might be sought in the same jurisdiction in which the corresponding order was made. In some cases, the variation may be of limited relevance outside that jurisdiction. In the Commission's view, if a court in the same jurisdiction in which a corresponding order was made varies that order, that variation should have no effect in Queensland after the order has been registered in Queensland. This is consistent with the position in New South Wales and Victoria.¹⁹⁴⁸

17.64 Similarly, there are many reasons why a person might seek the revocation of a corresponding order in the same jurisdiction in which it was made. For example, a court may order the revocation of an order following a successful appeal. On the other hand, the person against whom an order has been made might seek the revocation of an order on the basis that the aggrieved person is no longer in that jurisdiction.

17.65 The Commission considers that, if a court in the same jurisdiction in which a corresponding order was made revokes that order after the order has been registered in Queensland, that revocation should have no effect in Queensland. Again, this is consistent with the position in New South Wales and Victoria.¹⁹⁴⁹

17.66 If, for whatever reason, an eligible person wishes to vary a registered corresponding order as it applies in Queensland, or to cancel its registration in Queensland, that person may apply to vary or set aside the order under the Personal Protection Bill 2007. For example, an application might be made to vary a registered corresponding order to reflect a change to the order in the jurisdiction in which it was originally made. The Commission also notes its

¹⁹⁴⁶ See para 20.112 of this Report.

¹⁹⁴⁷ See para 17.22 of this Report.

¹⁹⁴⁸ See para 17.21 of this Report.

¹⁹⁴⁹ Ibid.

recommendation that in considering an application to vary or set aside a protection order, the court must have regard to any matters it considers relevant.¹⁹⁵⁰ A change to the order in the original jurisdiction may be one such relevant consideration.

RECOMMENDATIONS

17.67 The Commission makes the following recommendations:

- 17-1 The Personal Protection Bill 2007 should provide for the registration and enforcement of corresponding orders. The Bill should also provide that a 'corresponding order' means an order made by a court of another State or New Zealand under a law prescribed under a regulation as a corresponding law.¹⁹⁵¹

Procedure for registration, including notice of application

- 17-2 The Personal Protection Bill 2007 should make provision for a person to apply to the Magistrates Court to register a corresponding order. The application should be made in the approved form and, unless it is made by a police officer, verified by statutory declaration.¹⁹⁵²

See Personal Protection Bill 2007 cl 70(1), (3), (4).

- 17-3 The Personal Protection Bill 2007 should make provision to require the corresponding order or a certified copy of the order to accompany the application for registration of a corresponding order.¹⁹⁵³

See Personal Protection Bill 2007 cl 70(2).

- 17-4 The Personal Protection Bill 2007 should provide that, unless the court has decided to deal with an application to register a corresponding order ex parte, the registrar must serve a copy of the application and notice of when and where the application will be heard on the person against whom the order was made and a person protected by the order, if he or she is not the applicant.¹⁹⁵⁴

¹⁹⁵⁰ See para 15.51 of this Report.

¹⁹⁵¹ See para 17.28–17.29 of this Report.

¹⁹⁵² See para 17.33 of this Report.

¹⁹⁵³ Ibid.

¹⁹⁵⁴ See para 17.34–17.35 of this Report.

See Personal Protection Bill 2007 cl 72.

- 17-5 The Personal Protection Bill 2007 should provide for the court to deal with an application to register a corresponding order ex parte if the court is satisfied it is necessary to do so to prevent the person against whom the order was made causing serious harm to the person protected by the corresponding order or substantial damage to property of the person protected by the corresponding order.¹⁹⁵⁵

See Personal Protection Bill 2007 cl 71.

- 17-6 The Personal Protection Bill 2007 should provide that, after considering an application to register a corresponding order, the court may make an order registering the corresponding order if it is satisfied the corresponding order is in force in the original jurisdiction.¹⁹⁵⁶

See Personal Protection Bill 2007 cl 75(1).

- 17-7 The Personal Protection Bill 2007 should provide that the court may vary the corresponding order for the purpose of its registration by modifying it to the extent the court considers necessary for the order to operate effectively in Queensland.¹⁹⁵⁷

See Personal Protection Bill 2007 cl 75(2).

- 17-8 The Personal Protection Bill 2007 should include a provision dealing with the court's powers on the hearing of an application for registration of a corresponding order (other than an ex parte hearing) in the absence of the respondent, on proof the respondent has been served. The provision should be similar to the provisions that apply on the hearing of an application to make, vary or set aside a protection order. The Bill should also provide that a person required to be served with a registration application is taken to be served if he or she appears before the court.¹⁹⁵⁸

See Personal Protection Bill 2007 cl 74(1)–(3), 95.

1955 See para 17.35 of this Report.

1956 See para 17.37 of this Report.

1957 Ibid.

1958 See para 17.38 of this Report.

17-9 The Personal Protection Bill 2007 should provide for the following persons to appear on the hearing of an application to register a corresponding order:¹⁹⁵⁹

- (a) the applicant;
- (b) the person against whom the corresponding order was made (unless the court decides to deal with the application ex parte);
- (c) the person protected by the corresponding order; and
- (d) another person given leave by the court to appear.

See Personal Protection Bill 2007 cl 73.

Notification of registration

17-10 The Personal Protection Bill 2007 should provide that, if the application has been dealt with ex parte, the court may give a direction that a copy of the registered corresponding order is not to be served on the respondent, or that information in the order about the person protected by the order must not be included in a copy of the order given to the respondent. The court may give such a direction only if the court is satisfied it is necessary to prevent:¹⁹⁶⁰

- (a) serious harm to the person protected by the order; or
- (b) substantial damage to property of the person protected by the order.

See Personal Protection Bill 2007 cl 75(3), (4).

17-11 The Personal Protection Bill 2007 should provide that, if a court has registered a corresponding order and has not directed that a copy of the registered order, or information contained in a copy of the order, must not be given to the respondent, as soon as practicable after the order is registered, the registrar of the court must serve a copy of the registered order on the person against whom the order was made, the person protected by the order and any other person whom the court directs is to be served with a copy of the order.¹⁹⁶¹

¹⁹⁵⁹ See para 17.39 of this Report.

¹⁹⁶⁰ See para 17.46 of this Report.

¹⁹⁶¹ See para 17.46, 17.47, 17.55 of this Report.

See Personal Protection Bill 2007 cl 76.

Enforceability of a registered corresponding order

17-12 The Personal Protection Bill 2007 should provide that a registered corresponding order is enforceable as if it were a protection order made under the Personal Protection Bill 2007. If notice of the registration has been withheld from the respondent, the registered order should be enforceable as if the respondent had been served with a copy of the registered order.¹⁹⁶²

See Personal Protection Bill 2007 cl 77(1)(a), (2), (3), (4).

Period of registration

17-13 The Personal Protection Bill 2007 should include a provision to the effect that, unless a registered corresponding order is earlier set aside or the period for which it is in force is varied, the order is in force for the period fixed by the court and stated in the order, being a period not more than the period for which the corresponding order, as made in the original jurisdiction, is in force.¹⁹⁶³

See Personal Protection Bill 2007 cl 78.

Variation of a registered corresponding order

17-14 The provisions of the Personal Protection Bill 2007 dealing with applications and orders to vary or set aside a protection order, including provisions for service of such applications and orders, should apply, with necessary changes, to registered corresponding orders.¹⁹⁶⁴ Consistent with those service provisions, an application to vary or set aside a registered corresponding order or an order varying or setting aside a registered corresponding order must be served on the person who applied for registration of the corresponding order, the person protected by the order, the person against whom the order was made and any other person whom the court directs is to be served.

See Personal Protection Bill 2007 cl 77(1)(b), (3), (4).

1962 See para 17.50 of this Report.

1963 See para 17.53 of this Report.

1964 See para 17.58–17.59 of this Report.

Effect of variation or revocation of the order in the original jurisdiction

17-15 If a court in the same jurisdiction in which a corresponding order was made varies or revokes that order after the order has been registered in Queensland, that variation or revocation should have no effect in Queensland.¹⁹⁶⁵

¹⁹⁶⁵ See para 17.63, 17.65 of this Report.

Chapter 18

Publication of proceedings

INTRODUCTION	467
THE <i>PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)</i>	468
THE <i>DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)</i>	469
THE POSITION IN OTHER JURISDICTIONS	471
Prohibition on publication of identity – ACT, New South Wales and Victoria	471
Prohibition on publication of other information – Victoria, Western Australia	473
Power to order non-publication – New South Wales and Tasmania	474
RESTRICTING THE PUBLICATION OF PROCEEDINGS	475
The Commission’s view	477
CRITERIA FOR THE EXERCISE OF DISCRETION	478
The Commission’s view	480
THE INFORMATION CAPABLE OF BEING RESTRICTED	481
The Commission’s view	482
APPLICATIONS	483
The Commission’s view	483
OFFENCE AND PENALTY	484
The Commission’s view	485
EXCUSE OR EXCEPTIONS	485
The Commission’s view	485
RECOMMENDATIONS	486

INTRODUCTION

18.1 In considering whether the *Peace and Good Behaviour Act 1982* (Qld) provides an effective mechanism for the protection of the community from breaches of the peace, the Commission is required, by its terms of reference, to have regard to the protection provided against domestic violence under the *Domestic and Family Violence Protection Act 1989* (Qld).¹⁹⁶⁶

18.2 The Discussion Paper did not specifically consider the issue of publication of proceedings under the *Peace and Good Behaviour Act 1982* (Qld). The prohibition on publication of proceedings under the *Domestic and Family Violence Protection Act 1989* (Qld) raises the issue of whether a similar prohibition or other restriction on publication should apply to proceedings under the Personal Protection Bill 2007.

18.3 This chapter considers the restriction of publication or other dissemination of proceedings under the Personal Protection Bill 2007 to the public or a section of the public. It does not consider disclosure or communication of information about proceedings to individuals.

18.4 Court proceedings are ordinarily to be heard in public¹⁹⁶⁷ and, in the absence of a suppression order or a legislative restriction, information about such proceedings, including the identity of persons involved in the proceedings, is able to be reported and published.¹⁹⁶⁸

18.5 In the absence of statutory authority, the Magistrates Court may make a non-publication order only to the extent permitted by its implied powers to ensure the administration of justice in its jurisdiction according to law.¹⁹⁶⁹

18.6 Like other departures from the principle of open justice, a non-publication order may be made, in the absence of statutory authority, only where it is necessary to secure the administration of justice.¹⁹⁷⁰ Saving a party from ‘loss of privacy, embarrassment, distress, financial harm or other collateral

¹⁹⁶⁶ The terms of reference are set out in Appendix 1 to this Report.

¹⁹⁶⁷ For proceedings under the *Peace and Good Behaviour Act 1982* (Qld), see s 70 of the *Justices Act 1886* (Qld).

¹⁹⁶⁸ D Butler and S Rodrick, *Australian Media Law* (3rd ed, 2007) [5.05]; J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 2; *Scott v Scott* [1913] AC 417. See also *Brennan v State of New South Wales* [2006] NSWSC 167, [31] (Hall J); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55 (Kirby P); *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 44 (Fitzgerald P and Lee J); *R v His Honour Judge Noud, Ex parte MacNamara* [1991] 2 Qd R 86, 103 (Williams J).

¹⁹⁶⁹ *Attorney-General for New South Wales v Mayas Pty Ltd* (1998) 14 NSWLR 342, 346 (Mahoney JA). Note that it is unclear whether a court has power to make a non-publication order binding on persons outside the court: D Butler and S Rodrick, *Australian Media Law* (3rd ed, 2007) [5.165]; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55–8 (Kirby P).

¹⁹⁷⁰ See generally D Butler and S Rodrick, *Australian Media Law* (3rd ed, 2007) [5.175]; *R v His Honour Judge Noud, Ex parte MacNamara* [1991] 2 Qd R 86, 103–105 (Williams J). See para 18.36 of this Report.

'disadvantage' is insufficient ground at common law to withhold information about proceedings from the public.¹⁹⁷¹

18.7 However, a statute may give the Court power to order non-publication or may otherwise impose a restriction on publication of particular information for certain proceedings.¹⁹⁷²

THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)

18.8 There is no restriction on publication imposed by the *Peace and Good Behaviour Act 1982* (Qld). However, the *Justices Act 1886* (Qld) and the *Evidence Act 1977* (Qld) contain prohibitions that would apply to proceedings under the Act.¹⁹⁷³

18.9 Section 71B of the *Justices Act 1886* (Qld) prohibits the taking of a photograph or picture in or of the room or place in which proceedings are being, have been or are about to be conducted, or of a person therein.¹⁹⁷⁴ It also prohibits the publication of a photograph or picture so taken.¹⁹⁷⁵

18.10 Under section 21AZC of the *Evidence Act 1977* (Qld), it is an offence to disseminate to the public by radio or television a recording of any video-taped evidence of a 'special witness' given in civil proceedings, other than with the court's approval.¹⁹⁷⁶ The court may approve the publication only in 'exceptional circumstances'¹⁹⁷⁷ and may attach conditions to the approval.¹⁹⁷⁸ A 'special witness' is:¹⁹⁷⁹

1971 *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 45 (Fitzgerald P and Lee J). See para 18.40 of this Report.

1972 See para 18.41 of this Report.

1973 *Peace and Good Behaviour Act 1982* (Qld) s 8; *Justices Act 1886* (Qld) s 71B; *Evidence Act 1977* (Qld) s 21AZC.

1974 *Justices Act 1886* (Qld) s 71B(1). Also note Magistrates Court of Queensland, Practice Direction 6 of 2006, 'Recording Devices in Courtrooms: Magistrates Court' which provides that '[e]xcept with permission of the presiding Magistrate or justices constituting a Magistrates Court ... any device capable of capturing or transmitting the proceedings of the court, aurally and/or visually, is not to be used for that purpose in a court room where proceedings are being conducted'.

1975 *Justices Act 1886* (Qld) s 71B(2). The maximum penalty for publication is \$525 or one month imprisonment: See *Penalties and Sentences Act 1992* (Qld) s 5.

1976 *Evidence Act 1977* (Qld) ss 21AY (definition of 'recording'), 21AZC. Note, the maximum penalty is \$7500 or two years imprisonment for an individual and \$75 000 for a corporation: *Evidence Act 1977* (Qld) s 21AZC(1); *Penalties and Sentences Act 1992* (Qld) s 5.

1977 *Evidence Act 1977* (Qld) s 21AZC(2).

1978 *Evidence Act 1977* (Qld) s 21AZC(1).

1979 *Evidence Act 1977* (Qld) s 21A(1) (definition of 'special witness'). Under s 21A(2)(e) of the *Evidence Act 1977* (Qld), the court may order that a video-taped recording of the evidence of a special witness be substituted for the witness's direct testimony in any proceeding.

- (a) a child under 16 years; or
 - (b) a person who, in the court's opinion—
 - (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
 - (ii) would be likely to suffer severe emotional trauma; or
 - (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
- if required to give evidence in accordance with the usual rules and practice of the court.

THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)

18.11 Section 82 of the *Domestic and Family Violence Protection Act 1989* (Qld) prohibits the publication and dissemination of information about proceedings under that Act that would reveal the identity of the parties to the proceedings. This may address concerns that the social stigma attached to domestic and family violence deters people from seeking protection under domestic violence legislation.¹⁹⁸⁰ The Act does not otherwise restrict the publication of information about proceedings.¹⁹⁸¹

18.12 Section 82(1) provides that, unless the court expressly permits (or it is permitted under a regulation),¹⁹⁸² it is an offence to publish in a newspaper or a periodical or to otherwise disseminate by any means to the public or a section of the public (including by radio broadcast or television):¹⁹⁸³

- a notification of proceedings identified by reference to the parties' names; or
- any account of proceedings that identifies or is likely to identify:

¹⁹⁸⁰ See D Bagshaw et al, *Reshaping Responses to Domestic Violence: Final Report* (April 2000) 86; The Women's Services Network, *Domestic Violence in Regional Australia: A Literature Review* (June 2000) [4.23].

¹⁹⁸¹ This may represent an attempt to balance respect for privacy with the public interest in publication. See, for example, in respect of the related issue of whether protection order hearings should be held in closed court, the Second Reading debate of the Domestic Violence (Family Protection) Amendment Bill 1992 (Qld): Queensland, *Parliamentary Debates*, Legislative Assembly, 4 August 1992, 6015 (Ms Molly Robson). Ms Robson noted that there is a need to recognise and respect the rights and privacy of an individual who 'may have to present sensitive and intimate details of her life that she may not wish to share with others'. She also observed that, on the other hand, '[d]omestic violence is very public business. It is the business of the community as a whole to be active in working against domestic violence'.

¹⁹⁸² See para 18.14 of this Report.

¹⁹⁸³ Note, the offence attracts a maximum penalty of \$3000 or one year imprisonment: *Domestic and Family Violence Protection Act 1989* (Qld) s 82(1); *Penalties and Sentences Act 1992* (Qld) s 5.

- the aggrieved, a named person, the respondent, the applicant or the appellant (other than a police officer);
- a witness (other than a police officer); or
- a child concerned in the proceedings.

18.13 Sections 82(2) and (3) exempt the following types of publications and communications:

- publication of a bona fide law report or other technical publication intended primarily for use by members of a profession;
- publication or dissemination of an account of proceedings to a person who is member of a profession in connection with the practice of that profession or to a student in connection with that person's studies;
- communication of a transcript of evidence or other document to:
 - persons concerned in proceedings in a court or to a police officer for use in connection with the proceedings;
 - a body responsible for disciplining members of a profession; or
 - persons concerned in disciplinary proceedings (before a body responsible for disciplining members of the profession) against a member of a profession.

18.14 Pursuant to section 82(1) of the Act, the *Domestic and Family Violence Protection Regulation 2003* (Qld) permits the publication of a notification or an account of proceedings if:

- the proceedings relate to a matter in the public domain;¹⁹⁸⁴ or
- the community has a legitimate interest in the proceedings.¹⁹⁸⁵

18.15 Note, however, that these exceptions are extremely narrowly defined.¹⁹⁸⁶

¹⁹⁸⁴ *Domestic and Family Violence Protection Regulation 2003* (Qld) s 6(1)(a). A proceeding relates to a matter in the public domain if the person against whom or for whose benefit a domestic violence order was made in the proceedings is subsequently convicted in proceedings under another Act that were factually related to the domestic violence order: *Domestic and Family Violence Protection Regulation 2003* (Qld) s 6(2).

¹⁹⁸⁵ *Domestic and Family Violence Protection Regulation 2003* (Qld) s 6(1)(b). The community has a legitimate interest in the proceedings if an incident occurs in which one of the parties to the proceedings (a respondent, aggrieved or named person) causes the death of, or injury to, another of the parties and the incident results in the death of the first party: *Domestic and Family Violence Protection Regulation 2003* (Qld) s 6(3).

¹⁹⁸⁶ See note 1984–1985 of this Report.

THE POSITION IN OTHER JURISDICTIONS

18.16 The civil restraining order legislation in the ACT, New South Wales, Tasmania, Victoria and Western Australia also include provisions to restrict the publication of particular information about proceedings.¹⁹⁸⁷

18.17 In the ACT, New South Wales, Victoria and Western Australia, the provisions impose a prohibition on the publication and/or dissemination of particular information. In Tasmania, by contrast, the legislation empowers the justice and/or the court to make a non-publication order in relation to particular information. The court is also empowered to make a non-publication order in New South Wales.

18.18 Most of these provisions apply in relation to the identification of particular persons. Similarly, in Western Australia, the restriction applies to information about a party's whereabouts. The Victorian legislation additionally restricts the publication of the location of the court in which the relevant proceedings are heard.

18.19 The Commission notes that in the ACT, New South Wales and Western Australia, the legislation deals with both general restraining orders and restraining orders in relation to domestic violence. Similarly, the Victorian legislation examined here relates to intervention orders for stalking.¹⁹⁸⁸ The nature of domestic and family violence matters may colour the inclusion and formulation of the publication restrictions included in these statutes.

Prohibition on publication of identity – ACT, New South Wales and Victoria

18.20 In the ACT, it is an offence to publish an account or report of a proceeding on an application for a protection order¹⁹⁸⁹ that identifies a party, a witness, or a person related to or associated with a party or otherwise concerned in the matter, or that allows the identity of such a person to be

1987

Domestic Violence and Protection Orders Act 2001 (ACT) s 100; *Crimes Act 1900* (NSW) ss 562ZJ, 562ZK; *Justices Act 1959* (Tas) s 106K; *Family Violence Act 2004* (Tas) s 32; *Crimes (Family Violence) Act 1987* (Vic) s 24; *Restraining Orders Act 1997* (WA) s 70. Note the *Summary Procedure Act 1921* (SA), under which a person may apply for a restraining order, does not impose a restriction on publication of proceedings taken under that Act.

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Sections 562ZJ and 562ZK of the *Crimes Act 1900* (NSW), dealing with the publication of proceedings, are replicated in s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

In Victoria, an intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

1988

See note 1987 of this Report.

1989

A protection order means a personal protection order or a domestic violence order: *Domestic Violence and Protection Orders Act 2001* (ACT) s 3, Dictionary (definition of 'protection order').

worked out.¹⁹⁹⁰ The court or the magistrate may, however, permit circulation of such information if satisfied that:¹⁹⁹¹

- it is in the public interest;
- it will promote compliance with the protection order; or
- it is necessary or desirable for the proper functioning of the Act.

18.21 There are also other exceptions to the prohibition, for example, to allow a person to tell someone else about the contents of a protection order, for communications for court or tribunal proceedings, and for publication in law reports or other technical or professional publications.¹⁹⁹²

18.22 In New South Wales, the *Crimes Act 1900* (NSW) prohibits the publication or broadcast, before proceedings in relation to an apprehended violence order¹⁹⁹³ are determined, of information, a picture or other material that identifies or is likely to lead to the identification of a child:¹⁹⁹⁴

- for whose protection or against whom an order is sought; or
- who appears, or is reasonably likely to appear, as a witness in the proceedings; or
- who is, or is reasonably likely to be, mentioned or otherwise involved in the proceedings.

18.23 The court may otherwise give its consent to the publication or dissemination, although the legislation does not specify particular circumstances in which such consent may be given.¹⁹⁹⁵ The legislation also provides an exception for publication in an official report of proceedings.¹⁹⁹⁶

¹⁹⁹⁰ *Domestic Violence and Protection Orders Act 2001* (ACT) s 100(1). Note that the maximum penalty is \$5000 (or \$25 000 for a corporation) or six months imprisonment or both: *Legislation Act 2001* (ACT) s 133.

¹⁹⁹¹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 101(2)(a), (3).

¹⁹⁹² *Domestic Violence and Protection Orders Act 2001* (ACT) s 101(1), (2).

¹⁹⁹³ An 'apprehended violence order' means an apprehended personal violence order or an apprehended domestic violence order: *Crimes Act 1900* (NSW) s 562A (definition of 'apprehended violence order').

¹⁹⁹⁴ *Crimes Act 1900* (NSW) s 562ZJ(1), (2), (4). Note, the maximum penalty is \$22 000 or two years imprisonment for an individual and \$220 000 for a corporation: *Crimes Act 1900* (NSW) s 562ZJ(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17. A 'child' is a person under 16 years: *Crimes Act 1900* (NSW) s 562A (definition of 'child'). Section 562ZJ is replicated in s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Note that s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) also provides for a similar prohibition on the publication of identifying information about a person, other than a child, in an apprehended personal violence order proceeding. For the application of the legislation in New South Wales, see note 1987 of this Report.

¹⁹⁹⁵ *Crimes Act 1900* (NSW) s 562ZJ(3)(b).

¹⁹⁹⁶ *Crimes Act 1900* (NSW) s 562ZJ(3)(a).

18.24 In Victoria, section 24 of the *Crimes (Family Violence) Act 1987* (Vic) provides that, in proceedings involving a child, it is an offence to publish or cause to be published:

- a report of proceedings¹⁹⁹⁷ containing, among other things, the name, address, school or any particulars calculated to lead to the identification of a child or any other person in the proceedings as a party or a witness; or
- a picture¹⁹⁹⁸ of or including the child or another person concerned in the proceedings.

18.25 The legislation does not empower the court to otherwise permit such publication nor does it provide any exceptions to the prohibition.¹⁹⁹⁹

18.26 Section 24 also prohibits the publication of other information. This is discussed below.²⁰⁰⁰

Prohibition on publication of other information – Victoria, Western Australia

18.27 In Victoria, the *Crimes (Family Violence) Act 1987* (Vic) provides that, in addition to the offences described above, it is an offence to publish or cause to be published a report of proceedings involving a child that contains the locality of, or any particulars calculated to lead to the identification of, the particular venue of the court.²⁰⁰¹

18.28 In Western Australia, it is prohibited to publish²⁰⁰² or to otherwise disseminate to the public or a section of the public information that would, or would be likely to, disclose the whereabouts of a party or a witness.²⁰⁰³

18.29 The court may, however, specify in a restraining order that the publication or dissemination of particular information is permitted, if it is satisfied

1997 In any newspaper or broadcast by means of wireless, telegraphy, television or other means: *Crimes (Family Violence) Act 1987* (Vic) s 24(a). For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 1987 of this Report.

1998 In a newspaper or by television or other means: *Crimes (Family Violence) Act 1987* (Vic) s 24(b).

1999 Note, the maximum penalty is \$2202: *Crimes (Family Violence) Act 1987* (Vic) s 24; *Monetary Units Act 2004* (Vic) ss 5(2), 7.

2000 See para 18.27 of this Report.

2001 *Crimes (Family Violence) Act 1987* (Vic) s 24(a). Note, the maximum penalty is \$2202: *Monetary Units Act 2004* (Vic) ss 5(2), 7. For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 1987 of this Report.

2002 In a newspaper or periodical, by radio, television or other electronic broadcast: *Restraining Orders Act 1997* (WA) s 70(2).

2003 *Restraining Orders Act 1997* (WA) s 70(2). Note, the maximum penalty is \$6000 or 18 months imprisonment: *Restraining Orders Act 1997* (WA) s 70(2). These provisions apply both to violence and misconduct restraining orders.

that:²⁰⁰⁴

- the person to whom the information is to be disclosed is already aware of the whereabouts of the person to be protected by the prohibition; or
- the person to be protected understands the effect of the prohibition and agrees that it should not apply.

18.30 The legislation also provides an exception for ‘confidential exchanges’ of information between certain authorities where it is necessary to ensure the safety of a person or child affected or protected by a violence restraining order.²⁰⁰⁵

Power to order non-publication – New South Wales and Tasmania

18.31 Unlike the legislation in other Australian jurisdictions, the legislation in Tasmania confers power on the justice or the court concerned to make an order that certain information not be published. In addition to a prohibition on publication of information that identifies a child involved in proceedings, the legislation in New South Wales also gives the court power to make a non-publication order.

18.32 The *Crimes Act 1900* (NSW) provides that a court may direct that information identifying a protected person, a defendant, a witness or another person who is, or is reasonably likely to be, mentioned or otherwise involved in apprehended domestic violence order proceedings must not be published or broadcast before the proceedings are determined.²⁰⁰⁶ Contravention of such a direction is an offence.²⁰⁰⁷ However, a non-publication direction does not prohibit the publication of an official report of proceedings or publication with the consent of the person or the court.²⁰⁰⁸

18.33 Section 106K of the *Justices Act 1959* (Tas), which applies in respect of proceedings for restraint orders, provides that the justices may order, before, during or after the proceedings, that the name of a party or witness must not be published.²⁰⁰⁹ The justices may make an order where it appears that it is

2004 *Restraining Orders Act 1997* (WA) s 70(3).

2005 *Restraining Orders Act 1997* (WA) s 70A.

2006 *Crimes Act 1900* (NSW) s 562ZK(1), (4). Section 562ZK of the *Crimes Act 1900* (NSW) is replicated in s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales, see note 1987 of this Report.

2007 *Crimes Act 1900* (NSW) s 562ZK(2). Note, the maximum penalty is \$22 000 or two years imprisonment or both for an individual or \$220 000 for a corporation: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

2008 *Crimes Act 1900* (NSW) s 562ZK(3).

2009 *Justices Act 1959* (Tas) s 106K(1).

desirable to prohibit the publication of the person's name 'for the furtherance of, or otherwise in the interests of, the administration of justice'.²⁰¹⁰

18.34 An order made under section 106K prohibits the printing or publication of the party's or witness's name or of 'any reference or allusion' to the party or witness that is, in the opinion of the justices, intended or sufficient to disclose the identity of that party or witness.²⁰¹¹

RESTRICTING THE PUBLICATION OF PROCEEDINGS

18.35 The general presumption is that court proceedings are open to the public and capable of being reported.²⁰¹² Open justice promotes public scrutiny and accountability of judicial proceedings.²⁰¹³ It permits informed public discussion and awareness of judicial and legal matters, may encourage others to participate in proceedings or in the system generally, and facilitates predictability and consistency of judicial outcomes.²⁰¹⁴ Without the ability for proceedings to be reported, the value of open hearings is diminished.²⁰¹⁵

18.36 This principle, however, is not absolute. The common law recognises that the principle may be overridden, but only where it is necessary for the administration of justice:²⁰¹⁶

As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.

-
- 2010 *Justices Act 1959 (Tas) s 106K(1).*
- 2011 *Justices Act 1959 (Tas) s 106K(2), (4).* Note, the maximum penalty for contravention of an order is \$600 or three months imprisonment: *Justices Act 1959 (Tas) s 106K(5); Penalty Units and Other Penalties Act 1987 (Tas) s 4.*
- 2012 See note 1968 of this Report.
- 2013 *Scott v Scott [1913] AC 417, 463 (Lord Atkinson); Russell v Russell (1976) 134 CLR 495, 520 (Gibbs J).*
- 2014 See generally D Butler and S Rodrick, *Australian Media Law* (3rd ed, 2007) [5.10]–[5.15]; J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 34–45; JH Wigmore, *Evidence in Trials at Common Law*, Vol 6 (Chadbourn rev 1976) §1834; New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) [10.5].
- 2015 *The Herald & Weekly Times Ltd v Medical Practitioners Board of Victoria [1999] 1 VR 267, [40], [42] (Hedigan J).*
- 2016 *Scott v Scott [1913] AC 417, 437–8 (Viscount Haldane LC).* For example, the principle may be overridden to facilitate the giving of evidence by particularly sensitive witnesses, such as children and sexual offence complainants; where publicity would destroy the subject matter of the action such as litigation involving trade secrets; where protection from harm is required for particular classes of people such as wards of the court, juvenile criminal defendants, and the mentally ill; where national security is involved; and where publicity would prejudice the fairness of a trial. See generally D Butler and S Rodrick, *Australian Media Law* (3rd ed, 2007) [5.65]–[5.80], [5.115]–[5.135], [5.175]; New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) [10.7].

18.37 Restricting publication of information about proceedings represents one means of derogation from the open justice principle.²⁰¹⁷ In its Discussion Paper on contempt by publication, the New South Wales Law Reform Commission commented, in relation to the use of non-publication orders, that:²⁰¹⁸

It is a preventative strategy employed by the courts, sometimes under statutory authority, designed to enhance the administration of justice. ... Essentially their function is to restrict publicity which may prejudice a fair trial or which may deter people from seeking justice or participating in its administration.

18.38 Publicity may deter people from instituting proceedings, may discourage frank testimony, and may prejudice the fairness of proceedings.²⁰¹⁹

18.39 In addition to the interest in the administration of justice are concerns about protecting participants in court proceedings from harmful consequences of publicity, particularly as a result of selective or insensitive media reporting.²⁰²⁰

[I]t is important to remember ... that the open conduct of the courts can cause great pain and loss to those touched by what is done and what is publicised. It is, in my opinion, the function of the law – and the obligation of the courts in administering it – to avoid such pain and loss to the extent that it is possible to do so.

18.40 However, reputational harm, embarrassment, distress, and ridicule are generally considered insufficient to warrant a departure from open justice at common law.²⁰²¹

18.41 A statutory restriction on publication of proceedings could take one of two forms:

2017 Two other means are generally recognised: the exclusion of the public or of particular persons from a hearing or part of a hearing and the concealment of information, such as evidence given or of a witness's name, from those in attendance at a hearing. See A Monson, 'Privacy and the Administration of Justice' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002); D Butler and S Rodrick, *Australian Media Law* (3rd ed, 2007) [5.55], [5.95]; New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) [10.8].

2018 New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) [10.43].

2019 G Nettheim, 'Open justice versus justice' (1985) 9 *Adelaide Law Review* 487, 487–8.

2020 *John Fairfax Group Pty Ltd (receivers and managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131, 163–4 (Mahoney JA). Also see C Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92, 105: 'where embarrassment and distress, particularly of a victim, can be avoided, with minimal curtailment of the open-justice principle, the interests of justice would be better served'. It has been suggested that these matters are better dealt with by the courts and by Parliament than by media self-regulation: New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) [10.19]; Australian Law Reform Commission, *Contempt*, Report No 35 (1987) [247].

2021 *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] 1 QB 227, 235 (Sir Donaldson MR); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 58–60 (Kirby P), 61–2 (Samuels JA), 63–4 (Priestly JA); *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 45 (Fitzgerald P and Lee J).

- a prohibition on publication of particular information (perhaps with discretion conferred on the court to permit publication in certain circumstances);²⁰²² or
- a discretion conferred on the court to prohibit publication in particular circumstances.²⁰²³

18.42 In its Report on contempt by publication, the New South Wales Law Reform Commission considered that restrictions of the first type (that is, a general prohibition on publication) should be limited to those based on clearly justifiable and manifest policies and that are narrowly and well defined.²⁰²⁴ This might be satisfied, for example, in relation to proceedings for the protection of children.²⁰²⁵

18.43 In relation to restrictions of the second type (where the court is empowered to make non-publication orders), the New South Wales Law Reform Commission considered that ‘the general rule should be that justice is administered in public view and that derogations from the principle of open justice should only be permissible under exceptional circumstances’ and should be ‘based upon securing the needs of justice rather than the needs of particular individuals’.²⁰²⁶

The Commission’s view

18.44 Proceedings under the Personal Protection Bill 2007 will generally be held in open court. Given that most matters arising in proceedings under the Personal Protection Bill 2007 are likely to be innocuous, and absent a compelling policy reason to do so, such as there is under the *Domestic and Family Violence Protection Act 1989* (Qld),²⁰²⁷ the Commission does not

2022 See, for example, *Criminal Law (Sexual Offences) Act 1978* (Qld) ss 6, 7; *Family Law Act 1975* (Cth) s 121.

2023 See, for example, *Criminal Code* (Qld) s 695A.

2024 New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (2003) [10.14]. The New South Wales Law Reform Commission did not consider that a complete ban on reporting of bail or committal proceedings was justified and would represent an ‘unnecessary infringement of the principle of open justice’. New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) [10.81].

2025 See *Child Protection Act 1999* (Qld) ss 192, 193 which prohibit the publication of particular information about proceedings under that Act.

2026 New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) [10.91]–[10.92]; New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (2003) [10.15]. See Australian Law Reform Commission, *Contempt*, Report No 35 (1987) [247]:

While the underlying principle should be that anything said in legal proceedings should be capable of being reported with impunity, this should be subject to strictly and carefully defined judicial powers to postpone or prohibit reporting where a substantial risk of prejudice would otherwise arise.

See also *Contempt of Court Act 1981* (UK) s 4(2) under which the court may, ‘where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose’.

2027 See para 18.11 of this Report.

consider there should be a prohibition on publication of proceedings or of particular information about proceedings.

18.45 However, the Commission acknowledges that there may be circumstances in which it is desirable to restrict publication. For example, it may be necessary in order to protect the safety of vulnerable adults or children involved or concerned in proceedings.

18.46 At present, there is no general legislative provision allowing the Magistrates Court to restrict publication of proceedings under the *Peace and Good Behaviour Act 1982* (Qld)²⁰²⁸ and the common law in relation to non-publication orders is somewhat unsettled.²⁰²⁹ Given the desire to make the Personal Protection Bill 2007 clear, comprehensive and accessible on its face, particularly to unrepresented litigants, it is desirable to include a provision in the Personal Protection Bill 2007 setting out the circumstances in which publication of proceedings under the Bill may be restricted. The Commission considers the Personal Protection Bill 2007 should confer discretion on the Court to restrict publication of proceedings under the Bill, by making a non-publication order, in certain circumstances.

18.47 For the same reasons, the Commission also considers this power should be conferred on the District Court and the Court of Appeal in relation to appeals under the Personal Protection Bill 2007,²⁰³⁰ and on a court conferred with jurisdiction under the Bill to make or vary a protection order against an offender in sentencing proceedings to the extent those proceedings relate to the protection order.²⁰³¹

CRITERIA FOR THE EXERCISE OF DISCRETION

18.48 Tasmania is the only Australian jurisdiction which confers general discretion to make non-publication orders in relation to proceedings under its general civil restraining order legislation. The criterion for the exercise of that

2028 Neither the *Peace and Good Behaviour Act 1982* (Qld), the *Justices Act 1886* (Qld), the *Magistrates Courts Act 1921* (Qld) nor the *Uniform Civil Procedure Rules 1999* (Qld) contain any general provisions restricting publication or empowering the Magistrates Court to restrict publication of proceedings under the *Peace and Good Behaviour Act 1982* (Qld). Section 21AZC of the *Evidence Act 1977* (Qld) is limited to video-taped evidence of special witnesses and s 71B of the *Justices Act 1886* (Qld) is limited to photographs and pictures: see para 18.9–18.10 of this Report.

2029 See note 1969 of this Report.

2030 The Commission has made recommendations elsewhere in this Report about the conferral of jurisdiction on the District Court and Court of Appeal for appeals against orders made under the Personal Protection Bill 2007. See para 16.39–16.40 of this Report.

2031 The Commission has made recommendations elsewhere in this Report about the power of a court to make a protection order under the Personal Protection Bill 2007 where a person pleads guilty to, or is found guilty of, an offence that involves behaviour that constitutes grounds for making a protection order. See para 12.109–12.110 of this Report.

discretion is if it appears desirable 'for the furtherance of, or otherwise in the interests of, the administration of justice'.²⁰³²

18.49 In its Report on contempt by publication, the New South Wales Law Reform Commission recommended that the court be empowered to suppress publication where it is necessary for the administration of justice, either generally, or in relation to specific proceedings.²⁰³³ It acknowledged, however, that hardship caused to children or victims of sexual assault may be a compelling consideration for a non-publication order.²⁰³⁴

18.50 The Law Reform Commission of Western Australia recommended in its review of suppression orders that the criteria for the grant of an order should exclude mere embarrassment or invasion of privacy but require such factors to be considered against the genuine public interest in the subject matter.²⁰³⁵

18.51 Legislative criteria for the exercise of a power to order non-publication of proceedings are stipulated in many statutes in relation to a variety of judicial and quasi-judicial proceedings. Such criteria are specific to the matters of particular significance for the legislative scheme and the proceedings taken in relation to that scheme.²⁰³⁶

18.52 In Western Australia, several criteria are specified for the exercise of the power to order non-publication that is conferred on the State Administrative Tribunal. That Tribunal has jurisdiction under numerous statutes in administrative, commercial and personal matters.²⁰³⁷ There are, therefore, several specified circumstances in which it may order non-publication:²⁰³⁸

2032 *Justices Act 1959 (Tas) s 106K(1).*

2033 New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (2003) [10.20] rec 22. See also Law Reform Commission of Ireland, *Contempt of Court*, Report No 47 (1994) [6.40] in which it was recommended in relation to criminal proceedings that the court be empowered to order the postponement of publication of its proceedings where it appeared necessary to avoid a substantial risk of prejudice to the administration of justice in those or other pending or imminent proceedings.

2034 New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) [10.91]. See also *Nationwide News Pty Ltd v District Court of New South Wales* (1996) 40 NSWLR 486, 495 (Mahoney P).

2035 Law Reform Commission of Western Australia, *Review of the Law of Contempt*, Report No 93 (2003) 47 rec 17.

2036 See, for example, *Drugs Misuse Act 1986* (Qld) s 121; *Penalties and Sentences Act 1992* (Qld) s 13A(8), (9); *Industrial Relations Act 1999* (Qld) s 679(5), (8); *Land and Resources Tribunal Act 1999* (Qld) s 65(3), (4).

2037 *State Administrative Tribunal Act 2004* (WA) pt 3; and see *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA).

2038 *State Administrative Tribunal Act 2004* (WA) ss 61(4), 62(3). Note that similar criteria govern the exercise of the discretion to order non-publication conferred on the Victorian Civil and Administrative Tribunal which, like the State Administrative Tribunal of Western Australia, is a tribunal of generalist jurisdiction: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3), (4).

- (a) to avoid endangering the national or international security of Western Australia or Australia;
- (b) to avoid damaging inter-governmental relations;
- (c) to avoid prejudicing the administration of justice;
- (d) to avoid endangering the physical or mental health or safety of any person;
- (e) to avoid offending public decency or morality;
- (f) to avoid endangering property;
- (g) to avoid the publication of confidential information or information the publication of which would be contrary to the public interest; or
- (h) for any other reason in the interests of justice.

The Commission's view

18.53 The primary concern of the Personal Protection Bill 2007 is personal safety and the protection of a person's property from damage. Proceedings under the Bill are likely to involve, from time to time, children and/or young people and vulnerable adults including those people who would, if they were witnesses, be 'special witnesses' under the *Evidence Act 1977* (Qld).

18.54 Any discretion to restrict publication of proceedings under the Personal Protection Bill 2007 should be guided by criteria. Given the desire to make the Bill comprehensive and accessible, the Commission considers the criteria should be set out in the Personal Protection Bill 2007.

18.55 There may be occasions when it is necessary for the administration of justice to restrict publication, such as to avoid prejudicing a proceeding. There may also be occasions where it is necessary to ensure a person's safety, to avoid damage to property, or to avoid other harmful consequences of publicity particularly in relation to children and vulnerable adults. The Commission envisages that such situations will arise infrequently but that, given their potentially serious consequences, they should nevertheless be catered for.

18.56 The Commission considers therefore that the Personal Protection Bill 2007 should provide that the court may make a non-publication order if it is satisfied it is necessary to avoid serious harm or injustice to a person.

18.57 The Commission also considers that a provision should be included in the Personal Protection Bill 2007 in similar terms to section 35(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) to the effect that, in deciding whether to make a non-publication order, the court must take as the basis of its consideration the principle that it is desirable that hearings should be held in public and that evidence given before it and the contents of documents filed

with the court or received in evidence should be available to the public and to all the parties.²⁰³⁹

THE INFORMATION CAPABLE OF BEING RESTRICTED

18.58 At present, two types of information about proceedings under the *Peace and Good Behaviour Act 1982* (Qld) are prohibited from publication:

- video-taped evidence of special witnesses;²⁰⁴⁰ and
- photographs or pictures taken of or in the room or place in which proceedings are being, have been or are about to be conducted or of a person therein.²⁰⁴¹

18.59 The prohibitions in the *Domestic and Family Violence Protection Act 1989* (Qld) and the civil restraining order legislation in the other Australian jurisdictions relate primarily to information that identifies or could identify particular persons involved or concerned in proceedings, such as witnesses and parties.²⁰⁴² The civil restraining order legislation in Western Australia prohibits publication of information of the whereabouts of a party or witness.²⁰⁴³ The prohibition in Victoria relates to identifying information of both persons involved in proceedings, including pictures, and the locality or venue of the court in which the proceedings take place.²⁰⁴⁴

18.60 Provisions in other statutes that restrict publication of proceedings tend to relate either to identification of particular persons²⁰⁴⁵ or, more broadly, to any information about proceedings, including identifying information.²⁰⁴⁶ The

2039 Section 35(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) provides that for a direction that a hearing be held in private or restricting disclosure to a party to the proceeding of particular information, the Tribunal is to 'take as the basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties'.

2040 *Evidence Act 1977* (Qld) s 21AZC.

2041 *Justices Act 1886* (Qld) s 71B.

2042 See para 18.12, 18.20–18.24, 18.32–18.34 of this Report.

2043 *Restraining Orders Act 1997* (WA) s 70(2).

2044 *Crimes (Family Violence) Act 1987* (Vic) s 24(a), (b). For the application of this legislation, see note 1987 of this Report.

2045 See, for example, *Criminal Law (Sexual Offences) Act 1978* (Qld) ss 6, 7; *Criminal Code* (Qld) s 695A; *Family Law Act 1975* (Cth) s 121(1), (3).

2046 See, for example, *Drugs Misuse Act 1986* (Qld) s 121(1); *Penalties and Sentences Act 1992* (Qld) s 13A(8); *Child Protection Act 1999* (Qld) s 192.

formulation adopted in relation to the Western Australian State Administrative Tribunal is:²⁰⁴⁷

- any evidence given before the Tribunal;
- the contents of any documents produced to the Tribunal; and
- any information that might enable a person who has appeared before the Tribunal to be identified.

The Commission's view

18.61 In its review of suppression orders, the Law Reform Commission of Western Australia considered that one of the clear cases where power to make a non-publication order should exist is where it is necessary to suppress a witness's name for his or her protection.²⁰⁴⁸ It has been suggested that suppression of identifying information is an acceptable compromise between the protection of persons involved in proceedings and the principle of open justice.²⁰⁴⁹

18.62 The Commission recognises, however, that it may be very difficult to prevent particular people from identifying a person. For example, family members, colleagues, club members and so on in an intimate relationship with the person may be able to identify a person from minimal and non-specific information. In situations where a non-publication order is made in order to protect a person's safety from such individuals, prohibiting publication of identifying information may be insufficient and ineffective without additionally prohibiting publication of other information.

18.63 The Commission considers there may also be occasions where the nature of the proceedings or of information given during proceedings warrants non-publication. For example, it may be desirable to restrict publication of evidence of confidential information or of a person's whereabouts. The Commission appreciates that such situations will be uncommon but that, given their potentially serious consequences, they should nevertheless be catered for.

²⁰⁴⁷ *State Administrative Tribunal Act 2004* (WA) s 62(1). See also *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3); *Administrative Appeals Tribunal Act 1975* (Cth) s 35(2)(aa), (b).

²⁰⁴⁸ Law Reform Commission of Western Australia, *Review of the Law of Contempt*, Report No 93 (2003) 47. The other case identified by the Commission was where the subject matter of the litigation is secret and thus prone to destruction if publicised.

²⁰⁴⁹ C Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92, 106; *The Family Law Act 1975: Aspects of its operation and interpretation*, Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (1992) [15.23], [15.30]–[15.31] in relation to s 121 of the *Family Law Act 1975* (Cth). Also see *Witness v Marsden* (2000) 49 NSWLR 429, [144] (Heydon JA).

18.64 The Commission therefore considers the court should have power to make a non-publication order in respect of any information about a proceeding under the Bill. This would include, for example, the following kinds of information:

- evidence given in the proceeding (being either oral or documentary evidence); and
- information, including a picture or photograph, that identifies or is likely to identify:
 - the aggrieved person, a named person, the respondent, or the applicant or appellant; or
 - a witness in the proceedings; or
 - a child concerned in the proceedings; or
 - the whereabouts of any of those persons.

APPLICATIONS

18.65 A further question is when the court should be permitted to make a non-publication order: on its own initiative and/or on application?

18.66 At present, there is nothing in the *Peace and Good Behaviour Act 1982* (Qld) or the *Justices Act 1886* (Qld) stipulating whether any order made under those Acts may be made on the court's own initiative and/or on application to it.

18.67 In its review of contempt by publication, the New South Wales Law Reform Commission recommended that the court should be able to make a non-publication order on its own initiative or on application by any person the court is satisfied has a sufficient interest in the matter.²⁰⁵⁰ It also recommended that the media have standing to be heard on an application.²⁰⁵¹

The Commission's view

18.68 The Commission considers that a non-publication order may be contemplated for the benefit or protection of any of the persons involved or concerned in proceedings under the Personal Protection Bill 2007, including witnesses, and considers that any person with standing to appear at a hearing in the proceeding should be able to apply for a non-publication order.

²⁰⁵⁰ New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (2003) [10.22].

²⁰⁵¹ Ibid. Also see New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) [10.100].

18.69 Elsewhere in this Report, the Commission has recommended that the following persons have standing to appear in a proceeding under the Personal Protection Bill 2007 to make, vary or set aside a protection order:²⁰⁵²

- an applicant for the proceeding;
- if the proceeding is an application to vary or set aside a protection order, a person who was an applicant for the making of the protection order;
- a respondent for the proceeding;
- a person who is, or is sought to be, protected by the relevant protection order; and
- another person given leave by the court to appear.

18.70 The Commission considers that in relation to a non-publication order, it may be appropriate for the court to give leave to appear to a media organisation or entity. The Commission acknowledges that the media are likely to be best placed to advance arguments against non-publication.

18.71 The Commission also considers the court should be able to make a non-publication order on its own initiative.

OFFENCE AND PENALTY

18.72 Both the *Justices Act 1886* (Qld) and the *Evidence Act 1977* (Qld) provide that it is an offence, punishable by a specified maximum penalty, to contravene the prohibitions on publication contained in those statutes.²⁰⁵³

18.73 Similarly, section 82(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that it is an offence, punishable by a maximum of a \$3000 fine or one year imprisonment, to contravene the prohibition on publication of proceedings.²⁰⁵⁴

²⁰⁵² See para 20.74 of this Report. Also note the Commission's recommendations about the persons who may appear on an appeal, at para 16.45 of this Report, and on an application to register a corresponding order, at para 17.39 of this Report.

²⁰⁵³ *Justices Act 1886* (Qld) s 71B(2) which provides that the maximum penalty is \$525 or one month imprisonment; *Evidence Act 1977* (Qld) s 21AZC(1) which provides that the maximum penalty is \$7500 or two years imprisonment for an individual and \$750 000 for a corporation. See *Penalties and Sentences Act 1992* (Qld) s 5.

²⁰⁵⁴ *Penalties and Sentences Act 1992* (Qld) s 5.

18.74 Penalties for non-compliance with a prohibition on publication are also specified in the civil restraining order legislation of the other Australian jurisdictions.²⁰⁵⁵

The Commission's view

18.75 The Commission considers the Personal Protection Bill 2007 should specify that contravention of a non-publication order made under the Bill is an offence. The Bill should also specify a maximum penalty for the offence.

EXCUSE OR EXCEPTIONS

18.76 A final matter to consider is whether the Personal Protection Bill 2007 should include, in addition to any defences or excuses that may be available under the *Criminal Code* (Qld), a specific excuse for contravention of a non-publication order or any exceptions to the operation of such an order.

18.77 Neither the *Justices Act 1886* (Qld) nor the *Evidence Act 1977* (Qld) provide an excuse for contravention of the prohibitions on publication contained in those statutes.²⁰⁵⁶

18.78 Similarly, there is no excuse provided for non-compliance with the prohibition on publication of proceedings contained in section 82(1) of the *Domestic and Family Violence Protection Act 1989* (Qld), nor in any of the civil restraining order statutes of the other Australian jurisdictions.

18.79 However, a number of exceptions to the prohibitions on publication are set out in the *Domestic and Family Violence Protection Act 1989* (Qld).²⁰⁵⁷ Similar exceptions are provided in relation to the prohibition in section 121 of the *Family Law Act 1975* (Cth) and some are adopted in the civil restraining order legislation of the ACT and New South Wales.²⁰⁵⁸

The Commission's view

18.80 The Commission considers that there may be circumstances in which publication of material the subject of a non-publication order is legitimate, appropriate, or otherwise reasonable. The Commission does not consider, for

²⁰⁵⁵ *Domestic Violence and Protection Orders Act 2001* (ACT) s 100(1); *Crimes Act 1900* (NSW) s 562ZJ(2); *Justices Act 1959* (Tas) s 106K(5); *Family Violence Act 2004* (Tas) s 32; *Crimes (Family Violence) Act 1987* (Vic) s 24; *Restraining Orders Act 1997* (WA) s 70(2).

Section 562ZJ of the *Crimes Act 1900* (NSW) is replicated in s 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). For the application of the legislation in New South Wales and Victoria, see note 1987 of this Report.

²⁰⁵⁶ *Justices Act 1886* (Qld) s 71B; *Evidence Act 1977* (Qld) s 21AZC.

²⁰⁵⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 82(2), (3). See para 18.13–18.14 of this Report.

²⁰⁵⁸ See *Family Law Act 1975* (Cth) s 121(9); *Domestic Violence and Protection Orders Act 2001* (ACT) s 100(2); *Crimes Act 1900* (NSW) ss 562ZJ(3). See para 18.21, 18.23 of this Report.

example, that a person should be prevented by a non-publication order from disclosing information that it is necessary or reasonable to disclose for the purpose of court proceedings.

18.81 The Commission considers it would be useful to include a provision in the Personal Protection Bill 2007 that it is an offence to contravene a non-publication order unless the person has a reasonable excuse. The Bill should also provide that, without limiting what might be a reasonable excuse, it is a reasonable excuse to publish the information if it is published:

- in an official report of the proceeding or another proceeding in which the information is relevant;
- to a member of a profession and the publication is relevant to the practice of the person's profession; or
- for use in a judicial proceeding.

18.82 The Commission considers such an excuse would be sufficiently flexible to avoid unjust imposition of liability and would provide certainty in relation to particular publications that should be permitted.

RECOMMENDATIONS

18.83 The Commission makes the following recommendations:

18-1 The Personal Protection Bill 2007 should provide that, in any proceeding under the Bill, including an appeal proceeding or a proceeding in which a sentencing court makes or varies a protection order against an offender to the extent the proceeding relates to the making or variation of a protection order, the court may make a non-publication order prohibiting the publication of any information about the proceeding.²⁰⁵⁹

See Personal Protection Bill 2007 cl 80(1), (2), 114(2).

18-2 The Personal Protection Bill 2007 should provide that a court may make a non-publication order only if it is satisfied it is necessary to avoid serious harm or injustice to a person.²⁰⁶⁰

²⁰⁵⁹ See para 18.46–18.47, 18.64 of this Report.

²⁰⁶⁰ See para 18.56 of this Report.

See Personal Protection Bill 2007 cl 80(2).

- 18-3 A provision should be included in the Personal Protection Bill 2007 in similar terms to section 35(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) to the effect that, in deciding whether to make a non-publication order, the court must take as the basis of its consideration the principle that it is desirable that hearings should be held in public and that evidence given before the court and the contents of documents filed with the court or received in evidence by the court should be available to the public and to all the parties.²⁰⁶¹

See Personal Protection Bill 2007 cl 80(4).

- 18-4 The Personal Protection Bill 2007 should provide that the court may make a non-publication order on its own initiative or on application by any person who has standing under the Bill to appear at a hearing for the proceeding.²⁰⁶²

See Personal Protection Bill 2007 cl 80(3).

- 18-5 A provision should be included in the Personal Protection Bill 2007 specifying that a person must not contravene a non-publication order made under the Bill unless the person has a reasonable excuse, and specifying the maximum penalty that may be imposed for contravention of a non-publication order.²⁰⁶³

See Personal Protection Bill 2007 cl 116(1).

- 18-6 The Personal Protection Bill 2007 should provide that, without limiting what might be a reasonable excuse, it is a 'reasonable excuse' to publish information in contravention of a non-publication order if it is published:²⁰⁶⁴

- (a) in an official report of the proceeding or another proceeding in which the information is relevant;

2061 See para 18.57 of this Report.

2062 See para 18.68, 18.71 of this Report.

2063 See para 18.75, 18.81 of this Report.

2064 See para 18.81 of this Report.

- (b) to a member of a profession and the publication is relevant to the practice of the person's profession; or
- (c) for use in a judicial proceeding.

See Personal Protection Bill 2007 cl 116(2), (3).

Chapter 19

Service of documents

INTRODUCTION	490
THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD).....	490
THE JUSTICES ACT 1886 (QLD).....	491
THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)	493
The original application and summons	493
Orders	494
Applications to vary or set aside	495
Notices of appeal	495
Manner and proof of service	495
THE POSITION IN OTHER JURISDICTIONS	497
The original application and summons	497
Orders	498
Applications to vary or set aside	500
Notices of appeal	500
SUBMISSIONS.....	500
THE COMMISSION'S VIEW	502
Who should be served	502
Who must effect service.....	505
Manner of service.....	507
Proof of service	508
NOTIFICATION OF APPLICATIONS INVOLVING CHILDREN	509
The <i>Peace and Good Behaviour Act 1982</i> (Qld)	509
The <i>Domestic and Family Violence Protection Act 1989</i> (Qld).....	509
The <i>Child Protection Act 1999</i> (Qld)	510
The Commission's view	510
RECOMMENDATIONS	513

INTRODUCTION

19.1 The Commission's recommendations throughout this Report provide for various applications and orders to be made under the Commission's proposed Personal Protection Bill 2007 which, consequently, require the service of documents on particular persons. Those documents include the original application for a protection order and any summons, protection orders made by the court, applications to vary or set aside a protection order, and notices of appeal against an order or a decision made under the Bill.²⁰⁶⁵

19.2 This chapter considers the following matters in relation to the service of documents under the Personal Protection Bill 2007:

- who should be served;
- who should effect service of a document;
- the manner of service; and
- proof of service.

19.3 It also considers the notification of applications involving children.

THE PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)

19.4 At present, service under the *Peace and Good Behaviour Act 1982* (Qld) is governed by the provisions of the *Justices Act 1886* (Qld).²⁰⁶⁶ This would include service of the originating application and any summons.

19.5 The *Peace and Good Behaviour Act 1982* (Qld) also 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).²⁰⁶⁷

19.6 Neither the *Peace and Good Behaviour Act 1982* (Qld) nor the *Justices Act 1886* (Qld) specifies who is required to effect service of a complaint and summons, or an order.

2065 The Commission has also made recommendations about a scheme for the registration of corresponding orders (made in another Australian State or Territory or in New Zealand) under the Personal Protection Bill 2007 and for interim protection orders obtained by police on application by telephone or other electronic means. Those recommendations also deal with notification and service requirements. See para 9.142, 17.34, 17.46, 17.55, 17.60, 17.61 of this Report.

2066 Section 8 of the *Peace and Good Behaviour Act 1982* (Qld) provides that the provisions of and proceedings and procedures under the *Justices Act 1886* (Qld) that apply in the case of a summary prosecution apply to proceedings under the *Peace and Good Behaviour Act 1982* (Qld), subject to any necessary or prescribed modifications.

2067 *Peace and Good Behaviour Act 1982* (Qld) s 7(2); *Justices Act 1886* (Qld) s 56(1). See para 19.9 of this Report. This would include any orders made under the Act.

19.7 The Queensland Police Service Operational Procedures Manual provides that a police officer should only serve a document in relation to civil process if section 798 of the *Police Powers and Responsibilities Act 2000* (Qld) applies.²⁰⁶⁸ Section 798 provides that a police officer ‘may serve or enforce a warrant, summons, order or command of any court, judge, magistrate or justice’. There may be some doubt whether this applies to an order that does not require the person being served to take some form of specific action, such as attend court.²⁰⁶⁹

THE JUSTICES ACT 1886 (QLD)

19.8 The *Justices Act 1886* (Qld) provides for service in relation to the issue of a summons. Section 54(1A) of the *Justices Act 1886* (Qld) provides that a summons, and a copy of the written complaint on which the summons is issued, is to be served in accordance with that Act.²⁰⁷⁰

19.9 Section 56(1) of that Act specifies that the manner in which a summons is to be served is by delivering it to the person personally, or ‘if the person cannot reasonably be found’ by leaving it with someone else at the person’s usual or last known business or residential address, or (for a summons directing the person to appear on a complaint of a simple offence or breach of duty) by registered post.

19.10 The *Justices Act 1886* (Qld) does not generally specify who is required to serve a summons under that Act,²⁰⁷¹ although section 798 of the *Police Powers and Responsibilities Act 2000* (Qld) provides that a police officer ‘may serve or enforce a warrant, summons, order or command of any court, judge, magistrate or justice’.²⁰⁷²

19.11 The *Justices Act 1886* (Qld) also provides for proof of service of a summons. Section 56(3)–(5) of the *Justices Act 1886* (Qld) provides:

²⁰⁶⁸ Queensland Police Service, *Operational Procedures Manual* [14.29.1].

²⁰⁶⁹ See *Vaschina v Clague* (Unreported, District Court of Queensland, Wylie DCJ, 20 December 2002) [5], cited in Queensland Police Service, *Operational Procedures Manual* [14.29.1].

²⁰⁷⁰ Note also s 7 of the *Peace and Good Behaviour Regulation 1999* (Qld) which provides that, when a defendant is served with a summons issued under s 4(1) of the *Peace and Good Behaviour Act 1982* (Qld), he or she must also be served with a copy of the relevant complaint.

²⁰⁷¹ Although, note s 56A (Right of entry to serve summons) of the *Justices Act 1886* (Qld) which contemplates service by a ‘public officer’.

²⁰⁷² But see note 2069 of this Report.

56 Service of summonses

...

- (3) The person who serves a summons shall either—
 - (a) attend personally before the Magistrates Court, or, as the case may be, the justices taking the examination of witnesses in relation to an indictable offence, at the place and time for hearing mentioned in the summons and, if necessary, at any extended time therefore, to depose, if necessary, to the service thereof; or
 - (b) attend before any justice of the peace having jurisdiction in the State or part of the State or part of the Commonwealth in which such summons was served and depose, on oath and in writing endorsed on a copy of the summons, to the service thereof.
- (4) Where a summons is served as prescribed by subsection (1)(a)—
 - (a) the person who serves the summons shall, in the person's deposition as to service endorsed on a copy of the summons under subsection (3), state the time and place at which the person posted the copy of the summons;
 - (b) the complainant shall depose, on oath and in writing endorsed on the copy of the summons endorsed under subsection (3), that the address to which a copy of the summons was posted is (if such be the case) the defendant's address last known to the person and as to the person's means of knowledge.
- (5) Every such deposition shall, upon production to the Magistrates Court by which or to the stipendiary magistrate by whom the complaint upon which the summons issued, is heard, or, as the case may be, to the justices who take the examination of witnesses in relation to an indictable offence in respect of that complaint, be evidence of the matters contained therein and be sufficient proof of the service of the summons on the defendant.

19.12 At present, the proof of service provisions of the *Justices Act 1886* (Qld) apply in respect of service of orders under the *Peace and Good Behaviour Act 1982* (Qld).²⁰⁷³

19.13 The *Justices Act 1886* (Qld) also provides for service of notices of appeal. In contrast to the *Domestic and Family Violence Protection Act 1989* (Qld), it provides that the relevant registrar is required to give notice of the appeal to the respondent.²⁰⁷⁴

19.14 In contrast to the manner of service provided for under the *Justices Act 1886* (Qld), the *Uniform Civil Procedure Rules 1999* (Qld) provide that all documents in Magistrates Court proceedings, including an originating process,

²⁰⁷³ *Peace and Good Behaviour Act 1982* (Qld) s 7(2).

²⁰⁷⁴ *Justices Act 1886* (Qld) s 222D(1).

may be served by ordinary service, unless the court orders otherwise.²⁰⁷⁵ The *Uniform Civil Procedure Rules 1999* (Qld) also make provision for the court to order substituted service '[i]f, for any reason, it is impracticable to serve a document in a way required'.²⁰⁷⁶

THE DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 1989 (QLD)

19.15 The *Domestic and Family Violence Protection Act 1989* (Qld) includes detailed service provisions in relation to the original application and summons, orders, applications to vary and set aside orders, and notices of appeal. Those provisions specify who must be served, who is required to effect service, and the manner in which service is to be effected. The *Domestic and Family Violence Protection Act 1989* (Qld) also makes provision for proof of service by applying the provisions of the *Justices Act 1886* (Qld).

The original application and summons

19.16 The *Domestic and Family Violence Protection Act 1989* (Qld) provides that the clerk of the court must give two copies of the application and any summons to the police officer in charge of the police division in which the respondent ordinarily resides or was last known to reside. The officer must cause the application and any summons to be served on the respondent.²⁰⁷⁷

19.17 If the applicant is not the aggrieved, the applicant must serve the aggrieved with a copy of the application and notice of the time and place at which the application is to be heard.²⁰⁷⁸

2075 *Uniform Civil Procedure Rules 1999* (Qld) r 111. Rule 112 sets out the manner in which ordinary service may be performed:

- By leaving it at or posting it to the person's address for service or, if the person does not have an address for service, the person's last known place of business or residence;
- By faxing or emailing the document to the person or the person's solicitor;
- By document exchange to the exchange box of the person's solicitor; or
- By an electronic means prescribed by practice direction.

2076 *Uniform Civil Procedure Rules 1999* (Qld) r 116. Rule 116 provides:

116 Substituted service

- (1) If, for any reason, it is impracticable to serve a document in a way required under this chapter, the court may make an order substituting another way of serving the document.
- (2) The court may, in the order, specify the steps to be taken, instead of service, for bringing the document to the attention of the person to be served.
- (3) The court may, in the order, specify that the document is to be taken to have been served on the happening of a specified event or at the end of a specified time.
- (4) The court may make an order under this rule even though the person to be served is not in Queensland or was not in Queensland when the proceeding started.

2077 *Domestic and Family Violence Protection Act 1989* (Qld) s 47(4), (5).

2078 *Domestic and Family Violence Protection Act 1989* (Qld) s 47(6).

19.18 If a police officer who makes an application for a protection order issues the respondent a notice in the form of a notice to appear under the *Police Powers and Responsibilities Act 2000* (Qld), in lieu of a summons, the notice is to be served on the respondent.²⁰⁷⁹

Orders

19.19 Section 58 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that when a court has made, varied or revoked a domestic violence order, the clerk of the court must cause a copy of the order to be given to the respondent, the aggrieved and each named person and the Commissioner of Police. Where the clerk has not given a copy to the respondent or the aggrieved before they have departed the court precincts, or the order is made in the absence of those parties, section 58(3) provides that the clerk must arrange service by police. Section 58(3)–(4) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides:

58 Service of court orders

...

- (3) Where an order referred to in subsection (1) is made in the absence of the respondent or the aggrieved or the clerk of the court has not caused a copy of the order to be served on the respondent or given to the aggrieved before the respondent or, as the case may be, aggrieved has departed the court precincts, the clerk shall—
 - (a) in the case where a copy is to be served on the respondent, cause 2 copies of the order and, in the case where a copy of the application is to be served on the respondent, 2 copies of the application to be given to the officer in charge of the police division in which the respondent was last known to the clerk to ordinarily reside; or
 - (b) in the case where a copy is to be given to the aggrieved, cause 1 copy of the order to be given to the officer in charge of the police division in which the aggrieved was last known to the clerk to ordinarily reside.
- (4) The officer in charge of a police division who receives a copy or copies of an order or an application from the clerk of the court under subsection (3) must cause a copy of the order or, as the case requires, of the application to be served on the respondent or, as the case may be, given to the aggrieved as soon as is practicable.

2079

Domestic and Family Violence Protection Act 1989 (Qld) s 47(8); *Police Powers and Responsibilities Act 2000* (Qld) s 382(2), (3). A notice mentioned in s 47(8) need not state an alleged offence as required under the *Police Powers and Responsibilities Act 2000* (Qld); *Domestic and Family Violence Protection Act 1989* (Qld) s 47(9)(a). For the purposes of the court being satisfied, on the non-appearance of the respondent, that he or she has been given certain documents, such a notice is taken to be a summons: *Domestic and Family Violence Protection Act 1989* (Qld) ss 47(9)(b), 49.

Applications to vary or set aside

19.20 Section 51 of the *Domestic and Family Violence Protection Act 1989* (Qld) specifies various procedural requirements for making an application to vary or revoke a domestic violence order, including requirements associated with the service of applications for the variation or the revocation of an order.²⁰⁸⁰

19.21 For example, section 51(4) requires the applicant to cause a copy of the application and notification of the hearing time and place to be served on the other party to the application and the Commissioner of Police. Section 51(4A) further specifies that where an aggrieved or a named person applies for a variation of an order to extend the protection given to the aggrieved or named person, to extend the period or scope of the order or to add a condition to the order, the clerk of the court must arrange for a police officer to serve an application on the respondent.²⁰⁸¹ Section 51(5) also makes provision for the substituted service of an application if it appears to the court that it is not reasonably practicable to effect service on the respondent.²⁰⁸²

Notices of appeal

19.22 Under the *Domestic and Family Violence Protection Act 1989* (Qld), the appellant is required to serve a copy of the notice of appeal on each person, being either the aggrieved or respondent to the order, other than the appellant and on the clerk of the court that made the order or decision appealed against.²⁰⁸³ A copy of the notice must also be given to the Commissioner of Police.²⁰⁸⁴ There is also provision to apply to a District Court judge for an order in relation to substituted service.²⁰⁸⁵

Manner and proof of service

19.23 Section 85 of the *Domestic and Family Violence Protection Act 1989* (Qld) specifies the manner in which a document is to be served on, or given to, a person for the purposes of the Act. Section 85(1) provides that a summons, order or other document may be served in the same way as a summons may be

2080 *Domestic and Family Violence Protection Act 1989* (Qld) s 51(4)–(7). The other procedural provisions of s 51 are examined in Chapter 15 of this Report.

2081 *Domestic and Family Violence Protection Act 1989* (Qld) s 51(4)(a), (4A).

2082 *Domestic and Family Violence Protection Act 1989* (Qld) s 51(5).

2083 *Domestic and Family Violence Protection Act 1989* (Qld) s 64(1)(a), (b).

2084 *Domestic and Family Violence Protection Act 1989* (Qld) s 64(1)(c).

2085 *Domestic and Family Violence Protection Act 1989* (Qld) s 64(3). That section provides that, if it appears to a District Court judge to whom application is made that it is not reasonably practicable to effect service on a particular person, the judge may order that service on that person be effected by such means of substituted service as the judge thinks fit.

served under the *Justices Act 1886* (Qld).²⁰⁸⁶ Section 85(2) sets out the means by which a document may otherwise be given to a person:

85 Service etc. of documents

...

- (2) A document to be given to any person for the purposes of this Act shall be taken to have been duly given if—
 - (a) it is given to the person personally or to a person authorised by the person to whom it is directed to accept delivery of documents on the person's behalf, either generally or in a particular case; or
 - (b) it is left at the place of residence or business of the person to whom it is directed last known to the person who gives it; or
 - (c) it is sent by post to the place of residence or business of the person to whom it is directed last known to the person who gives it.

19.24 The means by which service may be effected may differ, therefore, depending on whether the document is 'given' to the respondent by the clerk of the court, under section 85(2) of the *Domestic and Family Violence Protection Act 1989* (Qld), or is 'served' by police, in accordance with section 56(1) of the *Justices Act 1886* (Qld).

19.25 The manner of service provided by section 85(2) of the *Domestic and Family Violence Protection Act 1989* (Qld) is less restrictive than the requirements of section 56(1) of the *Justices Act 1886* (Qld). For example, service by post under the *Justices Act 1886* (Qld) provision is limited to registered post and, if the document is left at the person's usual or last known address, it must be left with a person.²⁰⁸⁷

19.26 The *Domestic and Family Violence Protection Act 1989* (Qld) also sets out particular requirements for the manner in which a document is to be given to a child. If a child is under 16 years, the document must not be given to the child at or near the child's school, unless there is no other place where service may reasonably be effected, and a copy of the document must also be given to the child's parent.²⁰⁸⁸ If the child is at least 16 years, the document is to be given to the child 'as discretely as practicable' and a copy must only be given to the child's parent if the court so orders.²⁰⁸⁹ These provisions were inserted into the

²⁰⁸⁶ See para 19.9–19.10 of this Report.

²⁰⁸⁷ See para 19.9 of this Report.

²⁰⁸⁸ *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(4).

²⁰⁸⁹ *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(5). Note that, to the extent of any inconsistency with the provisions of s 85, the provisions of s 12D(4) or (5) will prevail: *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(6).

Act as a result of concern that 'young people should be able to obtain a protection order without loss of privacy'.²⁰⁹⁰

19.27 In relation to proof of service, section 85(1) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that the provisions of the *Justices Act 1886* (Qld) will apply if service is effected in accordance with the provisions of that Act.²⁰⁹¹

THE POSITION IN OTHER JURISDICTIONS

The original application and summons

19.28 In the ACT, the registrar must serve a copy of the application and a notice about the date for the hearing on the respondent and anyone else with a relevant interest. Service must be effected personally unless the court otherwise orders because service is not reasonably practicable or is impossible.²⁰⁹² The court may also direct that a document be served by a police officer 'if the court considers that it is appropriate to do so'.²⁰⁹³

2090 Explanatory Notes, Domestic Violence Legislation Amendment Bill 2001, 9. Note also that '[a] policy decision was made to choose 16 years, because at this age a child is old enough to leave school, receive government benefits, and secure employment': Explanatory Notes, Domestic Violence Legislation Amendment Bill 2001, 10. Note also *Uniform Civil Procedure Rules 1999* (Qld) r 108 (Personal service—young people) which provides that a document required to be served personally on a young person (under 18 years) must instead be served on either the young person's litigation guardian, parent or guardian, or other adult who has the care of the young person or with whom the young person lives.

2091 See para 19.11 of this Report.

2092 *Domestic Violence and Protection Orders Act 2001* (ACT) ss 16(1)(b), (4), 98. Section 98 provides:

98 If service impracticable or impossible

(1) This section applies if—

- (a) personal service of an application under this Act is not reasonably practicable; or
- (b) a document that is not required to be personally served cannot be served under section 97.

(2) The Magistrates Court may order that the application or document be served in the way, stated in the order, that the court considers is likely to bring the application or document to the attention of the person required to be served.

2093 *Domestic Violence and Protection Orders Act 2001* (ACT) s 99. That section provides:

99 Service of documents by police

(1) The Magistrates Court may direct that a document required to be served on someone be served by a police officer if the court considers that it is appropriate to do so.

(2) If the Magistrates Court gives a direction under subsection (1), an authorised police officer must, when asked to do so by the registrar, arrange for the document to be served by a police officer.

(3) For this section:

authorised police officer means the police officer in charge of a police station.

19.29 In the Northern Territory, a clerk must give written notice of the time and place for the hearing of the application to the parties to the order applied for as soon as practicable after the application is filed.²⁰⁹⁴

19.30 In Victoria, a copy of the complaint for an intervention order for stalking must be served on the defendant personally or by leaving a copy at the defendant's last or most usual address with another person for the defendant. The court may make an order for substituted service if it appears that service cannot be promptly effected.²⁰⁹⁵

19.31 In Western Australia, a summons relating to a restraining order is to be served personally or by post. If the summons is served by post, it must be served by prepaid registered post and by the registrar, a police officer, or a person authorised by the registrar.²⁰⁹⁶

Orders

19.32 In the ACT, an order must be served on the respondent personally, by the registrar, unless the respondent was present in court when the order was made or the court made an order for substituted service.²⁰⁹⁷ The court may also direct that a document be served by a police officer 'if the court considers that it is appropriate to do so'.²⁰⁹⁸ A copy of the order must also be given by the registrar to each other party to the proceeding, the chief police officer, and the registrar of firearms.²⁰⁹⁹

19.33 In New South Wales, if the defendant is present in court, the registrar must serve the defendant with the order personally or, if unable to do so, by post. If there is no appearance in court by the defendant, the registrar is to arrange for personal service by a police officer or such other person as the registrar thinks fit.²¹⁰⁰ The registrar must also cause a copy of the order to be

²⁰⁹⁴ *Justices Act* (NT) s 85, as amended by the *Domestic and Family Violence Act* (NT). The *Domestic and Family Violence Act* (NT) repeals pt IV div 7 of the *Justices Act* (NT) introducing a new pt IVA, which provides for the making of personal violence restraining orders. The *Domestic and Family Violence Act* (NT) was assented to on 12 December 2007 and will commence on a date to be proclaimed. Section 85 of the *Justices Act* (NT) is a new provision.

²⁰⁹⁵ *Crimes (Family Violence) Act 1987* (Vic) s 11(2), (3). An intervention order may be made under the *Crimes (Family Violence) Act 1987* (Vic) in relation to stalking behaviour even if there is no family relationship between the complainant and the person sought to be restrained: *Crimes Act 1958* (Vic) s 21A(5).

²⁰⁹⁶ *Restraining Orders Act 1997* (WA) s 54.

²⁰⁹⁷ *Domestic Violence and Protection Orders Act 2001* (ACT) ss 33, 98.

²⁰⁹⁸ See note 2093 of this Report.

²⁰⁹⁹ *Domestic Violence and Protection Orders Act 2001* (ACT) s 33(1)(c).

²¹⁰⁰ *Crimes Act 1900* (NSW) s 562ZZA(2)–(4). The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which was assented to on 7 December 2007 and will commence on a date to be proclaimed, repeals and replaces pt 15A of the *Crimes Act 1900* (NSW). Section 562ZZA of the *Crimes Act 1900* (NSW) is replicated in s 77 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

given to the Commissioner of Police and to each protected person.²¹⁰¹

19.34 Under the recently amended *Justices Act* (NT) in the Northern Territory, as soon as practicable after a personal violence restraining order is made, the Court must give a copy of it to the protected person, the defendant and the Commissioner of Police.²¹⁰²

19.35 In South Australia, a restraining order must be served on the respondent personally.²¹⁰³ 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.²¹⁰⁴ 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.²¹⁰⁵ The registrar must also forward a copy of the order to the Commissioner of Police and the complainant.²¹⁰⁶

19.36 In Victoria, where the complaint consists of stalking and an intervention order has been made under the family violence legislation, the registrar must serve the respondent with a copy of the order personally.²¹⁰⁷ 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.²¹⁰⁸ The registrar must also cause a copy of the order to be forwarded to the Chief Commissioner of Police, each of the parties to the proceeding, and the aggrieved person, if that person was not also a party.²¹⁰⁹

19.37 In Western Australia, a restraining order must generally be served personally on the person against whom it is made.²¹¹⁰ However, there is provision for an order to be served, in certain circumstances, by post²¹¹¹ or

2101 *Crimes Act 1900* (NSW) s 562ZZA(6).

2102 *Justices Act* (NT) s 90, as amended by the *Domestic and Family Violence Act* (NT). For the application of the *Justices Act* (NT), see note 2094 of this Report.

2103 *Summary Procedure Act 1921* (SA) s 99E(1), (2).

2104 *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.

2105 *Summary Procedure Act 1921* (SA) s 99E(3)(b).

2106 *Summary Procedure Act 1921* (SA) s 99G(1).

2107 *Crimes (Family Violence) Act 1987* (Vic) s 17(1)(b). For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 2095 of this Report.

2108 *Crimes (Family Violence) Act 1987* (Vic) s 17(2).

2109 *Crimes (Family Violence) Act 1987* (Vic) s 17(1)(d).

2110 *Restraining Orders Act 1997* (WA) ss 10(1)(a), 44, 55(1).

2111 *Restraining Orders Act 1997* (WA) s 55(3).

orally.²¹¹² Oral service may be effected face to face or by telephone, radio, video conference or another similar method.²¹¹³ 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.²¹¹⁴ A restraining order is taken to have been served if the respondent is present in court when the order is made.²¹¹⁵

Applications to vary or set aside

19.38 In Victoria, the applicant in an application for a variation, revocation or extension of an intervention order must cause a copy of the application to be served on each of the other parties and the aggrieved person if he or she is not also a party.²¹¹⁶

Notices of appeal

19.39 In the ACT and Victoria, service of the notice of appeal on the respondent or other parties is required to be effected by the appellant.²¹¹⁷ Under the legislation in the ACT, however, the court may direct that a police officer effect service if it 'considers that it is appropriate to do so'.²¹¹⁸

SUBMISSIONS

19.40 In its Discussion Paper, the Commission sought submissions on whether the current provision for service of an order under the *Peace and Good Behaviour Act 1982* (Qld) is adequate.²¹¹⁹

19.41 Two submissions considered that peace and good behaviour orders should be served only by personal service.²¹²⁰ One submission considered service by post is appropriate.²¹²¹ Another submission considered a more

2112 *Restraining Orders Act 1997* (WA) s 55(2).

2113 *Restraining Orders Act 1997* (WA) s 55(6).

2114 *Restraining Orders Act 1997* (WA) s 55(5).

2115 *Restraining Orders Act 1997* (WA) s 55(3a).

2116 *Crimes (Family Violence) Act 1987* (Vic) s 16(5). For the application of the *Crimes (Family Violence) Act 1987* (Vic), see note 2095 of this Report.

2117 *Domestic Violence and Protection Orders Act 2001* (ACT) s 80(b); *Crimes (Family Violence) Act 1987* (Vic) ss 20(3), 21(2).

2118 *Domestic Violence and Protection Orders Act 2001* (ACT) s 99(1).

2119 Queensland Law Reform Commission, Discussion Paper, *A Review of the Peace and Good Behaviour Act 1982* (WP 59, March 2005) 100 (Question 9-2).

2120 Submissions 5, 6.

2121 Submission 14.

flexible approach would be to provide for both service by registered post and personal service.²¹²²

19.42 In the view of the Chief Magistrate of Queensland, the *Peace and Good Behaviour Act 1982* (Qld) should make similar provision to the *Domestic and Family Violence Protection Act 1989* (Qld) in relation to the service of an order, including proof of service.²¹²³

19.43 Legal Aid Queensland expressed the view that, where the respondent has not been present in court, orders (including interim orders) should be served by the police, who should explain the effect of the order to the respondent. Although requiring police to serve and explain orders was likely to impose an additional burden on the Queensland Police Service, Legal Aid Queensland considered the requirement would 'enhance the likelihood that the orders will be complied with and prevent the need for further police involvement'.²¹²⁴

19.44 The Women's Legal Service and Caxton Legal Centre Inc considered that where safety issues arise it should be possible for service to be effected by police.²¹²⁵ Caxton Legal Centre Inc observed:²¹²⁶

We are aware of at least one case where the police served documents for our client and this intervention appeared to have a very positive effect on the overall proceedings. After being served by the Police, the defendant, who had previously been making very serious threats against our client, seemed finally to accept that our client wanted nothing to do with him. We were able to settle the matter and his harassment of our client ceased completely.

19.45 A submission from a community legal service suggested that service should not be conducted by the parties themselves, but by a third party.²¹²⁷

19.46 The Women's Legal Service also considered that there should be a provision for the respondent to be taken to have been served if he or she is present in court when the order is made.²¹²⁸

19.47 A submission from the Magistrates Court Branch of the Department of Justice and Attorney-General reflecting the views of a group of Magistrates Court registrars addressed the issue of service of the originating summons.²¹²⁹

2122 Submission 15.

2123 Submissions 12, 12C.

2124 Submission 13.

2125 Submissions 8, 19.

2126 Submission 19.

2127 Submission 5.

2128 Submission 8.

2129 Submission 28.

This submission commented that, at present, complainants are advised to request that a police officer serve the summons and that, subject to availability, the police generally comply with such requests. This submission suggested:

... the provisions of the Act could be tightened to require that [the Queensland Police Service] serve the summons (as in the [*Domestic and Family Violence Protection Act 1989 (Qld)*]) as opposed to the complainant being responsible for service, as is currently the case.

THE COMMISSION'S VIEW

19.48 The Commission considers the Personal Protection Bill 2007 should include provisions specifying who should be served with particular applications and orders, who should be required to effect service and in what manner service is to be effected. The Commission's approach to service is generally consistent with the position under the *Domestic and Family Violence Protection Act 1989* (Qld) and under the civil restraining order legislation in other jurisdictions.

Who should be served

19.49 The Commission considers that, generally, the Personal Protection Bill 2007 should specify the following persons who must be served with particular applications and orders:

- A copy of an application for a protection order and any summons issued on the application must be served on each respondent for the order being sought.²¹³⁰ A copy of the application and notice of when and where the application is to be heard must also be served on each aggrieved person, if the aggrieved person is not the applicant, and on any other person whom the court directs is to be served. This is generally consistent with the approach taken under section 47 of the *Domestic and Family Violence Protection Act 1989* (Qld) and of the civil restraining order legislation in the other jurisdictions.
- A copy of an application to vary or set aside an order, and notification of when and where the application is to be heard, must be served on each person, other than the person who makes the application, who was an applicant for the existing protection order, aggrieved person or respondent for the existing protection order, and another person whom the court directs is to be served. This is consistent with section 51(4)(a) of the *Domestic and Family Violence Protection Act 1989* (Qld).

2130

In relation to the service by police on the respondent of a notice, in the form of a notice to appear under the *Police Powers and Responsibilities Act 2000* (Qld), instead of a summons, along with a copy of the application, see para 9.165 of this Report.

- A copy of a protection order or an order varying or setting aside a protection order must be served on each respondent for the protection order, the applicant for the order, if he or she is not an aggrieved person, each aggrieved person for the protection order and on another person whom the court directs is to be served. It is important for the respondent and the persons protected by the order to be aware of the existence, terms and duration of the order. Having a copy of the order will also assist the aggrieved person in notifying other relevant people of the existence and terms of the order. This is generally consistent with section 58(1)–(2) of the *Domestic and Family Violence Protection Act 1989* (Qld) and with the civil restraining order legislation in other jurisdictions.
- A copy of the notice of appeal must be served on the following persons:
 - each person, other than the appellant, who was an aggrieved person, applicant or respondent for the protection order or proposed protection order (including a registered corresponding order or a corresponding order sought to be registered) to which the order or decision appealed against relates;
 - if the order or decision appealed against was made on an application of which notice was given to a parent of an aggrieved person or respondent – the person given notice of the application;
 - the registrar of the first instance court or, for an appeal against a decision of a magistrate to make an interim protection order, the registrar of the court to which the application for the protection order was made; and
 - another person whom the court directs is to be served.

19.50 It is important that the parties to a protection order and, if relevant, a parent who has been served with documents in the original proceedings on an application relating to a protection order, in addition to another person directed to be served by the court, have notice of an appeal. This is generally wider than the position under the *Domestic and Family Violence Protection Act 1989* (Qld) and the civil restraining order legislation in other jurisdictions.

19.51 For the registration of a corresponding order, the Commission has recommended elsewhere in this Report that a copy of the registered order be served on the person protected by the order and on another person whom the court directs is to be served. The Commission has also recommended that a copy of the registered order be served on the respondent unless the court orders otherwise.²¹³¹ The Commission has also recommended that the provisions of the Personal Protection Bill 2007 dealing with applications and orders to vary or set aside a protection order, including provisions for service of such applications and orders, should apply, with necessary changes, to registered corresponding orders. Consistent with those service provisions, an application to vary or set aside a registered corresponding order or an order varying or setting aside a registered corresponding order is to be served on the person who applied for registration of the corresponding order, the person protected by the order, the person against whom the order was made and any other person whom the court directs is to be served.²¹³²

19.52 The Commission has recommended elsewhere in this Report that the Personal Protection Bill 2007 include a provision requiring the Commissioner of Police to be given, by the registrar of the court hearing the relevant proceeding, a copy of the following application, order or notice within a specified period after the application or order is made or notice is filed:²¹³³

- an application for a protection order;
- an application for an order varying or setting aside a protection order, including a registered corresponding order;
- an application to register a corresponding order;
- a protection order, including an interim protection order;
- an order varying or setting aside a protection order, including a registered corresponding order
- an order registering a corresponding order;
- a notice of appeal.

19.53 For an interim protection order obtained by a police officer on a telephone application to a magistrate, the Commission has recommended, elsewhere in this Report, the inclusion of procedural provisions including

²¹³¹ See para 17.46–17.47 of this Report.

²¹³² See para 17.59 of this Report.

²¹³³ See para 20.112 of this Report.

provisions for service of a copy of the order, and of the application on which it was made, to the respondent and the aggrieved person.²¹³⁴

Who must effect service

19.54 The Commission considers the provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) in relation to the persons responsible for effecting service of documents are a useful starting point for the service provisions of the Personal Protection Bill 2007. In particular, the Commission considers the provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) which confer responsibility on the clerk of the court to arrange service of documents and require police to effect service in some circumstances may be appropriate. However, the Commission considers the provisions of that Act are unnecessarily complicated in requiring different persons to effect service of documents in different circumstances.

19.55 The Commission does not consider it appropriate for the person who is, or is seeking to be, protected by an order to be required to effect service of an application or order on the respondent. The registrar of the court where the application is filed or the order is made is in the best position to arrange service of those documents on the respondent.

19.56 An original application initiates a court proceeding against the respondent and a summons issued with it requires the respondent to attend court. The service of a copy of an order on the respondent provides the respondent with a written record of the order, including its specific terms and conditions. Given the significance to the respondent of applications and orders made under the Personal Protection Bill 2007, the Commission considers it appropriate for service to be effected by the registrar of the court, rather than by the applicant or the aggrieved person.

19.57 There may also be circumstances in which it may be dangerous, intimidating or frightening for an applicant or aggrieved person to serve a copy of an original application or order on the respondent. Similarly, in relation to an application to vary or set aside an order, it may be inappropriate for the applicant to serve the other person, being either the respondent to the order or the protected person. This may also apply in relation to a notice of appeal.

19.58 The Commission considers, therefore, that the Personal Protection Bill 2007 should generally provide for service of documents by the registrar of the court in which the relevant application is filed or the order is made. This should apply to the original application and any summons, a protection order or an order varying or setting aside a protection order, and an application to vary or set aside an order. In relation to a notice of appeal, service should be required to be effected by the registrar of the court in which the notice of appeal is lodged.

²¹³⁴ See para 9.142 of this Report.

19.59 The Commission is also of the view that it may sometimes be appropriate for service of documents to be effected by police. This might arise, for example, where the respondent did not appear in court when the order was made, or where service may involve a risk to a person's safety.

19.60 The Commission therefore considers that the Personal Protection Bill 2007 should provide that, if a document is required to be served under the Bill, and a court hearing the proceeding to which the document relates, or the registrar of the court, considers it appropriate to do so, the court or registrar may direct that the document be served by a police officer. The Bill should also provide that, if the court or registrar gives such a direction, the registrar must give the document to the officer in charge of the nearest police station who must arrange for the document to be served by a police officer. This is generally consistent with section 99 of the *Domestic Violence and Protection Orders Act 2001* (ACT).²¹³⁵ A provision to this effect would also allow the appeal court or the registrar of the appeal court to direct, if the court or registrar considers it is appropriate to do so, that service of a notice of appeal be effected by a police officer.

19.61 For an interim protection order obtained by a police officer on a telephone application, the Commission has recommended the inclusion of procedural provisions elsewhere in this Report, including provisions for service by the police officer of a copy of the order.²¹³⁶

19.62 For the registration of a corresponding order and applications to vary a registered corresponding order, the Commission has recommended elsewhere in this Report the inclusion of procedural provisions, including provisions requiring that service of documents be effected by the registrar of the court.²¹³⁷

19.63 These provisions will have resource implications for both the Magistrates Court and the Queensland Police Service by adding to existing responsibilities under the *Domestic and Family Violence Protection Act 1989* (Qld). However, the provisions the Commission has recommended are a simpler version of what is already required under the *Domestic and Family Violence Protection Act 1989* (Qld). In relation to service by police, the Commission is also conscious that safety or other considerations may necessitate the involvement of a police officer and notes that police are often already called upon to effect service under the *Peace and Good Behaviour Act 1982* (Qld).²¹³⁸

2135 See note 2093 of this Report.

2136 See para 9.142 of this Report.

2137 See para 17.34, 17.46, 17.55, 17.60, 17.61 of this Report.

2138 See, for example, para 19.47 of this Report.

Manner of service

19.64 If the manner of service is not specified in the Personal Protection Bill 2007, the provisions of the *Justices Act 1886* (Qld) will apply.²¹³⁹ Section 56(1) of that Act provides for service to be effected either personally, by leaving it at the person's usual or last known business or residential address, or (for certain summonses) by registered post.²¹⁴⁰

19.65 A requirement for personal service may create problems if the person 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 person has received a copy of the document.

19.66 The Commission considers that, consistent with the civil restraining order legislation in the other jurisdictions, the Personal Protection Bill 2007 should provide that service of a document should be effected by delivering it to the person personally or, where this is not reasonably practicable, by:

- leaving it at or posting it to the person's home or work address last known to the person serving the document; or
- leaving it at or posting it to the person's address for service, if the person has an address for service.

19.67 The Commission does not consider that service by post should be required to be by registered post. Registered mail ensures there will be a record of collection. However, if a person fails to collect his or her mail, he or she will not have actual notice of the matter, even though service will be taken to have occurred.²¹⁴¹ The purpose of service, after all, is to ensure as far as possible that the person receives a copy of the document.

19.68 The Commission also considers a provision should be included in the Personal Protection Bill 2007 permitting the court hearing the proceeding to which the document relates, or the registrar of the relevant court, to make an order for substituted service. A provision similar to rule 116 of the *Uniform Civil Procedure Rules 1999* (Qld) should be included in the Bill, to the effect that the court hearing the proceeding to which the document relates or, the registrar of the court, may make an order substituting another way of serving the document if it is not reasonably practicable for a document to be served in the required way.²¹⁴² As with rule 116, the Bill should provide that the court or registrar may

²¹³⁹ Elsewhere in this Report, the Commission has recommended that except where it is inconsistent with the Personal Protection Bill 2007, the *Justices Act 1886* (Qld) should apply, with any necessary changes, to proceedings under the Bill. See para 20.155 of this Report.

²¹⁴⁰ See para 19.9 of this Report.

²¹⁴¹ Note s 39A(2) of the *Acts Interpretation Act 1954* (Qld) which provides that, if an Act requires a document to be served by a particular postal method, the requirement is taken to be satisfied if the document is posted by that method.

²¹⁴² See note 2076 of this Report.

state in the order the steps to be taken to bring the document to the attention of the person and that the document is taken to have been served on the happening of a stated event or at the end of a stated time. This should also apply in relation to a notice of appeal, so that the appeal court, or the registrar of the appeal court, may order substituted service.

19.69 The Commission also considers it appropriate to include a provision in the Personal Protection Bill 2007 in relation to the manner in which documents are to be given to a child. The Commission notes that the *Domestic and Family Violence Protection Act 1989* (Qld) includes special provisions about the service of documents on children.²¹⁴³ The Commission also notes that both the *Juvenile Justice Act 1992* (Qld) and the *Police Powers and Responsibilities Act 2000* (Qld) include similar provisions requiring that a person serving a complaint and summons, or a notice to appear, on a child must do so:²¹⁴⁴

- as discreetly as practicable; and
- not at, or in the vicinity of the child's place of employment or school, unless there is no other place where service may be reasonably effected.

19.70 The Commission considers it appropriate to exercise the same care with respect to children who are to be served with a document under the Personal Protection Bill 2007. The Commission therefore recommends that a provision be included in the Bill to the effect that, a person serving a document on a child, must do so:

- as discreetly as practicable; and
- not at, or in the vicinity of, the child's place of employment or school, unless there is no other place where service may be reasonably effected.

Proof of service

19.71 The Commission has recommended elsewhere in this Report that a respondent may only be held in breach of an order in certain alternative circumstances, including, that the respondent was served with a copy of the order.²¹⁴⁵ The Commission has also recommended that upon the non-appearance of the respondent on an application for a protection order, the court may adjourn the application, issue a warrant for the respondent's apprehension (subject to certain requirements), or hear and decide the application. Proof of service on the respondent is therefore of particular importance.

²¹⁴³ *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(4), (5). See para 19.26 of this Report.

²¹⁴⁴ *Juvenile Justice Act 1992* (Qld) s 43 (Service of complaint and summons if offender a child); *Police Powers and Responsibilities Act 2000* (Qld) s 383 (Notice to appear must be served discreetly on a child).

²¹⁴⁵ See para 14.54 of this Report. See s 80(1) of the *Domestic and Family Violence Protection Act 1989* (Qld).

19.72 The Commission is of the view that proof of service should be required under the Personal Protection Bill 2007. The Commission considers that the provisions of section 56(3)–(5) of the *Justices Act 1886* (Qld) are appropriate and should apply, with necessary modifications, in respect of the service of documents under the Personal Protection Bill 2007. The Commission notes that elsewhere in this Report, it has recommended that the provisions of the *Justices Act 1886* (Qld) should apply, with any necessary changes, to proceedings under the Personal Protection Bill 2007, except to the extent of any inconsistency.²¹⁴⁶ The Commission considers this provision sufficient to incorporate the proof of service provisions in section 56(3)–(5) of the *Justices Act 1886* (Qld) without the need for any further specific provision in the Bill.

NOTIFICATION OF APPLICATIONS INVOLVING CHILDREN

19.73 The *Domestic and Family Violence Protection Act 1989* (Qld) includes provision for the service of applications, and other documents, that must be served on a child who is an aggrieved or respondent, on the child's parent in certain circumstances.²¹⁴⁷

19.74 This raises the issue of whether the Personal Protection Bill 2007 should make similar provision.

19.75 This section of the chapter considers the service of applications involving a child on a parent of the child. It also considers the service of applications involving a child on the Department of Child Safety where the child is in the guardianship of the Chief Executive of that Department.

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

19.76 The *Peace and Good Behaviour Act 1982* (Qld) does not make provision for the service of applications involving a child on the child's parent or for notice of applications to the Department of Child Safety.

The *Domestic and Family Violence Protection Act 1989* (Qld)

19.77 Section 12D(4)(a) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a copy of a document required to be served on a child must also be given to a parent of the child if the child is under 16 years.

19.78 Section 12(5)(a) of the Act provides that if the child is at least 16 years, a copy of a document required to be served on the child must not be given to a parent of the child unless the court orders.

²¹⁴⁶ See para 20.155 of this Report.

²¹⁴⁷ *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(4), (5).

19.79 The *Domestic and Family Violence Protection Act 1989* (Qld) does not contain any provisions requiring notification of applications or service of documents on the Department of Child Safety.

The *Child Protection Act 1999* (Qld)

19.80 In Queensland, the *Child Protection Act 1999* (Qld) provides the legal framework for child protection. That Act is administered by the Department of Child Safety. The Department's role under the Act is to investigate concerns that a child or young person has been harmed, or is at risk of harm, and to provide ongoing services to children and young people who are experiencing, or are at risk of experiencing, harm.²¹⁴⁸ In appropriate circumstances, a child protection order may grant custody or guardianship of the child to the Chief Executive.²¹⁴⁹

The Commission's view

19.81 The Commission considers that the Personal Protection Bill 2007 should provide that if:

- for an application to make, vary or set aside a protection order, a child is an aggrieved person or a respondent; or
- for an application to register a corresponding order (that is not dealt with by the court ex parte), a child is a person protected by the order or against whom the order was made;

a copy of the application, and notice of when and where the application will be heard, must be given to the child's parent by the registrar.

19.82 The Commission considers this may be particularly important if the child is a respondent. Providing an opportunity for the parent to assist the child, through guidance or representation for example, is important in respecting the rights of the child to be heard and to be protected.²¹⁵⁰ As noted by the Australian Law Reform Commission, '[p]arents are often the most effective advocates for children'.²¹⁵¹

²¹⁴⁸ 'Harm' to a child is defined as 'any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing': *Child Protection Act 1999* (Qld) s 9(1). Harm can be caused by physical, psychological or emotional abuse or neglect or sexual abuse or exploitation: *Child Protection Act 1999* (Qld) s 9(3). It is immaterial how the harm is caused: *Child Protection Act 1999* (Qld) s 9(2).

²¹⁴⁹ *Child Protection Act 1999* (Qld) s 61(d)(ii), (e), (f)(iii). A child protection order can be made only if the court is satisfied of a range of matters: *Child Protection Act 1999* (Qld) s 59.

²¹⁵⁰ Respect for the responsibilities, rights and duties of parents to provide appropriate direction and guidance in the exercise by the child of his or her rights is provided for in art 5 of the *Convention on the Rights of the Child*, adopted by the United Nations GA Res 44/25 of 20 November 1989.

²¹⁵¹ Australian Law Reform Commission, *Seen and heard: Priority for children in the legal process*, Report No 84 (1997) [13.2].

19.83 The Commission acknowledges, however, that there may be circumstances in which it is unnecessary or inappropriate for notice of an application to be given to the child's parent. This may occur, for example, if the child is a young person who is living independently, particularly if the child and parent have a hostile relationship or the child fears abuse from one or both parents. In those circumstances, the child may not want one or both of his or her parents to know about the proceedings. Children's privacy and, commensurate with their individual development and capacity, children's autonomy, should be respected.²¹⁵²

19.84 The Commission therefore considers the Bill should further provide that if the aggrieved person or respondent is a child, a copy of the application with notice of when and where the application is to be heard must be given by the registrar to a parent of the child, unless the court otherwise orders.²¹⁵³ The Commission considers it desirable to preserve the court's discretion to direct, in appropriate circumstances, that notice of the application not be given to the child's parent.

19.85 To facilitate that discretion, the Commission is also of the view that provision should be made in the Bill to require the court, when it is considering whether to make an order that the relevant documents are not required to be given to the child's parent, to have regard to the best interests of the child and, for deciding what is in the child's best interests, to consider any expressed views of the child.²¹⁵⁴

19.86 The Commission also notes that it may sometimes be difficult for a child's parent to be identified and/or located in order for service to be effected. The Commission therefore considers that the Bill should also provide that the requirement to give a copy of the application to the child's parent need not be complied with if, after reasonable inquiry, the parent cannot be found.

19.87 The Commission also notes that there may be circumstances in which a child involved in an application is under the guardianship of the Chief Executive of the Department of Child Safety. In that role, the Chief Executive has 'all the powers, rights and responsibilities in relation to the child that would otherwise have been vested in the person having parental responsibility for

2152 The child's right to privacy is specifically recognised in art 16 of the *Convention on the Rights of the Child*, adopted by the United Nations GA Res 44/25 of 20 November 1989. See generally, Australian Law Reform Commission, *Seen and heard: Priority for children in the legal process*, Report No 84 (1997) ch 4 [13.2]; M Raynor, 'Young people and the law' (2005) 17(2) *Legaldate* 5; L Eade, 'Legal Incapacity, Autonomy, and Children's Rights' (2003) 5(2) *Newcastle Law Review* 157, 165.

2153 Elsewhere in this Report, the Commission has recommended that the Personal Protection Bill 2007 include a definition of 'parent' modelled on s 10 of the *Education (General Provisions) Act 2006* (Qld); see para 6.77 of this Report.

2154 The rights of the child to express his or her views in matters affecting the child and to have those views given due weight in accordance with the age and maturity of the child are recognised in art 12 of the *Convention on the Rights of the Child*, adopted by the United Nations GA Res 44/25 of 20 November 1989.

making decisions about the long-term care, welfare and development of the child'.²¹⁵⁵

19.88 The Commission considers it appropriate that, in such circumstances, the Department of Child Safety is given notice of the application as the child's parent.

19.89 The Commission notes that elsewhere in this Report, it has recommended the inclusion in the Personal Protection Bill 2007 of a definition of 'parent' based on section 10 of the *Education (General Provisions) Act 2006* (Qld) for the purposes of defining who is eligible as a 'parent' to make an application for a personal protection order on behalf of a child.²¹⁵⁶ That definition provides that, if the child is in the guardianship of the Chief Executive of the Department of Child Safety, the Chief Executive is to be regarded as the child's parent.²¹⁵⁷

19.90 The Commission considers it appropriate that this definition also apply to the provision it has recommended about notification of an application involving a child on the child's 'parent'.

19.91 The Commission notes that this limits the 'notification' to notice of a proceeding involving a child for whom the Chief Executive of Department of Child Safety has parental responsibility as the child's guardian, rather than reporting of concerns about a child who is not under the parental responsibility of the Department (which would trigger the Department's detailed assessment

²¹⁵⁵ *Child Protection Act 1999* (Qld) s 13(c).

²¹⁵⁶ See para 6.77 of this Report. Section 10 of the *Education (General Provisions) Act 2006* (Qld) provides:

10 Meaning of parent

- (1) A **parent**, of a child, is any of the following persons—
 - (a) the child's mother;
 - (b) the child's father;
 - (c) a person who exercises parental responsibility for the child.
- (2) However, a person standing in the place of a parent of a child on a temporary basis is not a parent of the child.
- (3) A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.
- (4) A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.
- (5) Despite subsections (1), (3) and (4), if—
 - (a) a person is granted guardianship of a child under the *Child Protection Act 1999*; or
 - (b) a person otherwise exercises parental responsibility for a child under a decision or order of a federal court or a court of a State;
 then a reference in this Act to a parent of a child is a reference only to a person mentioned in paragraph (a) or (b).

²¹⁵⁷ Note that the *Child Protection Act 1999* (Qld) provides that the Childrens Court may make a child protection order granting guardianship of a child to specified persons, including the Chief Executive of the Department of Child Safety. Under that Act, the Court may grant short-term guardianship of a child to the Chief Executive of the Department of Child Safety: *Child Protection Act 1999* (Qld) s 61(e). Also, the Court may grant long-term guardianship of a child to the Chief Executive of the Department of Child Safety or certain other persons: *Child Protection Act 1999* (Qld) s 61(f).

processes).²¹⁵⁸ The difficulties associated with general reporting are therefore avoided.²¹⁵⁹ The Commission also notes that a magistrate or a court officer would, at any time, be able to notify the Department of Child Safety of legitimate concerns about a child at risk without the need to rely on particular legislative provision.²¹⁶⁰

19.92 Finally, the Personal Protection Bill 2007 should also provide that failure to comply with the provision requiring notification of applications involving a child on the child's parent does not invalidate or otherwise affect an order made by the court on the application.

RECOMMENDATIONS

19.93 The Commission makes the following recommendations:

19-1 A provision should be included in the Personal Protection Bill 2007 to the effect that the registrar of the court to which an application for a protection order is made must serve a copy of the application and any summons issued on the application on each respondent for the order applied for. The registrar of the court to which an application for a protection order is made must also give a copy of the application and notice of when and where the application is to be heard to:²¹⁶¹

2158 If the Chief Executive of the Department of Child Safety becomes aware of alleged harm or alleged risk of harm to a child and reasonably suspects the child is in need of protection, the Chief Executive must immediately have an authorised officer investigate the allegation and assess the child's need of protection or take other action the Chief Executive considers appropriate. Such action may include seeking an assessment order (to authorise actions necessary to investigate whether a child is in need of protection) or child protection order. See *Child Protection Act 1999* (Qld) ss 14(1), 25, 34, 54.

2159 For example, a number of statutes impose mandatory reporting obligations on individuals in certain occupations or employment: See, for example, *Child Protection Act 1999* (Qld) s 148; *Public Health Act 2005* (Qld) ss 191, 192; *Commission for Children and Young People and Child Guardian Act 2000* (Qld) s 20. Mandatory reporting is seen as a necessity to protect children's rights because children do not have the resources to protect themselves. However, the expansion of mandatory reporting has been criticised because, without a concomitant increase in resources to deal with referrals, resources may be diverted from prevention and treatment: C Humphreys, *Domestic Violence and Child Protection: Challenging Directions for Practice* (2007) Issues Paper 13 (Australian Domestic & Family Violence Clearinghouse); A Jacob and D Fanning, *Report on Child Protection Services in Tasmania* (2006), Tasmania Department of Health and Human Services and Commissioner for Children Tasmania, 59–63. It has been noted, for example, that by widening the net of the child protection system, mandatory reporting in domestic violence situations means that 'children who are at high-risk are less likely to be found amongst the huge number of referrals': C Humphreys, *Domestic Violence and Child Protection: Challenging Directions for Practice* (2007) Issues Paper 13 (Australian Domestic & Family Violence Clearinghouse) 5.

2160 A person who, acting honestly, makes a notification or gives information about alleged harm or alleged risk of harm to a child does not breach professional ethics and does not become liable civilly, criminally or under an administrative process for giving the notification or information: *Child Protection Act 1999* (Qld) s 22.

2161 See para 19.49, 19.58 of this Report.

- (a) if the aggrieved person for the protection order applied for is not an applicant, each aggrieved person for the protection order; and
- (b) any other person whom the court directs is to be served.

See Personal Protection Bill 2007 cl 21, 23.

- 19-2 A provision should be included in the Personal Protection Bill 2007 to the effect that where an application to vary or set aside a protection order (an 'existing order') is made, the registrar of the court to which the application is made must serve a copy of the application and notice of when and where the application will be heard on the following persons, other than the person who made the application:²¹⁶²
- (a) each person who was an applicant for the existing order;
 - (b) each aggrieved person for the existing order;
 - (c) each respondent for the existing order;
 - (d) another person whom the court directs is to be served with the application.

See Personal Protection Bill 2007 cl 65.

- 19-3 A provision should be included in the Personal Protection Bill 2007 to the effect that, if a court makes a protection order or an order varying or setting aside a protection order, the registrar of the court that made the order must serve a copy of the order on each of the following:²¹⁶³
- (a) each respondent for the protection order;
 - (b) each aggrieved person for the protection order;
 - (c) the applicant for the protection order if the applicant is not an aggrieved person;
 - (d) another person whom the court directs is to be served.

See Personal Protection Bill 2007 cl 101.

²¹⁶² Ibid.

²¹⁶³ Ibid.

19-4 A provision should be included in the Personal Protection Bill 2007, to the effect that the registrar of the appeal court must serve a copy of the notice of appeal on each of the following persons:²¹⁶⁴

- (a) each person, other than the appellant, who was an aggrieved person, applicant or respondent for the protection order or proposed protection order (including a registered corresponding order or a corresponding order sought to be registered) to which the order or decision appealed against relates;
- (b) if the order or decision appealed against was made on an application of which notice was given to a parent of an aggrieved person or respondent – the person given notice of the application;
- (c) the registrar of the court that made the order or decision at first instance or, for an appeal against a decision of a magistrate to make an interim protection order, the registrar of the court to which the application for the protection order was made;
- (d) another person whom the court directs is to be served with the notice of appeal.

See Personal Protection Bill 2007 cl 111(3).

19-5 The Personal Protection Bill 2007 should provide that, if a document is required to be served under the Bill, and a court hearing the proceeding to which the document relates or the registrar of the court, considers it appropriate to do so, the court or registrar may direct that the document be served by a police officer. If the court or registrar makes such a direction, the registrar must give the document to the officer in charge of the nearest police station who must arrange for the document to be served by a police officer.²¹⁶⁵

See Personal Protection Bill 2007 cl 104.

²¹⁶⁴ Ibid.

²¹⁶⁵ See para 19.60 of this Report.

19-6 The Personal Protection Bill 2007 should provide that service of a document under the Bill should generally be effected by delivering it to the person personally or, if it is not reasonably practicable to do so, by leaving it at or posting it to the person's home or work address last known to the person serving the document or the person's address for service.²¹⁶⁶

See Personal Protection Bill 2007 cl 102(1).

19-7 A provision should be included in the Personal Protection Bill 2007, similar to rule 116 of the *Uniform Civil Procedure Rules 1999* (Qld), to the effect that the court hearing the proceeding to which the document relates, or the registrar of the court may make an order substituting another way of serving the document if it is not reasonably practicable for a document to be served in the required way.²¹⁶⁷ The relevant court or registrar may state in the order the steps to be taken to bring the document to the attention of the person required to be served and that the document is taken to have been served on the happening of a stated event or at the end of a stated time.

See Personal Protection Bill 2007 cl 102(2), (3).

19-8 The Personal Protection Bill 2007 should include a provision to the effect that, a person serving a document on a child must do so:²¹⁶⁸

- (a) as discreetly as practicable; and
- (b) not at, or in the vicinity of, the child's place of employment or school, unless there is no other place where service may be reasonably effected.

See Personal Protection Bill 2007 cl 103.

19-9 The Personal Protection Bill 2007 should provide that if:²¹⁶⁹

- (a) for an application to make, vary or set aside a protection order, a child is an aggrieved person or a respondent; or

²¹⁶⁶ See para 19.66 of this Report.

²¹⁶⁷ See para 19.68 of this Report.

²¹⁶⁸ See para 19.70 of this Report.

²¹⁶⁹ See para 19.81, 19.84 of this Report.

- (b) for an application to register a corresponding order that is not dealt with by the court ex parte, a child is a person protected by the order or against whom the order was made; a copy of the application and notice of when and where the application is to be heard must be given by the registrar to a parent of the child.

See Personal Protection Bill 2007 cl 91(1), (2).

- 19-10 The Personal Protection Bill 2007 should include a definition of 'parent' modelled on section 10 of the *Education (General Provisions) Act 2006* (Qld) for the purposes of the provision requiring notification of applications involving a child on the child's parent.²¹⁷⁰

See Personal Protection Bill 2007 cl 26.

- 19-11 The Personal Protection Bill 2007 should include a provision to the effect that the requirement to give a copy of the application and notice of when and where it will be heard to the child's parent need not be complied with if the court makes an order that the documents are not required to be given to a parent of the child, or a parent of the child cannot be found after reasonable inquiry.²¹⁷¹

See Personal Protection Bill 2007 cl 91(3).

- 19-12 The Personal Protection Bill 2007 should include a provision to the effect that in considering whether to make an order that a copy of the application and notice of when and where it is to be heard is not required to be given to the child's parent, the court must have regard to the best interests of the child and, for deciding what is in the child's bests interests, the court must consider any expressed views of the child.²¹⁷²

See Personal Protection Bill 2007 cl 91(4), (5).

2170 See para 19.89–19.90 of this Report.

2171 See para 19.84, 19.86 of this Report.

2172 See para 19.85 of this Report.

19-13 The Personal Protection Bill 2007 should provide that failure to comply with the provision requiring notification of applications involving a child on the child's parent does not invalidate or otherwise affect an order made by the court on the application.²¹⁷³

See Personal Protection Bill 2007 cl 91(6).

²¹⁷³ See para 19.92 of this Report.

