



Domestic violence

laws in Australia

June 2009

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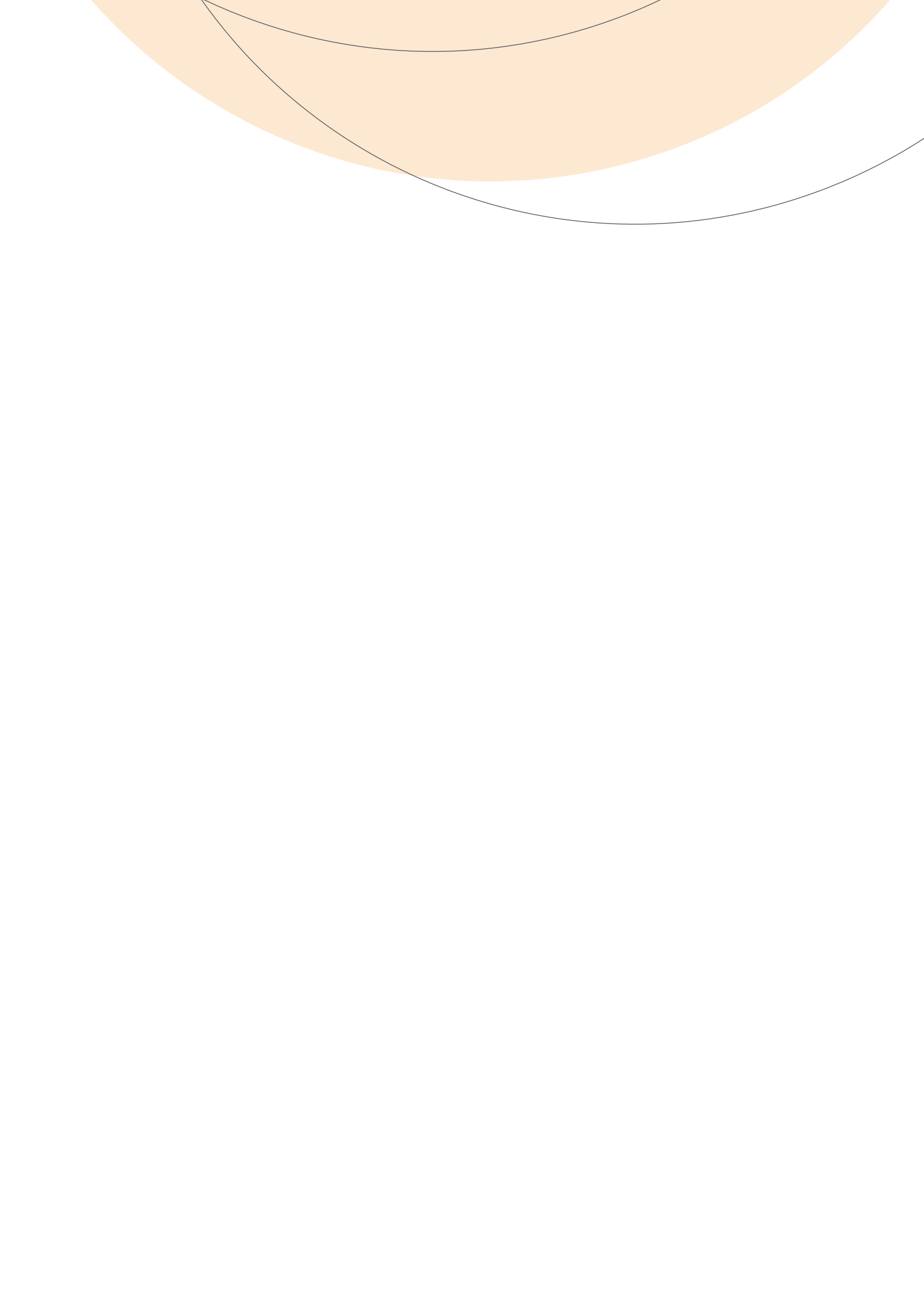
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Disclaimer: This report was prepared by the Australian Government Solicitor (AGS) at the request of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). It provides general information about Australian and New Zealand legislation relating specifically to domestic violence. The Report does not constitute legal advice, and nothing in the Report should be relied upon for the purposes of, or in connection with, a particular matter.

Readers should note that the Report discusses Commonwealth, State, Territory and New Zealand legislation as in force at 25 November 2008 (the date on which AGS originally provided the Report to FaHCSIA). The Report does not reflect any changes that may have been made to the legislation since that date.


Views expressed in this publication do not necessarily reflect the views of FaHCSIA or the Ministers responsible for the portfolios of Families, Housing, Community Services and Indigenous Affairs.

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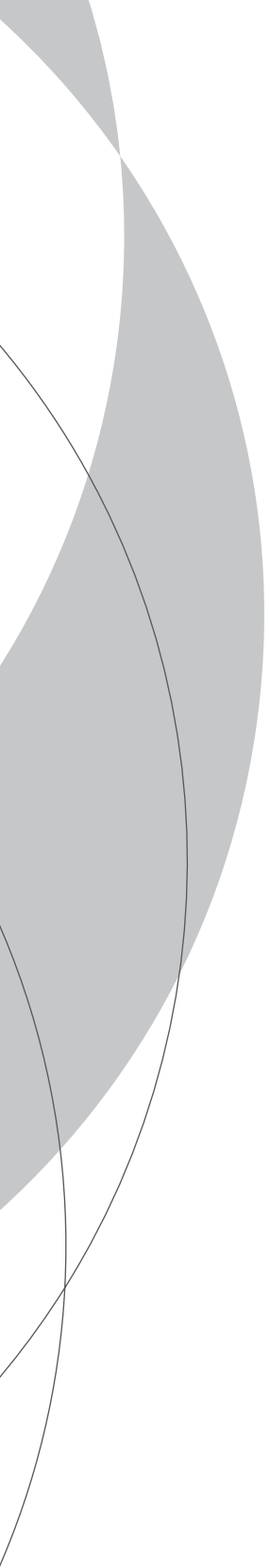



Contents

Part 1	Introduction, Preliminary Matters and Executive Summary	1
	Introduction.....	5
	Preliminary Matters.....	9
	Executive Summary	13
Part 2	Domestic Violence Protection Orders – overview of State, Territory and New Zealand legislation	23
	1 Introduction and General Observations	25
	2 New South Wales: <i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW)	33
	3 Queensland: <i>Domestic and Family Violence Protection Act 1989</i> (Qld)	43
	4 South Australia: <i>Domestic Violence Act 1994</i> (SA)	51
	5 Tasmania: <i>Family Violence Act 2004</i> (Tas)	59
	6 Victoria: <i>Family Violence Protection Act 2008</i> (Vic).....	69
	7 Western Australia: <i>Restraining Orders Act 1997</i> (WA).....	83
	8 Australian Capital Territory: <i>Domestic Violence and Protection Orders Act 2008</i> (ACT).....	95
	9 Northern Territory: <i>Domestic and Family Violence Act 2007</i> (NT).....	107
	10 New Zealand: <i>Domestic Violence Act 1995</i> (NZ).....	117
	Appendix to Part 2: penalties for breach of domestic violence protection orders.....	125
Part 3	Consideration of specific issues relating to State, Territory and New Zealand legislation	127
	1 What constitutes domestic violence	129
	2 Exclusion orders.....	145
	3 Provision for counselling and rehabilitation programs.....	155
	4 Portability of orders	165



Part 4	Stalking Offences.....	171
Part 5	Domestic violence and family law issues – Overview of relevant provisions of the <i>Family Law Act 1975</i>	181
	1 Introduction	183
	2 Provisions relating to care of children and associated issues	185
	3 Protection orders and injunctions	205
	Appendix to Part 5.....	211
Part 6	Overlap and conflict between the Family Law Act and State/Territory protection orders legislation	213
	1 Introduction	215
	2 Conflict and inconsistency between orders under the Family Law Act relating to children and State/Territory protection orders.....	217
	3 Interaction between Family Law Act orders/injunctions and State/Territory domestic violence protection orders	229
	4 The Family Law Act and State/Territory protection orders legislation: Discussion of key issues	235
	Appendix to Part 6.....	243
	Bibliography	246





Part 1:
Introduction,
preliminary
matters and
executive summary



Introduction

- 1.1. The Australian Government Solicitor (AGS) is pleased to present this Report in response to the request from the Department of Families, Housing, Community Services and Indigenous Affairs (the Department) for a comparative analysis of the laws relating specifically to domestic violence in Australia and New Zealand. Our aim is to provide a Report to assist the National Council to Reduce Violence against Women and their Children in the development of its *Time for Action* report.
- 1.2. The Australian Bureau of Statistics reported in 2005 that physical assaults against women most commonly occur in the home, that family members or friends were the most likely perpetrators of physical assaults on women, and that, of those women who were physically assaulted, 46% (780,500) were assaulted by a current or previous partner.¹ The position is worse for Indigenous women, who are estimated to be up to 40 times more likely to experience violence in the home than non-Indigenous women.²
- 1.3. Over the past several decades, governments at the Commonwealth, State and Territory levels have taken steps in response to domestic violence through legislative and non-legislative measures. The law can do much to discourage domestic violence – by making it a crime and attaching penalties intended both to punish and to deter offenders and would-be offenders, and by establishing mechanisms (such as protection orders) designed to protect and assist the persons against whom domestic violence is perpetrated or threatened. The law can also seek to change behaviours by, for example, encouraging or even mandating perpetrators' participation in counselling programs. By conferring strong powers on the authorities of the state to deal with domestic violence, lawmakers can send a clear message to the community about what is acceptable and unacceptable behaviour in homes and families.

¹ Australian Bureau of Statistics, *Personal Safety Survey: Australia* (2005, reissued 21 August 2006).

² J Mouzos and T Makkai, *Women's Experiences of Male Violence Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)*, (Australian Institute of Criminology, Research and Public Policy Series No. 56, 2004).

1.4. As requested, this Report provides:

- an overview of all State and Territory and New Zealand domestic violence- specific laws providing for the making of protection orders;
- a comparative analysis of what behaviours constitute domestic violence for the purposes of those laws, and what relationship must exist between the persons concerned in order for the legislation to apply;
- a comparative analysis of the laws of each of the examined jurisdictions for the registration and enforcement of domestic violence protection orders made in other jurisdictions ('portability' of orders);
- a comparative analysis of the laws of the examined jurisdictions in relation to orders which operate to exclude a perpetrator of domestic violence from that person's home (where the perpetrator and the victim would normally cohabit);
- a comparative analysis of the laws of the examined jurisdictions providing for counselling (both mandatory and voluntary) for perpetrators of domestic violence;
- an overview of the laws of the examined jurisdictions that make stalking an offence;
- an overview of the provisions in the *Family Law Act 1975* (Cth) that have particular significance in relation to domestic violence; and
- an analysis of areas where there is overlap and potential for conflict between orders or injunctions made under the *Family Law Act 1975* (Cth) and orders made under the State and Territory domestic violence protection orders legislation.

*Australian Government Solicitor
25 November 2008*



Preliminary matters


Scope of this Report

- 1.5. Consistently with our instructions, in preparing this Report we have examined how the relevant legislation operates *at face value*. It is of course another matter as to how well the legislative schemes operate, in practice, to respond to domestic violence and, more broadly, to ensure the safety of women and children. There is a large body of literature relating to the practical obstacles faced by victims of domestic violence in attempting to engage with the legal system in this context, as well as the limitations of a legal response *per se*. In preparing this Report, we have drawn on some of this material to provide context and insights into some of the issues, but, in line with our instructions, it is not within the scope of this Report to address practical obstacles of this kind.

Terminology used in this Report

- 1.6. There has been much debate as to what is the best or most appropriate terminology to use when addressing issues relating to violence between spouses, partners, family members and so on.³ Objections have been raised to both ‘domestic violence’ and ‘family violence’ (the terms most often used), and we acknowledge that both terms are problematic. Similarly, objections can be made to use of terms such as ‘victims’ of domestic violence.
- 1.7. In this Report, we generally use the term ‘domestic violence’, and we refer to ‘victims’ of domestic violence. Our use of these terms does not reflect any view on our part about the issues referred to above. Rather, we use these terms simply because they are probably the most-commonly used and best understood of the alternatives.
- 1.8. However, where we deal specifically with the *Family Law Act 1975* (Cth), we use the term ‘family violence’. This is because ‘family violence’ is a defined term in that Act, and has a specific meaning in that context. In order to maintain accuracy, therefore, it is important to use the terms that are used in that legislation.

³ For a discussion of these issues, see for example B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (OUP, 2007), pp 177-79.

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- 1.9. In the State, Territory and New Zealand domestic violence-related legislation examined in this Report, there is little consistency in the use of key terms, and this can make it difficult to generalise and compare across jurisdictions. For convenience, therefore, we generally refer to a protection or restraining order applied for or obtained under that legislation as a ‘domestic violence protection order’. Generally, we refer to a person who has applied for or obtained such an order as ‘the applicant’ or ‘the protected person’, and the person against whom such an order is sought or made as ‘the respondent’. However, in the overviews of the relevant legislation in Chapters 2-10 of Part 2, we use the terms used in the legislation itself.

The 1999 Model Laws Report

- 1.10. In April 1999, the Domestic Violence Legislation Working Group, comprised of Commonwealth, State and Territory officials, produced the *Model Domestic Violence Laws Report*.⁴ This contained model State/Territory legislation dealing with domestic violence protection orders, as well as commentary on specific features of the model.
- 1.11. In our Report, we refer to that publication as ‘the 1999 Model Laws Report’, to the model legislation it contained as ‘the 1999 Model Legislation’, and to the Domestic Violence Legislation Working Group as ‘the 1999 Working Group’.
- 1.12. We have found the 1999 Model Legislation a very useful tool in preparing this Report, and in a number of places we make comparisons between the provision that was made in the model and the provision made by the State, Territory and New Zealand legislation currently in force.

⁴ Commonwealth Attorney-General’s Department, April 1999.



Executive Summary

Parts 2 and 3: State, Territory and New Zealand domestic violence protection orders legislation

- 1.13. There is legislation in force in all Australian States and Territories, and in New Zealand, that empowers courts to make apprehended violence orders specifically to protect victims of domestic violence, or persons at risk of domestic violence.
- 1.14. The precise provision made by the legislation in these jurisdictions differs in myriad ways. Further, there is variation across jurisdictions in the basic approach taken to some important issues.
- 1.15. However, in very broad terms, from our examination of the legislation it appears to us that the provision made in all jurisdictions is of largely similar effect in terms of almost all central features of the legislative schemes. Broadly, it can be said that, in the majority of jurisdictions, the domestic violence-specific legislation is of similar scope in terms of the relationships covered.⁵ In terms of its effect, the legislation does not appear to be substantially different across jurisdictions in respect of crucial matters such as:
- the types of conduct that may constitute domestic violence, and the grounds on which protection orders may be made;
 - the types of orders that may be made in the domestic violence context and the kinds of prohibitions, restraints and conditions that an order may impose on the person against whom it is made;
 - the capacity for temporary orders to be made or obtained quickly by police in emergency situations, without the need for an appearance before a court; and
 - the (criminal) effect of contravening a domestic violence protection order.
- 1.16. Further, purely in terms of a consideration of the legislation at face value, it appears to us that, in respect of these central elements, the laws are generally clear, comprehensive and robust.

⁵ There are exceptions to this: see further paragraphs 1.30 to 1.32.



Specific areas where the legislation differs across jurisdictions

- 1.17. There are some areas in which there are differences between the various legislative regimes to which we think it is worth drawing particular attention.
- 1.18. First, there are significant differences across jurisdictions in relation to the maximum penalties that may be imposed for a contravention of a domestic violence protection order. For a number of reasons, it is not possible to make any straightforward comparison in this regard.⁶ However, broadly, it can be said that there is very significant variation between the maximum penalties, in terms of both fines and imprisonment, applying in the different jurisdictions.
- 1.19. Another point of difference relates to whether the legislation imposes on police any obligation to take particular action in cases of suspected domestic violence.⁷ Legislation in only two jurisdictions – Queensland and Western Australia – requires a police officer to investigate, on reasonable suspicion, whether acts of domestic violence have occurred or are likely to occur. In only one jurisdiction – Western Australia – are police required to take particular action (such as making an application for a protection order) following investigation of suspected domestic violence.
- 1.20. There is significant variation across jurisdictions in relation to the approach taken to the issue of counselling and rehabilitation programs for perpetrators of domestic violence.⁸ The domestic violence-specific legislation in some jurisdictions makes no express provision for such counselling (although, in some cases, sentencing-related or other legislation may do so). In other jurisdictions, relatively specific and comprehensive provision is made, including provision empowering a court to direct a person against whom a domestic violence protection order has been made to attend counselling, and attaching criminal penalties to a failure to comply.

⁶ See further at paragraphs 2.1.16.

⁷ It is another question whether any such obligations *should* be imposed on police: see for example the 1999 Model Laws Report.


⁸ The relevant legislative provisions are outlined in Chapters 2-10 of Part 2, and considered in detail in Chapter 3 of Part 3.

What constitutes domestic violence?

- 1.21. In all Australian jurisdictions, the grounds on which a court can make a domestic violence protection order relate to the commission, or potential commission, by the respondent of a particular type of conduct against a person with whom the respondent is in a relevant type of relationship.

Types of conduct that constitute domestic violence

- 1.22. While there are some differences, the types of conduct that constitute domestic violence, and so provide the grounds for making a protection order, are generally similar across the various jurisdictions.
- 1.23. In all jurisdictions, domestic violence includes assault/personal injury (including sexual assault) and intentional damage to the protected person's property, and threats of such behaviour. Domestic violence also expressly encompasses intimidation in all jurisdictions other than the ACT (although certain types of behaviour amounting to intimidation may constitute domestic violence in that jurisdiction).
- 1.24. In some jurisdictions, specific provision is made for the making of orders to protect a child from exposure to domestic violence. Some jurisdictions go further, so that exposing a child to domestic violence against another person is itself domestic violence perpetrated against the child.
- 1.25. The legislation in several jurisdictions expressly includes 'economic abuse' as a form of domestic violence. Each of those jurisdictions deals with this issue differently but, in very broad terms, 'economic abuse' relates to conduct such as coercing a person to relinquish control over assets or income, disposing of a person's property without his or her consent, preventing a person from accessing joint financial assets for the purpose of meeting normal household expenses, or withholding financial support necessary for the maintenance of the person or the person's children.

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- 1.26. In some jurisdictions, such conduct can only constitute ‘economic abuse’ if it is done with a particular intention such as, for example, an intention to cause mental harm, apprehension or fear. In other jurisdictions, conduct can amount to economic abuse whether or not it was carried out with a specific intention of this kind.
- 1.27. The legislation in all States and Territories, and New Zealand, provides for the making of domestic violence protection orders on the basis of at least some of the behaviours that would normally be described as stalking. The legislation in some, but not all, jurisdictions expressly provide that ‘stalking’ constitutes domestic violence.
- 1.28. Some jurisdictions’ legislation expressly includes ‘emotional abuse’ or ‘psychological abuse’ as a form of domestic violence. Broadly, these terms relate to behaviour by a person towards another person such as tormenting, intimidating or harassing the other person, for example by making repeated derogatory taunts. The legislation in some jurisdictions where ‘emotional abuse’ or ‘psychological abuse’ are not expressly dealt with nevertheless covers at least some kinds of conduct that could be described by those terms.
- 1.29. The legislation in the majority of jurisdictions provides that harming or killing a pet animal of a person can constitute domestic violence.

Which relationships are covered?

- 1.30. In all jurisdictions, the domestic violence-specific legislation only applies where the victim of violence or threatened violence is or has been in a particular kind of relationship with the perpetrator. In most jurisdictions, a wide range of relationships is comprehended by the legislation including, at least, spouses and de facto partners (including same sex partners), children and step-children, the child of a person’s de facto partner and other persons who are generally regarded as ‘relatives’.
- 1.31. The Tasmanian and South Australian legislation are exceptions to this, however. Broadly speaking, a protection order can only be made under the Tasmanian legislation in respect of conduct directed towards a current or former spouse or (same sex or opposite sex) de facto partner. An order can only be made under the South Australian legislation in respect of conduct directed towards a current or former spouse, a ‘domestic partner’ who resides with the perpetrator, or certain children.
- 1.32. However, this does not mean that, in Tasmania and South Australia, a person subjected to domestic violence at the hands of, say, a sibling or a relative of the person’s de facto partner cannot obtain an apprehended violence order. A person in this situation could seek a restraining order under other (non-domestic violence specific) Tasmanian or South Australian legislation.

Exclusion orders

- 1.33. Domestic violence-related legislation in every State and Territory allows courts to include in a domestic violence protection order a condition excluding the person against whom the order is made from a residence shared with the protected person. In New Zealand, a court can make an exclusion order independently of a protection order. In some jurisdictions, a court considering the imposition of an exclusion condition must take into account certain special considerations (for example, in Victoria, a court must consider the desirability of minimising disruption to the protected person and any child living with that person). In other jurisdictions, no such special considerations are specified in the legislation.
- 1.34. The legislation across jurisdictions varies in terms of the impact of an exclusion condition on parties' legal position in relation to residential tenancies. For example, in some but not all jurisdictions there is a specific mechanism for adjusting or transferring tenancies where exclusion conditions are in force.

Portability of orders

- 1.35. The capacity for protection orders to be enforced across jurisdictions is an important issue for victims of domestic violence. The domestic violence-related legislation across Australia recognises the need for such 'portability' of orders. A person protected by a domestic violence protection order made in one State or Territory (or New Zealand) may apply, in any of the other States and Territories, for the order to be registered. Such registration is essentially an administrative process. Upon registration, in effect the order has the same legal status and becomes enforceable in the registering jurisdiction as if it were an order made under that jurisdiction's legislation.
- 1.36. However, this manual, jurisdiction-by-jurisdiction approach to registration appears to be a less than satisfactory answer to the need for portability of domestic violence protection orders. With cooperative action by the Commonwealth, States and Territories (including legislative amendment at the State and Territory level), it should be possible to achieve an efficient, comprehensive and truly national registration scheme for such orders that could significantly enhance the protection offered to victims and provide needed assistance to law enforcement authorities dealing with domestic violence.⁹

⁹ A national scheme of this kind, involving use of the Commonwealth's CrimTrac database, was proposed by the 1999 Working Group. We outline this proposal in Chapter 4 of Part

Part 4: Stalking offences

- 1.37. Legislation in every State and Territory, and in New Zealand, makes stalking an offence.
- 1.38. Although there is some variation between jurisdictions as to what constitutes stalking, in all jurisdictions the act in question must be intended to arouse apprehension or fear in the person being stalked, or to cause that person physical or mental harm. Under the legislation in jurisdictions other than New South Wales and Victoria, the act must occur on more than one occasion.
- 1.39. In all jurisdictions, stalking includes following a person or loitering near a person's house, place of work or any other place frequented by the person. In most jurisdictions, it also includes communicating with a person (whether by mail, telephone or over the internet), interfering with a person's property, giving a person offensive material or keeping a person under surveillance.
- 1.40. There is significant variation across jurisdictions in relation to penalties. In terms of imprisonment, the offence carries the lightest maximum penalty in New Zealand and the Northern Territory (2 years) and the heaviest in Victoria (10 years). In other jurisdictions, maximum penalties range between 3 and 5 years, and up to 8 years in certain aggravating circumstances.¹⁰ In some jurisdictions, the legislation making stalking an offence also specifically provides for a fine as well as, or in lieu of, a term of imprisonment.

Parts 5 and 6: domestic violence and the *Family Law Act 1975*

- 1.41. The *Family Law Act 1975* (Cth) (the FL Act) deals with a range of issues associated with marriage, de facto relationships, divorce and separation. Most importantly for the purposes of this Report, the FL Act covers arrangements and orders relating to the care and maintenance of children. Courts exercising jurisdiction under the FL Act can make a range of orders with respect to children, including determining where a child is to live, with whom the child is to spend time, and who is responsible for making decisions about the child's welfare.

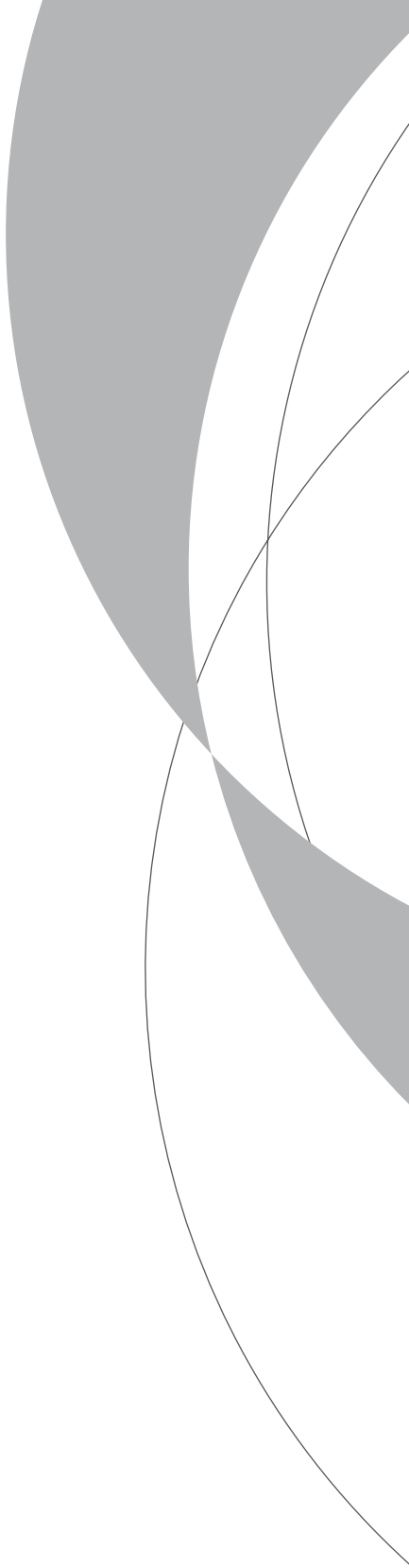
¹⁰ However, note that penalties for criminal offences work differently under Tasmanian law – see further paragraph 4.17.

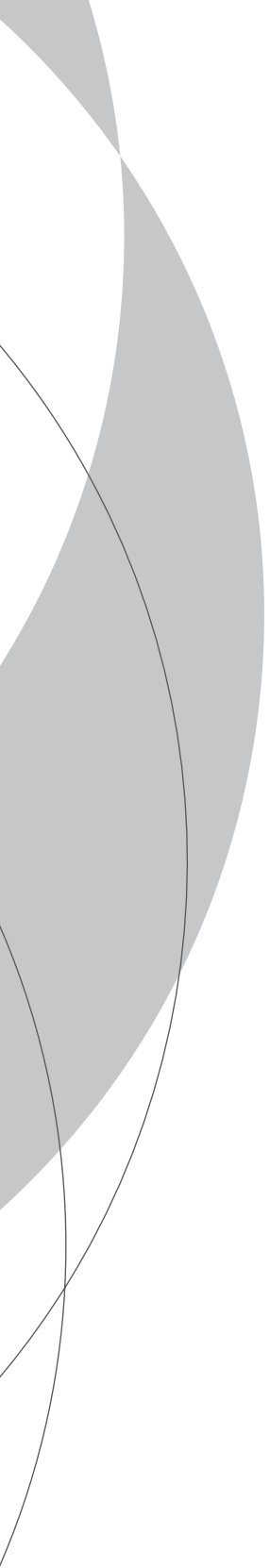
Part 5: Family Law Act responses to domestic violence

- 1.42. A family's experience of 'family violence' (the term used in the FL Act) is of critical importance when decisions are being made about children under that Act. One of the objects of the FL Act is to protect children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. In addition, the FL Act recognises the significance of family violence in a number of other ways. These include:
- directing courts to have regard to the need to ensure protection from family violence;
 - requiring courts to take prompt action in response to allegations of child abuse and family violence;
 - directing courts that the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence is a primary consideration when determining what is in a child's best interests;
 - providing that the presumption in favour of equal shared parental responsibility does not apply if there are reasonable grounds to believe that a parent of a child has engaged in family violence or child abuse; and
 - empowering courts to make orders or injunctions for a person's protection, including for the personal protection of a child, a parent of a child and a party to a marriage.
- 1.43. Families who have experienced family violence may also be exempt from the normal requirement of participation in Family Dispute Resolution (FDR) before parenting orders are sought from a court. FDR practitioners are directed to 'screen' clients for issues of family violence and not to proceed with FDR where a person's experience of family violence makes it inappropriate to do so.
- 1.44. We discuss the ways in which the FL Act deals with domestic violence issues in Part 5 of this Report.

Part 6: overlap and conflict between the Family Law Act and State and Territory domestic violence laws

- 1.45. In some cases, orders made under State or Territory domestic violence laws and orders made under the FL Act in relation to the same family may overlap or conflict. The greatest potential for conflict probably arises when a parenting order under the FL Act and a State or Territory domestic violence protection order are in force at the same time. In part, this potential for conflict derives from an inherent tension in the FL Act between, on the one hand, facilitating children's meaningful contact with both parents and, on the other, protecting children and their parents from family violence.
- 1.46. The FL Act and the State and Territory domestic violence laws contain mechanisms that are designed to avoid or overcome conflicts between such orders. These include:
- requiring applicants to tell courts about other relevant orders that are in force when they seek an FL Act order or a State or Territory protection order;
 - giving courts that are making protection orders under State or Territory legislation power to revive, vary, discharge or suspend existing FL Act orders that relate to contact with children; and
 - providing that FL Act orders relating to care of and contact with children override pre-existing State or Territory protection orders to the extent of any inconsistency between them.
- 1.47. However, as we discuss in Part 6 of this Report, these measures do not entirely resolve the difficulties faced by parents and courts when attempting to ensure the safety and wellbeing of children and their families after separation, in cases involving domestic violence.
- 1.48. A separate issue arises from the fact that orders or injunctions for a person's personal protection can be made under the FL Act. This would seem to give rise to the possibility of conflict between such an order or injunction and a State or Territory domestic violence protection order. For a number of reasons, however, it appears that this may not pose a substantial problem in practice. The FL Act prevents people from applying for an order or injunction for personal protection under that Act if a State or Territory domestic violence protection order is in force in relation to the same matter. Requirements to inform a court about other relevant orders should also go some way to preventing orders being made in relation to the same individuals that are identical to or inconsistent with each other.





Part 2: Domestic
violence protection
orders – Overview
of State, Territory
and New Zealand
legislation




1 Introduction and general observations

Introduction

- 2.1.1. This Part is concerned with the State, Territory and New Zealand laws providing for the protection of persons from domestic violence – in particular, legislation authorising the making of domestic violence protection orders or similar, and creating domestic violence-specific offences. This Part is intended to provide a broad overview of the legislation, focusing on key issues for comparison.
- 2.1.2. It should be noted that, in some jurisdictions, the legislation examined in this Part is not confined to authorising the making of orders for the protection of persons from domestic violence, but also allows orders to be made where there is no family or 'domestic' relationship between the persons concerned. In other jurisdictions, there is provision for the making of domestic violence protection orders in one Act, while another Act provides for the making of apprehended violence or restraining orders other than in the domestic violence context.
- 2.1.3. In this Part, we focus on orders made in response to, or for the protection of persons against, domestic violence. However, we note that, other than in terms of the persons who may be the subject of the orders in question, it appears the legislative provision made in relation to other types of apprehended violence orders is in many jurisdictions of broadly similar effect.

The nature of domestic violence protection orders and proceedings for such orders

- 2.1.4. It is worth noting at the outset that application proceedings for, or the making of, domestic violence protection orders (or similar) are civil, not criminal, proceedings. This is because protection orders of the kind considered in this Report are *apprehended* violence orders. That is, such an order is made for the purpose of preventing a person from engaging in *future* violence towards the person for whose benefit the order is made (although the grounds on which an order is made may, of course, relate to previous conduct engaged in by the person against whom the order is made).

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- 2.1.5. A number of legal implications arise from the fact that proceedings for domestic violence protection orders are civil proceedings, and from the nature of such orders. For example, unless the legislation in question otherwise provides, the standard of proof that applies in such proceedings is the civil standard, i.e. relevant matters must be proved on the balance of probabilities.¹¹ Also, the powers of police and courts in relation to matters such as arrest and detention will generally be significantly more restricted under legislative provisions dealing with applications for protection orders (being *apprehended* violence orders), compared with provisions of the general State and Territory criminal law.
- 2.1.6. Of course, conduct that leads to the making of a domestic violence protection order – for example, assault or sexual assault – may, of itself, constitute a criminal offence. The same conduct may, therefore, give rise to proceedings for the making of a protection order as well as a criminal prosecution. However, not all conduct that may constitute grounds for the making of a domestic violence protection order will also constitute a criminal offence. For example, in some jurisdictions ‘economic abuse’ can constitute domestic violence for the purposes of the protection orders legislation, but there is no corresponding offence.
- 2.1.7. Finally, it should be noted that breach of a domestic violence protection order is an offence in all jurisdictions. Proceedings relating to breach are thus criminal proceedings and, in most jurisdictions, associated matters such as arrest, remand and bail are therefore dealt with in the State and Territory legislation dealing with offences generally.¹²

General observations in relation to State, Territory and New Zealand domestic violence protection orders legislation

- 2.1.8. The precise provision made in the State, Territory and New Zealand legislation relating to domestic violence protection orders differs in myriad ways. Further, there is variation across jurisdictions in the approach taken to some important issues – for example, obligations on police to investigate and take other action where domestic violence is suspected, and provision for referral of perpetrators to counselling or rehabilitation programs.
- 2.1.9. However, in very broad terms, from our examination of the legislation it appears to us that the provision made in all jurisdictions is of largely similar effect in terms of almost all central features of the legislative schemes. In particular, the effect of the legislation does not appear to be substantially different across jurisdictions in respect of crucial matters such as:
- the conduct that may constitute domestic violence, and the grounds on which protection orders may be made;

¹¹ The criminal standard requires proof of relevant matters beyond reasonable doubt.

¹² Although, in some jurisdictions, specific provision is made in relation to certain of these matters in the principal domestic violence protection orders legislation itself.

- the types of orders that may be made in the domestic violence context and the kinds of prohibitions, restraints and conditions that an order may impose on the person against whom it is made;
- the capacity for temporary orders to be made or obtained quickly by police in emergency situations, without the need for an appearance before a court; and
- the (criminal) effect of contravening a domestic violence protection order.

2.1.10. Further, purely in terms of a consideration of the legislation at face value, it appears to us that, in respect of these central elements, the laws are generally clear, comprehensive and robust.¹³

Scope of the legislation – types of relationships covered by domestic violence protection orders legislation

2.1.11. The position is somewhat more complicated in terms of the scope of the legislation, i.e. the kind of relationship that must exist between a person seeking a domestic violence protection order and the person against whom it is sought.¹⁴ In most jurisdictions, the domestic violence-specific legislation is not confined to violence between spouses, de facto partners and immediate family members. Generally, the legislation can also apply in respect of persons in a broader range of relationships, encompassing, for example, extended family members and persons who are related by marriage.

2.1.12. In Tasmania and South Australia, however, the scope of the legislation providing for protection orders in the domestic violence context is far more limited. An examination of that legislation might at first sight suggest that there are significant differences across jurisdictions in terms of the extent to which protection orders are available to the range of persons who may be affected by domestic violence (as that term is normally understood).

2.1.13. However, in addition to the provision made in the domestic violence-specific legislation in these jurisdictions, provision is made in other legislation for protection or restraining orders in connection with apprehended violence, regardless of the relationship (if any) between the persons concerned. Further, the provision made in that other legislation appears generally to be of similar effect to that of the domestic violence-specific legislation.

2.1.14. When the whole scheme of apprehended violence protection orders legislation in each jurisdiction is considered, therefore, it may be that the variation across jurisdictions in terms of the scope of the domestic violence-specific legislation will not give rise to substantial differences in practice.

¹³ As already indicated, it is not within the scope of this Report to consider the *practical* efficacy of the legislation.

¹⁴ This issue is considered in detail in Chapter 1 of Part 3.

Specific areas where the legislation differs across jurisdictions

2.1.15. There are some areas in which there are differences between the various legislative regimes to which we think it is worth drawing particular attention.

Penalties for breach of orders

2.1.16. Perhaps the most obvious of these differences relates to the maximum penalties imposed by each of the relevant Acts for breach of a domestic violence protection order. We would caution that it is not possible to make a straightforward comparison here, for reasons including the following:

- while the applicable fine in one jurisdiction may be lower than in others, the maximum term of imprisonment in that jurisdiction may be higher than in some others;
- in some jurisdictions, the penalty is a fine *or* imprisonment, while in others a court may impose both a fine and a sentence of imprisonment;
- some, but not all, jurisdictions have a tiered penalty system for first and subsequent breaches.

2.1.17. Moreover, it should be noted that, in terms of the penalties *actually imposed* by courts in particular jurisdictions (as opposed to the applicable maximum penalties set out in the legislation), other factors may come into play – for example, differences in applicable sentencing legislation.

2.1.18. Nevertheless, clearly there is significant variation across jurisdictions in terms of the maximum penalties that can be imposed for breach of a domestic violence protection order.¹⁵ In terms of fines, the lowest maximum penalty is \$2,400 (for a first offence).¹⁶ The highest is \$50,000 (whether the offence is a first or a subsequent offence).¹⁷ In terms of imprisonment, in Australia the lowest maximum penalty is 1 year (for a first offence).¹⁸ The highest is 5 years.¹⁹

2.1.19. We note that, under the 1999 Model Legislation, breach of a domestic violence order was made a summary offence with a maximum penalty of \$24,000 or 1 year's imprisonment for a first offence or, for a subsequent offence, a maximum penalty of 2 years' imprisonment (see s 64(2)). As the Table in the Appendix to Part 2 of this Report illustrates, the legislation in some jurisdictions equals or exceeds the terms of imprisonment adopted in the 1999 Model Legislation, but imposes substantially smaller financial penalties. The 1999 Working Group considered, but did not support, the imposition of mandatory sentences of imprisonment for people who breach domestic violence orders.

¹⁵ The Table in the Appendix to Part 2 of this Report sets out the maximum penalties in all Australian jurisdictions and New Zealand.

¹⁶ *Family Violence Act 2004* (Tas) (the Tasmanian Act), s 35.

¹⁷ *Domestic Violence and Protection Orders Act* (ACT) (the ACT Act), s 90.

¹⁸ Tasmanian Act, s 35; *Domestic and Family Violence Protection Act 1989* (Qld) (the Queensland Act), s 80. (In New Zealand, the maximum term of imprisonment is 6 months: *Domestic Violence Act 1995* (NZ) (the NZ Act), s 40.)

¹⁹ *Domestic Violence and Protection Orders Act 2008* (ACT) (the ACT Act) (whether the offence is a first or subsequent offence), s 90; Tasmanian Act (for a fourth or subsequent offence), s 35(1)(d).

Obligations on police to act where domestic violence is suspected

- 2.1.20. Another significant point of difference arises in relation to whether police are required to take any particular action where domestic violence has occurred or is suspected.
- 2.1.21. The 1999 Model Legislation included a provision having the effect that, where a police officer believes or suspects that 'an act of domestic violence has been committed, is being committed or is likely to be committed', the officer *must* investigate the matter (s 8(1)).²⁰ Under the Model, police officers would not be *obliged* to make an application for a protection order following such an investigation, but would be obliged to make a written record of the reasons for not doing so (s 8(2)).
- 2.1.22. The 1999 Working Group accepted arguments put in submissions that 'the perception is that in some instances police officers are reluctant to seek protection orders where there has been a domestic disturbance but no direct evidence of violence (such as injury)', and considered that the provisions in s 8 were an appropriate response to this issue.²¹
- 2.1.23. The 1999 Model Laws Report stated that s 8 was intended 'to provide police officers with clear direction concerning their role in obtaining orders where they are needed and to encourage officers to consider seeking orders in domestic situations'.²² In conjunction with provisions enabling police to obtain orders by telephone in certain circumstances, s 8 was also intended to provide victims of domestic violence 'with the assurance that police officers will assist with obtaining orders when a crisis situation effectively prevents those victims seeking orders themselves'.²³
- 2.1.24. Similar provision is made in the Queensland, Western Australian and New South Wales legislation.²⁴ In Queensland, if a police officer reasonably suspects a person is 'an aggrieved' (i.e. a person for whose protection an order could be made), 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 (s 67(1) of the Queensland Act). An officer may, but is not obliged to, apply for a protection order or take other action under the Queensland Act if the officer reasonably believes that a person is an aggrieved, and there is sufficient reason for the officer to take action (s 67(2)).

²⁰ Section 8 of the 1999 Model Legislation was based on existing provisions in the New South Wales and Queensland legislation then in force.

²¹ 1999 Model Laws Report, op cit, p 39.

²² Ibid.

²³ Ibid.

²⁴ *Restraining Orders Act 1997* (WA) (the WA Act); *Domestic and Family Violence Protection Act 1989* (Qld) (the Queensland Act); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (the NSW Act).

- 2.1.25. In Western Australia, a police officer is to investigate whether an ‘act of family and domestic violence’ is being, has been or is likely to be committed if the officer reasonably suspects the commission of such an act, where it is a criminal offence, or has put the safety of a person at risk (s 62A). Following such an investigation, an officer is required to make an application for a restraining order, make a police order, or make a written record of why the officer did not take either of those actions (s 62C).
- 2.1.26. In New South Wales, an application for a protection order must generally be made by a police officer investigating the matter concerned if he or she suspects or believes that a domestic violence offence or child abuse-related offence has recently been or is being committed, or is imminent, or is likely to be committed, against the person for whose protection the order would be made (s 49(1)). However, in cases where the protected person is 16 or over, the investigating officer is not required to make an application if he or she believes that there is good reason not to do so (s 49(4)(b)). (In these circumstances, the officer must make a written record of his or her reasons (s 49(5)).
- 2.1.27. In the ACT, police are not obliged to investigate on the basis of reasonable suspicion, or to apply for orders. However, police dealing with certain kinds of domestic violence incidents must keep records of reasons for decisions not to take particular steps such as, for example, making an emergency order (s 83 of the ACT Act).

Power to make a protection order in criminal proceedings

- 2.1.28. Western Australia is the only jurisdiction in which it is mandatory for a court to make a protection order in certain criminal proceedings. Under the WA Act, a violence restraining order must be made where a person is convicted of a ‘violent personal offence’.²⁵ The only exception is if the person who would be protected by the order objects to its being made.²⁶
- 2.1.29. The NSW Act provides that a court must make an apprehended violence order where a person has been convicted of a ‘domestic violence offence’, unless the court is satisfied that such an order is not required.²⁷
- 2.1.30. The Queensland and NT Acts allow a court to make a protection order, on its own initiative, where a person pleads to or is found guilty of an offence that involves domestic violence.²⁸ South Australia has a similar provision in its sentencing legislation.²⁹ The Tasmanian,³⁰ New South Wales³¹ and Western Australian³² Acts also include an equivalent power, but extend its application to persons not yet convicted.

²⁵ WA Act, s 63A. ‘Violent personal offence’ is defined to mean certain offences against the *Criminal Code* such as inflicting grievous bodily harm, sexual coercion, etc. Under the WA Act the order lasts for life.

²⁶ WA Act, s 63A(4).

²⁷ NSW Act, s 39(1) and (2). The example given in the provision is where the protection order is not needed because one has already been made against the offender.

²⁸ Queensland Act, s 30; NT Act, s 45.

²⁹ *Criminal Law (Sentencing) Act 1988* (SA), s 19A.

³⁰ Tasmanian Act, s 36 (at hearing of complaint).

³¹ NSW Act, s 40 (when person is charged).

³² WA Act, s 63 (including when person applies for bail before a judicial officer).

2.1.31. The NZ, ACT and Victorian Acts do not specifically provide for a court to make a protection order when convicting a person of a domestic or personal violence-related offence.³³

2.1.32. The approach taken in Queensland and the Northern Territory closely aligns with the approach taken in the 1999 Model Legislation. The 1999 Model Laws Report justified that approach on the basis that:

*There will be occasions when it is more efficient and in no way inappropriate for the court to make an order on its own initiative when the defendant has been found guilty of an offence. This ensures ongoing protection of victims without further proceedings.*³⁴

2.1.33. The 1999 Model Legislation took the approach of conferring a discretion on the court (see s 15(1)), rather than the mandatory approach adopted in Western Australia, on the basis that ‘discretion and flexibility will better ensure that orders are made where required’ and may prevent ‘inappropriate or unnecessary orders being issued’.³⁵ The 1999 Model Legislation also included an exception, similar to that in the Western Australian Act, where the victim of the offence objects to the order (see s 15(3)). In this context, the 1999 Model Laws Report stated that it was ‘vital to permit victims of domestic violence to retain control over their domestic arrangements’.³⁶ Unlike the approach taken in Tasmania, New South Wales and Western Australia, the 1999 Model Legislation did not extend a court’s power to make an order in respect of persons accused but not yet convicted, suggesting that making an order before a person had been tried ‘may readily be seen as a denial of justice’.³⁷

Provisions relating to counselling or rehabilitation programs for respondents

2.1.34. There are significant differences across jurisdictions with respect to the making of orders directing respondents to domestic violence protection orders to attend counselling or rehabilitation programs, or referring them to such programs. In some jurisdictions, the domestic violence-specific legislation makes no express provision in relation to such counselling or rehabilitation (although other laws, such as, for example, sentencing legislation, may do so). In other jurisdictions, the domestic violence-specific legislation includes relatively comprehensive provision in relation to these matters, but there are significant differences in the approaches taken across these jurisdictions.

2.1.35. These issues are examined in detail in Chapter 3 of Part 3 of this Report.

³³ In Victoria, a court may make an intervention order on its own initiative in relation to stalking: *Crimes Act 1958* (Vic), s 21A(5). In the ACT, a court sentencing a person for certain offences, including a domestic violence offence, can prohibit the person from contacting or going near a person for up to 12 months: *Crimes (Sentencing) Act 2005* (ACT), ss 23 and 24 (not yet commenced).

³⁴ 1999 Model Laws Report, op cit, p 67.

³⁵ Ibid.

³⁶ Ibid.

³⁷ 1999 Model Laws Report, pp 67-68.



2 New South Wales: Crimes (Domestic and Personal Violence) Act 2007 (NSW)

2.2.1. In New South Wales, the principal legislation relating to apprehended violence orders in the domestic violence context, and to domestic violence-specific offences, is the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (the NSW Act).

Objects of the NSW Act

2.2.2. The objects of the NSW Act in relation to domestic violence are set out in s 9(1), as follows:

- (a) to ensure the safety and protection of all persons, including children, who experience or witness domestic violence, and
- (b) to reduce and prevent violence by a person against another person where a domestic relationship exists between those persons, and
- (c) to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women, and
- (d) to enact provisions that are consistent with the United Nations Convention on the Rights of the Child.


2.2.3. Section 9(2) states that the Act aims to achieve those objects by:

- (a) empowering courts to make apprehended domestic violence orders to protect people from domestic violence, intimidation (including harassment) and stalking, and
- (b) ensuring that access to courts is as safe, speedy, inexpensive and simple as is consistent with justice.

Apprehended domestic violence protection orders – overview

2.2.4. Under the NSW Act, a court may make, on application, an apprehended domestic violence order (ADVO) (s 16).³⁸ An ADVO is an order for the protection of a person against someone with whom the person has or has had a 'domestic relationship'. (The meaning of the term 'domestic relationship' is explained in paragraphs 2.2.8–2.2.9 below.) In the NSW Act, the person for whose protection an ADVO is sought or made is called 'the protected person', and the person against whom the order is sought or made is called the 'defendant' (s 3(1)).

38 The NSW Act also provides for the making of apprehended personal violence orders (APVOs) (see Part 5). An APVO is an order for the protection of a person against someone with whom the person does not have and has not had a 'domestic relationship'. The content and effect of APVOs are similar to ADVOs, as are the grounds on which an APVO can be made.

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- 2.2.5. In addition to final ADVOs, courts can make interim orders pending a further hearing of the matter. An interim ADVO can be made, on application, if it appears to the court that it is necessary or appropriate to do so in the circumstances (s 22(1)). Interim ADVOs can also be made by a court registrar, pending a further hearing of the matter by the court, if both parties consent to the making of the order (s 23(1)). An interim ADVO, while it remains in force, has the same effect as a final ADVO (s 22(6)).
- 2.2.6. Provision is also made, in Part 7 of the NSW Act, for the making of 'provisional' interim ADVOs. Essentially, these are orders made in circumstances where an incident has occurred between the protected person and the defendant, and there is an urgent and immediate need to ensure the safety of the protected person. The provisions relating to provisional orders assist in such cases by allowing applications to be made, in relevant cases, by telephone or facsimile (ss 25(1) and 26(1)). Also, provisional orders need not be made by a court, but can be made by 'authorised officers' (s 28(1)). Those officers include certain New South Wales officials as well as magistrates and court registrars.

Who can make orders?

- 2.2.7. Jurisdiction to make ADVOs and to determine applications made under the NSW Act is conferred, depending on the circumstances in the particular case, on the Local Court, the Children's Court or the District Court (s 91).

Which relationships are covered?

- 2.2.8. An ADVO can only be made where the protected person has or has had a 'domestic relationship' with the defendant. The term 'domestic relationship' is defined in s 5 of the NSW Act to extend to the following kinds of relationship:
- marriage;
 - de facto relationships (within the meaning of the *Property (Relationships) Act 1984* (NSW));
 - 'intimate personal relationships' (whether or not involving a relationship of a sexual nature);
 - relationships between persons living in the same household;
 - relationships between residents of residential facilities (not being a correctional or detention centre);
 - relationships involving the protected person's dependence on the ongoing paid or unpaid care of the defendant;
 - relationships between relatives; and
 - in the case of an Aboriginal person or a Torres Strait Islander, extended family or kinship relationships.
- 2.2.9. The word 'relative' is defined broadly in s 6, and includes parents, children, siblings, uncles, aunts, nephews, nieces and persons related to the protected person by marriage.

Who may or must apply for an order?

- 2.2.10. An application for an ADVO may only be made by a person for whose protection the order would be made, or a police officer (s 48). However, in cases where the person seeking protection is a child under 16, or the order sought is a provisional order, only a police officer may apply (ss 48(3) and 25, respectively).
- 2.2.11. In certain circumstances, a police officer must make an application for a provisional or final ADVO. For example, generally an officer must make an application for an order where he or she suspects or believes that a 'domestic violence offence' (explained below), or the offence of stalking created by s 13 of the NSW Act, has recently been or is being committed, or is imminent, or is likely to be committed against the person for whose protection the order would be made (see ss 27(1)(a)(i) and 49(1)(a)).

Grounds on which an order may be made

- 2.2.12. Under s 16(1), a court may make an ADVO, on application, if satisfied on the balance of probabilities that a person who has or has had a 'domestic relationship' with the defendant has reasonable grounds to fear, and in fact fears:
- the commission by the defendant of a 'personal violence offence' against the protected person; or
 - the engagement of the defendant in conduct in which the defendant intimidates the protected person or a person with whom the protected person has a domestic relationship, or stalks the protected person. (Here, the court must be of the opinion that the conduct in question is sufficient to warrant the making of the order.)
- 2.2.13. In certain circumstances, actual fear on the part of the protected person is not required. This includes situations where the protected person is a child under 16, or where, in the opinion of the court, the protected person has been subjected to, or is reasonably likely to be subjected to, conduct amounting to a 'personal violence offence' (s 16(2)).
- 2.2.14. The term 'personal violence offence' is defined to include an offence under a provision of the *Crimes Act 1900* (NSW) specified in s 4(a) of the NSW Act. A wide range of offences against the person is specified, including murder, manslaughter, infliction of grievous bodily harm, assault, sexual assault and sexual abuse of a child. The offence under s 14 of the NSW Act of contravening an interim or final ADVO is also a 'personal violence offence' (s 4(b)).
- 2.2.15. A court may make an interim or final ADVO without being satisfied as to the matters that are normally prerequisites to the making of those orders if the protected person and the defendant consent to the making of the order (s 78(1)).
- 2.2.16. Section 17 of the NSW Act sets out the matters that are to be considered by a court in deciding whether or not to make an ADVO. The overriding consideration is the safety and protection of the protected person and any child directly affected by the conduct of the defendant alleged in the application for the order (s 17(1)).

Cases in which a court must make an order

- 2.2.17. In certain circumstances, a court *must* make an interim or final ADVO, regardless of whether an application for such an order has been made.
- 2.2.18. Where a person pleads guilty to, or is found guilty of, certain kinds of offences, a final ADVO must be made (s 39). The offences in question are:
- the stalking/intimidation offence under s 13; or
 - a ‘domestic violence offence’ (other than murder or manslaughter).
- 2.2.19. Here, a ‘domestic violence offence’ is a ‘personal violence offence’ committed by the defendant against the protected person where there is or has been a ‘domestic relationship’ between those persons (s 11).
- 2.2.20. An interim ADVO must be made in a case where a person is charged with an offence that appears to the court to be a ‘serious offence’ (s 40). ‘Serious offences’ include the stalking/intimidation offence under s 13, as well as attempted murder and ‘domestic violence offences’ (other than murder or manslaughter) (s 40(5)).

Application process

- 2.2.21. Proceedings for an interim or final ADVO are commenced in a court by the issuing and filing of an application notice. The application form requires the names and contact details of the protected person and the defendant, the order sought and the legislation under which it is sought, and the grounds for the application.
- 2.2.22. Where the application is made by a police officer, that officer issues the notice and files a copy with the court (s 51). Where a protected person makes the application, that person issues and files the application notice (which must have been signed by a registrar) (s 52).
- 2.2.23. An application notice must also be served on the defendant, in accordance with the relevant court rules. Where the application notice has been issued by a police officer, a police officer must serve the notice (s 55(1)). In the case of an application notice issued by a protected person, the notice must be served by a person authorised by the relevant court rules (s 55(2)).

Police powers when application made and obligation to investigate

- 2.2.24. Where an application for a final ADVO has been made, an authorised officer can issue a warrant for the arrest of the defendant (s 88(1)). A warrant may be issued whether or not the defendant is alleged to have committed an offence (s 88(2)). A warrant for the arrest of the defendant *must* be issued if it appears to the authorised officer that the personal safety of the protected person would be put at risk unless the defendant is arrested for the purpose of being brought before the relevant court (s 88(3)).
- 2.2.25. Where a police officer makes or is about to make an application for a provisional order, the officer may direct the defendant to remain at the scene of the incident in question or, where the defendant has left the scene, at another place where the officer locates the defendant (s 89).
- 2.2.26. A defendant may also be detained or arrested where this is done for the purpose of enabling personal service on the defendant of a copy of an ADVO or a variation of such an order (s 90).
- 2.2.27. The NSW Act also makes provision for the arrest of a defendant to ensure that person's appearance in proceedings under the Act. Where a defendant fails to appear in such proceedings (either personally or through a legal or other representative), the presiding magistrate may issue a warrant for the defendant's arrest (s 69(1)). (The only proviso is that the magistrate must be satisfied that the defendant had notice of the date, time and place of the proceedings.)
- 2.2.28. When a defendant is arrested under such a warrant, the defendant will then be brought before a magistrate, court registrar or authorised officer. Unless bail is granted or dispensed with, the magistrate, registrar or officer may issue a warrant for the detention of the defendant and order that the defendant be brought before the court at a specified time (s 69(2)).
- 2.2.29. We note that a police officer in New South Wales is also authorised by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) to enter and remain in a dwelling if the officer reasonably believes that a domestic violence offence is being or has recently been committed, if invited by a person who apparently resides in the dwelling and who the officer believes is the victim of domestic violence (s 82). If the officer is denied entry, the police officer is able to obtain a warrant. Once the officer has entered the dwelling, he or she, amongst other things, may exercise any lawful power of arrest and must enquire as to the presence of firearms in the dwelling (s 85).

Content and effect of an order

General conditions

2.2.30. Under an ADVO, a court may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court (s 35), including:

- prohibiting or restricting approaches by the defendant to the protected person;
- prohibiting or restricting access by the defendant to premises occupied by the protected person, the protected person's workplace, or any specified premises or place frequented by the protected person;
- prohibiting or restricting the defendant from approaching the protected person within 12 hours of consuming drugs or alcohol;
- prohibiting the defendant from possessing firearms; and
- prohibiting the defendant from interfering with the protected person's property.

2.2.31. In addition, by operation of s 36, all ADVOs prohibit the defendant from:

- assaulting, molesting, harassing, threatening or otherwise interfering with the protected person or a person with whom the protected person has a domestic relationship;
- engaging in any other conduct that intimidates the protected person or a person with whom the protected person has a domestic relationship; and
- stalking the protected person or a person with whom the protected person has a domestic relationship.

Exclusion conditions

2.2.32. Under the NSW Act, an ADVO may prohibit the defendant from accessing premises occupied by the protected person, regardless of whether the defendant has a legal or equitable interest in the premises (s 35(2)(b)(i)). In circumstances where a protected person and the defendant normally cohabit, an ADVO may thus effectively exclude the respondent from his or her home.

Firearms

2.2.33. Under the NSW Act an ADVO may prohibit or restrict possession by the defendant of firearms (s 35(2)(d)), require the defendant to dispose of firearms in his or her possession and surrender any firearms licence (s 35(4)).

Duration, revocation and variation of an order

- 2.2.34.** A final ADVO remains in force for the period specified in the order (s 79(1)). The specified period must be as long as is necessary in the opinion of the court to ensure the safety and protection of the protected person (s 79(2)). If a court fails to specify a period in an order, the order remains in force for 12 months after the date the order is made (s 79(3)).
- 2.2.35.** Section 24 deals with the duration of interim ADVOs. Such an order remains in force until:
- it is revoked; or
 - it ceases to have effect upon the making of a final ADVO; or
 - the application for a final ADVO is withdrawn or dismissed;
- whichever occurs first.
- 2.2.36.** A provisional ADVO remains in force until midnight on the twenty-eighth day after the order is made, unless it is sooner revoked or ceases to have effect, or the application for a final ADVO is withdrawn or dismissed (s 32(1)). If a court makes an interim or final ADVO against a defendant for the protection of a person protected by a provisional ADVO, the provisional order ceases to have effect (s 32(2)).
- 2.2.37.** An application may be made at any time by the protected person, the defendant or a police officer for the variation or revocation of an ADVO (s 72). (If one of the protected persons under the order is a child, the application must be made by a police officer: s 72(3).)
- 2.2.38.** ADVOs can be varied by:
- extending or reducing the duration of the order (s 73(2)(a));
 - amending or deleting any prohibitions or restrictions specified in the order (s 73(2)(b)); or
 - specifying additional prohibitions or restrictions in the order (s 73(2)(c)).
- 2.2.39.** Where an application is made for the variation or revocation of an ADVO, the court may do so 'if satisfied that in all the circumstances it is proper to do so' (s 73(1)). In deciding whether to vary an ADVO, the court must 'consider the safety and protection of the protected person and any child directly or indirectly affected by' domestic violence (s 42(2)).³⁹

³⁹ By contrast, the NSW Act makes no express provision as to the specific matters a court must consider when deciding to revoke an ADVO

Enforcement and breach of an order

- 2.2.40. A person who knowingly contravenes a prohibition or restriction specified in an ADVO made against the person is guilty of an offence (s 14). The maximum penalty is imprisonment for 2 years or 50 penalty units (currently \$5,500), or both.
- 2.2.41. Unless the court otherwise orders, where a defendant over 18 years of age is convicted of the offence of breaching an ADVO, a term of imprisonment must be imposed if the act constituting the offence was an act of violence against a person (s 14(4)). If the court decides not to impose a sentence of imprisonment, it must give its reasons for not doing so (s 14(6)).
- 2.2.42. A person is not guilty of the offence of breaching an ADVO unless the person was present in court when the order was made or was served with a copy of the order (s 14(2)).
- 2.2.43. The NSW Act makes no special provision with respect to the arrest of a person suspected of having breached an ADVO. However, because breach of an ADVO is a criminal offence, the normal rules under New South Wales criminal law in relation to matters such as arrest, remand and bail will apply.
- 2.2.44. Certain requirements are imposed on police in cases where an officer suspects on reasonable grounds that a person has committed an offence by breaching a prohibition or restriction in an ADVO, or if an alleged breach has been reported to the officer or another officer. In these circumstances, the officer is required to make a written record of the reasons for deciding not to initiate criminal proceedings in respect of the alleged contravention, or a decision to discontinue such proceedings (s 14(8)).

Procedural protections for applicants and witnesses

- 2.2.45. Generally, the address at which a protected person resides or intends to reside must not be stated in an application for an ADVO or an order (s 43). The exceptions to this are where the protected person has consented to the address being included, where the defendant already knows the address, or where it is necessary to state the address in order to achieve compliance with the order 'and the safety of the protected person would not be seriously threatened' (s 43(2)).
- 2.2.46. Under s 45(2), a court may direct that the name of a protected person, a witness in ADVO proceedings or a person otherwise involved in such proceedings must not be published or broadcast before the proceedings are concluded.
- 2.2.47. The NSW Act also makes provision for the applicant (or the defendant) to have a support person (eg. a parent, relative or friend) near him or her when giving evidence (s 46).

Protection of children

- 2.2.48. An ADVO may be made under the NSW Act for the protection of a child under 16 in his or her own right. As noted above, such an application may only be made by a police officer (s 48(3)). An application must be made for an order for a child if a police officer suspects or believes that an offence under s 227 of the *Children and Young Persons Act 1998* (NSW) has recently been or is being committed, or is imminent, or is likely to be committed, against the child for whose protection the order would be made (s 49(1(b))). In essence, the offence in s 227 of that Act relates to action that has resulted in or appears likely to result in physical injury, sexual abuse or significant emotional or psychological harm to a child.
- 2.2.49. Part 9 of the NSW Act contains provisions aimed specifically at ensuring the protection of children. Of particular significance is s 38(2), which has the effect that an ADVO made for an adult must include, as a protected person under the order, any child with whom the adult has a 'domestic relationship', unless there are good reasons for not doing so.
- 2.2.50. Part 9 also contains certain protections for children in ADVO-related proceedings where a child is a protected person or a witness. Such proceedings are to be heard in the absence of the public unless the court directs otherwise (s 41(2)). Also, a child is not to be required to give evidence about a matter unless the court is of the opinion that it is in the interests of justice to do so (s 41(4)). Section 42(5) ensures that, if a child is required to give evidence in ADVO-related proceedings, this is done in accordance with the special measures in the *Criminal Procedure Act 1986* (NSW) relating to the giving of evidence by vulnerable witnesses. This means that evidence of a previous representation made by a child may be in the form of an audio or video recording of the representation made in the course of the investigation of the matter in question, and that a child may give evidence by closed-circuit television.
- 2.2.51. There is also specific provision for protecting the identity of children in ADVO-related proceedings. Section 45 makes it an offence to publish or broadcast the name of or other identifying information in relation to a child involved in ADVO proceedings before the proceedings are concluded.

Recognition and enforcement of orders made in other jurisdictions

- 2.2.52. A person may apply to a court under s 95 for registration of an 'external protection order'. In broad terms, an 'external protection order' is an order made by a court of another State or Territory, or of New Zealand, that has been made to prevent a person from acting in a manner that would justify the making, under the NSW Act, of an ADVO. Once registered, an external protection order has the same effect and may be enforced against a person as if it had been made under the NSW Act (s 97(1)). In certain circumstances, registered external protection orders can be varied by a court on application by (among others) the protected person.



3 Queensland: Domestic and Family Violence Protection Act 1989 (Qld)

- 2.3.1. In Queensland, the principal legislation relating to domestic violence protection orders is the *Domestic and Family Violence Protection Act 1989* (Qld) (the Queensland Act).

Objects of the Queensland Act

- 2.3.2. The main purpose of the Queensland Act and the way in which it is to be achieved are set out in s 3A:
- (1) The main purpose of this Act is to provide for the safety and protection of a person in the case of domestic violence committed by someone else if any of the following domestic relationships exist between the 2 person –
 - (a) a spousal relationship;
 - (b) an intimate personal relationship;
 - (c) a family relationship;
 - (d) an informal care relationship.
 - (2) The way in which the main purpose of this Act is to be achieved is by allowing a court to make a domestic violence order to provide protection for the person against further domestic violence.

Domestic violence orders – overview

- 2.3.3. A court may make a domestic violence order (DVO) for the benefit of ‘an aggrieved’ against a ‘respondent’ (s 13(1)). There are two types of DVOs:
- protection orders; and
 - temporary protection orders (s 13(2)).
- 2.3.4. A temporary protection order is an order made for a short period until a court is in a position to decide whether to make a protection order (s 13(3)). It may be made by a court in various circumstances where a final order cannot be made, such as following an adjournment (s 39C), or by a magistrate when an application is made by a police officer and needs to be determined quickly (s 39G).

Who can make orders?

2.3.5. The Queensland Act confers jurisdiction on every Magistrates Court and magistrate to make DVOs (s 4). A Magistrates Court, the Childrens Court, the District Court or the Supreme Court also has jurisdiction to make a DVO when a person is before the court for an offence involving domestic violence (ss 16 and 30).

Which relationships are covered?

2.3.6. The following relationships are considered to be 'domestic relationships' for the purposes of the Act (s 11A):

- a spousal relationship;
- an 'intimate personal relationship';
- a 'family relationship'; or
- an informal care relationship.

2.3.7. A spouse includes a former spouse and either of the biological parents of a child (s 12). An 'intimate personal relationship' does not necessarily mean a sexual relationship: it is enough that the two persons date or dated and their lives are or were so enmeshed that the actions of one affect the other (s 12A(2)). Same sex relationships are covered (s 12A(4)). Also, the definition of 'family relationship' in s 12B extends to a 'relative' of a person. 'Relative' goes further than connection by blood or marriage and recognises that, for some people, including Aboriginal and Torres Strait Islander peoples, the concept of a relative may be wider than is ordinarily understood (s 12B(4)).

Who may or must apply for a DVO?

2.3.8. The following persons may apply for a protection order:

- an aggrieved (i.e. the person for whose protection the order would be made);
- a person authorised by an aggrieved to appear (an authorised person);
- a police officer involved in the investigation of a matter; and
- a person acting under another Act for the aggrieved such as the *Guardianship and Administration Act 2000* (s 14).

2.3.9. Where a police officer takes a person into custody under s 69 of the Queensland Act (see paragraph 2.3.17 below), the officer must prepare an application for a protection order (s 71).

Grounds on which an order may be made

- 2.3.10.** A court may make a DVO against a person who has committed (or is likely to commit or to carry out a threat to commit) an 'act of domestic violence' against another person where a domestic relationship exists between the two persons (s 20).
- 2.3.11.** An act of domestic violence includes (s 11(2)):
- wilful injury;
 - wilful damage to the other person's property (such as wilfully injuring a de facto's pet);
 - intimidation or harassment;
 - indecent behaviour;
 - threatening to commit such acts; or
 - procuring someone else to commit such acts.
- 2.3.12.** 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 DVO against the offender under s 30 if the court is satisfied that a protection order could be made against the offender as the respondent.
- 2.3.13.** In addition, a court may make a DVO in a form agreed to by, or on behalf of, the aggrieved and the respondent (s 33).

Application process

- 2.3.14.** DVO proceedings are commenced in a court when an application for a protection order is made. (In certain circumstances, a police officer may apply for a temporary protection order by telephone or fax, or similar facility: s 54).
- 2.3.15.** On application for a protection order, a clerk of the court or a justice would generally issue a summons directing the respondent to appear at a stated time and place (s 47(1)). A copy of the application must accompany the summons. A summons does not have to be issued if the applicant asks for the application to be heard for a temporary protection order. A temporary order may be made, therefore, without the respondent appearing before the court or being notified about the application (see also s 13(4)).
- 2.3.16.** Having made a DVO, the court must cause a copy to be given to the aggrieved, the respondent and the Police Commissioner.

Police powers when application made and obligation to investigate

- 2.3.17.** If a police officer has reasonable grounds for suspecting that an act of domestic violence has been committed and a person or a person's property is in danger, the officer may take the respondent into custody using such force as is reasonable and necessary (s 69(1)). The officer must then prepare an application for a protection order and immediately bring the respondent before the court for the hearing and determination of the application, if the respondent is still in custody (s 71). Under s 69(2), the respondent may be held in custody until that application is heard and determined, or a temporary protection order is made, or until arrangements are made under s 71(3). If the respondent can no longer be held on one of those bases, and the appropriate police officer (i.e. head of station or watch house) considers it necessary to arrange for the safety of the aggrieved, there is provision in s 69(3) for the respondent to be held longer, but not for more than 4 hours from when he or she was first taken into custody (s 69(4)).
- 2.3.18.** Section 67 provides that, if a police officer reasonably suspects that a person is a person for whose benefit a DVO may be made, it is the duty of the officer to investigate, or cause to be investigated, the complaint, report or circumstances on which the suspicion is based, until such time as the officer is satisfied that the suspicion is unfounded. If, after the investigation, the officer reasonably believes that the person is an aggrieved person, the officer may apply for a protection order to protect the person.
- 2.3.19.** Under s 609 of the *Police Powers and Responsibilities Act 2000* (Qld), it is lawful for a police officer to enter and remain at a place where the officer reasonably believes domestic violence (amongst other things) is occurring or has occurred before the officer's arrival, and may detain any person in order to ascertain whether the reason for the entry exists. Further detention, search and seizure powers are available if the officer is reasonably satisfied that the reason for the entry exists.

Content and effect of an order

General conditions

- 2.3.20.** A DVO requires the respondent to be of good behaviour and to refrain from committing acts of domestic violence or procuring someone else to commit the violence (ss 17(a) and 22). The respondent must also comply with any other conditions that a court considers necessary and desirable (ss 17(b) and 25), including prohibiting:
- behaviour that would constitute an act of domestic violence;
 - remaining at, entering or approaching to enter premises, including premises in which the respondent has a proprietary interest;
 - approaching or attempting to approach the aggrieved or a named person;

- contacting or attempting to contact the aggrieved or named person;
- locating or attempting to locate the aggrieved or named person; and
- stated conduct towards a child of the aggrieved.

2.3.21. When imposing conditions on a respondent, the need to protect the aggrieved and any named persons, along with the welfare of a child of the aggrieved, are to be of paramount importance (s 25(5)).

Exclusion conditions

2.3.22. The conditions that may be imposed on the respondent to a DVO include conditions prohibiting that person from remaining in, entering or approaching stated premises, even if the respondent has a legal or equitable interest in the premises (s 25(3)(b)). In circumstances where the person protected by a DVO and the respondent normally live together, the respondent can thus be excluded from his or her home.

Firearms

2.3.23. The Queensland Act includes provisions relating to weapons that operate in conjunction with the *Weapons Act 1990* (Qld) (the Weapons Act). A licence to possess and use a weapon within the meaning of the Weapons Act is automatically revoked if the licensee is named as a respondent in a protection order (s 28A of the Weapons Act). Further, the Weapons Act will apply to a person named as a respondent in a DVO even if that person is a person normally exempt from the Weapons Act because of s 2 of that Act. Relevantly, members and trainee members of the Queensland Police, and persons engaged in the manufacture or assembly, warehousing or transport of weapons, who are named as respondents, will not be exempted from licensing requirements in the Weapons Act, including the requirement that they be fit and proper persons. A person is not a fit and proper person to hold a licence if a DVO has been made against them in the previous five years.

2.3.24. Before making a DVO under the Queensland Act, a court must ask about weapons and weapons licences in the respondent's possession, whether the respondent has access to weapons in his or her employment, and whether the respondent is a person to whom the Weapons Act does not normally apply (s 24). The court must specify in the DVO as much information as it can about weapons in the possession of the respondent so that police have relevant information if they later have to exercise a power under an Act to seize weapons (s 29).

2.3.25. Under s 26 of the Queensland Act, if a court is satisfied that a respondent has used or threatened to use any thing in committing an act of domestic violence against the aggrieved, and is likely to use the thing again or carry out the threat, the court may, as a condition of a DVO, prohibit the respondent from possessing the thing (or a thing of the same type) for the duration of the DVO (s 26(1)-(2)). If the court makes such an order, the thing is taken to be a weapon and may be dealt with under the Queensland Act and the *Weapons Act 1990* (Qld) as a weapon for which there is no licence (s 26(3)).

Duration, revocation and variation of an order

- 2.3.26.** A protection order continues for the period ordered by the court. This period cannot be longer than 2 years, unless the court is satisfied that there are special reasons for ordering that a protection order continues for a longer period (s 34A).
- 2.3.27.** 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 (s 34B).
- 2.3.28.** Under s 35, a court may vary the conditions imposed by the DVO or the period for which the DVO continues in force. The court may vary the DVO on an application to vary or revoke it, on its own initiative, or when dealing with a contravention of the order (s 35(3)). Before a court varies a DVO, it must consider the grounds set out in the application for the protection order and the findings of the court that made the DVO (s 35(4)).
- 2.3.29.** In considering an application to revoke an order, s 36(2) requires the court to have regard to:
- any expressed wishes of the aggrieved;
 - any current contact between the aggrieved and the 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.
- 2.3.30.** The court may only revoke the order if the court considers the safety of the aggrieved or a named person would not be compromised by the revocation (s 36(3)).

Enforcement and breach of an order

- 2.3.31.** If the respondent was served with a copy of the order, or was present in court when the order was made, or a police officer has told the respondent about the existence of the order, the respondent can be charged with an offence if he or she contravenes the order or a condition imposed by the order (s 80). The penalties for breaching a DVO are set out in s 80 of the Act. If the respondent has previously been convicted on at least 2 different occasions for breaching a DVO within a period of up to 3 years before the present offence was committed, the maximum penalty is 2 years imprisonment. In other circumstances, the maximum penalty is 40 penalty units (currently \$4,000)⁴⁰ or 1 year's imprisonment.
- 2.3.32.** The Queensland Act makes no special provision with respect to the arrest of a person suspected of having breached a DVO. However, because breach of a DVO is a criminal offence, the normal rules under the Queensland criminal law in relation to matters such as arrest, remand and bail will apply.

⁴⁰ See *Penalties and Sentences Act 1992* (Qld), s 5(1)(c).

Procedural protections for applicants and witnesses

- 2.3.33.** Section 82 provides that it is an offence to publish or disseminate to the public various matters including an account of proceedings that identifies or is likely to identify the aggrieved or a child concerned in DVO proceedings.

Protection of children

- 2.3.34.** As a 'relative', a child of the aggrieved may be included in a DVO made for the benefit of the aggrieved if the court is satisfied, for example, that the respondent is likely to intimidate or harass the child (s 21(1)). As noted above, the welfare of a child of the aggrieved is one of the matters that is to be of paramount importance when a court determines the conditions to be imposed on a respondent (s 25(5)).
- 2.3.35.** A DVO may also be made for the protection of a child in his or her own right, but only if a spousal relationship, intimate personal relationship or informal carer relationship exists between the child and the respondent (s 12D(2)). In other words, it is not possible for a child under 18 to be named as the aggrieved if there is a family relationship between the child and the other party named in the DVO. In these circumstances, however, a child could be included in the order of a relative.
- 2.3.36.** As far as procedural provisions aimed specifically at ensuring the protection of children are concerned, under s 81A a child (other than a child who is the aggrieved or the respondent) may not be called as a witness, be asked to swear an affidavit or to remain in court during the proceedings, subject to a contrary order of the court. If a court orders that 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 (s 81A(3)).

Recognition and enforcement of orders made in other jurisdictions

- 2.3.37.** A person may apply to the clerk of a Magistrates Court for the registration of an 'interstate order' (i.e. an order made by a court of another State, a Territory or New Zealand under a prescribed law of that other jurisdiction) (s 40). The clerk is required to be satisfied that the interstate order is in force (by obtaining a certified copy of it) and that the order was served, or was taken to be served, on the person against whom it was made (s 41). The clerk must register the interstate order unless the clerk believes that it is necessary (or the applicant makes a request) to refer the interstate order to the Magistrates Court for adaptation or modification (s 42(3)). The clerk is required to give the applicant and the Police Commissioner a certificate of the registration within 2 business days (s 43(1)).
- 2.3.38.** Notice of the registration is not to be given to the person against whom the order was made unless the aggrieved has consented to this (s 43(2)). Once registered, the interstate order has the same effect and may be enforced or varied as if it were a protection order made under the Queensland Act (ss 44 and 45). An applicant need not give notice of an application for registration of an interstate order to the person against whom the order was originally made (s 46).



4 South Australia: Domestic Violence Act 1994 (SA)

- 2.4.1. In South Australia, the principal legislation relating to domestic violence protection orders is the *Domestic Violence Act 1994* (SA) (the SA Act). It is significantly less detailed than the Acts in other jurisdictions.

Objects of the SA Act

- 2.4.2. The primary purpose of the SA Act, as stated in its long title, is ‘to provide for restraining orders in cases of domestic violence’.

Domestic violence restraining orders – overview

- 2.4.3. The SA Act provides that a court may make a ‘domestic violence restraining order’ (DVRO) upon a complaint being made under the Act (s 4(1)) if there is a reasonable apprehension that the defendant may commit ‘domestic violence’.⁴¹ (The meaning of the term ‘domestic violence’ is examined in paragraph 2.4.14 below.) A complaint may be made by a police officer or a person against whom, or against whose property, the behaviour complained about, is directed (s 7). In addition, a complaint may be made and dealt with by telephone by a police officer or a person introduced by a police officer (s 8).
- 2.4.4. Although there are no provisions for interim DVROs or for the issue of a DVRO by a person other than a court, the SA Act provides for the issuing of DVROs by a court in urgent situations in the absence of the defendant (s 9).⁴²

Who can make orders?

- 2.4.5. The SA Act confers jurisdiction on the Magistrates Court of South Australia to make DVROs (see the definition of ‘Court’ in s 3).

⁴¹ Restraining orders outside the domestic violence context are provided for in Division 7 of Part 4 of the *Summary Procedure Act 1921* (SA).

⁴² The SA Act also provides that proceedings for DVROs are to be dealt with by the Court as a matter of priority (s 18).

Which relationships are covered?

2.4.6. As discussed at paragraph 2.4.14 below, ‘domestic violence’ involves causing personal injury or engaging in other types of conduct in relation to a ‘family member’. ‘Family member’, in relation to a person against whom an order may be made (a ‘defendant’), is defined in s 3 of the Act as:

- (a) a spouse or former spouse of the defendant;
- (b) a domestic partner or former domestic partner of the defendant; or
- (c) a child of whom –
 - (i) the defendant; or
 - (ii) a spouse or former spouse of the defendant; or
 - (iii) a domestic partner or former domestic partner of the defendant, has custody as a parent or guardian; or
- (d) a child who normally or regularly resides with –
 - (i) the defendant; or
 - (ii) a spouse or former spouse of the defendant; or
 - (iii) a domestic partner or former domestic partner of the defendant.

2.4.7. A ‘spouse’ of a defendant is a person to whom the defendant is legally married. A ‘domestic partner’ is a person with whom the defendant lives in a ‘close personal relationship’, i.e. a ‘relationship between 2 adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis’ (s 3 of the SA Act). The relationship need not be, or have been, sexual. A person who lives with the defendant as part of the same household, but who does not form a ‘couple’ with the defendant, e.g. an elderly mother living with the defendant and his wife, would not be a ‘family member’. Further, a person who is in a sexual or other close relationship with the defendant, but who does not live with the defendant, is not a ‘family member’.

2.4.8. However, persons who are not ‘family members’ may apply for a restraining order under the *Summary Procedure Act 1921* (SA) (the Summary Procedure Act). A court may grant a restraining order under that Act in broadly similar terms to a DVRO.⁴³ Courts’ power to make restraining orders under the Summary Procedure Act is not confined to particular categories of people or relationships, but is instead based on there being a reasonable apprehension that the defendant may, unless restrained, cause personal injury or damage to property or behave in an intimidating or offensive manner towards the person for whose benefit the order would be made, and the court being satisfied that the making of the order is appropriate in the circumstances.⁴⁴

2.4.9. A more detailed discussion of these issues is set out in Chapter 1 of Part 3 of this Report.

⁴³ Summary Procedure Act, s 99.

⁴⁴ Summary Procedure Act, s 99(1).

Who may or must apply for an order?

- 2.4.10. An application for a DVRO is made to the court by way of a complaint under s 7 of the South Australia Act. A complaint may be made by:
- a member of the police force; or
 - a person against whom, or against whose property, the alleged domestic violence has been, or may be, directed (s 7(1)).
- 2.4.11. Where the applicant is a child, the complaint may be made on behalf of the child by his or her parent or guardian, or a person with whom the child resides, or by the child with the court's permission (but only if the child is over 14) (s 16 of the SA Act).
- 2.4.12. The South Australia Act does not impose an obligation on any person (such as, for example, a police officer) to make an application for a DVRO in any circumstances.

Grounds on which an order may be made

- 2.4.13. A court may make a DVRO if there is a reasonable apprehension that the defendant may commit 'domestic violence' and the court is satisfied that the making of the order is appropriate in the circumstances (s 4(1)).
- 2.4.14. For the purposes of the SA Act, 'domestic violence' includes causing personal injury to a family member or damage to the property of a family member. It also includes engaging in any of the following conduct on two or more occasions so as to reasonably arouse in a family member apprehension or fear of personal injury or damage to property or any other significant apprehension or fear (s 4(2)):
- following a family member;
 - loitering outside the residence of, or other place frequented by, a family member;
 - interfering with property of a family member;
 - giving, sending, publishing etc offensive material to a family member;
 - communicating with a family member or to others about a family member using mail, telephone or other form of electronic communication;
 - keeping a family member under surveillance; or
 - engaging in other conduct.
- 2.4.15. The court may take into account events that have taken place outside South Australia, and may make an order against a person who is not resident in the State (s 4(3)).
- 2.4.16. The court can make a DVRO without considering the grounds of the application if the defendant consents to the order, even though the defendant may dispute that the grounds exist (s 4(4)).

Application process

- 2.4.17. A DVRO is made under the SA Act on a complaint (s 4). The SA Act does not set out the procedure in any detail. Section 7 requires complainants to inform the court of any relevant family contact order, or pending application for a family contact order of which the complainant is aware. As noted above, the SA Act has a procedure for dealing with a complaint by telephone, and s 9 contains a procedure for making an order in the absence of the defendant.
- 2.4.18. Section 19 provides that, subject to the South Australia Act and relevant rules of court, the Summary Procedure Act applies to a complaint and proceedings under the SA Act.

Police powers when application made and obligation to investigate

- 2.4.19. A police officer may require a person who the officer has reason to believe is subject to a DVRO that has not been served on the person to remain at a particular place for up to two hours to allow the order to be served. If the police officer reasonably suspects the person will not comply with the order, the police officer may, without warrant, arrest and detain the person for up to two hours (s 11). The same powers apply if a police officer has reason to believe a complaint about the person has been or is about to be made by telephone (s 8(7)).

Content and effect of an order

General conditions

- 2.4.20. A DVRO 'may impose such restraints on the defendant as are necessary or desirable to prevent the defendant acting in the apprehended manner' (s 5(1)(a)), including:
- prohibiting the defendant from being on premises or in a specified locality;
 - prohibiting the defendant from approaching a family member within a specified distance;
 - prohibiting the defendant from contacting, harassing, threatening or intimidating a family member or any other person at a place where a family member resides or works;
 - prohibiting the defendant from damaging property or taking possession of specified personal property;
 - prohibiting the defendant from causing or allowing another person to engage in such conduct; and
 - restricting the defendant's possession of firearms.

Exclusion conditions

2.4.21. A DVRO may prohibit the defendant from being on premises at which a family member resides (s 5(2)(a)). Such an order may be made against the defendant in relation to premises despite the fact that the defendant has a legal or equitable interest in the premises or property (s 5(3)). Where the aggrieved person and the defendant normally live together, therefore, the defendant can be excluded from the family home.

Firearms

2.4.22. If a defendant has possession of a firearm or is licensed to possess a firearm, s 10 of the SA Act obliges a court to make certain supplementary orders:

- an order that the firearm be confiscated and disposed of or dealt with in accordance with the court's directions;
- an order authorising a police officer to enter premises and to search and take possession of any such firearm;
- an order that a licence or permit to possess a firearm held by the defendant be cancelled and delivered up;
- an order that the defendant be disqualified from holding or obtaining a firearm licence or permit; and
- an order that the defendant be prohibited from possessing a firearm in the course of his or her employment.

Duration, revocation and variation of an order

2.4.23. A DVRO must be served on the defendant personally and is not binding until it has been served (s 11).

2.4.24. The SA Act makes no specific provision for the duration of a final DVRO (presumably, the term of a DVRO is set out in the order). A DVRO made in response to a telephone complaint or in the absence of the defendant will continue in force only until the conclusion of the hearing to which the defendant is summoned to appear, unless the court confirms the order (ss 8 and 9).

2.4.25. A DVRO can be varied or revoked on the application of a police officer, a person for whose benefit the order was made or the defendant (s 12). The defendant must have the permission of the court to seek a variation or revocation. There are safeguards relating to the revocation of firearms orders (s 12(2)) and no order may be varied or revoked without all parties being given a reasonable opportunity to be heard.

Enforcement and breach of an order

- 2.4.26. It is an offence to contravene or fail to comply with a DVRO, for which the maximum penalty is 2 years imprisonment (s 15(1)). Police may arrest without warrant, and detain for up to 24 hours, a person suspected of contravening or failing to comply with a DVRO (s 15).
- 2.4.27. A police officer may, without warrant, arrest and detain a person for up to 24 hours if the officer has reason to suspect that the person has contravened or failed to comply with a DVRO (s 15(2) and (3)).

Protection of children

- 2.4.28. A DVRO may apply for the benefit of any family member specified in the order, in addition to the family member who made the complaint or on whose behalf the complaint was made (s 5(1)(b)). By virtue of s 16, a child may him or herself be the complainant or applicant for a DVRO. If the child is 14 or over, the court can give leave for the child to make an application. Otherwise, an application can be made for a DVRO for the child by a parent or guardian, or a person with whom the child normally or regularly resides.
- 2.4.29. The SA Act makes no special provision in relation to children as witnesses in DVRO proceedings⁴⁵

Recognition and enforcement of orders made in other jurisdictions

- 2.4.30. The Principal Registrar may, subject to any applicable rules of court, register a 'foreign domestic violence restraint order', being an order made under a law of another State or Territory or New Zealand declared by regulation to be a law corresponding to the SA Act (see ss 3 and 14).
- 2.4.31. A registered foreign DVRO has the same effect, and may be enforced in the same way, as a DVRO under made under the SA Act (s 14(2)). The court may give such directions and make such adaptations or modifications to the order as the court considers to be necessary for the effective operation of the order in South Australia (s 14(3)), and may, on application, vary the order or cancel the registration at any time (s 14(4)).

⁴⁵ There may be other South Australian legislation relevant to this, but we have not attempted to ascertain whether in this case.



5 Tasmania: Family Violence Act 2004 (Tas)

- 2.5.1. In Tasmania, the principal legislation relating to protection orders in the domestic violence context, and to domestic violence-specific offences, is the *Family Violence Act 2004* (Tas) (the Tasmanian Act).⁴⁶

Objects of the Tasmanian Act

- 2.5.2. The primary purpose of the Tasmanian Act, as stated in its long title, is ‘to provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence’. Section 3 of the Act provides that ‘[i]n the administration of this Act, the safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations’.

Family violence orders: Overview

- 2.5.3. Under the Tasmanian Act, a court may make, on application, a family violence order (FVO) for the protection of an ‘affected person’ (or another person named in the order) in relation to the past and prospective commission of ‘family violence’ (see ss 15 and 16(1) and (2)).
- 2.5.4. A court can make an interim FVO pending the determination of proceedings for an FVO that have been commenced (s 23(1)). The Tasmanian Act does not specify any matters of which the court must be satisfied before it can make an interim FVO.
- 2.5.5. In addition to an FVO, the Tasmanian Act also provides that a police officer may make a police family violence order (PFVO) against a person if the officer is satisfied that the person has committed, or is likely to commit, a ‘family violence offence’ (s 14(1)).

⁴⁶ Part XA of the *Justices Act 1959* (Tas) provides for restraint orders that can be made in other contexts: for example, where a person has caused or threatened to cause personal injury or has engaged in ‘stalking’ as defined in that Act (s 106B(1)).

Who can make orders?

- 2.5.6. A 'court of summary jurisdiction'⁴⁷ may make an FVO upon the making of an application (ss 5, 16(1) and 31(1)). An application for an FVO also enlivens the court's jurisdiction to make an interim FVO (s 23(1)).
- 2.5.7. Proceedings for an FVO can be transferred to the Magistrates Court (Youth Justice Division) or the Magistrates Court (Children's Division) if the court in which the proceedings are commenced determines that this is appropriate (s 31(8) and (9) of the Tasmanian Act).
- 2.5.8. Power to make a PFVO is conferred on a police officer of the rank of sergeant or above, or who is authorised by the Commissioner of Police (s 14(1)).

Which relationships are covered?

- 2.5.9. Jurisdiction to make an FVO or PFVO turns on the incidence of 'family violence'.⁴⁸ This is defined in s 7 of the Tasmanian Act as certain types of conduct by a person against that person's 'spouse or partner',⁴⁹ which is defined in s 4 as someone with whom the person is, or has been, in a 'family relationship'. A 'family relationship', as also defined in s 4, in turn means a marriage or a 'significant relationship' within the meaning of the *Relationships Act 2003* (Tas) (the Relationships Act).
- 2.5.10. A 'significant relationship' is a relationship between two adult persons who have a relationship as a couple and who are not married to one another or related by family (s 4 of the Relationships Act). For the purposes of the Tasmanian Act, a 'family relationship' also includes a relationship in which one or both of the parties is between the ages of 16 and 18 and would, but for that fact, be a 'significant relationship' within the meaning of the Relationships Act (s 4).
- 2.5.11. Persons are 'related by family' (see s 7 of the Relationships Act), and therefore cannot have a 'family relationship' for the purposes of the Tasmanian Act, if:
- one is the parent, or another ancestor, of the other; or
 - one is the child, or another descendant, of the other; or
 - they have a parent in common.

⁴⁷ Defined in s 3 of the *Justices Act 1959* (Tas) as a '(a) a court of petty sessions; and (b) a court held by one justice'.

⁴⁸ A PFVO may be made if the police officer is satisfied that a person has committed, or is likely to commit, a 'family violence offence' (s 14(1)), which is defined as any offence the commission of which constitutes family violence (s 4).

⁴⁹ It also includes contravening an FVO, interim FVO, PFVO or external family violence order (s 7(b)(iii)). Depending on the terms of the relevant order, such a contravention could take place in the context of a different type of relationship. For example, an FVO may contain conditions to protect any person (s 16(2)). External family violence orders are discussed in paragraph 2.5.48 below.

2.5.12. A significant relationship may be registered under Part 2 of the Relationships Act. In the absence of registration, the existence of a significant relationship depends on all the circumstances, including the following if relevant:

- the duration of the relationship;
- the nature and extent of common residence;
- whether or not a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- the care and support of children;
- the performance of household duties; and
- the reputation and public aspects of the relationship.

2.5.13. While orders are only available under the Tasmanian Act in connection with ‘family relationships’, it is important to note that courts have a broader power under the *Justices Act 1959* (Tas) (the Justices Act) to make ‘restraint orders.’⁵⁰ (The Justices Act does not limit the relationships in connection with which a court can make a restraint order.) Restraint orders can be made in similar terms to FVOs made under the Tasmanian Act.

2.5.14. A more detailed discussion of these issues is set out in Chapter 1 of Part 3 of this Report.

Who may or must apply for an order?

2.5.15. Under s 15 of the Tasmanian Act, an application to a court for an FVO may be made by:

- a police officer; or
- an ‘affected person’ (defined in s 3 as a person against whom family violence is directed); or
- an ‘affected child’ (defined in s 3 as a child whose safety, psychological wellbeing or interests are affected or likely to be affected by family violence), if the court is satisfied that the child is capable of understanding the nature of the proceedings; or
- any other person to whom leave to apply is granted by a court.

⁵⁰ See generally Justices Act, Part XA.

2.5.16. The Tasmanian Act does not give any person other than a police officer a right to apply for PFVO, and nor does it impose an obligation on a police officer to make an application for an FVO or PFVO in any circumstances.

Grounds on which an order may be made

2.5.17. A court may make an FVO if satisfied, on the balance of probabilities, that

- a person has committed ‘family violence’; and
- that person may again commit family violence (s 16(1)).⁵¹

2.5.18. ‘Family violence’ is defined in s 7 as any of the following types of conduct committed by a person, directly or indirectly, against that person’s spouse or partner:

- assault, including sexual assault;
- threats, coercion, intimidation or verbal abuse;
- abduction;
- stalking (as defined in s 192 of the *Criminal Code (Tas)*);
- attempting or threatening to commit the above conduct;
- economic abuse (defined in s 8 of the Tasmanian Act as pursuing a course of conduct (made up of one or more actions, such as coercing a partner to relinquish control over assets or income) with the intent to unreasonably control or intimidate the spouse or partner or cause them mental harm, apprehension or fear);⁵²
- emotional abuse or intimidation (defined in s 9 of the Tasmanian Act as pursuing a course of conduct that the person knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, the spouse or partner);⁵³
- contravening an external family violence order, an interim FVO, an FVO or a PFVO.

2.5.19. A court may make an FVO in terms consented to by the parties. In making an FVO by consent, the court may record that the person against whom the order is made does not admit any of the matters alleged in the application for that order (s 22 of the Tasmanian Act).

2.5.20. A PFVO may be made in relation to a person where the relevant police officer is satisfied that the person has committed, or is likely to commit, a ‘family violence offence’ (s 14(1) of the Tasmanian Act). ‘Family violence offence’ is defined in s 4 as any offence the commission of which constitutes family violence.

⁵¹ If the court is not satisfied of the specified matters, it may consider making a restraining order under Part XA of the Justices Act (see Tasmanian Act, s 24).

⁵² Economic abuse against a spouse or partner is also an offence: s 8 of the Tasmanian Act.

⁵³ Emotional abuse against a spouse or partner is also an offence: s 9 of the Tasmanian Act.

Application process

2.5.21. An application for an FVO must be in the approved form (s 30 of the Tasmanian Act). Forms are generally available from the Magistrates Court. The Commissioner of Police is deemed to be a party to the proceedings (s 31(2A)). If the court is satisfied that the application has been served on the respondent, or that reasonable attempts to serve it have been made, the proceedings may be conducted in the absence of the respondent (s 31(7)).

Police powers when application made and obligation to investigate

2.5.22. The Tasmanian Act provides that a police officer may arrest a person without warrant if the officer reasonably suspects that the person has committed family violence (s 11(1)). In deciding whether to arrest, the police officer must give priority to the safety, wellbeing and interests of any affected person or affected child (s 11(5)).

2.5.23. The arrested person may be detained for a period reasonably required to do any or all of the following:

- determine the charge or charges that should be laid;⁵⁴
- carry out a risk screening or safety audit;
- implement the measures identified by a safety audit where it is practical to do so; and
- make and serve a PFVO or an application for an FVO (s 11(4)).

2.5.24. ‘Risk screening’ means an assessment carried out by a police officer of the likelihood of the repetition or escalation of family violence (s 4). A ‘safety audit’ is an audit also carried out by police, of the physical and other measures immediately available to enhance the safety of an affected person or child and may include making a plan to implement such measures.

2.5.25. The arrested person must otherwise be brought before a court as soon as practicable (s 11(2)).

2.5.26. In addition, if a police officer reasonably suspects that family violence is being, has been or is likely to be committed on premises, the Tasmanian Act confers powers on police to enter those premises, without a warrant, using any necessary force, and to remain there for so long as it is considered necessary to prevent family violence (s 10). Police may search the premises and any person on the premises and seize any object reasonably suspected of being used in family violence.

2.5.27. The Tasmanian Act also provides for the arrest of a person against whom an FVO is sought if the court thinks that it is a case of urgency and there is sufficient cause to do so (s 21(1)).

⁵⁴ This may include a reasonable time to conduct investigations in relation to an offence (see *Criminal Law (Detention and Interrogation) Act 1995* (Tas), ss 11(3), 4(2)(a) and (4).)

Content and effect of an order

General conditions

2.5.28. An FVO may include such conditions as the court considers are necessary or desirable to prevent the commission of family violence against an affected person or protect any other person named in the order (s 16(2) of the Tasmanian Act). This may include requiring the person against whom the FVO is made (the respondent) to:

- vacate premises, not enter premises, or only enter premises on certain conditions; and
- not possess firearms (s 16(3)).

2.5.29. A PFVO may require the person to whom it is issued to do any or all of the following (s 14(3)):

- vacate premises, not enter premises, or only enter premises on certain conditions;
- surrender any firearm or other weapon;
- refrain from harassing, threatening, verbally abusing, assaulting or contacting (otherwise than under specified conditions) an affected person, affected child or other person named in the order;
- not approach, within a specified distance, an affected person, affected child or other person named in the order or certain premises.

Exclusion conditions

2.5.30. FVOs and PFVOs can require the respondent to vacate premises, not enter premises, or attach conditions to the respondent's entry onto premises. Such orders can be made whether or not the respondent has a legal or equitable interest in the premises (see for example s 16(3)(a)). Where the person protected by an order and the respondent normally cohabit, an order can thus effectively exclude the respondent from the family home.

Firearms

2.5.31. A court may include a condition in a FVO that the respondent not possess specified firearms or that the respondent forfeit or dispose of any firearms in his or her possession (s 16(3)(b)).

2.5.32. A PFVO may also require the respondent to surrender any firearm in his or her possession (s 14(3)(c)). A PFVO automatically suspends any licence or other permit relating to the respondent's possession of a firearm, and prohibits the respondent from applying for, or being granted or issued, such a licence or permit (s 14(15) of the Tasmanian Act).

Duration, revocation and variation of an order

- 2.5.33.** If the respondent is not present in court when an FVO is made, the order takes effect when it is served on the respondent personally (s 25 of the Tasmanian Act). It remains in force for such period as the court considers necessary to ensure the safety and interests of the person for whose benefit the order is made, or until it is revoked (s 19). The period of the FVO may be extended in certain circumstances under s 20 (see below).
- 2.5.34.** If the respondent is not present in court when an interim FVO is made, the order takes effect when it is served on the respondent personally (s 25). An interim FVO remains in effect until a final FVO in respect of the same parties takes effect, or until a date ordered by the court (s 23(2)). It may be extended at any time until the relevant application for a final FVO has been determined (s 23(3)).
- 2.5.35.** A PFVO must be served on the person to whom it is issued (s 14(2)). It has effect from the time it is served for the period, not exceeding 12 months, specified in the PFVO (s 14(6)). The term of a PFVO may be extended by a court on the application of a police officer, an affected person, the person to whom it is issued or any other person to whom leave to apply is granted (s 14(9)).
- 2.5.36.** A person who may apply for an FVO or a person against whom an FVO has been made may seek leave of a court to apply for a variation, extension or revocation of the FVO (s 20). Leave to apply may only be granted if the court is satisfied that there has been a substantial change in the relevant circumstances since the order was made or last varied (s 20(3)).
- 2.5.37.** An interim FVO may be varied or extended at any time until the relevant application for a final FVO has been determined (s 23(3)). The Tasmanian Act does not explicitly provide for the revocation of an interim FVO.
- 2.5.38.** A court may vary, extend or revoke a PFVO on the application of a police officer, an affected person, the person to whom it is issued or any other person to whom leave to apply is granted (s 14(9)). A second or subsequent application may only be made with the leave of the court, 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 (s 14(10) and (11)). A PFVO that has been varied or extended by a court is then taken to be an FVO (s 14(13)).
- 2.5.39.** A PFVO is revoked by the issue and service of an FVO or interim FVO in respect of the same parties (s 14(8)).
- 2.5.40.** A PFVO may be varied by a police officer with the consent of the affected person and the person against whom it is made, if the variation will not adversely affect the safety and interests of the affected person or any affected child (s 14(7)).

Enforcement and breach of an order

2.5.41. Pursuant to s 35 of the Tasmanian Act, a person who contravenes an FVO, interim FVO or PFVO is guilty of an offence and is liable to:

- in the case of a first offence, a fine not exceeding 20 penalty units (currently \$2,400) or imprisonment for a term not exceeding 12 months; or
- in the case of a second offence, a fine not exceeding 30 penalty units (currently \$3,600) or imprisonment for a term not exceeding 18 months; or
- in the case of a third offence, a fine not exceeding 40 penalty units (currently \$4,800) or imprisonment for a term not exceeding 2 years; or
- in the case of a fourth or subsequent offence, imprisonment for a term not exceeding 5 years.

2.5.42. The Tasmanian Act makes no special provision with respect to the arrest of a person suspected of having breached an FVO or PFVO. However, because breach of an FVO or PFVO is a criminal offence, the normal rules under Tasmanian criminal law in relation to matters such as arrest, remand and bail will apply.

Procedural protections for applicants and witnesses

2.5.43. In court proceedings under the Tasmanian Act, the court may make an order forbidding the publication of material relating to the proceedings if it appears desirable to do so in the interests of the administration of justice (s 32(1)). The court must make such an order in relation to material that may disclose the identity of an affected child (s 32(2)).

Protection of children

2.5.44. An application for an FVO may be made by an ‘affected child’, if the court is satisfied that the child is capable of understanding the nature of the proceedings (s 15(2)(c)).

2.5.45. We note that the definitions of ‘family violence’ and ‘affected child’ in the Tasmanian Act mean that violence directed towards a child does not constitute ‘family violence’. A child whose safety, psychological wellbeing or interests are affected or likely to be affected by family violence (committed by a person against their partner or spouse) could apply for an FVO, but a child who was directly the victim of violence committed by a family member against the child, rather than against that person’s partner or spouse, could not make an application.

2.5.46. As noted above, there is provision in the Tasmanian Act for protecting the identity of children in proceedings for an FVO. Under s 32(2), the court must make an order forbidding the publication of material which may disclose the identity of an affected child.

Provisions relating to mediation, counselling or rehabilitation

2.5.47. The Tasmanian Act makes provision relating to counselling in the context of sentencing for family violence offences. When determining the sentence for such an offence, the results of any 'rehabilitation program assessment' must be taken into account.⁵⁵

Recognition and enforcement of orders made in other jurisdictions

2.5.48. A person may apply to the Chief Clerk of Petty Sessions under s 26 of the Tasmanian Act for the registration of an 'external family violence order' – an order made by a court of another State or Territory, or New Zealand, which has been made to prevent family violence. The Chief Clerk may register the external family violence order or refer it to the court for adaptation and modification before registration (s 27). Once registered, an external protection order has the same effect and may be enforced against a person as if it were an FVO made under the Tasmanian Act (s 28). In certain circumstances, registered external family violence orders can be varied or extended by a court on application by (among others) the person for whose benefit the order was made (s 29).

⁵⁵ See s 13(b). A 'rehabilitation program assessment' is an assessment of the suitability of a person to take part in a structured treatment program designed to reduce the likelihood that a person who has committed a family violence offence will re-offend.



6 Victoria: Family Violence Protection Act 2008 (Vic)

2.6.1. In Victoria, the principal legislation currently in force relating to protection orders in the domestic violence context is the *Crimes (Family Violence) Act 1987* (Vic). However, that Act will be repealed and replaced by the *Family Violence Protection Act 2008* (Vic) (the Victorian Act), upon its commencement on 1 October 2009 (unless proclaimed earlier). Accordingly, in this Report we address only the Victorian Act of 2008.

Objects of the Victorian Act

2.6.2. The objects of the Victorian Act in relation to domestic violence are set out in s 1 as follows:

- a) maximise safety for children and adults who have experienced family violence; and
- b) prevent and reduce family violence to the greatest extent possible; and
- c) promote the accountability of perpetrators of family violence for their actions.

2.6.3. Section 2 states that the Act aims to achieve those objects by:

- a) providing an effective and accessible system of family violence intervention orders and family violence safety notices; and
- b) creating offences for contraventions of family violence intervention orders and family violence safety notices.

2.6.4. The Victorian Act also includes a preamble recognising:

- non-violence is a fundamental social value;
- family violence is a violation of human rights;
- family violence is not acceptable in any community or culture; and
- the justice system should respect the views of victims of family violence.

2.6.5. The preamble also recognises that family violence:

- is predominantly committed by men against women, children and other vulnerable persons;
- may have a serious impact on the current and future wellbeing of children who are exposed to its effects;
- affects the entire community and occurs in all areas of society;
- may involve emotional, psychological and economic abuse; and
- may involve overt or subtle exploitation of power imbalance and may consist of isolated incidents or patterns of abuse over a period of time.

Family violence intervention orders – overview

2.6.6. Under the Victorian Act, a court may make, on application, a family violence intervention order (FVIO) for the protection of an ‘affected family member’ in relation to the commission of ‘family violence’ (s 74; see also s 76). (The meaning of the term ‘family member’ is explained in paragraph 2.6.10 below and the meaning of the term ‘family violence’ is explained in paragraph 2.6.17 below). A court may on its own initiative make a FVIO for the protection of children who are family members of the affected family member or respondent (s 77). In the Victorian Act, the person for whose protection a FVIO is sought or made is called ‘the protected person’, and the person against whom the order is sought or made is called the ‘respondent’ (s 4).

2.6.7. In addition to final FVIOs, courts can make interim orders pending a further hearing of the matter (s 53 and s 101). An interim FVIO can be made on application for a FVIO or a variation of a FVIO, if (s 53(1)):

- the court is satisfied that it is necessary to ensure the safety of the affected family member, to preserve the affected family member’s property or to protect a child subjected to family violence by the respondent; or
- the parties have consented to, or do not oppose, the order; or
- a family safety violence notice has been issued and there are no circumstances justifying discontinuing protection of the person.

2.6.8. Provision is also made, in Division 2 of Part 3 of the Victorian Act, for the making of family violence safety notices (FVSNs) by a police officer of the rank of Sergeant or above.⁵⁶ Essentially, these are issued in circumstances where a family violence incident has occurred between the affected family member and the respondent, and a police officer responding to the incident applies for a FVSN to ensure the safety of the affected family member; or to preserve any property of the affected family member; or to protect a child who has been subjected to family violence committed by the respondent, until an application for a FVIO can be decided by a court (s 24). A FVSN is taken to be an application for a FVIO (s 31).

⁵⁶ Note that these provisions expire 2 years after they commence (s 41).

Who can make orders?

2.6.9. Jurisdiction to make FVIOs and to determine applications made under the Victorian Act is conferred, depending on the circumstances in the particular case,⁵⁷ on the Magistrates Court or the Children's Court (s 42)).

Which relationships are covered?

2.6.10. As discussed at paragraph 2.6.17 below, 'family violence' involves engaging in certain types of behaviour toward a 'family member'. The term 'family member', is defined in s 8 of the Victorian Act to extend to the following persons:

- a person who is, or has been, the relevant person's spouse or domestic partner (defined in s 9(1) as a person in a registered relationship within the meaning of the *Relationships Act 2008*, or an adult to whom the person is not married but is in a relationship as a couple where one or each person provides personal or financial commitment and support of a domestic nature);
- a person who has, or has had, an intimate personal relationship with the relevant person (whether or not it is sexual in nature);
- a person who is, or has been, a relative of the relevant person;
- a child who normally or regularly resides with the relevant person or has previously resided with the relevant person on a normal or regular basis;
- a child of a person who has, or has had, an intimate personal relationship with the relevant person;
- any other person whom the relevant person regards or regarded as being like a family member if it is or was reasonable to regard the other person as being like a family member having regard to the circumstances of the relationship, including matters such as social and emotional ties, whether they live together, recognition of the relationship in the particular community, the duration of the relationship, financial dependence, and provision of care and support.

2.6.11. The word 'relative' is defined broadly in s 10, and includes parents, grandparents, children, grandchildren, siblings, uncles, aunts, nephews, nieces, cousins and, for an Aboriginal or Torres Strait Islander person, a person who under Aboriginal or Torres Strait Islander tradition or contemporary social practice is the relevant person's relative. The definition extends to persons related to the protected person by marriage, and for domestic partners includes persons who would be a relative if the domestic partners were married to each other.

⁵⁷ Part 6, Division 1 of the Victorian Act deals with the circumstances in which each court has jurisdiction.

2.6.12. The court may also make an associated final FVIO under s 76 against an associate of the respondent who has subjected the protected person to what would be family violence if they were family members, and is likely to do so again, or to protect an associate of the protected person if the respondent has subjected them to what would be family violence if they were family members, and is likely to do so again.

Who may or must apply for an order?

2.6.13. Under s 45 of the Victorian Act, the following persons may apply for a FVIO:

- a police officer;
- an affected family member;
- any person with the written consent of an adult affected family member;
- where the affected family member is a child under 18, a parent or any other person with the written consent of the parent or with the court's leave;
- an affected family member who is a child over 14, with the court's leave;
- a guardian or any other person, with the court's leave, if the affected family member has a guardian.

2.6.14. Under s 77(2) of the Victorian Act, the court making a FVIO may also make a FVIO on its own initiative to protect a child who is a family member of the affected family member or the respondent.

Grounds on which an order may be made

2.6.15. A court may make a final FVIO, on application under s 74 or s 76 or on its own initiative under s 77(2), if satisfied on the balance of probabilities that the respondent, or additional respondent, has committed family violence against the affected family member, additional applicant, or child, and is likely to do so again.

2.6.16. A court may make a final FVIO against an adult respondent under s 74 or s 76 without being so satisfied if the parties to the proceeding consent to, or do not oppose, the making of the order (s 78(1)).

2.6.17. 'Family violence' is defined in s 5(1) as:

- a) behaviour by a person towards a family member of that person if that behaviour –
 - is physically or sexually abusive; or
 - is emotionally or psychologically abusive; or
 - is economically abusive; or
 - is threatening; or
 - is coercive; or

- in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
- b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

2.6.18. ‘Economic abuse’ is defined in s 6 as behaviour that is coercive, deceptive or unreasonably controls another person without that person’s consent –

- a) in a way that denies the person economic or financial autonomy they would have otherwise had; or
- b) by withholding or threatening to withhold necessary financial support for reasonable living expenses (of the person or their child) if they are entirely financially dependent on the person.

2.6.19. ‘Emotional or psychological abuse’ is defined in s 7 as behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person.

2.6.20. Section 5(2) sets out certain types of behaviour that are included in the definition of family violence (but without limiting the general definition in s 5(1)):

- a) assaulting or causing personal injury to a family member or threatening to do so;
- b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;
- c) intentionally damaging a family member’s property, or threatening to do so;
- d) unlawfully depriving a family member of the family member’s liberty, or threatening to do so;
- e) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.

It is not necessary for the behaviour to constitute a criminal offence (s 5(3)).

2.6.21. Under s 53, a court may make an interim FVIO, on application, if satisfied on the balance of probabilities that an interim order is necessary pending a final decision about the application –

- to ensure the safety of the affected family member; or
- to preserve any property of the affected family member; or
- to protect a child who has been subjected to family violence committed by the respondent.

2.6.22. A court may also make an interim FVIO if, on application, the parties have consented to or do not oppose the making of an interim order, or if a FVSN has been issued for an affected family member and the court is satisfied on the balance of probabilities that there are no circumstances that would justify discontinuing the protection of the person until a final decision about the application.

Application process

2.6.23. Proceedings for an interim or final FVIO are commenced in court by application. The application must include the information prescribed by rules under the Act (s 43(1)).

2.6.24. The appropriate registrar for the court must serve the application on the respondent and, if the applicant is not the affected family member, on the affected family member or their parent or guardian (s 48).

Police powers when application made and obligation to investigate

2.6.25. Where a police officer intends to make an application against an adult for a FVIO, an order varying a FVIO, or a FVSN, and the officer believes it is necessary to ensure the safety of a family member or preserve the property of a family member (s 13), the officer may:

- direct a person to go to or remain at a specified place or in the company of a specified person (s 14);
- apprehend and detain the person using reasonably necessary force if the person refuses or fails to comply with a direction under s 14 (s 15);
- search the person, if the person has been given a direction under s 14 or has been detained under s 15, and the officer reasonably suspects the person is in possession of an object that may cause injury or damage, or may be used to escape (s 16).

2.6.26. As noted above, under s 157(1)(c) of the Victorian Act, a police officer may, without warrant, enter and search any premises where the officer on reasonable grounds believes a person to be if the officer reasonably suspects the person is refusing or failing to comply with a direction under s 14.

2.6.27. If an application for a final FVIO has been made, a magistrate or appropriate registrar for the court may issue a warrant for the arrest of the respondent (s 50(1)). A warrant may be issued if the magistrate or registrar believes on reasonable grounds that it is necessary to ensure the safety of the affected family member, to preserve the affected family member's property, to protect a child who has been subjected to family violence by the respondent or to ensure the respondent attends court at the specified mention date.

2.6.28. A magistrate may issue a search warrant, on application by a police officer, if the officer intends to apply for a FVIO or FVSN against a person and there are reasonable grounds for suspecting that the person is committing or is about to commit an offence against the Act or in other circumstances relating to firearms and weapons (discussed at paragraph 2.6.31 below) (s 160(2)).

Content and effect of an order

General conditions

2.6.29. In a FVIO, a court may impose such conditions on the behaviour of the respondent as appear necessary or desirable to the court (s 81), including:

- a) prohibiting the respondent from committing family violence against the protected person;
- b) excluding the respondent from the protected person's residence (as set out in s 82);
- c) conditions relating to the use of the protected person's property or property belonging to a family member of the protected person, or property belonging to the protected person and the respondent (as set out in s 86);
- d) prohibiting the respondent from approaching, telephoning or otherwise contacting the protected person unless in the company of a police officer or specified person;
- e) prohibiting the respondent from being anywhere within a specified distance of the protected person or a specified place;
- f) prohibiting the respondent from causing another person to engage in conduct prohibited by the order;
- g) revoking or suspending the respondent's weapons approval or weapons exemption; and
- h) cancelling or suspending the respondent's firearms authority.

2.6.30. In deciding the conditions to be included in a FVIO the paramount consideration is the safety of the affected family member and any children subjected to the family violence to which the application relates (s 80). However, if the affected family member is an adult who has not consented to the making of the application, the FVIO may only include the conditions set out above at (a), (f), (g) and (h) (s 75(2)).

Firearms

2.6.31. A court intending to make a FVIO must enquire as to whether the respondent holds a firearms authority or weapons approval, or is a person in respect of whom a weapons exemption applies (s 94). If a court makes an interim FVIO, the court may include a condition suspending the respondent's firearms authority or weapons approval or the application of the weapons exemption (s 95(a)). If the court makes a final FVIO the court may include a condition cancelling the respondent's firearms authority or revoking the respondent's weapons approval or the application of the weapons exemption (s 95(b)).

- 2.6.32. If a FVSN or FVIO has been made against a person, or a police officer is satisfied on the balance of probabilities that there are grounds for issuing a FVSN or making a FVIO:
- if the police officer is aware that the person has a firearm or firearms authority in their possession, the police officer may direct the person to surrender it (s 158(2)) and, if the person fails to comply, the officer must seize it (s 163);
 - if the police officer is aware, or reasonably suspects, that the person has a firearm, firearms authority, ammunition or weapon in their possession, the police officer may without warrant enter and search the person's residence, former residence, vehicle, or place where the person is alleged to have committed family violence (s 159(2)).
- 2.6.33. A police officer may also apply for a search warrant for other premises or vehicles, if the officer intends to apply for a FVSN or FVIO, or one has already been made, and the officer reasonably believes that the person is in possession of a firearm, firearms authority, ammunition or weapon (s 160).
- 2.6.34. Sections 164 and 165 of the Victorian Act set out when a seized firearm, firearms authority, ammunition or weapon may be returned, forfeited to the Crown or disposed of, including by reference to the provisions of the *Firearms Act 1996* (Vic).

Exclusion conditions

- 2.6.35. The court must consider whether to include an exclusion condition in the FVIO to exclude the respondent from the protected person's residence, having regard to the circumstances of the case, including (s 82(1)):
- the desirability of minimising disruption to the protected person and any child living with the protected person and the importance of maintaining social networks and support;
 - the desirability of continuity and stability in the care of any child living with the protected person; and
 - the desirability of allowing any childcare arrangements, education, training or employment of the protected person or any child living with the protected person to continue without interruption or disturbance.
- 2.6.36. The court must include such a condition in a FVIO against an adult respondent, if the court decides this is appropriate and the protected person does not oppose it (s 82(4)).
- 2.6.37. A FVSN may include any condition a court may include in a FVIO (apart from conditions relating to weapons and firearms) (s 29). If a police officer serves a FVSN on a respondent that contains an exclusion condition, the officer must consider the accommodation needs of the respondent and any dependent children and take reasonably necessary steps to ensure they have access to temporary accommodation (s 36(1)).

Duration, revocation and variation of an order

- 2.6.38.** A final FVIO remains in force for the period specified in the order unless it is revoked or set aside on appeal (s 99(a)). In making a decision as to the specified period under the order the court must take into account the safety of the protected person, the views of the protected person, any assessment by the applicant (and the protected person if they are not the same person) of the level and duration of risk from the respondent (s 97(2)). The court may take into account any relevant matters raised by the respondent (s 97(3)). If a court fails to specify a period in an order, the order remains in force until it is revoked or set aside on appeal (s 99(b)).
- 2.6.39.** An interim FVIO remains in force until (s 60):
- it ceases to have effect upon the making of a final FVIO; or
 - the court refuses to make a final FVIO; or
 - it is revoked; or
 - the application for a final FVIO is withdrawn.
- 2.6.40.** A FVSN starts when it is served on the respondent and remains in force until either the court has made a FVIO and it has been served on the respondent, or the court refuses to make a FVIO (s 30(1)).
- 2.6.41.** An application may be made by a party to the proceeding (an affected family member, the applicant, or the respondent) or a police officer to vary or revoke a FVIO under s 100 or extend a FVIO under s 106 (s 108). The respondent must have the court's leave to apply for a variation or revocation, but does not need leave to apply for an extension (s 109).
- 2.6.42.** Where an application is made for the variation or revocation of a FVIO, the court must have regard to the circumstances of the case, including (s 100(2)):
- the applicant's reasons for seeking the variation or revocation;
 - the safety of the protected person;
 - the protected person's views about the variation or revocation;
 - whether or not the protected person is legally represented.
- 2.6.43.** The court must also decide whether (s 102):
- there has been any change in the need to protect another person protected by the order from being subjected to family violence (s 102(1)(a));
 - other persons have become family members of the respondent or protected person (s 102(1)(b));
 - there are any Family Law Act orders in relation to the living arrangements of, or the respondent spending time or communicating with, a child who is referred to in s 102(1)(a) or (b).

2.6.44. If a child referred to in s 102(1)(a) or (b) needs protection from family violence, the court may, on its own initiative, vary the order or make a new order for the child as a protected person (ss 103 and 104).

2.6.45. The court may make interim orders varying or extending the FVIO (ss 101 and 107).

Enforcement and breach of an order

2.6.46. A person who contravenes a FVIO or a FVSN made against the person is guilty of an offence (s 123 and s 37). The maximum penalty is imprisonment for 2 years or 240 penalty units (currently \$27,220.80), or both.

2.6.47. However, a person is not guilty of the offence of breaching an interim or final FVIO or a FVSN unless the person was served with a copy of the order or notice and was given an explanation of the order or notice in accordance with s 57/s 96 or s 35 (s 123(1)(b) and s 37(1)). It is a defence to the charge of breaching a FVIO that a FVSN was also in force at the time and the person's conduct was not in contravention of the FVSN, or vice versa (ss 123(3) and 37(3)).

2.6.48. If a police officer believes on reasonable grounds that a person has breached a FVIO or FVSN the officer may, without warrant, arrest and detain the person (ss 124 and 38).

2.6.49. Part 7 of the Victorian Act sets out specific enforcement powers relating to FVIOs and FVSNs. Under s 157, a police officer may, without warrant, enter and search any premises where the officer on reasonable grounds believes a person to be if the officer has the consent of the occupier, or the officer reasonably believes:

- the person has assaulted or threatened to assault a family member;
- the person is on the premises in contravention of a FVIO or FVSN; or
- the person is refusing or failing to comply with a direction under s 14.

2.6.50. A magistrate may issue a search warrant, on application by a police officer, if a FVIO or FVSN has been made against a person and the police officer believes on reasonable grounds that the person is committing or is about to commit an offence against the Act (s 160(2)).

Procedural protections for applicants and witnesses

2.6.51. A person must not publish a report of a court proceeding or about an order that contains any particulars likely to lead to the identification of any person involved in the proceedings or who is the subject of the order, unless the court authorises the publication (s 166). (There are more stringent provisions where a child is involved, discussed below.) The court may allow publication only if it is in the public interest and just in the circumstances, and in the case of a picture if it does not include a child and is not likely to lead to the identification of a child (s 169).

2.6.52. The rules of evidence do not apply in proceedings for a FVIO, except as provided by the Victorian Act (s 65(1)), and evidence may be given in writing (s 66). Certain provisions of the *Evidence Act 1958* (Vic) to protect witnesses are applied, e.g. to allow the court to forbid questions that are intended to insult or annoy or are needlessly offensive, and to disallow improper questions to children and persons with cognitive impairment (s 65(2)). The court may order proceedings to be closed to the public if necessary to prevent an affected family member, protected person or witness from undue distress or embarrassment (s 68). Alternative arrangements may be directed by the court such as permitting a witness to give evidence by closed-circuit television, using screens to obscure the witness's view of the respondent, allowing a party or witness to have a support person, and requiring legal practitioners to be seated (s 69(1)). An unrepresented respondent cannot personally cross-examine a 'protected witness' (i.e. an affected family member or protected person, a child, a family member of a party, or any person declared by the court to be a protected witness), except where an adult witness consents and the court considers with would not have a harmful effect on the witness (s 70).

Protection of children

2.6.53. An FVIO may be made under the Victorian Act for the protection of a child as an affected family member in his or her own right. As noted above, such an application may be made by a child over 14 with leave, a parent of the child, any other person with written consent of the parent or leave of the court (s 45(d)). An application for a FVIO for a child may be included in an application for the protection of the child's parent if the applications arise out of the same or similar circumstances (s 47(1)).

2.6.54. An interim FVIO may be made to protect a child who has been subjected to family violence committed by the respondent (s 53(1)(a)(iii)).

2.6.55. A FVSN can be issued to protect a child who has been subjected to family violence committed by the respondent (s 26(b)(iii)).

2.6.56. As noted above, s 77 of the Victorian Act also requires a court before making a final FVIO to consider whether there are any children who are family members of the affected family member or respondent who have been subjected to family violence by the respondent, and allows the court on its own initiative to include such a child as a protected person in the final FVIO or make a separate FVIO for the child.

2.6.57. In deciding the conditions to be included in a FVIO, the paramount consideration is the safety of the affected family member and any children subjected to the family violence to which the application relates (s 80). If the protected person or respondent is the parent of a child, the court must:

- enquire as to whether there are any Family Law Act orders or child protection orders in force in relation to the child (s 89);

- if applicable, revive, vary, discharge or suspend any inconsistent Family Law Act orders to the extent of its powers under s 86R of the *Family Law Act 1975* (s 90);
- decide whether the safety of the protected person or child will be jeopardised if the respondent has contact with the child (s 91); and
- if applicable, make orders arranging contact with the child (s 92) or prohibiting contact with the child (s 93).

2.6.58. The court must also consider the interests of a child in deciding whether to include an exclusion order in a FVIO under s 82 or s 83.

2.6.59. A child, other than an applicant or respondent, can only give evidence in FVIO proceedings if the court grants leave, having regard to the desirability of protecting children from unnecessary exposure to the court system and the harm that could occur to the child and family relationships if the child gives evidence (s 67). If a child is a witness the court may direct that alternative arrangements be made (eg. for closed-circuit television or use of screens),⁵⁸ unless this is not considered appropriate having regard to the wishes of the witness, the age and maturity of the witness, the available facilities and any other relevant matters (s 69(3)). Under s 70, the respondent is prohibited from personally cross-examining a child.

2.6.60. There is also provision for protecting the identity of children in FVIO-related proceedings in the Magistrates' Court. Section 166 makes it an offence to publish any information likely to lead to the identification of a child, any other person involved in a FVIO-related proceeding, or the particular venue of the court, if a party to or witness in the FVIO proceedings is a child. (Section 534 of the *Children, Youth and Families Act 2005* (Vic) provides restrictions on the publication of proceedings in the Children's Court.)

Provisions relating to mediation, counselling or rehabilitation

2.6.61. If a court makes a final FVIO, the court must also order the respondent to attend an interview for the purpose of assessing whether the respondent is eligible to attend counselling (s 129(1)), unless there is already a counselling order in force or there is no counselling that is reasonably practicable for the respondent to attend or the order is otherwise inappropriate (s 129(2)). The respondent must be assessed as eligible to attend counselling unless the respondent does not have the ability or capacity to participate in counselling because of any relevant matters (s 129(3)), including:

- the respondent's character, personal history or language skills;
- any disabilities of the respondent;
- any severe psychiatric or psychological conditions of the respondent; and
- any alcohol or other drug problems of the respondent.

⁵⁸ See paragraph 2.6.52.

- 2.6.62. Upon receiving the assessment, the court must order the respondent to attend counselling if satisfied that the respondent is eligible, unless there is already a counselling order in force, or there is no counselling that is reasonably practicable for the respondent to attend, or the order is otherwise inappropriate (s 130).
- 2.6.63. Failing to attend the interview or counselling without reasonable excuse is an offence (s 129(5) and s 130(4)). The maximum penalty is 10 penalty units (currently \$1,134.20).

Recognition and enforcement of orders made in other jurisdictions

- 2.6.64. An appropriate registrar may register a 'corresponding interstate order' (s 177) or a 'corresponding New Zealand order' (s 184) in the court. A corresponding order is an order that substantially corresponds to a final order under the Victorian Act, and is made under a law of another State or Territory, or of New Zealand, relating to the protection of persons from family or domestic violence that substantially corresponds to the Victorian Act or is prescribed as such.
- 2.6.65. Once registered, a corresponding interstate order may be enforced against a person as if it were a final order that had been made under the Victorian Act and served on the person (s 179). In certain circumstances, the effect in Victoria of corresponding interstate orders can be varied by a court on application by (among others) the protected person (s 181), but variations made by the corresponding State or Territory after registration in Victoria have no effect in Victoria (s 180). Once registered, a corresponding New Zealand order has the same effect in Victoria as in New Zealand, and can be enforced as if it were a final order (s 186). Corresponding New Zealand orders may not be varied by a court in Victoria, but variations, revocations or extensions by a New Zealand court have effect in Victoria (s 187).



7 Western Australia: Restraining Orders Act 1997 (WA)

- 2.7.1. In Western Australia, the principal legislation relating to protection orders in the domestic violence context is the *Restraining Orders Act 1997 (WA)* (the WA Act), supplemented by the *Restraining Orders Regulations 1997 (WA)* (WA Regulations).

Objects of the WA Act

- 2.7.2. The objects of the WA Act are described in the long title of the Act as follows:

An Act to provide for orders to restrain people from committing acts of family and domestic or personal violence by imposing restraints on their behaviour and activities, and for related purposes.

Violence restraining orders – overview

- 2.7.3. Under the WA Act, a court may make, on application, a violence restraining order (VRO) (s 11A). A VRO is an order restraining ‘the person bound by the order’ (who is referred to as the ‘respondent’ before the order is made) from committing an ‘act of abuse’ against the person protected by the order. (For convenience, in this Chapter, we use ‘respondent’ to refer to a person bound by the order.) An ‘act of abuse’ is either an act of family and domestic violence or an act of personal violence. (These terms are explained below.)
- 2.7.4. Interim orders (lasting more than 72 hours), can be made by a court at a hearing (including where the respondent is absent) (ss 29(1)(a), 43A(7)(a), 63(4b)), and by a magistrate in response to a telephone application (s 23) (telephone orders). A telephone order can be made in urgent cases where it is impracticable for an application for a VRO to be made or to be heard in court.
- 2.7.5. On being served with an interim order, the respondent may object to a final order being made, in which case a court hearing is held. If the respondent does not object, the interim order automatically becomes a final order (s 32).
- 2.7.6. Orders lasting less than 72 hours can also be made on telephone application or by a court in the absence of the respondent. Where it is impracticable for an application for a VRO to be made or to be heard in court, a police order lasting for up to 72 hours can be made where considered necessary to ensure the safety of a person from family and domestic violence (s 30A(1)).

Who can make orders?

- 2.7.7. Section 7A confers jurisdiction to make a VRO on the Magistrates Court and the Children's Court. If the respondent is a child under 18, an application for a VRO must be made to the Children's Court (s 25(3)(a)). In all other cases, the application is to be made to the Magistrates Court (s 25(3)(b)).
- 2.7.8. In other proceedings, such as where a court is hearing proceedings under the *Family Court Act 1997* (WA) (see s 63) or the *Family Law Act 1975* (Cth), the relevant court is also authorised to make an order (ss 7A(d) and 63–63A).

Which relationships are covered?

- 2.7.9. A VRO can be made whether or not the person to be protected has a particular kind of relationship with the respondent. However, the types of conduct which provide grounds for making a VRO are wider where they are in a 'family and domestic relationship'.
- 2.7.10. VROs restrain 'acts of abuse' against the person protected by the order. An 'act of abuse' is either an act of family and domestic violence or an act of personal violence. In this overview we focus on VROs to restrain acts of family and domestic violence.
- 2.7.11. To be an 'act of family and domestic violence' the act must have been committed by a person against another person with whom he or she has 'a family and domestic relationship' (s 6(1)). As defined in s 4, a 'family and domestic relationship' is a relationship between two persons:
- who are, or were, married to each other;
 - who are, or were, in a de facto relationship with each other;
 - who are, or were, 'related' to each other ('related' means being related to a person taking into consideration the cultural, social or religious backgrounds of the two persons, or being related to a person's current or former spouse or de facto spouse);
 - one of whom is a child who ordinarily or regularly resides (or resided) or stays (or stayed) with the other person;
 - one of whom is, or was, a child of whom the other person is a guardian; or
 - who have, or had, an 'intimate personal relationship' or 'other personal relationship', with each other ('other personal relationship' means a personal relationship of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects, or affected, the other person; 'intimate personal relationship' is not defined).

Who may or must apply for an order?

- 2.7.12. An application for a VRO may be made in person by the person seeking to be protected or by a police officer on behalf of that person (s 25(1)).
- 2.7.13. If the person seeking to be protected is a child, an application for a VRO may also be made by a parent or guardian of the child, or a child welfare officer, on behalf of the child (s 25(2)(a)). Similarly, 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 guardian may apply on behalf of the person (s 25(2)(b)).
- 2.7.14. An application for a VRO by telephone may be made by either:
- an authorised person (a police officer or a person who is prescribed in regulations) on behalf of the person seeking to be protected; or
 - the person seeking to be protected, if he or she is introduced to the authorised magistrate hearing the application by an authorised person (s 18(1)).
- 2.7.15. If the person seeking to be protected is a child, or a person for whom a guardian has been appointed, a telephone application may be made by a parent or guardian, or a child welfare officer, if the applicant is introduced to the magistrate by an authorised person (s 18(2)).
- 2.7.16. A police officer who has investigated suspected family and domestic violence must make a police order, or apply for a VRO, or make a written record of why he or she did not do so (s 62C).

Grounds on which an order may be made

- 2.7.17. A court may make a VRO if it is satisfied that:
- the respondent has committed an ‘act of abuse’ against a person seeking to be protected and is likely to do so again; or
 - a person seeking to be protected, or a person who has applied for the order on behalf of that person, reasonably fears that the respondent will commit an ‘act of abuse’ against the person seeking to be protected (s 11A).

2.7.18. 'Act of abuse' means an 'act of family and domestic violence' or an 'act of personal violence' (s 3). An 'act of family and domestic violence' is defined in s 6(1) to mean one of the following acts that a person commits against another person with whom he or she is in a family and domestic relationship:

- (a) assaulting or causing personal injury to the person;
- (b) kidnapping or depriving the person of his or her liberty;
- (c) damaging the person's property, including the injury or death of an animal that is the person's property;
- (d) behaving in an ongoing manner that is intimidating, offensive or emotionally abusive towards the person;
- (e) causing the person or a third person to be pursued —
 - (i) with intent to intimidate the person; or
 - (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the person;
- (f) threatening to commit any act described in paragraphs (a) to (c) against the person.

2.7.19. A person who procures an act of abuse is taken to have committed the act himself or herself and so can be the subject of a VRO (s 3).

2.7.20. In addition, under s 11B, a VRO may be made for the benefit of a child if the court is satisfied that:

- either:
 - (i) the child has been exposed to an act of family and domestic violence committed by or against a person with whom the child is in a family and domestic relationship and the child is likely again to be exposed to such an act; or
 - (ii) the applicant, the child or a person with whom the child is in a family and domestic relationship reasonably fears that the child will be exposed to an act of family and domestic violence committed by or against a person with whom the child is in a family and domestic relationship; and
- making a violence restraining order is appropriate in the circumstances.

2.7.21. In cases of urgency, whether or not an application for an order has been made a police officer may make a police order if the officer believes, or fears, or believes that another person fears, that:

- a person has committed an act of family and domestic violence and is likely again to do so again, or that an act of family and domestic violence will be committed against a person; or

- a child has been exposed to an act of family and domestic violence committed by or against a person with whom the child is in a family and domestic relationship, and this is likely to happen again, or that a child is likely again to be exposed to such an act;

and the officer believes that making a police order is necessary to ensure the safety/of a person (s 30A).

Cases in which a court must make an order

2.7.22. A court convicting a person for a ‘violent personal offence’ must make a VRO against the offender for the protection of the victim, and provide that the VRO is to remain in force for the life of the offender (s 63A(1) and (2)). However, a court must not do so if a victim of the offence, for whose benefit the court proposes to make the VRO, objects to the order being made (s 63A(4)).

2.7.23. ‘Violent personal offence’ is defined in s 63A(5) to mean an offence against one of the following sections of the *Criminal Code* (see the *Criminal Code Act Compilation Act 1913* (WA)):

- s 283 (attempt to murder);
- s 297 (grievous bodily harm);
- s 325 (sexual penetration without consent);
- s 326 (aggravated sexual penetration without consent);
- s 327 (sexual coercion); or
- s 328 (aggravated sexual coercion).

2.7.24. In addition, a police officer who has investigated suspected family and domestic violence must make a police order, or apply for a VRO, or make a written record of why he or she did not do so (s 62C).

Application process

2.7.25. An application for a VRO that is made in person must be in the prescribed form. The current application form in the WA Regulations requires the names and contact details of the person seeking to be protected, the applicant (if not the person seeking to be protected) and the respondent. The applicant must select from a list the grounds for the application, and give details of the respondent’s behaviour. The applicant is also to state whether there are any current family orders or Family Court proceedings, whether the respondent has a firearm, and whether the applicant wishes the respondent to be present at a first hearing.

2.7.26. A telephone application need not be in any particular form, and can be made by telephone, fax, radio, video conference, electronic mail or any other similar method (s 19). It is to be made to an authorised magistrate, and must be made either by an authorised person or by a person seeking to be protected (or parent, guardian or child welfare officer) who has been introduced by an authorised person (s 18).

Police powers when application made and obligation to investigate

- 2.7.27. If a police officer reasonably suspects that a person is committing, has committed, or is likely to commit an act of family and domestic violence which is a criminal offence or has put the safety of a person at risk, the officer must investigate the matter (s 62A).
- 2.7.28. A police officer may enter premises without warrant (but only after obtaining the approval of a senior officer), if the officer reasonably suspects that an act of family and domestic violence is being committed, or was committed before the officer's arrival (s 62B). The police officer may search the premises for a weapon and to establish whether anyone needs assistance, and may remain on the premises as long as is necessary to investigate, to ensure that there is no imminent danger, and to give or arrange for reasonable assistance.
- 2.7.29. After an investigation referred to in s 62A, or after entering or searching premises under s 62B, a police officer must (s 62C):
- apply for a VRO, in person or by telephone; or
 - make a police order; or
 - make a written record of the reasons why he or she did not apply for or make an order.
- 2.7.30. If a telephone application or a police order is being made, a police officer may require the respondent person to remain in a particular place so as to facilitate service of any resulting order. If the person does not remain in the place (or the officer reasonably believes that the person will not do so), the officer may arrest and detain the person in custody for up to 2 hours (s 62F).

Content and effect of an order

General conditions

- 2.7.31. A VRO may impose restraints on the lawful activities and behaviour of the respondent that the court considers appropriate to prevent the respondent:
- committing an act of abuse against the person seeking to be protected;
 - if the person seeking to be protected is a child, exposing a child to an act of abuse committed by the respondent;
 - behaving in a manner that could reasonably be expected to cause fear that the respondent will commit such an act (s 13(1)).
- 2.7.32. The restraints that may be imposed (s 13(2)) include restraining the respondent from:
- being on or near premises where the person seeking to be protected lives or works;
 - being on or near specified premises or in a specified locality or place;
 - approaching within a specified distance of the person seeking to be protected;

- communicating, or attempting to communicate (by whatever means), with the person seeking to be protected;
- preventing the person seeking to be protected from obtaining and using personal property reasonably needed by the person seeking to be protected, even if the respondent is the owner of, or has a right to be in possession of, the property;
- causing or allowing another person to engage in conduct of a type referred to above.

2.7.33. A VRO automatically includes a restraint on possession of firearms (discussed below) (s 14).

Exclusion conditions

2.7.34. A VRO may prohibit the respondent from entering or remaining in the place where the protected person lives, even if the respondent would otherwise be legally entitled to have access to or remain in that place (s 13(2) and (4)). So, for example, the respondent can be prohibited from entering or remaining in the family home even if the respondent is the owner or tenant.

Firearms

2.7.35. Every VRO includes a restraint prohibiting the respondent from being in possession of a firearm or firearms licence and from obtaining a firearms licence (s 14(1)). The respondent must surrender all firearms and firearms licences (s 14(2)). The police have power to search for and seize a firearm or firearms licence that the respondent refuses to surrender (s 62E).

2.7.36. However, the court may permit the respondent to have possession of a firearm if (s 14(5)):

- the respondent cannot otherwise carry on his or her usual occupation; and
- the conduct which gave rise to the VRO 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.

2.7.37. If the court permits the respondent to possess a firearm, the court must impose any reasonable conditions requested by the applicant or person seeking to be protected.

Duration, revocation and variation of an order

- 2.7.38.** A VRO comes into force when it is served on the respondent, or if a later time is specified in the order, at that time (s 16(1)). Generally, a VRO is to be served personally, but in certain circumstances it can be served orally (including by telephone) or by post (s 55). If a court is satisfied a person is deliberately avoiding being served, it can order substituted service, i.e. specified steps to be taken which will be sufficient to constitute service (s 60).
- 2.7.39.** A final VRO made at a final order hearing remains in force for the period specified in it, or if no period is specified, for 2 years (s 16(5)). In the case of an interim order that becomes a final order under s 32, the duration is calculated from the date on which the interim order came into force (s 16(5)(c)). Where a telephone order becomes a final order under s 32, the maximum duration of the order is 3 months (see s 16(5)(a)).
- 2.7.40.** An 'interim order' is a telephone order specified to last for more than 72 hours, or an order for more than 72 hours made by a court under s 29(1)(a) (at a first hearing in the absence of the respondent), or during certain other proceedings (ss 43A(7)(a) and 63(4b)). An interim order usually remains in force until (s 16(4)):
- a final order comes into force;
 - a final order hearing in respect of the matter is concluded without a final order being made;
 - the interim order is cancelled or expires; or
 - in the case of a telephone order, 3 months from the time the order came into force.
- 2.7.41.** If a telephone order, or order under s 29(1)(a), is specified to have a duration of 72 hours or less, the order remains in force for the period specified in it. However, if the order is not served on the respondent within 24 hours of the order being made, the order lapses (s 16(2)).
- 2.7.42.** A police order must be either a 24 hour or a 72 hour police order (s 30F). A 24 hour police order lapses if it is not served on the respondent within two hours of being made, and remains in force for 24 hours after it has been served. A 72 hour police order lapses if it is not served within 24 hours. After being served it remains in force for 72 hours or for a shorter time specified in the order which would, in the opinion of the police officer, be sufficient time for an application to be made to the court. A police order cannot be extended or renewed, and another police order cannot be made in relation to the same facts (s 30H).

- 2.7.43. An application for the variation or cancellation of a VRO may be made by the person protected by the order, or a police officer on his or her behalf, or (with leave) by the respondent (s 45). If the person protected by the order is a child, an application may also be made by a parent or guardian or a child welfare officer (s 45(2)(a)).
- 2.7.44. If the respondent makes the application, the court must decide whether to grant leave for the application to continue, and must do so only if it is satisfied that (s 46):
- there is evidence to support a claim that a person protected by the order has persistently invited or encouraged the applicant to breach the order, or by his or her actions has persistently attempted to cause the applicant to breach the order;
 - there has been a substantial change in the relevant circumstances since the order was made; or
 - in respect of an application to vary an interim order, there is evidence to support a claim that the restraints imposed by the order are causing the applicant serious and unnecessary hardship and that it is appropriate that the application be heard as a matter of urgency.
- 2.7.45. After considering an application for variation or cancellation of a VRO, the court may cancel the VRO, and/or make a new VRO, or dismiss the application (s 49).

Enforcement and breach of an order

- 2.7.46. It is an offence to breach a VRO (including a police order), with a maximum penalty of 2 years imprisonment or a \$6,000 fine, or both (s 61).
- 2.7.47. If, in committing an offence under this section, a child with whom the offender is in a family and domestic relationship is exposed to an act of abuse, this is to be taken to be an aggravating factor for sentencing purposes (s 61(4)).
- 2.7.48. The WA Act makes no specific provision with respect to the arrest of a person suspected of having breached a VRO. However, because breach of a VRO is a criminal offence, the normal rules under Western Australian criminal law in relation to matters such as arrest, remand and bail will apply.

Procedural protections for applicants and witnesses

- 2.7.49.** The applicant for a VRO must choose whether to have the first hearing in the respondent's absence, or whether to proceed directly to a defended hearing (s 26). A hearing in the absence of the respondent is heard in closed court, and the person seeking to be protected is entitled to have a support person(s) with them (s 27). At such a hearing the applicant may give evidence by affidavit, rather than orally (s 28). At the end of a hearing in the respondent's absence, the court may make a VRO which, if it is for more than 72 hours, is an interim VRO (s 29).
- 2.7.50.** In any proceedings relating to a VRO, the court must consider whether it is likely that, if special arrangements are not made, a party or a witness would be unable to give evidence satisfactorily, or would suffer severe emotional trauma or be unnecessarily intimidated or distressed. If so, the court may make arrangements to reduce that likelihood (r 10A of the WA Regulations). For example, such arrangements may include the use of closed-circuit television or shielding devices such as one-way glass. However these arrangements must ensure that the judge and all parties to the matter, or their counsel, are able to see, hear and speak to each witness while he or she is giving evidence.
- 2.7.51.** (There are also special provisions for children involved in VRO proceedings, discussed below.)
- 2.7.52.** A court that makes a VRO must explain, in the appropriate language, to the person protected (or their parent or guardian) and the respondent, if they are in court, the purpose, terms and effect of the order, and the consequences of breaching it (s 8). If the protected person or the respondent is not in court, a written explanation must be sent to that person. A similar explanation must be given by a police officer who makes a police order (s 30E(3)).
- 2.7.53.** A court must not reveal to a party to proceedings under the WA Act information relating to the whereabouts of another party or a witness, and it is an offence for any person to disseminate such information (s 70). The court can specify in the VRO that these prohibitions do not apply if satisfied that the person to whom the information relates has agreed to this, or the information is to be disclosed to someone who is already aware of the person's whereabouts.

Protection of children

- 2.7.54.** As already mentioned, a VRO may be made for the protection of a child, including on the basis of exposure to an act of family and domestic violence, against a person with whom the child is in a family and domestic relationship (s 11B).

2.7.55. Division 1 of Part 6 contains protections for children in VRO-related proceedings. In any proceedings that affect or may affect the well-being of the child the court may request child welfare authorities to intervene (s 50D). Except in the Children's Court, a child may give oral evidence only with the leave of the court, which can be granted only in exceptional circumstances (s 53A). If the child does give evidence, and video link facilities are available, the evidence must be given from outside the courtroom and transmitted via video link (s 53B). A child who gives oral evidence is entitled to have a support person(s) nearby (s 53C), and must not be directly cross-examined by an unrepresented person (s 53D). Previous statements by the child may be admitted as evidence, despite the rule against hearsay (s 53E). A child may be summonsed to a hearing in a court other than the Children's Court only with the leave of the court, which can be given only in exceptional circumstances (s 53F).

Provisions relating to mediation, counselling or rehabilitation

2.7.56. No provision is made in the WA Act for mediation or counselling in connection with the making of an application for a VRO.

2.7.57. However, where a court makes a VRO, it must explain to the person protected and to the respondent, if they are in court, that counselling and support services may be of assistance and, where appropriate, the court is to refer the person to specific services (s 8(1)(h)(i)). (A written explanation is to be sent where the persons concerned are not in court.) A similar explanation, and if appropriate a referral, must be given by a police officer who makes a police order (s 30E(3)(c)).

Recognition and enforcement of orders made in other jurisdictions

2.7.58. A person protected by an 'interstate order', or a police officer, may apply to a court for registration of that order (s 75). 'Interstate order' means a restraint order made by a court of another State or Territory under a law of that State or Territory corresponding to the WA Act (s 74). Once registered, the interstate order operates in Western Australia as if it were a final VRO that had been served on the respondent when it was registered (s 77). Notice of the registration is not to be given to the respondent, unless the applicant for registration so requests (s 76). Where a registered order is varied by a court in the State or Territory in which it was made and a notice of the variation is given to the registrar of the relevant Western Australian court, the variation operates in Western Australia (s 78). A registered order may also be varied or cancelled under Part 5 of the WA Act (s 79).

2.7.59. Similar registration provisions apply to a 'foreign restraining order' that is in force under a corresponding law of New Zealand or a prescribed country (ss 79A-79F).



8 Australian Capital Territory: Domestic Violence and Protection Orders Act 2008 (ACT)

- 2.8.1. In the ACT, the principal legislation currently in force that relates to protection orders in the domestic violence context is the *Domestic Violence and Protection Orders Act 2001* (ACT). However, that Act will be repealed and replaced by the *Domestic Violence and Protection Orders Act 2008* (ACT) (the ACT Act), upon its commencement on 30 March 2009. Accordingly, in this Report we address only the ACT Act of 2008.
- 2.8.2. The ACT Act is not limited to authorising the making of orders for the protection of persons from domestic violence, but also provides for the making of ‘personal protection orders’. Those orders protect persons from ‘personal violence’ that is not ‘domestic violence’, as defined. However, in this Chapter we focus on domestic violence orders.

Objects of the ACT Act

- 2.8.3. The object of the ACT Act in relation to domestic violence is (s 6(a)):
- to prevent violence between family members and others who are in a domestic relationship, recognising that domestic violence is a particular form of interpersonal violence that needs a greater level of protective response ...*
- 2.8.4. Section 7(1)(a) of the ACT Act provides that the paramount consideration in deciding an application for a domestic violence order is the need to ensure that the ‘aggrieved person’, and any children at risk of exposure to domestic violence, are protected from domestic violence. (The term ‘aggrieved person’ is explained below.) Section 7(2) provides that any domestic violence order made under the Act must be the least restrictive of the personal rights and liberties of the person against whom the order is made, whilst still achieving the objects of the Act and giving effect to s 7(1)(a).

Domestic violence orders: Overview

- 2.8.5. Under the ACT Act, the protection orders that may be made in response to domestic violence are Domestic Violence Orders (DVOs): s 10.
- 2.8.6. A DVO restrains the 'respondent' from engaging in conduct that constitutes 'domestic violence' in relation to the 'aggrieved person'. In relation to a DVO, an 'aggrieved person' is a person against whom the conduct that may be domestic violence has been, or is likely to be, directed (see the definition in the Dictionary to the ACT Act). The 'respondent' is the person against whom a DVO is sought (s 9(1)). (The term 'domestic violence', as used in the ACT Act, is explained below.)
- 2.8.7. In addition to final orders, the ACT Act also provides for the making of interim orders. An interim order can only be made where an application for a final order has been made (s 30(1)). Under s 29, an interim order can be made in a domestic violence case if the court is satisfied that it is necessary to make the order to do one or more of the following until the application for the final order is decided:
- ensure the safety of the aggrieved person or a child of the aggrieved person; or
 - prevent substantial damage to the property of the aggrieved person or a child of the aggrieved person.
- 2.8.8. Provision is also made, in Part 9 of the ACT Act, for the making of emergency orders, which are a kind of DVO. These orders may be made by a judicial officer under s 69 where:
- it is outside the sitting hours of the Magistrates Court;
 - the respondent has behaved in such a way that there are reasonable grounds for believing that the respondent may cause physical injury to, or substantial damage to the property of, the aggrieved person or a child of the aggrieved person; and
 - it is not practicable to arrest the respondent, or there is no ground to arrest the respondent.

Who can make orders?

- 2.8.9. The ACT Magistrates Court has jurisdiction to make DVOs and to determine applications made under the ACT Act. Also, in certain cases where the ACT Children's Court makes a protection order under the *Children and Young People Act 2008* (ACT) (CYP Act), that Court is taken to have exercised jurisdiction under the ACT Act as the Magistrates Court when making the order (s 17 of the ACT Act).⁵⁹

⁵⁹ Section 17 applies in cases including where the ACT Children's Court is satisfied that the person against whom the protection order is proposed to be made 'has engaged in domestic violence in relation to the child or young person' (see ACT Act, s 17(1)(b) and CYP Act, s 460(1)(b)(i)). For the purposes of s 460 of the CYP Act, 'domestic violence' 'includes psychological abuse of a child or young person' (see the definition in s 458 of that Act).

Which relationships are covered?

- 2.8.10. As indicated above, a DVO is an order that restrains the respondent from engaging in conduct that constitutes 'domestic violence', which is defined in s 13(1) of the ACT Act as certain conduct against a 'relevant person'.
- 2.8.11. Section 15(1) provides that, in relation to a person (the first person), a 'relevant person' is:
- a 'domestic partner' of the first person;
 - a relative of the first person;
 - a child of a 'domestic partner' of the first person;
 - a parent of a child of the first person; or
 - someone who is in a 'domestic relationship' with the first person.
- 2.8.12. A person is the 'domestic partner' of the first person if he or she lives with the first person in a 'domestic partnership' – that is, where the two persons live together as a couple on a 'genuine domestic basis' (s 169 of the *Legislation Act 2001* (ACT)). (This includes, but is not limited to, spouses and civil partners.)
- 2.8.13. Section 15(3) of the ACT Act provides that the term 'domestic relationship' has the meaning given by s 3 of the *Domestic Relationships Act 1994* (ACT). Section 3(1) of that Act provides as follows:
- domestic relationship means a personal relationship between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and includes a domestic partnership but does not include a legal marriage.*
- 2.8.14. A 'personal relationship' may exist between people although they are not members of the same household (s 3(2)(a) *Domestic Relationships Act 1994* (ACT)).

Who may or must apply for an order?

- 2.8.15. An application for a DVO, other than an emergency order, may be made by an aggrieved person, or by a police officer or another person for an aggrieved person (s 18). Also, a police officer may help an aggrieved person to make an application (s 18(2)). As noted above, only police officers may apply for emergency orders (s 68).

Grounds on which an order may be made

2.8.16. Under s 46(1)(a) of the ACT Act, the Magistrates Court may, on application, make a final DVO if satisfied that the respondent has engaged in domestic violence. Section 13(1) of the ACT Act provides that a person's conduct is 'domestic violence', for that Act, if it:

- a) causes physical or personal injury to a relevant person;
- b) causes damage to the property of a relevant person;
- c) is directed at a relevant person and is a domestic violence offence;
- d) is a threat made to a relevant person, to do anything in relation to the relevant person or another relevant person that, if done, would fall under paragraphs (a), (b) or (c);
- e) is harassing or offensive to a relevant person;
- f) is directed at a pet of a relevant person and is an animal violence offence; or
- g) is a threat, made to a relevant person, to do anything to a pet of the person or another relevant person that, if done, would be an animal violence offence.

2.8.17. Section 13(2) defines 'domestic violence offence' (see paragraph (c) above) to include an offence against s 90 of the ACT Act, which is about contravening protection orders. A 'domestic violence offence' is also an offence against a provision of other Acts (eg. the *Crimes Act 1900* (ACT)) that are listed in Schedule 1 to the ACT Act. Those offences include murder, manslaughter, inflicting grievous bodily harm, assault, sexual assault and stalking.

2.8.18. DVOs may also be made by consent (s 43(1)). Under s 43(2), consent orders may be made:

- whether or not the parties to the proceeding have attended, or any party has attended, before the Court;
- whether or not any ground for making the order has been made out; and
- without proof or admission of guilt.

Application process

2.8.19. Section 8 of the *Court Procedures Act 2004* (ACT) makes provision for a form to be approved for a particular purpose including, relevantly, applications for DVOs under the ACT Act.⁶⁰

⁶⁰ Forms have not yet been approved for such applications. (As mentioned previously, the ACT Act will commence on 30 March 2009.)

2.8.20. On receiving an application for a DVO, other than an emergency order, the registrar must enter the application into the Magistrates Court's record, and set a return date for the application (s 22(1)).

2.8.21. Section 63(1) of the ACT Act provides that the registrar must:

- serve on an applicant a notice about the proceeding for a non-emergency DVO stating the date for the application's return before the Magistrates Court; and
- serve a copy of the application and the notice on the relevant people.

For s 63(1), the 'relevant people' are the respondent and anyone else the registrar is satisfied has a relevant interest in the proceeding and who does not already have a copy of the application and the notice (s 63(5)).

2.8.22. Service on the applicant or respondent under s 63(1) of the ACT Act must be personal service unless the Magistrates Court makes an order under s 66 (s 63(4)). Section 66 applies if personal service of an application under the Act is not reasonably practicable (s 66(1)). Under s 66(2), the Magistrates Court may order that the application be served in the way, stated in the order, that the court considers is likely to bring the application to the attention of the person required to be served.

2.8.23. Section 67(1) of the ACT Act provides that 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.

2.8.24. Section 33 relates to service of applications for interim orders. That provision provides that the Magistrates Court may make an interim order even if a copy of the application and a notice about the proceeding stating the date for the application's return before the court have not been served on the respondent.

2.8.25. Under s 24(1) of the ACT Act, generally the registrar of the Magistrates Court must hold a preliminary conference in relation to an application for a DVO (other than an application for an emergency order). If, at any time during the preliminary conference, the registrar is satisfied that the application is likely to be more effectively resolved by mediation than by a hearing, the registrar must:

- recommend to the parties to the application that they seek mediation; and
- give the parties information about mediation; and
- adjourn the preliminary conference to allow for mediation to happen (s 25).

Police powers when application made and obligation to investigate

2.8.26. Under s 75(1), if it is proposed to apply for an emergency order against a person, a police officer may:

- if appropriate, remove the person to another place; and
- detain the person until the application for the order has been dealt with and a copy of any order made is given to the person.

A person must not be detained under s 75 for longer than 4 hours (s 75(2)).

2.8.27. Section 83 of the ACT Act is concerned with a situation where a police officer dealing with an incident is satisfied that there are reasonable grounds for believing that a person may cause physical injury to an aggrieved person if an emergency order is not made. If the officer decides, in such circumstances, not to apply for an emergency order, the officer must make a record of the decision and the reasons for it (s 83(2)).

Content and effect of an order

General conditions

2.8.28. A final order may contain the conditions or prohibitions the Magistrates Court considers necessary or desirable (s 48(1)), including:

- prohibiting the respondent from being on premises where the aggrieved person lives (s 48(2)(a)), works (s 48(2)(b)) or is likely to be (s 48(2)(c));
- prohibiting the respondent from being in a particular place (s 48(2)(d)), or being within a particular distance from the aggrieved person (s 48(2)(e)); and
- prohibiting the respondent from contacting, harassing, threatening or intimidating the aggrieved person (s 48(2)(f)), or damaging the aggrieved person's property (s 48(2)(g)).

2.8.29. These prohibitions may also be extended to the respondent's conduct in relation to any child of the aggrieved person, or any other child if the court is satisfied that there is an unacceptable risk of the child being exposed to domestic violence (s 48(2)(h)).

2.8.30. A DVO covers conduct not only within but also outside the ACT (s 12 of the ACT Act).

Exclusion conditions

2.8.31. Interim and final DVOs may prohibit the respondent from being on premises where the aggrieved person lives (ss 35(1) and 48(2)(a)). A respondent who normally lives with an aggrieved person can thus be excluded from the family home.

Firearms

2.8.32. If an interim DVO is made in relation to a respondent who is the holder of a firearms licence, that licence is suspended by force of s 40 of the ACT Act until the interim order ends (s 40(2)). The Magistrates Court may not make a consent order under which the licence is not suspended (s 40(4)). Section 40(5) provides that the Magistrates Court may order:

- the seizure of the firearms licence for the period stated in the interim DVO; and
- the seizure and detention for that period of any firearm or ammunition in the respondent's possession.

2.8.33. If a final DVO is made in relation to a respondent who is the holder of a firearms licence, that licence is cancelled by force of s 57 of the ACT Act (s 57(2)). The Magistrates Court may not make a consent order under which the firearms licence is not cancelled (s 57(4)). Under s 57(5), the Magistrates Court may order:

- the seizure of the firearms licence; and
- the seizure of any firearm or ammunition in the respondent's possession.

2.8.34. If an emergency order is made in relation to a respondent who is the holder of a firearms licence, the firearms licence is, by force of s 80 of the ACT Act, suspended until the order ends or is revoked (s 80(1)). A judicial officer may not make a consent order under which the firearms licence is not suspended (see s 43(3)). Section 80(2) provides that a judicial officer who makes an emergency order may also order:

- the seizure of the firearms licence for the period that the order is in force; and
- the seizure and detention for that period of any firearm and any ammunition for a firearm in the respondent's possession.

Duration, revocation and variation of an order

- 2.8.35.** A final DVO remains in force for 2 years, or a shorter period as stated in the order (s 55(1) of the ACT Act). However, the Magistrates Court may make such an order for a longer period if satisfied that there are special or exceptional circumstances that justify the longer period (s 55(2)). A final DVO must not be longer than 2 years if made by consent (s 55(3)).
- 2.8.36.** An interim DVO (other than an order made by consent) must not be in force for more than 2 years (s 37 of the ACT Act). An order made by consent remains in force for a period of up to 16 weeks (as stated in the order) (s 45(1)). Under s 38, an interim DVO ends before the end of the period stated in the order if any of the following happens:
- it is revoked;
 - the application on which it was made is dismissed;
 - a final DVO is made and the respondent is present when that order is made; or
 - if the respondent is not present when a final DVO is made – that order is served on the respondent.
- 2.8.37.** In circumstances where the respondent is not present when a final DVO is made, and an interim DVO would expire before the final order is served on the respondent, the interim order is taken to continue in force until the final order is served (s 39(2)).
- 2.8.38.** Under s 77 of the ACT Act, an emergency DVO remains in force until the earliest of the following:
- close of business on the second day after the day when the order is made (ignoring any day when the Magistrates Court is not open for business (see s 115));
 - the order is revoked;
 - a final DVO or an interim DVO made against the respondent in relation to the aggrieved person is served on the respondent.
- 2.8.39.** Under s 58(1) of the ACT Act, generally the Magistrates court may, on application, amend a DVO if satisfied that:
- the order as amended could be made on application for a DVO; and
 - if the amendment of a DVO would reduce the protection of a child who is 15 years old or younger – the child is no longer in need of the greater protection provided by the unamended DVO.

2.8.40. Section 58(1) does not apply to a kind of amendment if the Act otherwise expressly deals with the grounds for that kind of amendment or revocation (s 58(3)). For example, the Magistrates Court may, on application, amend an interim order only if satisfied that either:

- there has been a change in the circumstances of a party to the order; or
- the order causes unnecessary hardship to the respondent, and amending the order will not adversely affect the safety of the aggrieved person or a child of the aggrieved person.

Enforcement and breach of an order

2.8.41. Under s 90(2) of the ACT Act, a person who is subject to a DVO commits an offence if he or she engages in conduct that contravenes the order. The maximum penalty for the offence is a fine of 500 penalty units (currently \$50,000), or imprisonment for 5 years, or both.

2.8.42. Section 90 applies only if the person who is subject to a domestic violence order was present when the order was made, or has been personally served with a copy of the order (s 90(1)). Section 90 applies to conduct engaged in outside the ACT as well as conduct engaged in within the ACT (s 90(3)).

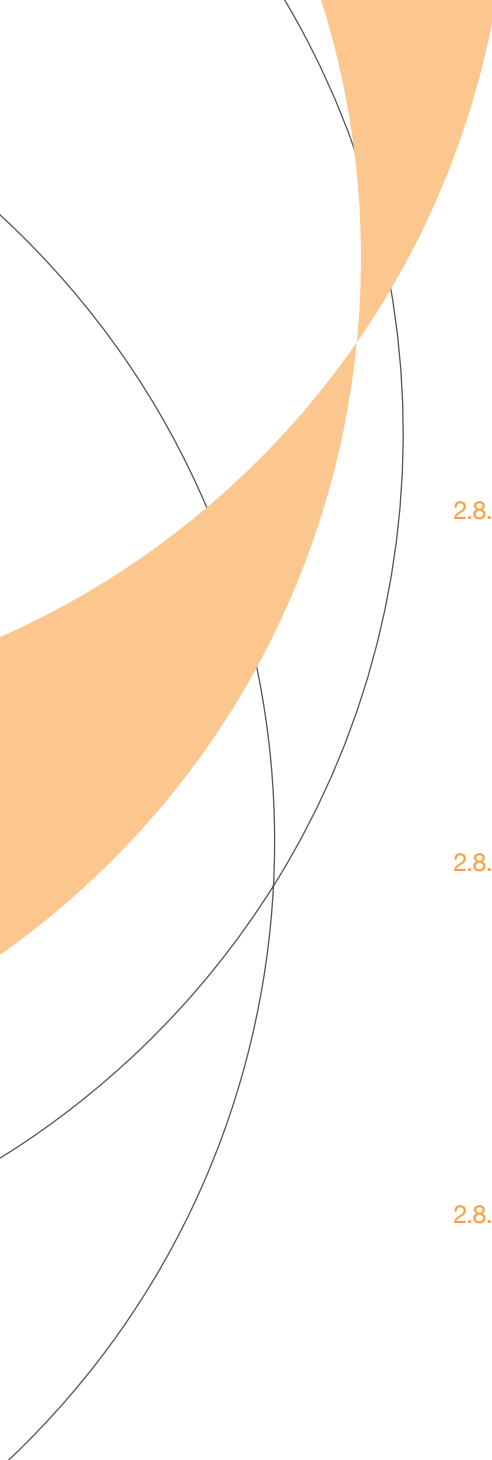
2.8.43. The ACT Act makes no special provision with respect to the arrest of a person suspected of having breached a DVO. However, because breach of a DVO is a criminal offence, the normal rules under ACT criminal law in relation to matters such as arrest, remand and bail will apply.

Procedural protections for applicants and witnesses

2.8.44. If an application form for a DVO requires the aggrieved person's home or work address to be included in the application for the order, the address need not be included unless the aggrieved person agrees to its inclusion (s 21 of the ACT Act).

2.8.45. The aggrieved person's home or work address must not be included in a DVO (s 87(1) of the ACT Act). However, under s 87(2), the aggrieved person's home or work address may be included if:

- the aggrieved person agrees to the address being included; or
- it is necessary to include the address to allow the respondent to comply with the order; or
- the Magistrates Court, registrar or another judicial officer making the order is satisfied that the respondent already knows the address.



2.8.46. Under s 111(1) of the ACT Act, a person commits an offence if the person publishes (completely or partly) an account or report of a proceeding on an application for a DVO, and the account or report:

- identifies a party to the proceeding; or
- identifies a person who is related to, or associated with, a party to the proceeding or is, or is claimed to be, in any other way concerned in the matter to which the proceeding relates; or
- identifies a witness to the proceeding; or
- allows the identity of a person mentioned above to be worked out.

2.8.47. Section 112 of the ACT Act contains exceptions to the offence under s 111(1). Section 112(2) provides that s 111 does not prevent the publication of an account or report of a proceeding on an application for a DVO if the publication is a permitted publication about proceedings mentioned in Schedule 2, s 2.2. A permitted publication about proceedings includes:

- information communicated to a court or tribunal under s 60CF(1) or (2) of the *Family Law Act 1975* (Cth),⁶¹ and
- information given to the chief executive responsible for, or an authorised person under the CYP Act to allow the chief executive to exercise his or her powers under the care and protection Chapters of that Act.

2.8.48. Further, under s 112(3)(b) of the ACT Act, the Magistrates Court may make an order allowing circulation of, or a magistrate may give permission to circulate, information the publication of which would otherwise contravene s 111(1) if satisfied that it will promote compliance with the DVO.

⁶¹ Section 60CF makes provision for informing courts of family violence orders which apply to a child, or a member of the child's family. A 'family violence order' is an order made under a prescribed law of a State or Territory to protect a person from family violence (see the definition in the *Family Law Act 1975* (Cth), s 4(1)).

Protection of children

- 2.8.49. Apart from applications for emergency orders (see paragraph 2.8.8 above), an aggrieved person who is a child may apply for a DVO in his or her own right (s 19(3)(b) of the ACT Act).
- 2.8.50. There is no specific prohibition on publishing the names or identities of children concerned in domestic violence proceedings, but the general prohibitions in s 111 would generally apply (see paragraph 2.8.46).

Provision for mediation, counselling or rehabilitation

- 2.8.51. Under the ACT Act, the Magistrates Court may recommend that the respondent, the aggrieved person or another relevant person take part in a program of counselling, training, mediation, rehabilitation or assessment (s 89).

Recognition and enforcement of orders made in other jurisdictions

- 2.8.52. A person may apply to the registrar of the Magistrates Court for registration of a recognised order (s 103(1) of the ACT Act). Relevantly, a 'recognised order' is an order under a law of a State, another Territory or New Zealand that corresponds to a DVO (s 102). A registered order is enforceable in the ACT as if it were a final order that had been personally served on the respondent, and may be amended or revoked in the same way as a final order (s 105).



9 Northern Territory: Domestic and Family Violence Act 2007 (NT)

2.9.1. In the Northern Territory the principal legislation relating to domestic violence protection orders is the *Domestic and Family Violence Act 2007* (NT) (the NT Act). An amendment passed on 18 February 2009 now provides for mandatory reporting of serious physical harm in domestic relationships.

Objects of the NT Act

2.9.2. The objects of the NT Act are set out in s 3(1) as follows:

- (a) to ensure the safety and protection of all persons, including children, who experience or are exposed to domestic violence; and
- (b) to ensure people who commit domestic violence accept responsibility for their conduct; and
- (c) to reduce and prevent domestic violence.

2.9.3. Section 3(2) provides that the objects are to be achieved by providing for:

- (a) the making of domestic violence orders to protect people from domestic violence and to encourage the people committing it to change their behaviour;
- (b) the registration of orders made in other jurisdictions;
- (c) the enforcement of those orders.

Domestic violence orders: Overview

2.9.4. The NT Act provides for two categories of domestic violence orders (DVOs) – court DVOs and police DVOs. Court DVOs are of three broad types:

- a CSJ DVO made by the Court of Summary Jurisdiction (CSJ) (s 28) (interim DVOs (s 35) and consent DVOs (s 38) can also be made);
- a DVO made by a court in criminal proceedings (s 45); or
- a DVO (including a police DVO) that has been confirmed by the CSJ (s 82).

2.9.5. A police DVO may be made by an authorised police officer when it is necessary to ensure a person's safety, and it is not practicable to obtain a CSJ DVO because of urgent circumstances, but a CSJ DVO might reasonably have been made if it had been practicable to apply for one (s 41).

2.9.6. A person who is to be protected by a DVO is referred to as a 'protected person', and the person against whom the order is made as 'the defendant'. The person or court that issues a DVO is called 'the issuing authority' (s 4).

Who can make orders?

2.9.7. The CSJ, or a clerk of the CSJ, may make a DVO. In addition, a court before which a person pleads guilty to, or is found guilty of, an offence involving domestic violence may also make a DVO against that person (s 45(1)).

2.9.8. DVOs may also be made by the police, and in some cases may be confirmed or varied by a magistrate.

Which relationships are covered?

2.9.9. A DVO can be made for the protection of a person who is in a 'domestic relationship' with the person against whom the order is made (s 13(2)). Section 9 provides that there is a 'domestic relationship' between two persons if:

- one is or has been in a 'family relationship' with the other, i.e. a spouse or de facto partner, or is otherwise a relative, including a person who is a relative according to Aboriginal tradition or contemporary social practice (s 10);
- one has or has had custody, guardianship, or a right of access to the other;
- one ordinarily or regularly lives, or has lived, with the other person or with someone else who is in a family relationship with the other person;
- one is or has been in a family relationship with a child of the other person;
- one is or has been in an 'intimate personal relationship' with the other person (whether they are of the same or the opposite sex (s 11), i.e. if:
 - (i) they are engaged to be married to each other, including a betrothal under cultural or religious tradition; or
 - (ii) the persons date each other (whether or not there is a sexual relationship), taking account of circumstances of the relationship such as the level of trust and commitment, the duration of the relationship, the frequency of contact between them, and the level of intimacy between them; or
- one is or has been in a 'carers relationship' with the other (i.e. one of them is dependent on the ongoing paid or unpaid care of the other) (s 12).

Who may or must apply for an order?

2.9.10. The following persons may apply for a CSJ DVO (s 28):

- an adult in a domestic relationship with the defendant;
- with the leave of the Court, a young person (between 15 and 18) in a domestic relationship with the defendant;
- an adult acting for a person (including a child) who is in a domestic relationship with the defendant; or
- a police officer.

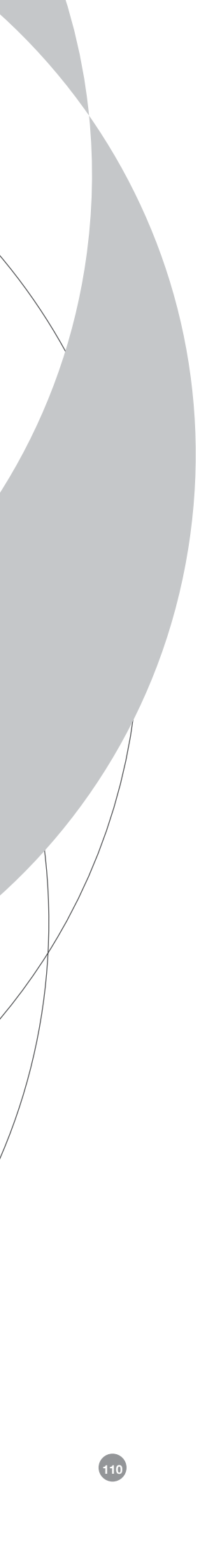
2.9.11. A police officer or child protection officer must apply for a CSJ DVO for the protection of a child if the officer reasonably believes that domestic violence has been, is being, or is likely to be committed, and that it has adversely affected the child's wellbeing, or is likely to do so (s 29).

Grounds on which an order may be made

2.9.12. An issuing authority may make a DVO only if satisfied that there are reasonable grounds for the protected person to fear the commission of 'domestic violence' against him or her by the defendant (s 18(1)). Because this is an objective test, the issuing authority may be satisfied that there are reasonable grounds for the protected person to fear domestic violence, even if the protected person does not give evidence, or denies fearing domestic violence.

2.9.13. Section 5 provides that 'domestic violence' is the commission (or attempt or threat of) any of the following conduct, against someone with whom the person is in a domestic relationship:

- causing physical harm or harm to a person's mental health, whether temporary or permanent (eg. sexual or other assault);
- damaging property, including causing the injury or death of an animal;
- intimidation, i.e. harassment (eg. including regular and unwanted contacting, or giving or sending offensive material to the person, any conduct that causes a reasonable apprehension of violence or damage to the victim's property, and any conduct that has the effect of unreasonably controlling the person or causes the person mental harm (s 6);
- stalking, which includes following the person, or approaching, watching or loitering near a place where the person lives, works or regularly goes for a social or leisure activity, if such conduct is engaged in on at least 2 separate occasions with the intention of causing harm to the person or causing the person to fear such harm to himself or herself (s 7);
- economic abuse, which includes coercing a person to relinquish control over assets or income, unreasonably disposing of the person's property (including jointly-owned property) without consent, unreasonably preventing the person from taking part in decisions over household expenditure or the disposition of joint property, and withholding money reasonably necessary for the maintenance of the person or his or her child (s 8).

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- 2.9.14.** The issuing authority may also make a DVO to protect a child if satisfied that there are reasonable grounds to fear that the child will be 'exposed' to domestic violence committed by or against a person with whom the child is in a domestic relationship (s 18(2)). Being 'exposed' to domestic violence includes not only seeing or hearing the violence, but also witnessing harm resulting from the violence (s 4). (For example, if a man physically assaults his de facto partner while his daughter is at school, the daughter is exposed to domestic violence if, on returning home, she sees her father's partner with resulting bruising.)
- 2.9.15.** A person who counsels or procures someone else to commit conduct that would be domestic violence if committed by the person is taken to have also committed the conduct (s 18). (For example, if a father advised his son to use physical violence against his (the son's) wife, the father would be committing domestic violence against the wife.)
- 2.9.16.** In deciding whether to make a DVO, the issuing authority must consider the safety and protection of the protected person to be of paramount importance (s 19).

Application process

- 2.9.17.** An application for a CSJ DVO must be in form approved by the Chief Magistrate and must be filed in the Court (s 30). The current approved form requires the names and addresses of the applicant and defendant, name and address for service of each protected person, a statement of the basis of the application, and an indication of the content of the order sought. It recommends, but does not require, the filing of a statutory declaration setting out the facts establishing a domestic relationship with the defendant, what has happened to make the application necessary and what is expected to happen in the future between the protected person and the defendant.
- 2.9.18.** As soon as practicable after the application is filed, a clerk of the court must give written notice to the parties of the time and place for the hearing of the application (s 31).

Police powers when application made and obligation to investigate

- 2.9.19.** The NT Act does not confer any powers of arrest that depend on an application being made. However, a police officer who reasonably believes that grounds exist for making a DVO against a person, and that it is necessary to remove the person to prevent an imminent risk of harm, has certain relevant powers (s 84). The police officer may enter premises, take the person into custody, and detain them for up to 4 hours until a DVO is made and given to the defendant.

Content and effect of an order

General conditions

- 2.9.20.** A DVO may impose the restraints on the defendant that the issuing authority considers necessary or desirable to prevent the commission of domestic violence against the protected person (s 21(1)(a)). Examples include restraining the defendant from contacting or approaching the protected person, or particular premises, or requiring the defendant to refrain from threatening or assaulting the protected person.
- 2.9.21.** A DVO may also impose on the defendant obligations that the issuing authority considers necessary or desirable to ensure the defendant accepts responsibility for the violence committed against the protected person, and to encourage the defendant to change his or her behaviour (s 21(1)(b)).
- 2.9.22.** In addition, a DVO may include other orders that the issuing authority considers are just or desirable in the particular case (eg. requiring the return of personal property to the defendant or the protected person) (s 21(1)(c)).

Exclusion conditions

- 2.9.23.** A DVO may include a condition restraining the defendant from contacting the protected person, including by remaining in the same home. If the defendant and the protected person normally live in the same home with a child, the issuing authority must apply a presumption that the protection of the protected person and the child are best achieved by them living in the home, when deciding on DVO conditions (s 20).
- 2.9.24.** A DVO may include a ‘premises access order’ requiring the defendant to vacate, or restraining the defendant from entering premises occupied by the protected person except on particular conditions (s 22). For example, a DVO might provide that a husband must leave the family home and can enter the home only by pre-arranged appointment with the protected person, in order to visit their children.

Firearms

- 2.9.25.** On the making of an interim DVO and until the DVO is confirmed or revoked, any firearms licence, permit or certificate of registration held by the defendant is automatically suspended (s 39 of the *Firearms Act*). A licence, permit or certificate of registration is automatically revoked on a final DVO being made (s 40 of the *Firearms Act*). The holder must immediately give the relevant firearm and the suspended/revoked licence, permit or certificate of registration to a police officer.

Duration, revocation and variation of an order

- 2.9.26.** A DVO (other than an interim DVO) is in force for the period stated in the DVO itself (s 27).
- 2.9.27.** The Court can make an interim DVO at any time during the proceeding for the hearing of an application for a CSJ DVO (s 35(1)). An interim DVO remains in force until a CSJ DVO is made and the defendant is either in the Court or has been given the CSJ DVO (s 35(3)). However, the Court can also revoke an interim DVO earlier, or fix a later date for it to expire after a CSJ DVO is made.
- 2.9.28.** A person commits an offence by contravening a DVO only if the person has been given a copy of the DVO, even though the DVO is 'in force' earlier. (See further in the discussion of enforcement.)
- 2.9.29.** The Court may vary or revoke a DVO on its own initiative or following an application (s 51). An application for variation or revocation may be made by, or on behalf of, a protected person (s 48). The defendant may apply for revocation or variation only with the leave of the Court. The Court can give the defendant leave to apply only if satisfied that there has been a substantial change in the relevant circumstances since the DVO was made, e.g. a change in care arrangements for children, or the defendant's completion of a rehabilitation program.
- 2.9.30.** If, because of urgent circumstances, it is not practicable to obtain a variation from a court, a court DVO, other than an interim DVO, can be varied by a magistrate, following an application by the police by phone, fax, or email. An application can be made only if the police officer is satisfied there has been a substantial change in the relevant circumstances since the DVO was made (ss 65, 66).
- 2.9.31.** A party to a police DVO may apply to a magistrate for a review of the DVO, and the magistrate may confirm, vary or revoke the DVO (Part 2.9).
- 2.9.32.** A copy of one of the following DVOs given to the defendant is taken to be a summons to appear before the CSJ to show cause why the DVO should not be confirmed by the court:
- a CSJ DVO that is made in the absence of the defendant, the defendant not having been given notice of the application (s 37);
 - a police DVO (s 44), including a police DVO that is confirmed by a magistrate (s 79);
 - a DVO that is varied without the defendant having an opportunity to be heard (s 59); or
 - a court DVO that is varied by a magistrate, in urgent circumstances (s 71).
- In such a case, at the hearing the Court may confirm (with or without variations) or revoke the DVO (s 82).


Enforcement and breach of an order

- 2.9.33.** If a DVO is in force against a person and the person contravenes the DVO, the person commits an offence, provided that he or she has been given a copy of the DVO (s 120). This is a strict liability offence, i.e. there is no need to prove that the defendant intended to contravene the DVO. The person is liable to a penalty of 400 penalty units (currently, \$44,000) or 2 years imprisonment (ss 121(1) and 122(2)). A copy of a DVO is taken to have been given to the defendant if the defendant was before the court when it was made, or it is served in accordance with s 25 of the *Interpretation Act* (NT) (including sending by post or fax), or given to the defendant in a way ordered by the court, or if a police officer informs the defendant, orally or in writing, of the making and terms of the DVO (s 119).
- 2.9.34.** Except in the case of a police DVO that has not been confirmed by the Court, if the defendant has previously been found guilty of contravening a DVO, the Court must record a conviction and impose a sentence of at least 7 days, unless:
- the offence does not result in harm to the protected person; and
 - the Court is satisfied that it is not appropriate in the particular circumstances (including, if the defendant is between 15 and 18 years old, because of the person's age) (ss 121(2),(3),(4) and 122(2),(3),(4)).
- 2.9.35.** The NT Act makes no special provision with respect to the arrest of a person suspected of having breached a DVO. However, because breach of a DVO is a criminal offence, the normal rules under the Northern Territory's criminal law in relation to matters such as arrest, remand and bail will apply.

Procedural protections for applicants and witnesses

- 2.9.36.** DVO proceedings⁶² must be held in closed court:
- at all times if the only protected person is a child;
 - while a vulnerable witness gives evidence;
- unless the court considers it in the interests of justice that the proceedings, or part of them, be open to the public (s 106).
- 2.9.37.** 'Vulnerable witness' means an adult protected person, or another adult witness who suffers from an intellectual disability or who, in the Court's view, is under a special disability (s 104). A vulnerable witness is entitled to give evidence from a place outside the courtroom using an audiovisual link. If no audiovisual link is available, or the witness chooses, the witness may give evidence from behind a screen, partition or one-way glass so that the witness cannot see the defendant (s 110). A vulnerable witness is entitled to be accompanied by a support person when giving evidence (s 111).

⁶² We refer to a hearing of an application for a DVO, or for confirmation, variation or revocation of a DVO, as 'DVO proceedings'. This does not include criminal proceedings for contravention of a DVO.

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- 2.9.38. The evidence of a child must be given by written or recorded statement, and the child is entitled to be accompanied by a relative or other person to provide emotional support (s 107). The child need not appear at the hearing and cannot be cross-examined (s 109).
- 2.9.39. If the defendant is not represented by a lawyer, the court may order that the defendant can cross-examine a witness with whom he or she is in a domestic relationship only by stating the question to the court or another authorised person, who then repeats it to the witness (s 114).
- 2.9.40. The court may admit and act on hearsay evidence in making, confirming, varying or revoking a DVO.
- 2.9.41. The issuing authority must explain to a protected person or the defendant, if present, the content and effect of a court DVO, and the consequences of contravening it, in a language or in terms that are likely to be readily understood by the person concerned (s 89).
- 2.9.42. A protected person's residential address must not be stated in a DVO unless it is already known to the defendant, or it is necessary to state the address in order to achieve compliance with the DVO (e.g. if the defendant must stay away from that address) and the protected person's personal safety will not be seriously threatened and his or her property is not likely to be damaged (s 25). A court DVO may prohibit the publication of the personal details of a protected person or witness, if publication would expose the person to the risk of harm (s 26). It is an offence to publish the name, or other identifying information, of a child who is a protected person, a witness, or otherwise mentioned or involved in a DVO proceeding (s 123).

Protection of children

- 2.9.43. Subject to some exceptions, a police officer or child protection officer who believes that domestic violence has affected or is likely to affect a child must apply for a DVO to protect the child (s 29). A court may make a DVO to protect a child who may be exposed to domestic violence committed by or against a person with whom the child is in a domestic relationship (s 18(2)).

2.9.44. During a hearing of an application for a DVO, or for confirmation, variation or revocation of a DVO, the court must be closed to the public at all times if the only protected person is a child, unless the court considers it to be in the interests of justice that the proceeding or part of it be in open court (s 106). The evidence of a child must be given by written or recorded statement, and the child is entitled to be accompanied by a relative or other person to provide emotional support (s 107). The child need not appear at the hearing and cannot be cross-examined (s 109). It is an offence to publish the name of, or other identifying information about, a child who is a protected person, a witness, or otherwise mentioned or involved in a DVO proceeding (s 123).

Provisions relating to mediation, counselling or rehabilitation

2.9.45. If the defendant consents, a court DVO may include an order requiring the defendant to take part in a rehabilitation program. The court must be satisfied that the defendant is a suitable person for the program and that there is a place available in the program (s 24).

Recognition and enforcement of orders made in other jurisdictions

2.9.46. The NT Act provides for the registration of 'external orders', i.e. orders in the nature of a DVO made under a prescribed law of a State, another Territory or New Zealand. An application for registration may be made by or on behalf of a protected person named in the order (s 93). A clerk of the court must either register the external order or refer it to the court for modification (s 94). Once the order is registered it is taken to be a court DVO (s 97).

2.9.47. Provision is also made for unregistered external orders to have effect for a limited time. If a police officer reasonably believes that a person in the Northern Territory is a defendant named in a current unregistered external protection order, the police officer must make a declaration. While the declaration is in force (for up to 72 hours), the external order has the effect of a court DVO



10 New Zealand: Domestic Violence Act 1995 (NZ)

2.10.1. In New Zealand, the principal legislation relating to protection orders in the domestic violence context is the *Domestic Violence Act 1995* (NZ) (the NZ Act).

Objects of the NZ Act

2.10.2. The object of the NZ Act, as described in s 5(1), is to reduce and prevent violence in domestic relationships by:


- a) Recognising that domestic violence, in all its forms, is unacceptable behaviour; and
- b) Ensuring that, where domestic violence occurs, there is effective legal protection for its victims.

2.10.3. Section 5(2) states that the NZ Act aims to achieve that object by:

- a) Empowering the court to make certain orders to protect victims of domestic violence:
- b) Ensuring that access to the court is as speedy, inexpensive, and simple as is consistent with justice:
- c) Providing, for persons who are victims of domestic violence, appropriate programmes:
- d) Requiring respondents and associated respondents to attend programmes that have the primary objective of stopping or preventing domestic violence:
- e) Providing more effective sanctions and enforcement in the event that a protection order is breached.

Protection orders: Overview

2.10.4. Under the NZ Act, a court may make, on application, a protection order (PO) (s 14). A PO is an order for the protection of a person against someone with whom the person has or has had a 'domestic relationship'. (The meaning of the term 'domestic relationship' is explained in paragraph 2.10.9 below.) In the NZ Act, a person who is to be protected by a PO is called a 'protected person', and the person against whom the order is made is called the 'respondent' (s 2).

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- 2.10.5.** If no notice of the application for the order has been given to the respondent, a temporary PO can be granted. A temporary PO becomes final after 3 months if it has been served on the respondent, and the respondent has not sought a hearing. A final PO can be granted by the court if notice of the application is given to the respondent, or if a hearing is held before a temporary PO becomes final.
- 2.10.6.** A temporary PO, while it remains in force, has the same effect as a final PO.
- 2.10.7.** The NZ Act also include provision for the making of orders relating to property: occupation orders, tenancy orders and furniture orders (Part 3).

Who can make orders?

- 2.10.8.** Protection Orders can be made by the Family Court or a District Court (s 7, definition of ‘Court’ in s 2).

Which relationships are covered?

- 2.10.9.** A PO can only be made where there is, or has been, a ‘domestic relationship’. There is a ‘domestic relationship’ (s 4) if a person:
- is a spouse or partner of the other person;
 - is a family member of the other person;
 - ordinarily shares a household with the other person (not just because they occupy the same house, or are landlord/tenant, or in an employment relationship); or
 - has a close personal relationship with the other person (not just an employment relationship). In deciding whether there is a close personal relationship, account is taken of the nature, intensity and duration of the relationship, but it need not be a sexual relationship.

Who may or must apply for an order?

- 2.10.10.** A person who is or has been in a domestic relationship with the respondent may apply to the court for a PO (s 7). An application may be made by a representative on behalf of a person who is unable to apply personally because of physical incapacity, or fear of harm, or for some other sufficient reason (ss 7(4), 12).
- 2.10.11.** The application for a PO must be made by a representative where the person who is eligible to apply:
- is under 16; or
 - does not have the capacity to understand the nature and foresee the consequences of decisions relating to his or her welfare, or does not have the capacity to communicate such decisions (ss 7(2) and (3), 11).

2.10.12. An application may be made either personally or by a representative where the eligible person is a 16 or 17 year old (s 9).

Grounds on which an order may be made

2.10.13. The court may make a PO if it is satisfied that:

- the respondent is using, or has used, domestic violence against the applicant, and/or a child of the applicant's family; and
- the order is necessary to protect the applicant and/or the child (s 14).

2.10.14. A 'child' is a person under 17 years of age, who has not been married or in a civil union or a de facto relationship. A 'child of the applicant's family' is a child who ordinarily or periodically resides with the applicant (whether or not that child is a child of the applicant and/or the respondent) (s 2).

2.10.15. 'Domestic violence' (see s 3) means any of the following conduct committed against a person with whom the respondent is, or has been, in a domestic relationship:

- physical abuse;
- sexual abuse;
- psychological abuse, including, but not limited to, intimidation, harassment, damage to property, and threats of physical, sexual, or psychological abuse.

2.10.16. In addition, causing or allowing a child to see or hear, or to be at risk of seeing or hearing, the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship is 'domestic violence' against the child (s 3(3)). For example, a man who assaults his partner, while the partner's child is in the next room, is likely to be committing domestic violence against the child as well as the partner.

2.10.17. A respondent who encourages another person to act in a way that would amount to domestic violence if engaged in by the respondent is regarded as having engaged in that behaviour personally. For example, if a father encouraged his son to intimidate his wife, an order could be made against the father if the court is satisfied that the order is necessary to protect the wife.

2.10.18. An order may also be made by consent of all the parties (s 86).

Application process

2.10.19. An application for a PO under the NZ Act must be made to the court in the form provided for in the Domestic Violence Rules 1996 (the NZ Rules) (rule 15). The application form for a PO requires the names of the protected person and the respondent, and any other person for the protection of whom, or against whom, the order is sought, any special conditions sought, and any request for the provision of a programme (Form DV 2, NZ Rules). It must be accompanied by a form setting out information about the respondent's access to weapons (rule 23).

2.10.20. The application must be accompanied by an affidavit setting out the evidence supporting the application (rule 21). An applicant for a PO may request that his or her residential address be kept confidential from the respondent (rule 22).

2.10.21. A person against whom an application is made must be given notice of the application except where the NZ Act or Rules provide that the application may be made without notice (rule 13(1)).

Police powers when application made and obligation to investigate

2.10.22. There is no provision in the NZ Act for a person to be arrested on the basis of an application for a PO, and no obligations are imposed on police in respect of investigation of suspected domestic violence.

Content and effect of an order

General conditions

2.10.23. A PO applies for the benefit of the applicant and also automatically applies for the benefit of any child of the applicant's family.

2.10.24. The court may direct that a PO will apply for the benefit of another 'specified person' if, because of a domestic relationship between the specified person and the applicant, the respondent acts towards the person in a way that would be domestic violence if there were a domestic relationship between the person and the respondent (s 16). For example, if a man threatens both his ex-wife and her new partner, the court could direct that a PO applied for by the ex-wife will also apply for the benefit of the new partner. Where practicable, the direction should be given with the consent of the person to be protected by it.

2.10.25. The court may also direct that a PO apply against the respondent's associates, if the respondent encourages them to engage in conduct that would be domestic violence if engaged in by the respondent (s 17). For example, if the respondent asks a friend to intimidate the respondent's ex-partner, the court, in granting a PO against the respondent, may direct that it will also apply to the friend. The associate concerned is called an 'associate respondent'.

2.10.26. By virtue of s 19, every PO is subject to standard conditions that:

- the respondent must not commit or threaten domestic violence against the protected person, or encourage another person to act in a way that would be domestic violence if engaged in by the respondent; and

- except while the protected person and the respondent are living together with the express consent of the protected person, the respondent must not engage in conduct such as: watching, loitering near or hindering access to the protected person's home, school or workplace; following or accosting the protected person; entering or remaining in a place occupied by the protected person without the latter's express consent; nor make any other contact with the protected person, except in an emergency, or in accordance with a written custody or access agreement or a special condition attached to the PO, or to attend a family group conference under other legislation. (This is referred to as the 'non-contact' condition.)

2.10.27. In addition, where the court makes a PO, it may impose any special conditions that it considers reasonably necessary to protect the protected person from further domestic violence by the respondent or associate respondent (s 27). For example, these may relate to arrangements for access to a child, or the manner and circumstances in which the respondent may make contact with the protected person.

Exclusion conditions

2.10.28. Part 3 of the NZ Act provides for the making of orders relating to property, including occupation orders and tenancy orders. An occupation order gives the applicant the right to live in a home and to exclude the respondent from it (ss 53, 54). If a tenancy order is made, the applicant becomes, legally, the tenant of the home, and the respondent ceases to be a tenant (s 58). These orders can only be made if it is necessary for the protection of the applicant, or if it is in the best interests of a child of the applicant's family. A person who has an interest in the property that would be affected must be given notice before an order (other than a temporary order) is made (s 74). A temporary occupation or tenancy order can be made on an application without notice to the respondent, but only if (s 60):

- the court is satisfied that the respondent has physically or sexually abused the applicant or a child of the applicant's family, and requiring notice would or might expose the applicant or a child of the applicant's family to physical or sexual abuse; and
- the court has made or makes a PO, unless the court considers that there are special reasons for not making a PO.

2.10.29. A temporary occupation or tenancy order becomes final after 3 months in the same way as a temporary PO (s 60(2)). Where an occupation or tenancy order is made on an application without notice while the applicant and the respondent are living in the same dwelling, the order expires on being discharged by the court, or on the discharge of the relevant temporary PO order or, if no PO was made, 7 days after the occupation or tenancy order is made (s 60).

Firearms

- 2.10.30.** Unless the court orders otherwise, protection orders are automatically subject to the standard firearms condition, i.e. that the respondent must not possess, or have under his or her control, any weapon, or hold a firearms licence, and must surrender any weapon or firearms licence within 24 hours of being served with the PO (s 21). Where a PO containing the standard weapons condition is served on the respondent, the nearest police station must be notified (s 89). The court may dispense with, modify, or discharge the standard firearms condition, but only if it is satisfied that the condition is not necessary to protect the persons protected by the PO (s 22).
- 2.10.31.** A firearms licence is deemed to be suspended on the making of a temporary PO, and to be revoked by a final PO (ss 21(2), 24). The police must detain a surrendered weapon for the period of suspension of a firearms licence (s 25). Where a firearms licence is revoked by a final PO, the firearm may be forfeited to the Crown under s 28 of the *Arms Act 1983* (NZ) (the Arms Act).
- 2.10.32.** Where a copy of a PO is provided to a police station under s 88, the officer in charge must immediately establish whether or not the respondent holds a firearms licence (s 90). If so, and if the licence has not been revoked by the PO, the officer in charge must arrange for immediate consideration to be given to revocation of the licence under the Arms Act, and to the exercise of powers under s 60A of the Arms Act. Section 60A of the Arms Act provides that if a police officer has reasonable grounds to suspect that a person has a firearm, and that a PO is in force against the person, or that there are grounds for an application for a PO, the police officer may without warrant search for and seize the firearm.

Duration, revocation and variation of an order

- 2.10.33.** A PO may be made without notice to the respondent if the court is satisfied that giving notice would or might entail delay that would cause a risk of harm or undue hardship to the applicant or a child of the applicant's family (s 13). A PO made on an application without notice is a temporary PO. A PO made on an application of which notice is given to the respondent is a final order (s 22(1)(a)).
- 2.10.34.** The court may extend the period for serving the temporary PO for up to 3 further months, and the temporary PO continues in force during any extensions. If, at the expiry of any extensions, the temporary PO has not been served on the respondent, the PO lapses.
- 2.10.35.** The respondent to a temporary PO is entitled to notify the court that he or she wishes to be heard on whether a final order should be substituted for the temporary order (s 76). In that case, the Registrar must assign a hearing date within 6 weeks. In addition, if the court considers that there is good reason why a temporary PO should not become final without a hearing at which the applicant or the respondent, or both, are present or represented, the court may direct that there be a hearing and may summons the respondent to appear (s 78).

2.10.36. At a hearing, the court may discharge the temporary PO, with or without making a final order in its place (s 80). A hearing can be adjourned only once, in the absence of special reasons for a further adjournment, and a temporary PO continues in force during an adjournment (s 80).

2.10.37. A temporary PO continues in force until:

- it becomes a final order after 3 months (if it is served on the respondent, and the respondent does not request a hearing); or
- lapses (if not served on the respondent within the required time); or
- is discharged by the court.

2.10.38. A final PO continues in force indefinitely, unless it is discharged under s 47.

2.10.39. On the application of the applicant or the respondent, the court may vary or discharge a special condition, impose a new special condition, or make, vary or discharge a direction to attend a programme (s 46(1)). On the application of the applicant, the court may vary a PO by extending it to apply against, or for the benefit of, another person (s 46(3)). Special conditions applying to protect a person other than the applicant may be varied or discharged on application of that other person (but not a child) (s 46(4)).

2.10.40. Under s 47, the court may, if it thinks fit, on the application of the applicant or the respondent, discharge a PO. An associate respondent or a protected person other than the applicant may also apply for the discharge of a PO in relation to them.

2.10.41. Where an application is made for discharge of a temporary PO, there must be a hearing within 6 weeks (ss 46(5), 47(6)).

Enforcement and breach of an order

2.10.42. A person who, without reasonable excuse, contravenes a PO is guilty of an offence, and is liable to a maximum penalty of 6 months imprisonment or a \$5,000 fine. For offences other than failing to attend a programme, if the person has been convicted at least twice before in the last three years, the maximum prison sentence is increased to 2 years (s 49).

2.10.43. A police officer may arrest a person without warrant if the police officer has good cause to suspect the person of breaching a PO (other than by failing to attend a programme) (s 50). In deciding whether to do so, the police officer must take into account:

- the risk to the safety of any protected person if the arrest is not made;
- the seriousness of the alleged breach of the PO;
- the length of time since the alleged breach occurred;
- the restraining effect on the person liable to be arrested of other persons or circumstances.

Procedural protections for applicants and witnesses

2.10.44. In proceedings other than criminal proceedings, the court may call and examine witnesses itself (s 82), and is not bound by the rules of evidence (s 8). The only persons who may be present during non-criminal proceedings are:

- officers of the court, the parties, lawyers appearing in the proceedings, witnesses, and other person whom the Judge permits to be present; and
- a reasonable number of persons nominated by the applicant or a protected person, to provide support to him or her (s 83).

Protection of children

2.10.45. For the purposes of the NZ Act, a child is a person under 17 who has not been married or in a civil union or de facto relationship. A child can apply for a PO through a representative. A minor aged 16 or 17 can apply for a PO either personally or through a representative. In the case of a child, 'domestic violence' includes allowing a child to see or hear, or to be at risk of seeing or hearing, the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship.

2.10.46. In addition, a PO obtained by another person applies for the benefit of any child of the applicant's family (s 16).

Provisions relating to mediation, counselling or rehabilitation

2.10.47. Normally, a court making a PO must direct the respondent, and may direct an associate respondent, to attend a specified 'programme' (s 32). A programme provided to a respondent has the primary objective of stopping or preventing domestic violence on the respondent's part (s 2).

Recognition and enforcement of orders made in other jurisdictions

2.10.48. A New Zealand court can register a 'foreign protection order' that is sent to the Secretary of the Department responsible for courts, with the required certification from the court where it was made, and with information that the protected person is in, or will be in, New Zealand (s 97). In broad terms, a 'foreign protection order' is an order made by a court of Australia, an Australian State or Territory, or a declared foreign country, that has been made to protect a person from conduct that would justify the making of a PO under the NZ Act (s 2).

2.10.49. Once registered, a foreign protection order has generally the same effect and may be enforced as if it had been made under the NZ Act (s 99). A foreign protection order, in the terms in which it has effect in New Zealand, may be varied in the same way as a PO under the NZ Act (s 99).

Appendix to Part 2: Penalties for breach of domestic violence protection orders

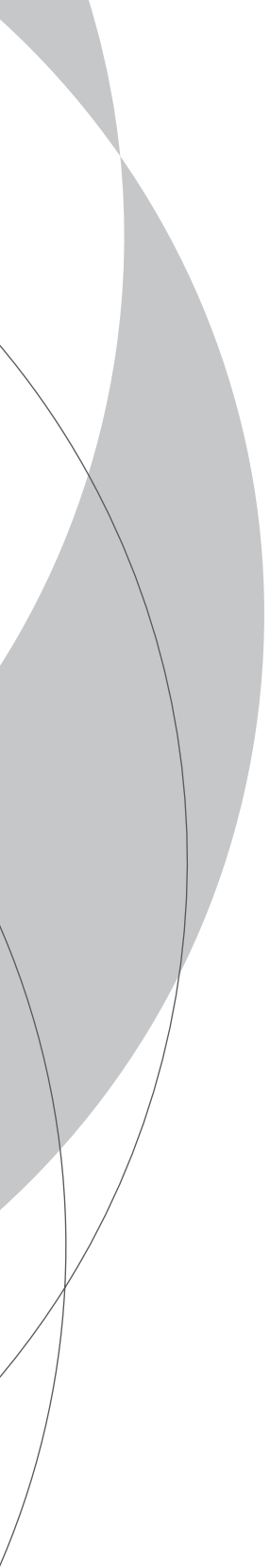
Jurisdiction	Penalty
ACT	The maximum penalty is a fine of 500 penalty units (\$50,000) or a term of imprisonment of 5 years or both: s 90 of the ACT Act.
NSW	The maximum penalty is a term of imprisonment of 2 years or 50 penalty units (\$5,500) or both: s 14 of the NSW Act. ⁶³
QLD	A first offence carries a maximum penalty of 1 year imprisonment or 40 penalty units (\$4,000), with 2 years for third and subsequent offences within a period of 3 years: s 80 of the Queensland Act.
NT	The maximum penalty is 400 penalty units (\$44,000) or a term of imprisonment of 2 years: ss 121-2 of the NT Act. ⁶⁴
WA	The maximum penalty is a \$6000 fine or a term of imprisonment of 2 years or both: s 61 of the WA Act.
SA	The maximum term of imprisonment is 2 years: s 15 of the SA Act. ⁶⁵
VIC	The maximum penalty is a term of imprisonment of 2 years or 240 penalty units (\$27,220.80) or both: ss 123 and 37 of the Victorian Act.
TAS	The Tasmanian Act provides for a tier of penalties from a maximum of 1 year or a fine of 20 penalty units (\$2,400) for a first offence, to 5 years for a fourth or subsequent offence: see s 35 of the Tasmanian Act.
NZ	The maximum penalty is a fine of \$5,000 or 6 months imprisonment, increasing to 2 years on the third offence in a period of 2 years: s 49. ⁶⁶

⁶³ The NSW Act provides that, unless a court orders otherwise, a person who is convicted of breaching an order must be sentenced to a term of imprisonment if the breach involved violence against a person (s 14(4)). This rule does not apply if the person being sentenced was under 18 at the time of the offence.

⁶⁴ The NT Act includes a presumption that if a person has previously been found guilty of contravening a DVO, a court must record a conviction and sentence the person to at least 7 days imprisonment: s 121(2). The rule does not apply if the contravention did not result in harm to a protected person, and the court is satisfied that it would not be appropriate to record a conviction in the circumstances of a particular case: s 121(3).

⁶⁵ The SA Act does not prescribe a financial penalty for contravention of an order. A court may impose a fine in substitution for a sentence of imprisonment if the court thinks that a good reason exists for departing from the penalty prescribed by the Act: see *Criminal Law (Sentencing) Act 1988* (SA), s 18.

⁶⁶ Under the *Sentencing Act 2002* (NZ), a court may sentence an offender to pay a fine instead of imposing a sentence of imprisonment if an enactment provides for a sentence of imprisonment but does not prescribe a fine: s 39.



Part 3:
Consideration of
specific issues relating
to State, Territory
and New Zealand
legislation



1 What constitutes domestic violence

3.1.1. In all Australian jurisdictions, the grounds on which a court can grant a protection order relate to the commission, or potential commission, by the respondent of a particular type of conduct against a person with whom the respondent is in a relevant type of relationship.⁶⁷ The terminology varies from jurisdiction to jurisdiction, but in this Chapter we refer to the conduct that provides grounds for an order as 'domestic violence', and to a person in the required relationship as a 'family member'.⁶⁸

Types of conduct that constitute domestic violence

3.1.2. The type of conduct that constitutes domestic violence, and so provides the grounds for making a protection order, is generally similar across the various jurisdictions, though there are some differences.

3.1.3. In New South Wales, the conduct that can give rise to a protection order is largely defined by reference to a large number of criminal offences (personal violence offences) in the *Crimes Act 1900* (NSW) (the Crimes Act), but in addition a protection order can be granted where a person reasonably fears intimidation or stalking.⁶⁹ In the other jurisdictions, rather than a link to particular offences under the general criminal law,⁷⁰ there is a description of the type of conduct that constitutes domestic violence. (However, in the ACT, one of the elements within the general description of domestic violence is conduct against a family member that is a 'domestic violence offence' against other legislation, e.g. the Crimes Act.⁷¹)


67 We deal here with the grounds on which courts can make an order, and have not compared the grounds for the making of a protection order by the police.

68 As will become apparent later in this Chapter, in some jurisdictions the types of relationships covered by the legislation are considerably broader than those ordinarily understood as familial: see paragraph 3.1.52ff.

69 NSW Act, ss 4, 16. We note that some of the provisions of the Crimes Act referred to in the definition of 'personal violence offence' have been repealed.

70 Although in some jurisdictions where a court convicts a person of certain criminal offences against a family member, the court may or must make a protection order. We do not deal with such provisions in this Chapter.

71 'Domestic violence offences' are listed in Schedule 1 to the ACT Act. 'Animal violence offences' against a pet of a family member are also covered.

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- 3.1.4. In all jurisdictions, domestic violence includes assault/personal injury (including sexual assault) and intentional damage to the protected person's property (at least for the purposes of intimidation), and threats of such behaviour. In addition, intimidation is included in the definition of domestic violence in all jurisdictions other than the ACT.⁷² The ACT definition, however, includes conduct that is 'harassing or offensive' which may cover some situations of intimidation.⁷³
- 3.1.5. We point out that a difference in the way the legislative provisions are expressed does not necessarily translate into a substantial difference in practice. For example, four jurisdictions expressly cover kidnapping/deprivation of liberty, and the others do not.⁷⁴ Although deprivation of liberty is not specifically mentioned in the NT Act, however, it would probably be covered by the definition of 'intimidation' under s 6(1)(c), which refers to 'conduct that has the effect of unreasonably controlling the person'. Deprivation of liberty, in most cases, would probably also amount to 'intimidation' which is a form of domestic violence under the Queensland and NZ Acts.⁷⁵ It may be 'harassing or offensive' conduct in the ACT, though this is less clear, and would probably depend on the facts of the particular case. In South Australia, deprivation of liberty would probably be conduct that would reasonably arouse a significant fear or apprehension. Such conduct constitutes domestic violence, but only if it is engaged in on two or more separate occasions.⁷⁶ Of course, in all jurisdictions if the deprivation of liberty involves assault (or, in some jurisdictions, if it causes a fear of assault) it will be domestic violence on that basis.
- 3.1.6. We discuss below some of the other differences between the jurisdictions as to the type of conduct that is treated as domestic violence.

Exposure of children to domestic violence

- 3.1.7. In the Northern Territory, Victoria, Western Australia and New Zealand there is specific provision authorising protection orders to protect a child from exposure to domestic violence against another person.
- 3.1.8. In Victoria and New Zealand, exposing a child to domestic violence against another family member is, itself, domestic violence against the child. In Victoria, the definition of 'family violence' includes 'causing a child to witness, or otherwise be exposed to the effects of' domestic violence.⁷⁷ Therefore, it is not necessary for the child to see or hear the domestic violence against the other family member being committed.

⁷² Victorian Act, s 5(1); NSW Act, s 16(1); Queensland Act, s 11(1); s 6(1) (definition of 'act of family and domestic violence'); Tasmanian Act, s 7; NT Act, ss 5 and 6; NZ Act, s 3. Under the SA Act (s 4(2)), the conduct must be engaged in on two or more occasions so as reasonably to arouse in a family member an apprehension or fear of personal injury or damage to property or any significant apprehension or fear.

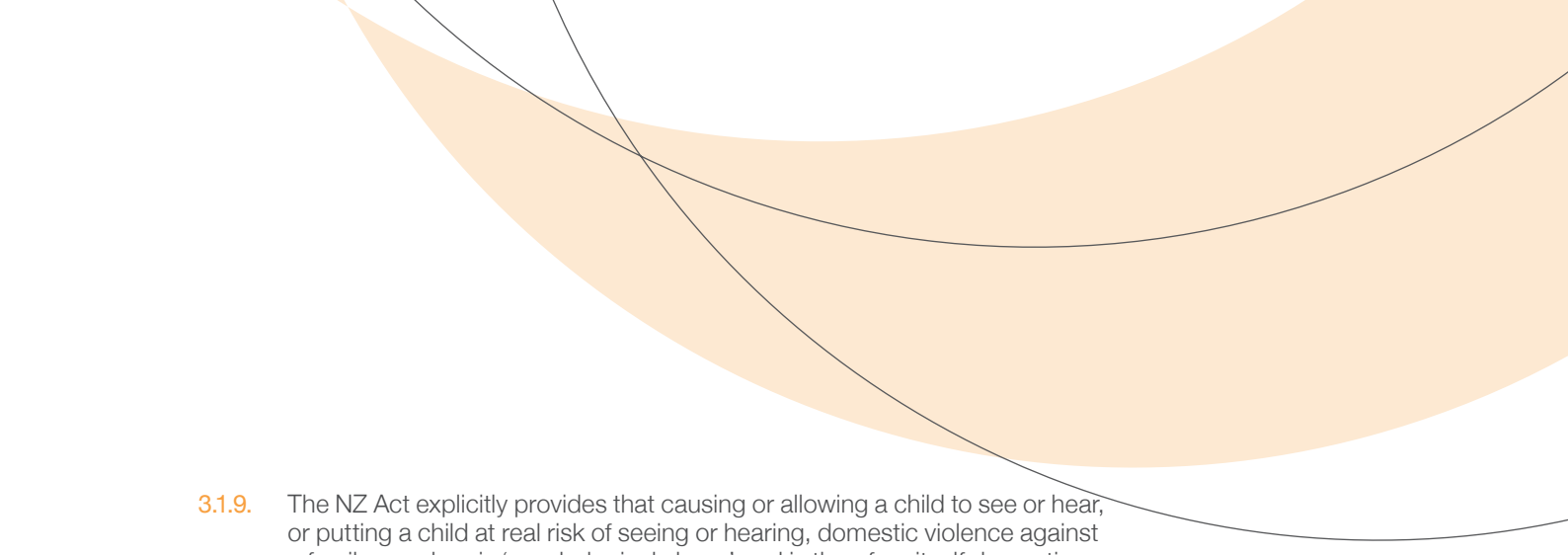
⁷³ ACT Act, s 14(1)(c).

⁷⁴ Victorian Act, s 5(2)(d); NSW Act, s 4(a) (referring to *Crimes Act 1900* (NSW) ss 86 and 87)); WA Act, s 6(1)(b); Tasmanian Act, s 7(a)(iii).

⁷⁵ Possibly there would not be intimidation if the person who is deprived of liberty is not aware of it, e.g. a small child abducted by a non-custodial parent, or a family member who is locked in a room without knowing it.

⁷⁶ SA Act, s 4(2)(c).

⁷⁷ Victorian Act, s 5(1)(b).

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- 3.1.9.** The NZ Act explicitly provides that causing or allowing a child to see or hear, or putting a child at real risk of seeing or hearing, domestic violence against a family member, is ‘psychological abuse’ and is therefore itself domestic violence against the child.⁷⁸ (However, the victim of the domestic violence is not regarded as having caused or allowed the child to witness it.) The NZ Act does not refer to the child witnessing the effects of domestic violence.
- 3.1.10.** In Western Australia⁷⁹ and the Northern Territory⁸⁰, exposing a child to domestic violence against another person is not defined as domestic violence against the child, but the courts are specifically authorised to make a protection order to protect the child from such exposure. In the Northern Territory, a child is taken to be ‘exposed’ to domestic violence against a family member, not only if the child sees or hears the domestic violence but also if the child witnesses harm resulting from the violence.⁸¹ So, for example, if a child’s mother is assaulted while the child is absent, but the child on returning home sees that her face is bruised, an order may be made to protect the child.
- 3.1.11.** In Western Australia, a protection order may be made for the benefit of a child if the court is satisfied that the child has been exposed, and is likely again to be exposed, to an act of family and domestic violence committed by or against a family member. In addition, the court can make an order for the benefit of the child where the applicant, the child or a family member of the child reasonably fears that the child will be exposed to an act of family and domestic violence committed by or against a family member.
- 3.1.12.** The other jurisdictions do not provide expressly either that exposing a child to domestic violence is domestic violence, or that an order can be made to protect a child from exposure to domestic violence. However, in jurisdictions where the definition of domestic violence (or cognate term) includes emotional or psychological abuse, this may in many cases cover a child being exposed to abuse of another person. For example, physical assault of the mother may amount to emotional or psychological abuse of the child, and so constitute domestic violence against the child as well as against the mother. This would allow an application for a protection order to be made on behalf of the child, even if the mother does not apply.
- 3.1.13.** In addition, in most jurisdictions, in deciding whether to make a protection order to protect another family member, the court will take account of the welfare of any child of the family, and the child can be named as a person protected by the protection order, even though there has been no domestic violence against the child itself.⁸²

78 NZ Act, s 3(3).

79 WA Act, s 11B.

80 NT Act, s 18(2).

81 NT Act, s 18(2) (see s 4 for the definition of ‘exposed’).

82 See NSW Act, s 38(2); Qld Act, s 21(1), SA Act, s 5(1)(b); Tasmanian Act, s 16(2); ACT Act, s 48(2)(h); NZ Act, s 16.

Economic abuse

- 3.1.14.** In Victoria, Tasmania and the Northern Territory, economic abuse is expressly included as a form of domestic violence. The provisions in those jurisdictions vary according to whether a particular intention on the part of the respondent is required, and according to whether economic abuse can be committed against any family member, or only against a spouse or partner.
- 3.1.15.** In Tasmania,⁸³ to commit economic abuse,⁸⁴ the respondent must intend to unreasonably control or intimidate his or her spouse or partner, or cause his or her spouse or partner mental harm, apprehension or fear. There is economic abuse if, with that intent, the respondent coerces the spouse or partner to relinquish control over assets or income, disposes of their property without consent, prevents them from participating in decisions over household expenditure or the disposition of joint property, prevents them from accessing joint financial assets for the purpose of meeting normal household expenses, or withholds or threatens to withhold the financial support reasonably necessary for the maintenance of the spouse or partner or an affected child.
- 3.1.16.** In the Northern Territory,⁸⁵ the type of conduct covered is generally similar to that in the Tasmanian definition, but is not limited to conduct towards a spouse or partner. In the Northern Territory economic abuse could be committed against any family member, e.g. by an adult child against a parent, or a brother against a sister. In addition, in the Northern Territory there is no need for the respondent to intend, by means of the economic abuse, to intimidate or unreasonably control any person, or to cause mental harm, apprehension or fear.
- 3.1.17.** In Victoria,⁸⁶ 'economic abuse' generally covers the same type of conduct as in Tasmania and the Northern Territory. In Victoria, that conduct may be carried out against any family member (not just a spouse or partner) and must be coercive, deceptive or unreasonably controlling. However, it seems to be sufficient that the conduct have that effect objectively, and that it is not necessary that the respondent intended to coerce, deceive or be unreasonably controlling.
- 3.1.18.** In New South Wales, a protection order can be obtained on the basis of a reasonable fear of a 'personal violence offence'. One of these is the offence in s 44 of the *Crimes Act 1900* (NSW), which makes it an offence to fail to provide 'any wife, apprentice, or servant or any insane person with necessary food, clothing, or lodging' in spite of being legally liable to do so, so that 'his or her life is endangered, or his or her health becomes or is likely to be seriously injured'. This would provide only very limited coverage of economic abuse.

⁸³ Tasmanian Act, s 8.

⁸⁴ This is an offence, as well as a ground for obtaining a protection order (s 8).

⁸⁵ NT Act, s 8.

⁸⁶ Victorian Act, s 6.

It is possible that some other cases of economic abuse would be covered in New South Wales because the conduct concerned would be ‘intimidation’, but that would depend on the circumstances of the particular case.

- 3.1.19. Similarly, in other jurisdictions that do not specifically cover economic abuse, some cases could be covered by some more general aspect of domestic violence, such as intimidation, emotional or psychological abuse, or coercion.

Stalking

- 3.1.20. We discuss here whether, in the various jurisdictions, ‘stalking’ constitutes domestic violence, and so can provide grounds for the making of a protection order. (We deal with stalking as a criminal offence in Part 4 of this Report.)
- 3.1.21. The NSW⁸⁷, NT⁸⁸ and Tasmanian⁸⁹ Acts, in setting out the conduct that constitutes domestic violence, expressly include ‘stalking’.
- 3.1.22. Under the ACT Act, domestic violence includes conduct that is directed at a family member and is a ‘domestic violence offence’.⁹⁰ The offence of stalking under s 35 of the *Crimes Act 1900* (ACT) is listed as a ‘domestic violence offence’. Therefore stalking is domestic violence in the ACT. (Section 13(1)(a) of the ACT Act also provides that a person’s conduct is ‘domestic violence’, for that Act, if it ‘is harassing or offensive to’ a family member.)
- 3.1.23. The SA, Queensland, Victorian and WA Acts do not use the word ‘stalking’. However, the SA Act’s definition of domestic violence covers conduct that can generally be described as stalking.⁹¹ Similarly, domestic violence under the WA Act includes intimidation and pursuit, and these are defined in a way that includes certain stalking behaviour.⁹² Domestic violence under the Queensland Act includes ‘intimidation or harassment’⁹³ and the examples of such behaviour given in the Act include certain types of stalking behaviour. The Victorian Act does not refer specifically to conduct that is normally described as ‘stalking’, but it covers behaviour that is threatening, tormenting, harassing or intimidating.⁹⁴ Similarly, the NZ Act includes in domestic violence psychological abuse, including, but not limited to, intimidation and harassment.
- 3.1.24. Therefore, all jurisdictions provide for the making of protection orders on the basis of at least some behaviour that is generally described by the word ‘stalking’.

87 NSW Act, s 16(1).

88 NT Act, s 5(d).

89 Tasmanian Act, s 7(a)(iv).

90 ACT Act, s 13(1)(c).

91 SA Act, s 4(2)(c).

92 WA Act, s 6(4) referring to the *Criminal Code* (WA), s 338D.

93 Queensland Act, s 11(1)(c).

94 Victorian Act, ss 5 and 7.

Emotional abuse

- 3.1.25.** Victoria, Western Australia, Tasmania, and New Zealand refer specifically to emotional abuse or psychological abuse as a form of domestic violence.⁹⁵
- 3.1.26.** The Victorian Act defines ‘emotional or psychological abuse’ as ‘behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person’.⁹⁶ Examples given in the Act include repeated derogatory taunts, threatening to disclose a person’s sexual orientation, preventing a person from making or keeping connections with family, friends or culture, and threatening suicide or self harm with the intention of tormenting or intimidating a family member.
- 3.1.27.** Some other jurisdictions that do not refer expressly to emotional abuse or psychological abuse would cover at least some of the conduct that could be described by those terms. The ACT Act includes as domestic violence conduct that ‘is harassing or offensive to a relevant person’. ‘Intimidation’ is covered in New South Wales,⁹⁸ and is defined to include ‘conduct amounting to harassment or molestation of the person’.⁹⁹ In Queensland, domestic violence includes ‘intimidation or harassment’.¹⁰⁰ The Northern Territory legislation covers ‘intimidation’¹⁰¹, which is defined to include harassment of the person, and ‘any conduct that has the effect of unreasonably controlling the person or causes the person mental harm’.¹⁰²
- 3.1.28.** In South Australia, the definition of ‘domestic violence’ does not explicitly cover emotional or psychological abuse. However, it does cover conduct that is engaged in on two or more separate occasions and that reasonably arouses in a family member apprehension or fear of personal injury or damage to property ‘or any significant apprehension or fear’.¹⁰³ The SA Act provides that the type of conduct concerned includes stalking behaviour (eg. following, loitering, sending material), but it is not limited to that behaviour. Also, the effect of the behaviour is not limited to fear or apprehension of injury or property damage, but includes ‘any significant apprehension or fear’. Probably, this would include apprehension or fear of humiliation or emotional distress, so that repeated derogatory taunts and repeated threats to disclose a person’s sexual orientation, for example, would be domestic violence. Probably, repeated threats of suicide or self harm with the intention of tormenting or intimidating a family member would also be domestic violence in South Australia. As noted, conduct must be engaged in on two or more separate occasions to be covered. Also, the focus of the South Australian provision on causing fear or apprehension of something happening in the future may make its scope more limited than the provisions in other jurisdictions relating to emotional abuse and intimidation.

⁹⁵ Victorian Act, s 5(1); WA Act, s 6(1)(d); Tasmanian Act, s 9; NZ Act, s 3.

⁹⁶ Victorian Act, s 7.

⁹⁷ ACT Act, s 13(1)(e).

⁹⁸ NSW Act, s 16(1).

⁹⁹ NSW Act, s 7.

¹⁰⁰ Qld Act, s 11(1)(c).

¹⁰¹ NT Act, s 5(c).

¹⁰² NT Act, s 6.

¹⁰³ SA Act, s 4.

Harm to animals

Comparison

- 3.1.29.** Five jurisdictions¹⁰⁴ provide that harming or killing a pet animal constitutes domestic violence. In Queensland,¹⁰⁵ Western Australia¹⁰⁶ and the Northern Territory,¹⁰⁷ harm to the animal is explicitly included as a form of damage to property. In the ACT, domestic violence includes, as a separate item from property damage, conduct that is an animal violence offence directed at a 'pet of the relevant person', or a threat to commit such conduct against a pet of the relevant person or of another relevant person.¹⁰⁸
- 3.1.30.** In Victoria, 'family violence' includes causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed, so as to control, dominate or coerce the family member.¹⁰⁹
- 3.1.31.** The other jurisdictions do not deal specifically with harm to animals, although such harm may be covered in many cases on the basis that it is damage to property or constitutes emotional abuse.
- 3.1.32.** Generally, causing damage to the property of a person is domestic violence, and this would include injuring or killing an animal that is the property of that person, even if the legislation does not specifically mention animals. However, in that case, harming the animal will only be domestic violence if the animal is, legally, the property of the person to be protected. This is also the case in Queensland and Western Australia, which specifically refer to an animal that is the property of the person to be protected.
- 3.1.33.** By contrast, the Victorian provision expressly covers harm, and threats to harm, an animal regardless of ownership, where the behaviour is directed so as to control, dominate or coerce a family member.¹¹⁰ In the ACT, causing harm to a 'pet of the relevant person' is domestic violence. Arguably an animal can be a pet of a person, without being that person's property.
- 3.1.34.** In New Zealand, 'property' of a person is defined to include property that the person does not own but uses or enjoys, or that is available for the person's use or enjoyment, or that is in the person's care or custody. This probably has the effect that domestic violence would cover harm to a family pet, on the basis that it is property damage, even if the pet is not owned by the person to be protected.
- 3.1.35.** Harm to an animal may in some cases be covered by more general provisions such as emotional abuse.

¹⁰⁴ Queensland, Western Australia, the Northern Territory, ACT, Victoria.

¹⁰⁵ Qld Act, s 11(2).

¹⁰⁶ WA Ac, s 6(1)(c).

¹⁰⁷ NT Act, s 5.

¹⁰⁸ ACT Act, s 13(1)(f) and (g).

¹⁰⁹ Victorian Act, s 5(2)(e).

¹¹⁰ wVictorian Act, s 5(2)(e)..

Comment

3.1.36. As mentioned above, in certain jurisdictions harm or threats to harm an animal are included in the definitions of domestic violence only if the animal is the property of the person to be protected. It could be argued that this limitation is inappropriate. The legal ownership of a pet animal may often be difficult to establish. Also, although one person (eg. the husband/father) has purchased the animal and is its legal owner, another member of the family may be responsible for its care and have a greater emotional connection to it. Causing or threatening harm to an animal is a form of coercion and causes emotional and psychological harm to a person who is emotionally attached to the animal, regardless of whether that person has a property interest in the animal.

Is it necessary that domestic violence has already been committed?

3.1.37. In the ACT, New Zealand, Tasmania and Victoria, an order can only be made if the court is satisfied that the defendant has already committed, or is committing, domestic violence conduct. However, in all of those jurisdictions domestic violence conduct is defined to include threatening to commit certain behaviour. So, for example, if the court is satisfied that the defendant has threatened to assault a family member, it is satisfied that the defendant has committed domestic violence conduct, even though no actual assault has occurred.

Is it necessary that there be fear, a risk, or a likelihood that domestic violence will be committed in the future?

3.1.38. In the ACT, it is enough that the defendant has committed domestic violence. There is no specific requirement for the court to be satisfied that there is a risk or fear of further domestic violence.¹¹¹

3.1.39. In New South Wales, where conduct amounts to a 'personal violence offence', the fact that it has been committed is enough to allow a court to make a protection order (even if there is no conviction). Equally, if conduct amounting to a 'personal violence offence' is likely to be committed (even if it has not been in the past), a protection order can be made.¹¹² However, this does not apply to conduct that is domestic violence, but not a personal violence offence.

3.1.40. In New Zealand, an order may be made if the court is satisfied both

- that the respondent is using, or has used, domestic violence against a family member; and
- that the order is necessary to protect the family member.

– This implies that, to make a protection order, the court must consider that there is some risk of future domestic violence.

¹¹¹ Which may be by threatening violence - s 13(1).

¹¹² NSW Act, s 16.

- 3.1.41. In Victoria, Queensland, and Western Australia¹¹³ an order it can be made if:
- the defendant has committed domestic violence (including by threat); and
 - is likely to do so again.
- 3.1.42. In Tasmania, an order can be granted if the defendant has committed domestic violence and *may* do so again.
- 3.1.43. Therefore, there is a lower threshold of risk of future domestic violence in Tasmania than in Victoria, Queensland, and Western Australia, where future domestic violence must be ‘likely’. We point out that the courts have held that the meaning of ‘likely’ varies according to the context. In some contexts, it means more likely than not or more than a fifty per cent chance, but often it refers to a real or not remote chance or possibility even if it is less than fifty per cent, and is equivalent to ‘prone’, ‘with a propensity’ or ‘liable’. In the context of the making of protection orders, probably a fifty per cent probability of domestic violence would not be required, and it would be considered ‘likely’ if there were a real chance that it would occur.¹¹⁴
- 3.1.44. South Australia, New South Wales, the Northern Territory and Western Australia do not require that the defendant has already committed domestic violence.
- 3.1.45. In South Australia, a court may make a protection order if ‘there is a reasonable apprehension’ that the defendant may commit domestic violence. In the Northern Territory the court may make a protection order if satisfied that there are reasonable grounds for the protected person to fear the commission of domestic violence. In these jurisdictions, the question is not whether an applicant actually fears domestic violence, but whether, objectively, there are reasonable grounds for fearing that the respondent will commit domestic violence.
- 3.1.46. In New South Wales, for a protection order to be made, generally the court must be satisfied both that the person to be protected has reasonable grounds to fear domestic violence, and that the person in fact fears domestic violence. However, in certain circumstances, actual fear on the part of the protected person is not required. This includes situations where the protected person is a child under 16, or has been subjected to, or is reasonably likely to be subjected to, conduct amounting to a ‘personal violence offence’.
- 3.1.47. In Western Australia, there are two alternative grounds for making a protection order. The first, mentioned above, is that the respondent has committed domestic violence and is likely to do so again. Alternatively, a protection order can be made if either a person seeking to be protected, or another person who has applied for the order on behalf of that person, reasonably fears that the respondent will commit domestic violence against the person seeking to be protected. In effect, as in New South Wales, this requires both an actual fear and that there be reasonable grounds for the fear.

¹¹³ WA also has an alternative ground of fear of domestic violence.

¹¹⁴ See, e.g., *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331; and see the review of the case law in *Attorney-General for the State of New South Wales v Winters* [2007] NSWSC 1071.



Comment

- 3.1.48.** In practice, the distinction between those jurisdictions where domestic violence must already have been committed (ACT, New Zealand, Tasmania and Victoria), and those where it is sufficient that there be a likelihood or reasonable fear that it be committed in the future, may not be as great as at first appears.
- 3.1.49.** In all of the jurisdictions requiring that it already have been committed, domestic violence conduct is defined to include threatening to commit certain behaviour. So, for example, if the court is satisfied that the defendant has threatened to assault a family member, it is thereby satisfied that the defendant has committed domestic violence conduct, and can grant a protection order even though no actual assault has occurred.
- 3.1.50.** There is probably also not a great difference between requiring a court to be satisfied that the respondent is likely to commit domestic violence, and requiring it to be satisfied that there are reasonable grounds to fear domestic violence.
- 3.1.51.** There could potentially be significant practical issues, however, where a court is required to be satisfied that a person actually fears domestic violence (in New South Wales and Western Australia). This requirement could be easily satisfied if the person concerned gives evidence, but the court might not be able to be satisfied if the person to be protected failed to give evidence, or withdrew the application. We note that the ‘actual fear’ requirement exists in New South Wales only for protected persons of 16 or more who have not been subjected to, and are not reasonably likely to be subjected to, conduct amounting to a ‘personal violence offence’. In Western Australia, if it cannot be established that the person fears domestic violence, the alternative ground that the respondent has committed domestic violence, and is likely to do so again, may be available.

Relationships covered

- 3.1.52.** In most jurisdictions, a wide range of relationships is comprehended in the concept of a family member against whom certain conduct will constitute domestic violence. These include spouses and partners (including de facto and same sex), children and step-children, the child of a person’s de facto partner, and other persons who are generally regarded as relatives. The exceptions are Tasmania and South Australia.

Position in Tasmania

- 3.1.53.** The range of relationships covered by the Tasmanian Act is more limited than that in most jurisdictions. In the Tasmanian Act, ‘family violence’ which can provide grounds for a protection order is limited to conduct against a ‘spouse or partner’.¹¹⁵ A ‘spouse or partner’ is a person with whom one is, or has been, in a marriage or a ‘significant relationship’ within the meaning of the *Relationships Act 2003* (Tas). A ‘significant relationship’ is a relationship between two adult persons (including of the same sex) who have a relationship as a couple and who are not married to one another nor related by family.¹¹⁶ (For the purposes of the Tasmanian Act, a ‘family relationship’ also includes a relationship in which one or both of the parties is between the ages of 16 and 18 and would, but for that fact, be a significant relationship within the meaning of the *Relationships Act 2003*.)¹¹⁷
- 3.1.54.** A significant relationship is taken to exist if it has been registered under the *Relationships Act 2003* (Tas).¹¹⁸ In the absence of registration, the existence of a significant relationship depends on all the circumstances, including the following if relevant:
- the duration of the relationship;
 - the nature and extent of common residence;
 - whether or not a sexual relationship exists;
 - the degree of financial dependence or interdependence, and any arrangements for financial support between the parties;
 - the ownership, use and acquisition of property;
 - the degree of mutual commitment to a shared life;
 - the care and support of children;
 - the performance of household duties; and
 - the reputation and public aspects of the relationship.¹¹⁹
- 3.1.55.** Persons are ‘related by family’, and therefore cannot have a ‘family relationship’ for the purposes of the Tasmanian Act, if:
- one is the parent, or another ancestor, of the other (including through adoption); or
 - one is the child, or another descendant, of the other (including through adoption); or
 - they have a parent in common.¹²⁰

¹¹⁵ Tasmanian Act, s 7.

¹¹⁶ *Relationships Act 2003* (Tas), s 4.

¹¹⁷ *Relationships Act 2003* (Tas), s 4.

¹¹⁸ *Relationships Act 2003* (Tas), s 4(2).

¹¹⁹ *Relationships Act 2003* (Tas), s 3.

¹²⁰ *Relationships Act 2003* (Tas), s 7. Parent/child relationships may be traced through adoption (see s 7(2) and paragraph (c) of the definition of ‘child’ in s 3 of the *Relationships Act 2003* (Tas)).

3.1.56. Therefore, violent or other abusive conduct by a person against his or her parent, child or sibling does not, in itself, constitute ‘family violence’, so as to provide grounds for a family violence order under the Tasmanian Act. However if, for example, a respondent used a threat of violence against a child in order to intimidate the respondent’s spouse, that would be ‘family violence’ against the spouse, who could obtain a family violence order. Also, a family violence order can be obtained to protect a child whose wellbeing is likely to be affected by family violence against the respondent’s spouse or partner.¹²¹

3.1.57. While the Tasmanian Act thus applies in relation to violence between persons in a relatively limited range of relationships, it is important to note that ‘restraint orders’ under the *Justices Act 1959* (Tas) (the Justices Act) may be available in connection with relationships not covered by the Tasmanian Act. Under the Justices Act, restraint orders may be obtained by a person against someone who has caused or threatened personal injury or damage to property, or who has stalked the person, even if there is no particular relationship between those persons.¹²²

3.1.58. Restraint orders can include similar provisions to those available in an FVO under the Tasmanian Act, including orders that a person cease engaging in certain conduct, and orders in relation to firearms and exclusion from residential premises.¹²³

3.1.59. The penalties for breaching a restraint order are, however, considerably lower than those for breach of an FVO.¹²⁴

Position in South Australia

3.1.60. Under the SA Act, ‘domestic violence’ involves causing personal injury or engaging in other types of conduct in relation to a ‘family member’. Section 3 of the SA Act defines ‘family member’ as:

- (a) a spouse or former spouse of the defendant;
- (b) a domestic partner or former domestic partner of the defendant; or
- (c) a child of whom
 - (i) the defendant; or
 - (ii) a spouse or former spouse of the defendant; or
 - (iii) a domestic partner or former domestic partner of the defendant, has custody as a parent or guardian; or
- (d) a child who normally or regularly resides with –
 - (i) the defendant; or
 - (ii) a spouse or former spouse of the defendant; or
 - (iii) a domestic partner or former domestic partner of the defendant.

¹²¹ See also *Children, Young Persons and Their Families Act 1997* (Tas), ss 23 and 43: where an application is made for an assessment order or care and protection order in relation to a child, the court may instead, or in addition, make a restraint order against a person under Part XA of the Justices Act.

¹²² *Justices Act 1959* (Tas), s 106B.

¹²³ *Justices Act 1959* (Tas), s 106I.

¹²⁴ *Justices Act 1959* (Tas), s 106I.

3.1.61. A 'spouse' of a defendant is a person to whom the defendant is legally married. A 'domestic partner' is a person with whom the defendant lives in a 'close personal relationship', which is defined in s 3 as:

the relationship between 2 adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis, but does not include—

- (a) the relationship between a legally married couple; or
- (b) a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind.

Note: Two persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them.

3.1.62. This definition would cover same sex partners, and also covers relationships that are not, and have never been, sexual. However, the requirement that, to be a 'domestic partner', a person must live with the defendant 'as a couple on a genuine domestic basis' is a significant limitation. It would exclude many people who might otherwise fall within the everyday meaning of 'family member'. For example, if a man lives with his wife in the same household as members of the wife's family (eg. the wife's mother and brother), they would not be in a 'couple' with the man, and therefore would not be 'family members'.

3.1.63. In addition, a person is a 'domestic partner' of the defendant only if they live together. Couples who are in a sexual relationship, or other close relationship, but who do not live together are not covered by the SA Act.

3.1.64. However, as in Tasmania, in South Australia there may be an alternative remedy available to persons who are not 'family members'. Such persons may apply for a restraining order under the *Summary Procedure Act 1921* (SA) (the Summary Procedure Act).¹²⁵ A restraining order under the Summary Procedure Act is not confined to particular categories of people or relationships, and can be granted on grounds similar to those on which domestic violence restraining orders may be made under the SA Act for 'family members'. A restraining order may be granted if there is a reasonable apprehension that the defendant may, unless restrained, cause personal injury or damage to property or behave in an intimidating or offensive manner towards the person for whose benefit the order would be made, if the court is satisfied that the making of the order is appropriate in the circumstances.¹²⁶ Restraining orders can include very similar provisions to those available in an order under the SA Act, including orders that a person cease engaging in certain conduct, and orders in relation to firearms and exclusion from residential premises.¹²⁷

¹²⁵ *Summary Procedure Act*, s 99.

¹²⁶ *Summary Procedure Act*, s 99(1).

¹²⁷ *Summary Procedure Act*, s 99(3)-(4).

Other relationships covered by domestic violence legislation in some jurisdictions

People who are considered to be relatives

- 3.1.65.** Apart from Tasmania and South Australia, all jurisdictions define violence committed by a person against the person's 'relative', or a person to whom they are 'related', to be domestic violence. These terms are defined in slightly different ways in the various jurisdictions.¹²⁸ Some Acts rely on the general meaning of the term 'relative', or provide a general definition, others set out an extensive list of particular relationships, and sometimes the two approaches are combined.
- 3.1.66.** A number of jurisdictions recognise that in some social, cultural or family contexts, the concept of a relative or family member may be broader than is generally understood.¹²⁹ In particular, the extended concept of a relative in the context of Aboriginal and Torres Strait Islander culture (and Maori culture in the case of New Zealand) is recognised.¹³⁰

Carers

- 3.1.67.** Legislation in New South Wales and the Northern Territory classifies violence within caring relationships (including paid carers) as domestic or family violence.¹³¹ In Queensland, South Australia and the ACT, the legislation provides that the relationship with a paid carer, or a carer acting on behalf of another person or organisation (eg a charity), is not sufficient.¹³²
- 3.1.68.** Although legislation in the other jurisdictions does not deal directly with carers, it is possible that some relationships between a person and their carer may fall into another recognised category of relationship for the purposes of obtaining a domestic violence protection order. For instance, under the WA Act a person's relationship with their carer may fall within the meaning of 'other personal relationship'.¹³³ In New Zealand the relationship may be covered if the carer ordinarily shares a household with the person cared for (but not just as an employee), or has a close personal relationship with that person.¹³⁴

People who live together but are not in a sexual relationship

- 3.1.69.** If a person is violent towards someone they live with, this will constitute domestic violence in some jurisdictions even if the parties are not spouses, partners (as ordinarily understood) or family members.

¹²⁸ ACT Act, s 15(2); Victorian Act, s 10; NSW Act, s 6; NT Act, s 10; Qld Act, s 12B(2); WA Act, s 4(2); NZ Act, s 2.

¹²⁹ See ACT Act, s 15(2)(c)(ii); Qld Act, s 12B(4); WA Act, s 4(2); NT Act, s 10(2) (definition of 'family relationship').

¹³⁰ See NSW Act, s 5(h), as well as the provisions listed in the preceding footnote.

¹³¹ NSW Act, s 5(f); NT Act, s 9(g).

¹³² SA Act, s 3 (paragraph (b) of the definition of 'close personal relationship'); Qld Act, ss 11A(1)(d), 12C; ACT Act, s 15(3), *Domestic Relationships Act 1994* (ACT), s 3(2)(b).

¹³³ WA Act, s 4(2): 'other personal relationship' is defined as 'a personal relationship of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects, or affected, the other person'. See also the definition of 'family member' in the Victorian Act, s 8(3), particularly s 8(3)(f)-(g).

¹³⁴ NZ Act, s 4(1).

- 3.1.70.** In New South Wales, New Zealand and the Northern Territory, orders are available to protect a person from someone else who lives in the same household.¹³⁵ No further relationship between the protected person and the respondent is required. Legislation in these jurisdictions could apply to people who share a house but are otherwise unconnected by family or personal ties.
- 3.1.71.** In South Australia, adults who live together, without being married, are covered only if they are in a ‘close personal relationship’, which requires that they live together ‘as a couple on a genuine domestic basis’.¹³⁶ A note in the SA Act states that this need not necessarily be, or ever have been, a sexual relationship, but the requirement that there be a ‘couple’ would seem to exclude persons merely sharing a house with the defendant, the defendant’s parents, parents-in-law or siblings, for example.
- 3.1.72.** Legislation in the ACT, Western Australia and Victoria probably requires more than simply living together to constitute a relationship in connection with which a domestic violence protection order would be available. However, provisions in these jurisdictions are clearly designed to recognise that there can be meaningful personal relationships between people who live together but are not in a ‘marriage-like’ or sexual relationship. For example, the WA Act refers to ‘other personal relationships’, being relationships ‘of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects, or affected, the other person’.¹³⁷ This would encompass some people who live together, but is unlikely to apply in all such cases.

People who are in a sexual relationship but do not live together

- 3.1.73.** In most jurisdictions, people who are in a de facto relationship or a ‘dating’ relationship but who do not live together are able to obtain domestic violence orders against their partners. However, the SA Act does not recognise violence committed by a non-resident partner as ‘domestic violence’. In South Australia, domestic violence is committed by a person against a ‘family member’. Relevantly, ‘family member’ includes a domestic partner or former domestic partner, but the definition of ‘domestic partner’ requires that the parties live together in a ‘close personal relationship’.¹³⁸ Thus, if the parties have a close personal or intimate relationship but do not live together, violence between them will not constitute ‘domestic violence’ for the purposes of the SA Act.
- 3.1.74.** As discussed above, however, in South Australia restraining orders may be available to non-resident partners under other legislation.

¹³⁵ NSW Act, s 5(d); NZ Act s 4(1)(c); NT Act s 9(d).

¹³⁶ SA Act, s 3.

¹³⁷ WA Act, s 4(2).

¹³⁸ SA Act, ss 3-4.



2 Exclusion orders

- 3.2.1.** In cases where violence has occurred or is threatened between persons who live together, it may be necessary or appropriate for the perpetrator of the violence or threatened violence to be excluded from the home. Laws dealing with domestic violence in every Australian State and Territory, and in New Zealand, allow a court to make a protection order that includes a prohibition having that effect. For the purposes of this Report, such orders are referred to as 'exclusion orders'.¹³⁹
- 3.2.2.** In all Australian States and Territories, the relevant legislation does not make provision for free-standing exclusion orders. Rather, a court can include in a domestic violence protection order (or similar) conditions or prohibitions having the effect of excluding the respondent from a residence shared with the protected person.¹⁴⁰ Thus, when we refer to an 'exclusion order' made under State or Territory domestic violence protection orders legislation, we mean a protection order that includes such a condition or prohibition. We also refer to an 'exclusion condition', being a condition or prohibition in a protection order having the effect of excluding the respondent from his or her home, (where the respondent and the protected person normally cohabit).
- 3.2.3.** We note that the position in New Zealand is different in that, under the relevant New Zealand legislation, a person can apply for a free-standing occupation or tenancy order, without necessarily also seeking a protection order.¹⁴¹
- 3.2.4.** Although exclusion orders are available nation-wide, there are some differences in the approach taken in each jurisdiction. In particular, in some jurisdictions special rules apply to the making of exclusion orders, whereas in others there are no such special rules. In addition, there is significant variation between jurisdictions in terms of the factors courts are required to take into account when making exclusion orders, and the impact of exclusion orders on the parties' legal position in relation to residential property (for example, the impact of an order on a residential tenancy).

¹³⁹ Orders of this kind are also referred to in other literature as 'ouster orders' or 'kick-out orders'.

¹⁴⁰ The 1999 Model Legislation contains a similar provision allowing a court to make an order excluding a person from premises where the protected person lives, even if the respondent has a legal or equitable interest in the property: s 16(2)(b).

¹⁴¹ See Part 3 of the Act.

Key differences between jurisdictions

3.2.5. While some differences in the relevant legislative provisions across jurisdictions are unlikely to have significant consequences in practice, others may have an impact on the effectiveness of such orders. The key differences between the jurisdictions relate to:

- the factors courts are required to consider when making an exclusion order;
- whether the legislation focuses on or prioritises the safety and accommodation needs of the persons protected by an order;
- whether orders are available that facilitate access to personal property by the protected person and the respondent;
- whether there is a statutory presumption in favour of the protected person remaining in their place of residence; and
- the impact of an exclusion order (if any) on a residential tenancy.

Special considerations/requirements when excluding a respondent from his or her place of residence

3.2.6. In the Australian Capital Territory, South Australia, the Northern Territory and Tasmania, the making of exclusion orders is not subject to any mandatory additional considerations or requirements. In these jurisdictions, the grounds on which a protection order can be made, and the matters a court is required to consider when making a protection order, will be the same regardless of whether the order includes an exclusion condition.

3.2.7. In Queensland, Victoria, New South Wales and Western Australia, additional requirements apply when a court is considering making an exclusion order.

Factors that a court is required to consider when making an exclusion order

3.2.8. Courts are generally directed by the relevant State and Territory legislation to have regard to certain specified matters when deciding:

- whether to make a protection order
- the terms to be included in an order; and
- (in some cases) whether to make an exclusion order.

3.2.9. Some generally applicable matters that courts are required to consider when making protection orders may be particularly relevant in the context of exclusion orders, for example:

- the accommodation needs of the parties;¹⁴²
- the welfare of children of the respondent or the protected person;¹⁴³
- the existence of any relevant family contact orders.¹⁴⁴

3.2.10. In certain jurisdictions, courts' attention is drawn to specific factors to be considered when making exclusion orders, for example:

- the desirability of minimising disruption to the protected person and any child living with the protected person and the importance of maintaining social networks and support;¹⁴⁵
- the impact on the safety and protection of the protected person and any children who live at the residence if an exclusion order is not made;¹⁴⁶
- whether a term should be included in the order allowing the respondent to collect items of their personal property from the premises;¹⁴⁷
- additional considerations applying when a court is making an exclusion order against a respondent who is a child.¹⁴⁸

3.2.11. The summary above only reflects the specific factors to which courts' attention is drawn by the terms of the legislation. In most cases it would be open to courts to consider other relevant matters in a particular case. In many cases, courts could be expected to consider the specified factors even if the relevant legislation does not expressly direct them to do so. However, the advantage of specifying particular considerations is that it should ensure courts focus on matters considered especially important by the legislature, and that the parties are aware of the particular significance of those matters.

Requirement that courts consider making an exclusion order

3.2.12. In Victoria, a court that is making a Family Violence Intervention Order (FVIO), including an interim FVIO, is required to consider whether the respondent should be excluded from the home.¹⁴⁹ If a court decides that it is appropriate to so exclude an (adult) respondent, and the protected person does not oppose this then the court must do so.¹⁵⁰

¹⁴² NSW Act s 17(2)(c); ACT Act s 47(1)(c); WA Act ss 12(1)(d), 30B(e).

¹⁴³ ACT Act s 47(1)(c) WA Act ss 12(1)(c), 30B(d).

¹⁴⁴ ACT Act s 47(1)(f).

¹⁴⁵ Victorian Act, s 82(1).

¹⁴⁶ NSW Act s 17(2)(a).

¹⁴⁷ Queensland Act, s 25A(3).

¹⁴⁸ Victorian Act s 83.

¹⁴⁹ Victorian Act, s 82(1).

¹⁵⁰ Victorian Act, s 82(4).

Explicit focus on the needs of persons protected by a protection order

3.2.13. Legislation in several jurisdictions directs courts to pay particular attention to the interests of the protected person when deciding whether to make an exclusion order. Examples include:

- s 17(2)(a) of the NSW Act, which directs courts to consider what the impact would be on the protected person and any children living with that person if an exclusion order is not granted;
- s 82 of the Victorian Act, which provides that a court must consider the desirability of minimising disruption in the lives of protected persons and children who live with them, ensuring continuity of care for children who live with a protected person, and allowing continuity in childcare, education, training and employment for protected persons and children who live with them.

3.2.14. These provisions have the effect of focusing courts' attention on the needs of the people who are to be protected by a protection order, and on what an exclusion order would achieve in terms of their safety and wellbeing, rather than on the impact of an exclusion order on the respondent. This focus is not so clear in other legislation – for example, the Queensland Act provides that a court may attach conditions (including conditions excluding the respondent from the home) to a protection order if the court considers that the conditions are necessary in the circumstances and 'desirable in the interests of the aggrieved, any named person *and the respondent*'.¹⁵¹

Ancillary orders that facilitate access to personal property

3.2.15. Access to personal property may be a significant issue for all parties when an exclusion order is in force. If the respondent is excluded from their home, it is likely that they will need access to their personal effects in order to take up residence elsewhere. Equally, if an exclusion order is to allow a protected person and/or their children to remain in the home, it may be necessary to prevent the excluded party from removing necessary items from the premises. In some cases, quite prescriptive, detailed terms may need to be included in the order setting out what items are to be left at the premises for the use of the protected person and their children.

3.2.16. We note that, if the legislation in a particular jurisdiction does not deal expressly with retrieval of personal property, this does not mean that a court would be unable to attach appropriate conditions to an exclusion order – for example, stipulating that a person is excluded from premises but may return at a certain time to collect specified items.

¹⁵¹ Queensland Act, s 25(2) (our emphasis)..

3.2.17. Legislation in the following jurisdictions specifically provides for the making of an order allowing an excluded person to retrieve items of their property:

- Victoria: orders are available under the Victorian Act that allow the excluded person to return to the premises in the company of a police officer to obtain their personal property (provided the order does not require the property to remain at the residence);¹⁵²
- Western Australia: a court making a Violence Restraining Order that contains an exclusion condition must include provisions allowing the protected person and the respondent to the order to recover personal and other prescribed property;¹⁵³
- Northern Territory: if a Domestic Violence Order includes a premises access order, the defendant may enter the premises to retrieve their personal property if accompanied by a police officer;¹⁵⁴ and
- Queensland: if a court makes an order that includes an ouster (exclusion) condition, the court must consider including a condition allowing the respondent to recover stated property from the premises.¹⁵⁵

3.2.18. Legislation in some jurisdictions also makes express provision with respect to orders specifying that certain items of property must remain at the residence of the protected person. For example, if a person applies for an occupation order or a tenancy order under the New Zealand Act, a court may also make an ancillary furniture order granting to the applicant the use of all or any of the furniture, household appliances, and household effects in the dwelling house specified in the occupation/tenancy order.¹⁵⁶ In Victoria, exclusion orders may stipulate that furniture or appliances in the residence that enable the normal running of the home shall remain in the residence.¹⁵⁷

3.2.19. In practice, orders allowing a respondent to return to the premises from which they are excluded to collect their belongings may need to be tightly controlled in order to ensure that protected person(s) are not put at risk of violence. Some legislation deals specifically with these issues: see, for example the NT Act, which allows persons to collect personal property from premises from which they are excluded only if they are accompanied by a police officer.¹⁵⁸

Presumption in favour of protected persons remaining in the home

3.2.20. Only the NT Act contains an express presumption that the protection of the protected person and any children living with that person is best achieved by them remaining in their home.¹⁵⁹ The presumption must be applied by a court or other 'issuing authority' (eg. a police officer) making a protection order under that Act.

¹⁵² Victorian Act, s 86.

¹⁵³ Western Australian Act, s 13(5).

¹⁵⁴ NT Act, s 85.

¹⁵⁵ Queensland Act, s 25A.

¹⁵⁶ New Zealand Act, s 63.

¹⁵⁷ Victorian Act, s 86(b)(i).

¹⁵⁸ NT Act s 85.

¹⁵⁹ NT Act, s 20.

3.2.21. As a presumption that must be applied by decision-makers, this provision in the NT Act is stronger than the provisions examined above which oblige courts to consider the interests of the protected person and their children when making a protection order. However, the NT Act does not *require* a court to make an exclusion order when one is sought. Rather, it directs courts to start from the position that the interests of the protected person and their children would be best served by remaining in their home. The court or other issuing authority would of course need to determine whether an exclusion order is appropriate for achieving that outcome consistently with the safety of the protected person and any children living with that person.

Tenancy issues

3.2.22. Exclusion orders can raise particular issues for people who live in rented properties. If the person protected by an order is the sole (legal) tenant of a residential property, then an exclusion order should not affect their tenancy (leaving aside practical questions such as their ability to continue to cover the rent).

3.2.23. However, if a residential property is leased in the joint names of the protected person and the person subject to the exclusion order, or the protected person is not a lessee of the property, then tenancy arrangements can be complicated by an exclusion order. For example, a tenant who is the subject of an exclusion order might seek to end their tenancy agreement, or might simply stop paying rent, thus putting the protected person at risk of eviction.

3.2.24. There is legislation regulating residential tenancies in each State and Territory, and in New Zealand. Generally, power is given to a tribunal or similar authority to vary tenancy arrangements in cases of hardship. In some cases, tenants affected by domestic violence, and particularly by exclusion orders, may be able to seek relief from the relevant tribunal. However, in some jurisdictions the legislation goes further by making explicit links between the rules governing exclusion orders and the rules that apply to tenancies, and providing a mechanism for adjusting or transferring tenancies where exclusion orders are in force. For example:

- in Victoria the *Residential Tenancies Act 1997* (Vic) has been amended to allow existing tenancy agreements to be replaced if a final FVIO is made which excludes a tenant from premises, and to allow a protected person to change locks on a rented property;¹⁶⁰
- in Tasmania and the Northern Territory, courts have the power to terminate an existing residential tenancy agreement and replace it with a new agreement for the benefit of the affected person;¹⁶¹
- in New Zealand, courts can make a tenancy order having the effect of making the protected person the tenant of a particular residence and causing the respondent to the order to cease to be a tenant of the premises.¹⁶²

¹⁶⁰ See Victorian Act, Part 16, Division 10.

¹⁶¹ Tasmanian Act, s 17 and NT Act, s 23.

¹⁶² New Zealand Act, s 58.

Police powers to grant exclusion orders

3.2.25. In some Australian jurisdictions, police have powers to make protection orders that include exclusion conditions.

- In Victoria, a police officer may issue a Family Violence Safety Notice (FVSN) which can include an exclusion condition.¹⁶³ In such a case, the officer must consider the accommodation needs of the respondent and any dependent children of the respondent, and take any reasonable steps necessary to ensure the respondent and any dependent children of the respondent have access to temporary accommodation.¹⁶⁴ Conversely, if an FVSN does not include an exclusion condition, the police officer serving the notice must consider the accommodation needs of the protected person and any dependent children of that person, and take any reasonable steps necessary to ensure the protected person and any dependent children have access to temporary accommodation.¹⁶⁵
- In Tasmania, a police officer can issue a Police Family Violence Order (PFVO) if the officer is satisfied that a respondent has committed, or is likely to commit, a family violence offence.¹⁶⁶ A PFVO can require a person to vacate premises, not enter premises, or attach conditions to a person's entry onto premises.¹⁶⁷

Issues affecting the practical operation of exclusion orders

3.2.26. In some cases, separating the perpetrator and victims of family violence will be an appropriate means of preventing further abuse. Clearly, there is force in the argument that if the parties can no longer cohabit because of violence perpetrated by one of them, the perpetrator should be obliged to leave the home, rather than the victims of the violence (who may include children).

3.2.27. However, exclusion orders are not necessarily an appropriate solution in every circumstance. While exclusion orders may in some cases be effective in terms of securing the immediate safety of victims of domestic violence, they may not offer lasting solutions to the longer-term difficulties faced by victims. The practical difficulties raised by exclusion orders include those briefly discussed below.

Compliance issues

3.2.28. In many cases, the existence of a protection order does not remove the ongoing risk of further domestic violence, and may even heighten that risk. While many respondents will comply with the terms of a court order, some will not. Exclusion orders do not, therefore, necessarily ensure the safety of protected persons who remain in their homes.¹⁶⁸

¹⁶³ Victorian Act, ss 26 and 29(1).

¹⁶⁴ Victorian Act, s 36(1).

¹⁶⁵ Victorian Act, s 36(2).

¹⁶⁶ Tasmanian Act, s 14(1).

¹⁶⁷ Tasmanian Act, s 14(3).

¹⁶⁸ See R Edwards, *Staying Home, Leaving Violence* (Australian Domestic and Family Violence Clearing House, 2004).

3.2.29. In order for an exclusion order to be effective in securing the safety of the protected person and allowing them to remain in their home, the protected person must have some confidence that the respondent will comply with the order and that they will be protected from further violence. If a protected person fears that the respondent will breach an exclusion order and will return to the protected person's residence, the person may choose to enter a refuge or seek other accommodation. Pilot programs in several Australian jurisdictions have attempted to address these practical issues by providing additional safeguards for protected people who are judged to be at risk despite the terms of an exclusion order, for example, fitting sophisticated alarm systems at premises.¹⁶⁹

Housing issues

3.2.30. Remaining in a current residence, with the perpetrator of violence excluded by an exclusion order, may not be a sustainable long-term option for some families. A protected person may not be able to meet the costs of running a household if the respondent to an exclusion order ceases to contribute financially.¹⁷⁰

3.2.31. The person who is excluded from their home by an exclusion order may also have pressing accommodation needs, and a court may be reluctant to make an exclusion order unless it can be assured that that person will have access to emergency accommodation. This may be a particular barrier to the making of an exclusion order in rural and remote areas where such accommodation is limited.¹⁷¹

169 L McFerran, 'Taking Back the Castle: How Australia is making the home safer for women and children' (Australian Domestic and Family Violence Clearing House, Issues Paper No 14, 2007).

170 Domestic violence is associated with both primary and secondary homelessness for women and children, some of which is attributable to the difficulties women face in maintaining housing after separation: see 'Home Safe Home: The link between domestic and family violence and women's homelessness' (Partnerships Against Domestic Violence Report, 2000); Edwards, *Staying Home, Leaving Violence*, op cit.

171 McFerran, 'Taking Back the Castle', op cit.

Courts' willingness to grant exclusion orders

- 3.2.32.** Finally, there is some evidence of a general reluctance on the part of magistrates and judges to make exclusion orders.¹⁷² There appears to be little recent data about the frequency with which exclusion orders are granted to people who have experienced domestic violence, and the effectiveness of those orders in allowing victims of violence to remain safely in their homes. However, some research has suggested that magistrates have been reluctant to attach exclusion conditions to domestic violence orders.¹⁷³ It appears that magistrates have tended to focus on the accommodation needs of the respondent rather than on the safety of protected persons who remain at home without an exclusion order. There may also be concerns about the safety of women and children who remain at home even if they have been granted an exclusion order.¹⁷⁴
- 3.2.33.** In many jurisdictions, integrated programs have been implemented to raise awareness about exclusion orders, and to ensure that they are a realistic and safe option for victims of domestic violence. Risk assessment to determine whether an exclusion order is appropriate in a particular case, and additional police and security support for people who obtain exclusion orders, make these orders a more viable option for many applicants.¹⁷⁵ However, it is not yet clear that these initiatives, coupled with law reform in many States and Territories to direct courts' attention to the possibility of excluding a respondent from their home, has resulted in a widespread and significant increase in the proportion of cases in which exclusion orders are made.¹⁷⁶

¹⁷² R Edwards, *Violence Excluded: A Study into exclusion orders South East Sydney* (NSW Strategy to Reduce Violence Against Women, NSW Attorney-General's Department, Sydney 2004); R Field and B Carpenter, 'Issues relating to Queensland Magistrates Understandings of Domestic Violence' (Paper presented at the Domestic Violence Court Assistance Network (DVCAN) Conference 17-19 June 2003); R Field, B Carpenter and S Currie, 'Issues for Magistrates in the Making of Ouster Orders Under the *Domestic Violence (Family Protection Act) 1989* (Qld)' (Paper presented to the International Society of Family Law 10th World Conference, Brisbane 2000).

¹⁷³ Edwards, 'Violence Excluded', op cit, p 49.

¹⁷⁴ McFerran, 'Taking Back the Castle', op cit; J Oberin and W Weeks, *Women's Refuges, Shelters, Outreach and Support Services in Australia*, (WESNET, for Office of Women and Department of Family and Community Services, Canberra, 2004).

¹⁷⁵ McFerran, 'Taking Back the Castle', op cit.

¹⁷⁶ There appears to be a lack of data measuring the number of exclusion orders that are granted, and the differences between regions where there is targeted service-provision and those where this has not occurred.



3 Provision for counselling and rehabilitation programs

- 3.3.1. In all Australian States and Territories, and in New Zealand, one aspect of the response to domestic violence is the referral of perpetrators to treatment or education programs. However, only in Victoria, Western Australia, Tasmania, the ACT, the Northern Territory and New Zealand does the relevant domestic violence legislation make specific provision for referral to such programs, either as part of the protection order process or, in the criminal context, as a condition of sentencing or bail. In this Report, we refer to orders made under these legislative provisions as ‘counselling orders’. We also refer to a ‘counselling program’, being a treatment or education program the subject of the counselling order.
- 3.3.2. In this Chapter we focus on the jurisdictions that specifically provide for counselling orders in their domestic violence legislation.¹⁷⁷ Across those jurisdictions, there is significant variation between the relevant legislative provisions.

Key differences between jurisdictions that specifically provide for counselling orders in domestic violence legislation

- 3.3.3. The key differences between the jurisdictions relate to:
- when a counselling order may be made;
 - whether a counselling order is mandatory, voluntary, or made in connection with sentencing;
 - what is ‘counselling’;
 - counselling for protected persons and other persons;
 - the effect of a counselling order.

When a counselling order may be made

- 3.3.4. In all jurisdictions except Tasmania, the court makes the counselling order when making a domestic violence protection order. In Tasmania the counselling order is made as part of the sentencing process for a domestic violence related offence. In Western Australia a police officer making a police order may also refer a person to counselling.¹⁷⁸

¹⁷⁷ In relation to other jurisdictions, we make some reference to extra-legislative counselling programs.

¹⁷⁸ WA Act, s 30E(3).

Whether a counselling order is mandatory, voluntary, or made in connection with sentencing

Mandatory counselling orders

- 3.3.5.** The Victorian, NZ and NT Acts all provide for counselling orders in which a respondent is directed to attend counselling, with criminal penalties¹⁷⁹ attaching if a respondent fails to comply.¹⁸⁰
- 3.3.6.** Under the Victorian Act and the NZ Act, the court must make such an order against a respondent,¹⁸¹ subject to exceptions where it is not practicable or appropriate for the respondent to attend counselling. This involves an assessment of the respondent's character, personal history and any other relevant circumstances.¹⁸² In Victoria, the assessment specifically takes into account language skills, disabilities, severe psychiatric or psychological conditions, and alcohol or other drug problems. Further, the respondent must be an adult living in a specified geographical area that is proximate to a domestic violence court.¹⁸³
- 3.3.7.** Under the NT Act, the court may make such an order in a protection order, but only with the consent of the respondent.¹⁸⁴ The respondent must also be a suitable person for a counselling program and there must be a place available in a counselling program.¹⁸⁵

Voluntary counselling orders

- 3.3.8.** At the other end of the spectrum, the WA Act and the ACT Act only make specific provision for courts to recommend, or refer persons to, counselling.
- 3.3.9.** In Western Australia, in all cases where a protection order is made, the court or police officer must explain that counselling may assist the parties and, if the court thinks appropriate, must refer the parties to specific counselling programs.¹⁸⁶
- 3.3.10.** In the ACT, the court's power to make such a recommendation is entirely discretionary.¹⁸⁷

¹⁷⁹ Penalties are discussed further at paragraph 3.3.19ff.

¹⁸⁰ Note that the NZ Act also provides that a court must make a counselling order for a protected person or child if requested by the protected person: see paragraph 3.3.15.

¹⁸¹ Although the power is discretionary in relation to associate respondents (an associate of the respondent whom the respondent has encouraged to engage in conduct that would be domestic violence if engaged in by the respondent (NZ Act, s 17)). The court, in granting a protection order against the respondent, may also grant a protection order against the associate.

¹⁸² Victorian Act, s 130; NZ Act, s 32.

¹⁸³ Victorian Act, s 128.

¹⁸⁴ NT Act, s 24.

¹⁸⁵ NT Act, s 24.

¹⁸⁶ WA Act, ss 8 and 30E(3).

¹⁸⁷ ACT Act, s 89.

Counselling orders in connection with sentencing

- 3.3.11.** Unlike the other Acts, the Tasmanian Act only makes specific provision for counselling orders in connection with sentencing for domestic violence related offences and, in this regard, it interacts with the Sentencing Act 1997 (Tas). The court may order an assessment of whether or not the respondent is suitable to participate in a counselling program,¹⁸⁸ and must take the results of any assessment into account in determining the appropriate sentence.¹⁸⁹
- 3.3.12.** We note that other jurisdictions may also provide for counselling orders under general sentencing legislation.¹⁹⁰ However we do not consider such legislation in this section of the Report.

What is ‘counselling’?

- 3.3.13.** In each jurisdiction counselling orders are described differently:
- the Victorian Act refers only to ‘counselling’, without defining that term further;
 - the Western Australian provisions refer to ‘counselling and support services’ without defining these terms further;
 - in Tasmania, the Act refers to a ‘rehabilitation program’ which is a structured treatment program designed to reduce the likelihood that a person who has committed a family violence offence will re-offend;
 - the Northern Territory provisions also refer to a rehabilitation program, but define that program as a ‘perpetrators’ program’ under the *Sentencing Act*¹⁹¹ or another program to facilitate the respondent’s rehabilitation;¹⁹²
 - the ACT Act refers to counselling, training, mediation, rehabilitation or assessment;¹⁹³ and
 - in New Zealand, the Act refers to a programme with the primary objective of stopping or preventing domestic violence on the respondent’s part, promoting the protection of the protected person from domestic violence or assisting a child to deal with the effects of domestic violence.¹⁹⁴

¹⁸⁸ See *Sentencing Act 1997* (Tas), ss 7(ea) , 8, 27G(2), 82 and 89A; *Youth Justice Act 1997* (Tas), s 33A.

¹⁸⁹ Tasmanian Act ss 12(2)(a) and 13(b).

¹⁹⁰ For example, the *Sentencing Act 1995* (WA), which allows personal factors which contributed to the offender’s criminal behaviour to be assessed so that the offender has an opportunity to recognise, to take steps to control and, if necessary, to receive appropriate treatment for those factors.

¹⁹¹ The *Sentencing Act* (NT) defines a perpetrator program as a program specified as such by the Minister (s 78H).

¹⁹² NT Act, s 24.

¹⁹³ ACT Act, s 89.

¹⁹⁴ NZ Act, s 2.

3.3.14. Regardless of the way counselling orders are described in the legislation, in practice counselling programs vary widely.¹⁹⁵ For example, programs may:

- focus on perpetrators taking responsibility for domestic violence, or address psychological issues;
- be delivered to a group or be individually-tailored;
- extend from 6 to 24 weeks or involve single sessions;
- involve protected persons and family members.
- Counselling for protected persons and other relevant persons

3.3.15. The WA Act,¹⁹⁶ ACT Act¹⁹⁷ and NZ Act,¹⁹⁸ specifically provide that the court may make a counselling order to assist persons other than the respondent, including the protected person (ACT, Western Australia and NZ), other relevant persons (ACT and NZ), or a child of the protected person (NZ). In NZ, the Act specifically provides that a protected person and a respondent cannot be required to attend programme sessions at which the other person is also present.¹⁹⁹

3.3.16. The Victorian, Tasmanian and NT Acts do not specifically provide for counselling orders for persons other than the respondent. However, these jurisdictions may provide for counselling to assist victims of domestic violence in other Acts. For example, the *Victims Support and Rehabilitation Act 1996* (NSW) provides for victims and relevant family members to receive payment for approved counselling services.

3.3.17. Further, many jurisdictions provide for extra-legislative counselling programs for protected persons and other family members.

Effect of counselling orders

3.3.18. The effect of counselling orders depends on the purpose of the order and whether the order is directory or voluntary.

3.3.19. The Victorian, NT and NZ Acts specifically make failing to comply with a counselling order an offence.

3.3.20. In Victoria, failing to attend the interview or counselling without reasonable excuse is an offence.²⁰⁰ The maximum penalty is 10 penalty units (currently \$1,134.20). Uniquely in Victoria, because a counselling order is a separate order from a protection order, if the protection order is revoked, the counselling order remains in place.

¹⁹⁵ J Stewart, 'Specialist Domestic/ Family Violence Courts within the Australian Context' (Issues Paper 10, Australian Domestic & Family Violence Clearing House, 2005).

¹⁹⁶ WA Act, s 8.

¹⁹⁷ ACT Act, s 89.

¹⁹⁸ NZ Act, s 29.

¹⁹⁹ NZ Act, s 31.

²⁰⁰ Victorian Act, ss 129(5) and 130(4).

- 3.3.21.** In the Northern Territory and New Zealand, a counselling order is part of a protection order and is enforceable as such. Thus a person who contravenes a counselling order is guilty of an offence.²⁰¹ This incurs a maximum penalty of 6 months imprisonment or a \$5,000 fine in New Zealand,²⁰² and 400 penalty units (currently, \$44,000) or 2 years imprisonment in the Northern Territory. Under the NT Act, if the defendant satisfactorily completes a rehabilitation program the court may grant leave to the defendant to apply for an order varying or revoking the protection order,²⁰³ or a police officer may apply to vary the DVO.²⁰⁴
- 3.3.22.** The WA and ACT Acts make no specific provision for the effect of a failure to comply with a counselling order because attendance at counselling is voluntary.
- 3.3.23.** Under the Tasmanian Act, the effect of the counselling order is to assess whether a rehabilitation program order should be included in the respondent's sentence under the *Sentencing Act 1997* (Tas). If the court orders the respondent to attend a rehabilitation program as part of the respondent's sentence, any contravention of the order is an offence punishable by a maximum of 10 penalty units (currently \$1,200) or 3 months imprisonment.²⁰⁵ However, instead of, or as well as, conviction, the court may order the respondent to resume the program or may cancel the rehabilitation order.²⁰⁶ Any rehabilitation assessment the respondent undergoes will also be relevant to sentencing and bail for any future offences.²⁰⁷

Jurisdictions that do not specifically provide for counselling in domestic violence legislation

- 3.3.24.** The legislation dealing with domestic violence in New South Wales, Queensland and South Australia makes no specific provision for counselling orders. However, this does not necessarily preclude a court in these jurisdictions including a counselling order as a condition in a protection order. The general provisions relating to the conditions of protection orders in the Queensland Act,²⁰⁸ NSW Act²⁰⁹ and SA Act²¹⁰ all allow the court to impose any condition that the court considers necessary and desirable.

²⁰¹ NZ Act, s 32; NT Act, s 120.

²⁰² Note that the s 49 provisions for increasing penalties with multiple offences do not apply to failing to attend a program.

²⁰³ NT Act, s 48.

²⁰⁴ NT Act, s 65.

²⁰⁵ *Sentencing Act 1997* (Tas), s 54A.

²⁰⁶ *Sentencing Act 1997* (Tas), s 54A(5).

²⁰⁷ Tas Act, ss 13(b) and 12(2)(a).

²⁰⁸ Queensland Act, s 25.

²⁰⁹ NSW Act, s 35.

²¹⁰ SA Act, s 5.

- 3.3.25. These jurisdictions also provide for extra-legislative counselling or counselling programs.²¹¹ In Queensland, for example, Chief Magistrate Irwin noted in late 2005 that magistrates often recommend counselling in domestic violence proceedings.²¹² This includes informal recommendations as well as, in some courts, orders to attend specific programs.²¹³
- 3.3.26. In New South Wales, the domestic violence intervention court model (DVICM), piloted in Wagga Wagga and Campbelltown from late 2005, places offenders on a counselling program as part of their sentence if the magistrate deems this to be appropriate.²¹⁴
- 3.3.27. In South Australia, family violence courts operate in conjunction with the Violence Intervention Program. The program is most commonly used in the criminal context, but the court may also refer respondents to protection orders to the program. When the program is used in the criminal context, defendants are remanded on bail for 6 weeks to be assessed and, if assessed as suitable, the court may extend bail to allow the defendant to participate in the 'Stopping Violence Group'. When the program is used in the civil domestic violence context, participation is voluntary.²¹⁵

Issues affecting the practical operation of counselling orders

- 3.3.28. Concerns about counselling orders have been canvassed extensively in a number of reports across various jurisdictions.²¹⁶ Two of the issues that arise consistently are:
- concerns about a lack of evidence of the effectiveness of counselling, in particular mandated counselling; and
 - whether counselling is a weak substitute for criminal penalties, and the related issue of whether respondents will attend counselling with the wrong motivations.
- 3.3.29. Although an analysis of these issues is beyond the scope of this Report, we note below some of the concerns raised in reviews of domestic violence legislation.

211 Non-legislative programs also exist in jurisdictions that make legislative provision for counselling orders. For example, specialised family violence courts in Western Australia allow offenders in criminal proceedings relating to domestic violence to enter an early guilty plea and take part in a perpetrator program in exchange for a reduced sentence.

212 M Irwin 'Response to domestic and family violence: new directions' (Paper presented at the Domestic Violence Court Assistance Network Conference, Cairns, 11 November 2005).

213 One such program is the Gold Coast Domestic Violence Integrated Response, which allows respondents who have breached a protection order or committed a domestic violence offence to be placed on a probation order with a condition that they must attend and successfully complete a 24-week domestic violence program: see Gold Coast Domestic Violence Prevention Centre, Domestic Violence Integrated Response (2008) <<http://www.domesticviolence.com.au>>.

214 L Rodwell and N Smith, 'An Evaluation of the NSW Domestic Violence Intervention Court Model' (NSW Bureau of Crime Statistics and Research, 2008).

215 A recent paper prepared for the South Australian government (M Pyke QC, 'South Australian Domestic Violence Laws: Discussion and Options for Reform' (2007) (the Pyke Paper) also considered whether South Australia should reform its domestic violence legislation to provide mandated referral to perpetrator programs as a sentencing option.

216 See a comprehensive literature review and qualitative analysis in National Crime Prevention, *Ending domestic violence? Programs for perpetrators* (Report, 1999).

Effectiveness of counselling

- 3.3.30.** Despite extensive research, there appears to be no clear consensus on the question of the effectiveness of counselling programs in general or specific programs currently operating in Australia and New Zealand.²¹⁷ This is made more complicated by the differences between programs both within and between jurisdictions, as well as the differences between theories and evaluation (such as whether ‘effectiveness’ is assessed by reference to recidivism rates, drop-out rates, women’s views of their safety and so on).²¹⁸ For example, a review of the Tasmanian Act noted a lack of available information about the efficacy of referring convicted offenders to the family violence offender intervention program.²¹⁹
- 3.3.31.** The 1999 Model Laws Report cited arguments that mandatory counselling is rarely successful because it involves coercion, but voluntary counselling ‘could be ignored by defendants at will [and would involve] significant practical difficulties in enforcing counselling’.²²⁰ The 1999 Model Legislation included no specific provision for mandatory or voluntary counselling on the basis that, if a court considered necessary, a counselling order could be made under the general power to attach conditions to protection orders.
- 3.3.32.** The Australian Law Reform Commission (ALRC) took a similar position in its 1986 Report.²²¹ Nevertheless, the ALRC considered that, as some offenders could benefit from such a program, counselling options should be available to courts to be used in conjunction with other conditions.
- 3.3.33.** Similarly, the ACT Domestic Violence Prevention Council noted in its 2002 Report that, although magistrates commonly suggested counselling and treatment to respondents, ‘to direct a person to counselling through protection order proceedings may be well-intended but is fraught with complications’.²²²
- 3.3.34.** By contrast, 1999 the National Crime Prevention report²²³ had recommended mandatory referral of defendants to education programs with penalties for non-attendance or non-participation as part of ‘an integrated community-based intervention program’. This is essentially the position that was adopted in Victoria and New Zealand.

²¹⁷ See for example L Laing, ‘Responding to men who perpetrate domestic violence: controversies, interventions and challenges’ (Issues Paper 7, Australian Domestic Violence Clearing House, 2002).

²¹⁸ L Laing, ‘The Challenge of implementing and evaluating programs for perpetrators of domestic violence’ (Paper presented at the Crime Prevention Conference of the Australian Institute of Criminology and the Crime Prevention Branch, Commonwealth Attorney-General’s Department, Sydney, 12-13 September 2002).

²¹⁹ Urbis, *Review of the Family Violence Act 2004 (Tas)*, Report (2008) 2 and 18.

²²⁰ 1999 Model Laws Report, p 79.

²²¹ Australian Law Reform Commission, *Domestic Violence*, Final Report (1986) p 55.

²²² ACT Domestic Violence Prevention Council, *Implementing the Model Domestic Violence Laws Report 1999; an audit and commentary relating to the domestic violence laws in the Australian Capital Territory*, 2002, Report (2002), paragraph 7.1.

²²³ National Crime Prevention, *Ending domestic violence? Programs for perpetrators*, op cit.

Counselling orders and sentence reduction

3.3.35. The ALRC in its 1986 report recognised that, where the conduct in question constitutes a criminal offence, enabling counselling orders to be used in conjunction with other conditions:

*either without proceeding to conviction or, more usually, when a suspended sentence is imposed, may be used by offenders cynically, in order to escape a heavy punishment.*²²⁴

3.3.36. The ALRC noted in this regard that compulsory participation in counselling could be counter-productive because offenders may not be motivated to change their behaviour.²²⁵

3.3.37. The Victorian Law Reform Commission also recognised this problem, noting that, in the criminal context, counselling orders may be used as a weak substitute for a criminal penalty, and in any context, offenders may attend counselling for the wrong reasons.²²⁶

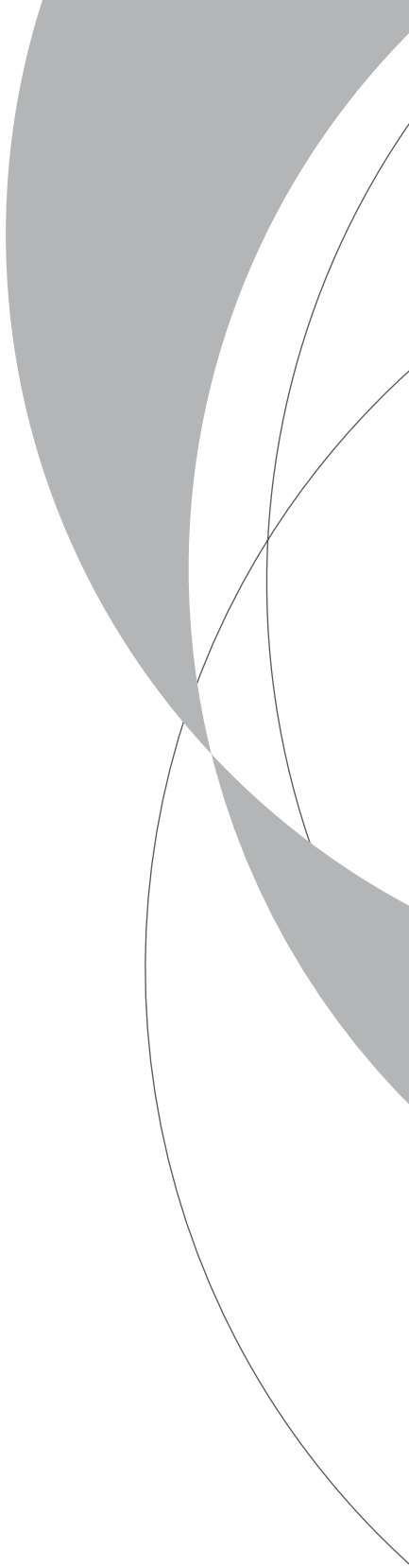
3.3.38. Similarly, a 2007 discussion paper prepared for the South Australian Government's recent review of domestic violence laws in that State (the Pyke Paper) noted that a problem with the South Australian violence intervention program approach was that defendants were utilising the program simply to receive a reduced penalty rather than because they were genuinely interested in changing their behaviour.²²⁷

²²⁴ ALRC, *Domestic Violence*, op cit, p 55.

²²⁵ Ibid.

²²⁶ Victorian Law Reform Commission, *Review of Family Violence Laws*, Final Report (2006), paragraph 10.84.

²²⁷ M Pyke QC, 'South Australian Domestic Violence Laws: Discussion and Options for Reform' (2007), p 124.






4 Portability of orders

Current legislative provision for registration and enforcement of interstate domestic violence protection orders

- 3.4.1. Clearly, the capacity for protection orders to be enforced across jurisdictions is an important issue for victims of domestic violence. This is especially so given that it is not uncommon for victims to move interstate (or to move from New Zealand to Australia or vice versa) in order to escape violent relationships. People who have obtained a protection order may also relocate for other reasons, for example, to be closer to their extended family or to seek employment.
- 3.4.2. Difficulty in enforcing protection orders granted in another state has, historically, been a key defect in the protection offered to victims by Australia's fragmented system of domestic violence laws. For practical reasons, it is not always possible, much less efficient, for a person to make a new application for a protection order in every jurisdiction they enter. Further, if a protected person moves interstate in an attempt to hide from a respondent, making a fresh application for a protection order could jeopardise their safety by revealing their new location.
- 3.4.3. The domestic violence-related legislation across Australia now recognises the need for 'portability' of orders. In each State and Territory, provision is made for a person to apply for registration of a domestic violence protection order (or similar) made by a court of another Australian jurisdiction or New Zealand (an external order).²²⁸ The process for effecting registration differs, in minor respects, across jurisdictions. There are also differences in relation to matters such as whether, and if so how, an external order may be varied in the jurisdiction in which it is registered.²²⁹

²²⁸ The relevant legislative provisions in each State and Territory are identified in Part 2 of this Report.

²²⁹ The issue of whether variation of an external protection order should be possible is not straightforward, and different approaches have been taken in different jurisdictions. We note that the approach taken in the 1999 Model was that variation of a registered external order should not be allowed.

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- 3.4.4. However, in essential respects, the legislative provisions in each jurisdiction are of the same or very similar effect. In each jurisdiction, an external order may only be registered upon application by the protected person or another person. The registration process is essentially an administrative one, with registration being carried out by an official of the relevant court. Upon registration of an external order, in effect the order has the same legal status, and becomes enforceable, in the registering jurisdiction as if it were an order made under that jurisdiction's legislation.

A national registration system for domestic violence orders?

- 3.4.5. While every jurisdiction thus makes provision for the manual registration, on application, of domestic violence protection orders, there is a question whether there could or should be a national registration scheme. This question was considered in the 1999 Model Legislation Report, which said that a *national* registration scheme, supported by a single database, could streamline and simplify inter-jurisdictional registration, and would enable protection orders:

... [to] attain immediate and true nationwide portability and provide needed protection to the victims of domestic violence, no matter where they live in Australia.²³⁰

- 3.4.6. The 1999 Model Legislation made provision for such a national scheme, premised on the use of the CrimTrac²³¹ database as the repository of the relevant information. The relevant provision of the 1999 Model Legislation²³² envisaged that, as soon as possible after the making of a domestic violence protection order by a court, the court clerk would be required to give written notice of the order to CrimTrac. Notice would also have to be given of any extension, variation, revocation or setting aside on appeal of a protection order. The information that courts would be required to provide in these notices was set out in the 1999 Model Legislation, for example, the names of the parties, the period for which the order has effect and the prohibitions or conditions imposed by the order.
- 3.4.7. The 1999 Model Legislation then included provisions having the effect that, upon the entry of an order made in one jurisdiction into the CrimTrac database, the order would be deemed to have been registered and to be enforceable in each other jurisdiction as if it had been made in that jurisdiction.²³³ (Here, it needs to be remembered that this was model *State/Territory* legislation.)

230 Op cit, p 169.

231 CrimTrac is an executive agency within the Commonwealth Attorney-General's portfolio. The CrimTrac scheme was established pursuant to an intergovernmental agreement between the Commonwealth, the States and the Territories, made on 13 July 2000. The scheme involves the operation and maintenance of a computer database that includes information provided by law enforcement agencies of the Commonwealth, the States and the Territories.

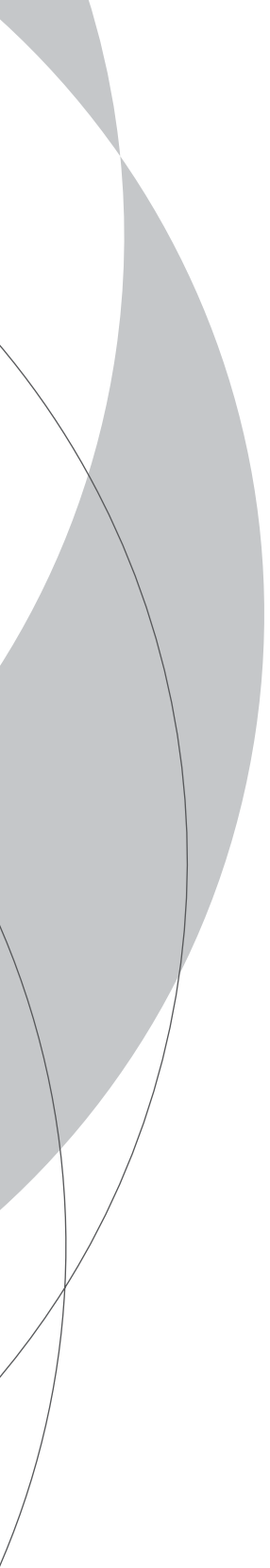
232 See s 42(1).


233 See ss 40-43.

- 3.4.8. The national registration scheme proposed in the 1999 Model Legislation could thus have rendered unnecessary the manual jurisdiction-by-jurisdiction registration process of the kind currently provided for in the State and Territory legislation. Further, since police authorities in the States and Territories can access the CrimTrac database for relevant purposes, the implementation of the proposed scheme could also have provided a single, comprehensive source of information for police in relation to the terms and status of external domestic violence protection orders.
- 3.4.9. The CrimTrac database does include information about apprehended violence protection orders. Our understanding is that police in all jurisdictions provide at least some information to CrimTrac about such orders for inclusion in the database, although we understand that the amount of detail provided varies significantly between jurisdictions.
- 3.4.10. However, a national registration scheme of the kind proposed by the 1999 Working Group – one that would achieve *automatic* national enforceability of orders as soon as they are made – has not been implemented. That is, the States and Territories have not made the legislative amendments that would be necessary in order to achieve this.
- 3.4.11. We have not been able to ascertain why a scheme of the kind proposed in 1999 was not pursued. Nor have we been able to find any post-1999 commentary considering the need for or merits of such a scheme. However, the issue was considered in the Pyke Paper.²³⁴ The Pyke Paper referenced the national database and registration scheme proposed in the 1999 Model Legislation and put, as an option for consideration by the South Australian Government, the possibility of that State, in consultation with the other States and Territories and the Commonwealth, pursuing:
- the establishment, as part of CrimTrac (or otherwise), a national database of all State and Federal orders in respect of domestic violence orders, injunctions or orders for the personal protection of parties or children.*²³⁵

²³⁴ Pyke, *op cit*.

²³⁵ *Ibid*, 140. The Pyke Paper also considered the broader question of whether a national database could also include orders made under the *Family Law Act 1975* relating to children, such as parenting orders and orders relating to contact with children. This issue is considered further in Part 6: see paragraphs 38-40 6.2.32 - 6.2.34.





Part 4:
stalking offences



4 Laws relating to stalking

- 4.1. This Part identifies Commonwealth, State, Territory and New Zealand criminal laws in relation to the offence of 'stalking'.

Commonwealth

- 4.2. There is no offence of stalking, as such, under Commonwealth law. However, a court might grant an order or injunction for the protection of a person under s 68B or s 114 of *Family Law Act 1975* in connection with conduct that constitutes or includes stalking, and a person who contravenes such an injunction is subject to sanctions that include imprisonment. The provisions in the *Family Law Act 1975* relating to protection orders and injunctions are considered in detail in Part 5 of this Report.

New South Wales

- 4.3. There are a number of offence provisions under New South Wales law that relate to stalking.

Crimes (Domestic and Personal Violence) Act 2007 (NSW)

- 4.4. Section 13 of the NSW Act makes it an offence to stalk or intimidate another person with the intention of causing the other person to fear mental or physical harm (including causing the person to fear physical or mental harm to another person with whom he or she has a domestic relationship). The offence carries a maximum penalty of 5 years imprisonment or a fine of 50 penalty units (currently \$5,500), or both.
- 4.5. 'Stalking' is defined in s 8(1) of the NSW Act to include 'the following of a person about or the watching or frequenting of the vicinity of, or an approach to, a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity.' Section 8(2) provides that, for the purpose of determining whether a person's conduct amounts to stalking, a court may have regard to any pattern of violence (especially violence constituting a 'domestic violence offence' in the person's behaviour).

Crimes Act 1900 (NSW)

- 4.6. Sections 60 (assault against police officers), 60A (assault against law enforcement officers), 60B (actions against third parties connected with law enforcement officers), 60C (obtaining information about law enforcement officers) and 60E (assaults at schools) of the *Crimes Act 1900* (NSW) (NSW Crimes Act) include stalking as an element of an offence. With the exception of s 60C, these are essentially assault provisions that include the act of stalking as an element of the assault. There is no definition of 'stalk' or 'stalking' in the NSW Crimes Act.

Queensland

- 4.7. Section 359E(1) of the *Criminal Code Act 1899* (Qld) (the Queensland Criminal Code) makes it an offence to unlawfully stalk a person. 'Unlawful stalking' is defined in s 359B of the Queensland Criminal Code, and includes either one protracted act, or conduct that occurs on more than one occasion, of the following kinds (or similar):

- following, loitering near, watching or approaching a person;
- contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;
- loitering near, watching, approaching or entering a place where a person lives, works or visits;
- leaving offensive material where it will be found by, given to or brought to the attention of, a person;
- giving offensive material to a person, directly or indirectly;
- an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence; and
- an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant.

- 4.8. Such conduct will amount to 'unlawful stalking' if it:

- 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
- causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.

- 4.9. The offence of unlawful stalking carries a maximum penalty of 5 years imprisonment (s 359E(2)), which may be increased to 7 years if any of the acts of unlawful stalking involve or include:

- an intentional threat to use violence against a person or their property (s 359E(3)(a));
- the possession of a weapon within the meaning of the *Weapons Act 1990* (Qld) (s 359E(3)(b)); or

- a contravention or threat to contravene an injunction or order imposed by a court or tribunal under a law of the Commonwealth or a State (s 359E(3)(c)).

4.10. Section 359D sets out a number of acts that do not constitute stalking – in effect, statutory exceptions to the offence. However, none of the exceptions are likely to be of relevance in the domestic violence context.

South Australia

4.11. Section 19AA(2) of the *Criminal Law Consolidation Act 1935* (SA) (the SA Criminal Law Act) makes it an offence to stalk another person. The basic offence carries a maximum penalty of 3 years imprisonment and an aggravated offence (defined in ss 5(1) and 5AA)²³⁶ carries a maximum penalty of 5 years.

4.12. Section 19AA(1) specifies that a person will ‘stalk’ another person if, on at least two separate occasions, the person:

- follows the other person (s 19AA(1)(a)(i));
- other place frequented by the other person (s 19AA(1)(a)(ii));
- enters or interferes with property in the possession of the other person (s 19AA(1)(a)(iii));
- gives or sends offensive material to the other person, or leaves offensive material where it will be found by, given to or brought to the attention of the other person (s 19AA(1)(a)(iv));
- publishes or transmits offensive material by means of the internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of, the other person (s 19AA(1)(a)(iva));
- communicates with the other person, or to others about the other person, by way of mail, telephone (including associated technology), facsimile transmission or the internet or some other form of electronic communication in a manner that could reasonably be expected to arouse apprehension or fear in the other person (s 19AA(1)(a)(ivb));
- keeps the other person under surveillance (s 19AA(1)(a)(v)); or
- acts in any other way that could reasonably be expected to arouse the other person’s apprehension or fear (s 19AA(1)(a)(vi));

with the intention of causing serious physical or mental harm to the other person or a third person, or with the intention of causing serious apprehension or fear.

²³⁶ A circumstance of aggravation includes, for example: committing the offence against the offender’s current or former spouse or domestic partner or a child normally residing with, or in the custody of, that person or the offender; knowing the conduct constituting the offence was in contravention of a court order designed to prevent such conduct; in abuse of a position of authority or trust; knowing the victim is in a position of particular vulnerability because of physical or mental disability; committing the offence in company; or intending to dissuade the victim from taking legal proceedings.

Additional charge

- 4.13. Further, any person charged with stalking is, subject to any exclusion in the instrument of the charge, also taken to be charged with 'offensive behaviour': SA Criminal Law Act s 19AA(3). 'Offensive behaviour' is defined in s 7 of the *Summary Offences Act 1953* (SA) and carries a maximum penalty of a \$1,250 fine or 3 months imprisonment.

Tasmania

- 4.14. Section 192 of the *Criminal Code Act 1924* (Tas) (the Tasmanian Criminal Code) makes stalking an offence. The acts that comprise stalking are set out in paragraphs (a) to (j) of s 192(1) of the Tasmanian Criminal Code and include doing any of the following with intent to cause another person physical or mental harm or to be apprehensive or fearful:
- following the person or a third person (s 192(1)(a));
 - keeping the person or a third person under surveillance (s 192(1)(b));
 - loitering outside a place that the person or a third person frequents (s 192(1)(c)); and
 - entering or interfering with the property of the person or the third person (s 192(1)(d)), and so on.
- 4.15. Section 192(2)(a) requires that the conduct must be sustained or must occur on more than one occasion.
- 4.16. As with Queensland, the Tasmanian Criminal Code provides for various statutory exceptions to the stalking offence. However, again, these are unlikely to be of relevance in the domestic violence context.
- 4.17. Conviction for the crime of stalking attracts the operation of s 389(3) of the Tasmanian Criminal Code, which provides that 'subject to the Sentencing Act 1997 (Tas) or any other statute, and except where otherwise expressly provided, the punishment for any crime shall be by imprisonment for 21 years, or by fine, or by both such punishments, and shall be such as the judge of the court of trial shall think fit in the circumstances of each particular case.' Relevantly, Part 2 of the *Sentencing Act 1997* (Tas) provides for sentencing orders that may be imposed on a person convicted of an offence, which include imprisonment, fine, drug treatment and so on (see s 7 of the *Sentencing Act 1997* (Tas)).

Victoria

- 4.18. Section 21A of the *Crimes Act 1958* (Vic) (the Victorian Crimes Act) makes it an offence to stalk another person. The maximum penalty for conviction of the offence is 10 years imprisonment.
- 4.19. Similar to other jurisdictions, the Victorian Crimes Act specifies the acts or conduct that constitutes stalking, which include:
- following the victim or any other person;
 - contacting the victim by post, telephone, fax, text message, email or other electronic communication or by any other means whatsoever;
 - publishing on the internet or by email statements relating to the victim;
 - causing an unauthorised computer function.
- 4.20. As with other jurisdictions, there must be an intention to cause physical or mental harm or fear in the victim.
- 4.21. As in other jurisdictions discussed above, the statutory exceptions to the stalking offence in the Victorian Crimes Act are unlikely to be relevant in domestic violence cases.

Intervention orders and proposed changes to the law

- 4.22. We note that s 21A(5) of the Victorian Crimes Act provides for the taking out of an intervention order, within the meaning of the *Crimes (Family Violence) Act 1987* (Vic), if a court is satisfied on the balance of probabilities that a person has stalked another person. We also note that there is currently a Bill before the Victorian Parliament (*Stalking Intervention Orders Bill 2008* (Vic) (the Bill)) which will, if enacted, provide for the making of intervention orders to protect persons from stalking and, as a consequence, repeal provisions in the Victorian Crimes Act providing for such orders. Contravention of an order provided for in the Bill will be an offence (see cl 32 of the Bill). If enacted, the offence will carry a maximum penalty of 240 penalty units (currently \$27,220.80) or 2 years imprisonment, or both.

Western Australia

- 4.23. Section 338E of the *Criminal Code Act Compilation Act 1913* (WA) (the WA Criminal Code) makes it an offence to pursue another person with intent to intimidate that person or a third person.
- 4.24. 'Intimidate', in relation to a person, includes causing physical or mental harm, or apprehension or fear, to the person (s 338D). 'Pursue' is defined in s 338D as including:
- repeatedly communicating with, or following, a person;
 - repeatedly causing a person to receive unsolicited items;
 - watching or besetting a person's home, place of employment, or any place the person happens to be.
- 4.25. Where the offence is committed in circumstances of aggravation (defined in s 338D), it is punishable by imprisonment for a maximum of 8 years. In any other case, the offence carries a maximum penalty of imprisonment for 3 years. (The Act also provides for the offence to be tried summarily, in which case the penalties are lower.)

Alternative offence

- 4.26. Section 338E(2) provides for an alternative ('simple') offence where a person pursues another person in a manner that could reasonably be expected to intimidate, and does in fact intimidate that person. If a person is convicted of the simple offence, the maximum penalty is 12 months imprisonment and a fine of \$12,000.
- 4.27. Section 338E(3) provides a statutory defence to a charge under s 338E if the accused can prove that he or she acted with 'lawful authority', but this is unlikely to be relevant in domestic violence cases.

Australian Capital Territory

- 4.28. Section 35 of the *Crimes Act 1900* (ACT) (the ACT Crimes Act) makes it an offence to stalk another person with intent to cause apprehension or fear of harm (s 35(1)(a)), or to cause harm to the stalked person or another person (s 35(1)(b)) or harass the stalked person (s 35(1)(c)). The maximum penalty for the offence is either:
- 5 years imprisonment (if the offence involved a contravention of an injunction or other order made by a court, or the offender was in possession of an offensive weapon); or
 - 2 years imprisonment in any other case.
- 4.29. For an act to constitute ‘stalking’, s 35(2) of the ACT Crimes Act requires one of the acts specified in paragraphs (a) to (j) to be done on at least 2 occasions. The acts which may constitute ‘stalking’ include:
- following or approaching the stalked person;
 - loitering near, watching, approaching or entering a place where the stalked person resides, works or visits;
 - keeping the stalked person under surveillance;
 - interfering with property in the possession of the stalked person; and
 - giving or sending offensive material to the stalked person or leaving offensive material where it is likely to be found by, given to or brought to the attention of, the stalked person.
- 4.30. Section 35(4) deems a person to have the requisite intent to stalk if the person knows or is reckless about whether stalking the person would result in an apprehension or fear of harm in the stalked person or the stalked person being harassed.
- 4.31. Section 35(3) of the ACT Crimes Act provides an exception to conduct reasonably engaged in by a person as part of the person’s employment, if it is a function of the person’s employment to engage in that conduct and the conduct is not otherwise unlawful. This exception is unlikely to be relevant in domestic violence cases.

Northern Territory

4.32. Section 189(2) of the *Criminal Code Act* (NT) (the NT Criminal Code) makes it an offence to stalk another person. The offence requires a person to engage in repeated instances of or a combination of any one of a number of specified acts including:

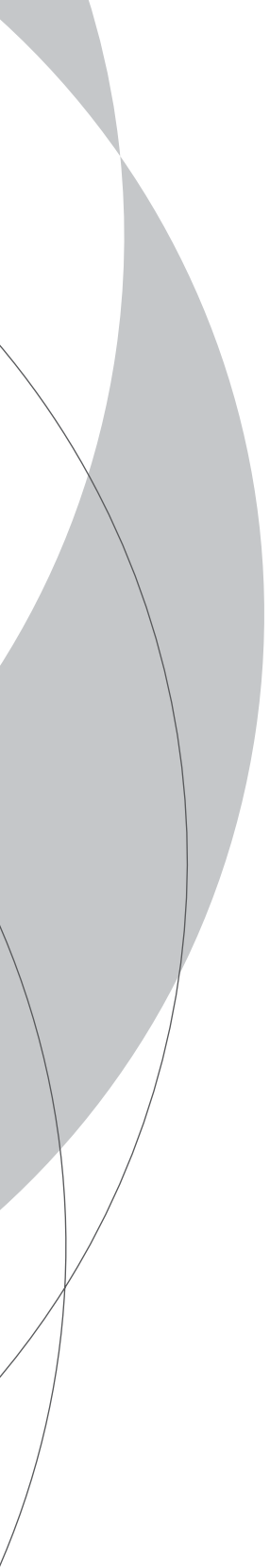
- following the victim or any other person ((s 189(1)(a));
- telephoning, sending electronic messages to, or otherwise contacting, the victim or another person (s 189(1)(b));
- entering or loitering outside or near the victim's or another person's place of residence or of business or any other place frequented by the victim or the other person (s 189(1)(c));
- interfering with property in the victim's or another person's possession (whether or not the offender has an interest in the property) (s 189(1)(d));
- giving offensive material to the victim or another person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person (s 189(1)(e));
- keeping the victim or another person under surveillance (s 189(1)(f)); or
- acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of another person (s 189(1)(g));

with the intention of causing physical or mental harm to the victim or arousing apprehension or fear in the victim.

4.33. The penalty for the offence is 2 years imprisonment or 5 years imprisonment where the conduct contravened a condition of bail or an injunction or order imposed by a court or the person was in possession of a weapon when the offence was committed.

New Zealand

- 4.34. Section 8(1) of the *Harassment Act 1997* (NZ) (NZ Harassment Act) makes it an offence to harass a person with intent to cause the other person to fear for their safety or the safety of any other person with whom that person has a family relationship. The offence is also made out if a person harasses another person in the knowledge that the harassment is likely to cause that person to fear for their safety or the safety of another person with whom that person has a family relationship. The offence carries a maximum penalty of 2 years imprisonment: NZ Harassment Act s 8(2).
- 4.35. Relevantly, 'harassment' is defined in s 3 of the NZ Harassment Act to mean the engagement in a pattern of behaviour directed against another person that includes doing a 'specified act' on at least two separate occasions within a period of 12 months. Section 4 defines 'specified act' and includes amongst those acts similar acts to those in Australian jurisdictions including:
- watching, loitering near, or preventing or hindering access to or from, a person's place of residence, business, employment, or any other place that the person frequents for any purpose (s 4(1)(a));
 - following, stopping, or accosting a person (s 4(1)(b));
 - entering, or interfering with, property in a person's possession (s 4(1)(c));
 - making contact with a person (whether by telephone, correspondence, or in any other way) (s 4(1)(d));
 - giving offensive material to a person, or leaving it where it will be found by, given to, or brought to the attention of, a person (s 4(1)(e));
 - acting in any other way that causes a person to fear for his or her safety, and that would cause a reasonable person in that person's particular circumstances to fear for his or her safety (s 4(1)(f)).



Part 5: Domestic
violence and family
law issues – Overview
of relevant provisions
of the Family Law
Act 1975



1 Introduction

- 5.1.1. In this Part, we explore the interaction between family violence and decision-making under the FL Act²³⁷ as well as the protection offered by that Act to parents and children who are experiencing or have experienced domestic violence.
- 5.1.2. Relevantly for the purposes of this Report, the FL Act deals with four key aspects of family relationships:
- responsibility for, and care of, children;
 - resolving disputes through family dispute resolution and family counselling;
 - ending marriages (by divorce or annulment); and
 - resolution of property disputes between parties to a marriage.
- 5.1.3. In this Part we consider how family violence impacts on the provisions dealing with these matters.
- 5.1.4. The FL Act also contains provisions which deal specifically with family violence and child abuse, including provisions empowering courts to make orders or injunctions for the protection of victims of such violence or abuse. We examine these provisions in the following Chapter.

²³⁷ Unless otherwise specified, references to legislation in this Chapter are to sections of the *Family Law Act 1975* (Cth).



2 Provision relating to care of children and associated issues


Scope and constitutional basis of the Family Law Act

- 5.2.1. The Commonwealth Parliament's power to legislate in relation to family law matters derives largely from a combination of heads of legislative power conferred by s 51 of the Constitution, and the power conferred by s 122 to make laws for the government of the Territories. In respect of certain family law-related matters, the Commonwealth's capacity to legislate derives from the referral of relevant powers by the States (other than Western Australia), pursuant to s 51(xxxvii) of the Constitution.
- 5.2.2. The Commonwealth has power to make laws with respect to marriage (s 51(xxi)) and 'divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants' (s 51(xxii)). The Commonwealth also has power to make laws with respect to custody, guardianship, and maintenance of, and access to, ex-nuptial children (including the children of de facto couples).²³⁸ The Commonwealth does not have power to make laws about the 'welfare' of children more generally.²³⁹
- 5.2.3. The FL Act covers certain areas of Australian law comprehensively, including 'matrimonial causes' and certain orders in relation to children. As a result, a number of legal mechanisms of relevance to victims of domestic violence are governed by the FL Act, including applications for divorces and orders about the people with whom children are to live and spend time.
- 5.2.4. Matrimonial causes²⁴⁰ are dealt with exclusively in the FL Act. Similarly, the FL Act deals exclusively with proceedings relating to children of the kind with which Part VII of that Act is concerned (except in Western Australia). The FL Act also lists exhaustively the courts in which matrimonial causes and proceedings under Part VII of the Act can be instituted (ss 39 and 41).

²³⁸ See the *Commonwealth Powers (Family Law - Children)* Acts of New South Wales, Victoria, Tasmania, and Queensland (the Referring Acts).

²³⁹ See s 3(2) of the Referring Acts.

²⁴⁰ 'Matrimonial cause' is defined in s 4(1), and includes proceedings for a divorce or annulment of a marriage. Matrimonial causes are expressly defined not to include proceedings under prescribed laws of a State or Territory (s 4(1)(e)). Effectively, this means that an application by a person for a violence protection order against their spouse, under State or Territory law, will not be a 'matrimonial cause'.

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- 5.2.5. The provisions of the FL Act dealing with 'matrimonial causes' apply, by definition, only to married couples. The provisions of the FL Act concerned with orders in relation to children apply in respect of all children, regardless of whether their parents are or have been married.²⁴¹
- 5.2.6. Part VII of the FL Act applies where a child's parents are or were in a same-sex relationship or a heterosexual de facto relationship. Currently, the FL Act does not apply to de facto partners who do not have children – their post-separation financial arrangements are governed by State and Territory laws. On 10 November 2008, the Commonwealth Parliament passed a Bill which extends the FL Act so as to allow de facto couples to access the various mechanisms under the FL Act for determining interests in property and spousal maintenance after separation.²⁴²

Western Australia

- 5.2.7. Western Australia has not referred power to the Commonwealth Parliament to legislate with respect to ex-nuptial children. That State has its own family law legislation which applies to ex-nuptial children and de facto partners. A separate court – the Family Court of Western Australia – exercises jurisdiction under the FL Act and under Western Australian law.
- 5.2.8. In practical terms, 'children of a marriage' are still covered by the FL Act in Western Australia, and all other children are covered by the *Family Court Act 1997* (WA). Generally, when the Commonwealth Parliament amends the FL Act, the Western Australian Parliament amends its legislation so as to mirror the FL Act.

Courts

- 5.2.9. The FL Act establishes the Family Court of Australia (the Family Court) (s 21).
- 5.2.10. In addition to the Family Court, the following courts exercise jurisdiction under the FL Act (see ss 39-41, Subdivision C of Part VII).²⁴³
- the Federal Magistrates' Court of Australia;
 - the Family Court of Western Australia;
 - the Supreme Court of the Northern Territory; and
 - State and Territory courts of summary jurisdiction.²⁴⁴

²⁴¹ Except ex-nuptial children in Western Australia (see 2.4.14 ff)

²⁴² *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (Cth).

²⁴³ The scope of the jurisdiction conferred on each of these courts varies: see further ss 39-41.

²⁴⁴ Courts of summary jurisdiction in each State are invested with federal jurisdiction in relation to matters arising under Part VII (s 69J). A 'court of summary jurisdiction' is defined in the *Acts Interpretation Act 1901* to mean 'any justice or justices of the peace or other magistrate of the Commonwealth or part of the Commonwealth, or of a State or part of a State ... sitting as a court (other than the Federal Magistrate's Court) for the making of summary orders or the summary punishment of offences under the law of the Commonwealth or part of the Commonwealth or under the law of the State ... or by virtue of his or their commission or commissions ...' (s 26(d)).

Recent reforms

5.2.11. The FL Act has been amended extensively since it commenced. The most significant recent changes were made by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (the 2006 amendments), which came into effect on 1 July 2006. Those changes included the way in which the FL Act deals with family violence. Perhaps most relevantly for present purposes, the 2006 amendments introduced a greater emphasis on out-of-court resolution of family law disputes, and significantly altered the way in which courts are required to approach the making of orders in respect of children. These changes are discussed in more detail below.

Definitions relevant to family violence

5.2.12. The FL Act distinguishes between the ‘abuse’ of a child and family violence, although there is potential for the same conduct in relation to a child to constitute both family violence and abuse of a child.

‘Abuse’ of a child

5.2.13. Section 4(1) defines ‘abuse’, in relation to a child, to mean:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

5.2.14. An assault on a child which is an offence under State or Territory law, or sexual activity involving a child, may also fall within the definition of ‘family violence’ (see below).

‘Family violence’

5.2.15. Section 4(1) defines ‘family violence’ to mean:

conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

5.2.16. A central element of the FL definition of family violence is the concept of 'reasonableness', introduced as part of the 2006 reforms.²⁴⁵ In order to constitute 'family violence', conduct must be such as to cause a person reasonably to fear for or be apprehensive about his or her personal wellbeing or safety. As indicated in the note to the definition, fear or apprehension about one's personal wellbeing or safety is only 'reasonable' if, in particular circumstances, a reasonable person in those circumstances would experience fear or apprehension. There is room within this concept of 'reasonableness' to take into account the particular circumstances of a relationship and the meaning that certain actions may have in that context.²⁴⁶

5.2.17. Whether or not a person's conduct constitutes 'family violence' depends, in part, on the relationship between that person and those who are affected by the conduct. For the purposes of the definition of 'family violence', s 4(1AB) defines 'member of the family' as follows:

a person (the *first person*) is a *member of the family* of another person (the *second person*) if:

- (d) the first person is or has been married to, or in a de facto relationship with, the second person; or
- (e) the first person is or has been a relative of the second person ... ; or
- (f) an order under [the FL Act] described in subparagraph (i) or (ii) is or was (at any time) in force:
 - (i) a parenting order (other than a child maintenance order) that relates to a child who is either the first person or the second person and that is in favour of the other of those persons;
 - (ii) an order providing for the first person or the second person to have custody or guardianship of, or a right of access to, the other of those persons; or
- (g) an order under a law of a State or Territory described in subparagraph (i) or (ii) is or was (at any time) in force:
 - (i) an order determining that the first person or the second person is or was to live with the other of those persons, or is or was to have custody or guardianship of the other of those persons;
 - (ii) an order providing for contact between the first person and the second person, or for the first person or the second person to have a right of access to the other of those persons; or

²⁴⁵ See *Family Law Amendment (Shared Parental Responsibility) Act 2005*, Schedule 1.

²⁴⁶ See further Fehlberg and Behrens, *Australian Family Law*, op cit, pp 215-16.

- (h) the first person ordinarily or regularly resides or resided with the second person, or with another member of the family of the second person; or
- (i) the first person is or has been a member of the family of a child of the second person.

5.2.18. A 'relative' in this context is (s 4(1AC)):

- (a) a father, mother, grandfather, grandmother, step-father or step-mother of the person; or
- (b) a son, daughter, grandson, grand-daughter, step-son or step-daughter of the person; or
- (c) a brother, sister, half-brother, half-sister, step-brother or step-sister of the person; or
- (d) an uncle or aunt of the person; or
- (e) a nephew or niece of the person; or
- (f) a cousin of the person; or
- (g) if the person is or was married—in addition to paragraphs (a) to (f), a person who is or was a relative, of the kind described in any of those paragraphs, of the person's spouse; or
- (h) if the person is or was in a de facto relationship with another person—in addition to paragraphs (a) to (f), a person who would be a relative of a kind described in any of those paragraphs if the persons in that de facto relationship were or had been married to each other.

5.2.19. The term 'family violence' is thus wide enough to encompass conduct that is not criminal, and conduct involving people who do not cohabit or form a core domestic unit. However, the definition is narrower in some respects than equivalent terms used in some State and Territory legislation.²⁴⁷

'Family violence orders'

5.2.20. The FL Act contains provisions dealing with the relationship between orders made under that Act and 'family violence orders' made under other legislation. In the FL Act, 'family violence order' means an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence (s 4(1)). For a list of prescribed laws and the orders that can be made under them, see Appendix A to this Part.

²⁴⁷ See, for example, the *Family Violence Act 2004* (Tas), s 7 and the *Family Violence Protection Act 2008* (Vic), s 5.

FL Act Part VII: orders and arrangements with respect to children

- 5.2.21. Part VII of the FL Act deals with children, and in particular the care and support of children, whose parents have divorced or separated. As discussed above, other than in Western Australia, the FL Act covers children regardless of whether or not their parents have been married to each other.
- 5.2.22. Below we outline some of the key features of Part VII that can be relevant to families with some history of domestic violence, and particularly where violence or the threat of violence is an ongoing feature of the relationship between the parents.

Parenting plans

- 5.2.23. Under the FL Act, parents are encouraged to reach agreement about matters concerning their children, having regard to the best interests of the children (s 63B). One way of doing so is to make a parenting plan, which is a written agreement that may deal with (s 63C):
- (a) the person or persons with whom a child is to live;
 - (b) the time a child is to spend with another person or other persons;
 - (c) the allocation of parental responsibility for a child;
 - (d) if 2 or more persons are to share parental responsibility for a child—the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
 - (e) the communication a child is to have with another person or other persons;
 - (f) maintenance of a child;
 - (g) the process to be used for resolving disputes about the terms or operation of the plan;
 - (h) the process to be used for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan;
 - (i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.
- 5.2.24. Importantly, parenting orders made by a court exercising jurisdiction under Part VII (discussed further below) are subject to the terms of subsequent parenting plans (s 64D). Effectively, the FL Act allows parents to agree to vary the terms of a court order without the need to return to court to seek an amendment of the orders by consent, by making a parenting plan.

- 5.2.25. In 'exceptional circumstances', a court can include in a parenting order a provision that the parenting order, or a specified provision of the parenting order, may only be varied by a subsequent order of the court (and not by a parenting plan) (s 64D(2)). 'Exceptional circumstances' include (s 64D(3)):
- (a) circumstances that give rise to a need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;
 - (b) the existence of substantial evidence that one of the child's parents is likely to seek to use coercion or duress to gain the agreement of the other parent to a parenting plan.
- 5.2.26. From our research, it appears that this power has not been widely used since it was introduced in 2006, even in cases where domestic violence has been a significant issue.²⁴⁸
- 5.2.27. It is important to recognise that, in cases of family violence, parents may not approach the making of a parenting plan from positions of equal bargaining power. Parenting plans are a flexible mechanism allowing parents to agree between themselves how to care for their children after separation. Parenting plans also allow parents who have obtained court orders under Part VII to respond to changes in their circumstances by making a parenting plan, rather than returning to court. However, entering into a parenting plan with a perpetrator of family violence may be problematic. Parties may not have equal bargaining power in the process of making a parenting plan. There may be pressure on one party to agree to arrangements that do not meet the party's needs or that are unsafe for some of the people involved (including children and other family members).²⁴⁹
- 5.2.28. The FL Act stipulates that an agreement is not a parenting plan for the purposes of the Act 'unless it is made free from any threat, duress or coercion' (s 63C(1A)). If a party were able to demonstrate to the satisfaction of a court that, because of family violence, they agreed to the terms of a parenting plan under threat, duress or coercion, the court should not regard the agreement as a parenting plan. This is particularly relevant if a court is being asked to make orders under Part VII and would otherwise have been obliged to have regard to the terms of the purported parenting plan (s 65DAB).

248 For an example of a case in which 'exceptional circumstances' were found to exist, see *James & Mae* [2007] FamCA 99 (20 February 2007). In contrast, for an example of a court's refusal to make an order under s 64D(2), see *Fennessy & Gregorian (formerly Sanchez)* [2007] FamCA 1574 (19 December 2007). In this case, Collier J held that despite the submission by the mother that she was likely to be harassed in future by the father, the mother had demonstrated sufficient fortitude as to be able to resist pressure to make a parenting plan altering the terms of the court's order. Further, the court noted that if she were threatened into making such a parenting plan, the mother would have 'very real prospects' of having the agreement set aside.

249 For a discussion of the difficulties experienced by victims of family violence in informal dispute-resolution processes, and particularly the power imbalances between victims and perpetrators of violence, see Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence* (Discussion Paper No 6, 2007, Melbourne); Australian Domestic & Family Violence Clearinghouse, *Family Law Act Reform: the potential for screening and risk assessment for family violence* (Issues Paper 12, 2007, Sydney).

Parenting orders generally

The best interests of a child

5.2.29. The best interests of a child are the paramount consideration when a court makes a parenting order (s 60CA). Section 60CC directs a court as to the factors it is to consider when determining what is in a child's best interests. The primary considerations are (s 60CC(2)):

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

5.2.30. Additional considerations include (s 60CC(3)):

- (3)
 - (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
 - (j) any family violence involving the child or a member of the child's family;
 - (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or
 - (ii) the making of the order was contested by a person;

5.2.31. Another significant 'additional consideration' in the context of family violence is 'the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent...' (s 60CC(3)(c)). These 'friendly parent' criteria have been the subject of extensive criticism by researchers and domestic violence victims' advocates,²⁵⁰ on the basis that they discourage women from making allegations of violence in family law proceedings for fear of being (a) disbelieved by a court and (b) cast as an 'unfriendly parent' in disputes about shared parental responsibility and time with children. These issues are discussed in further detail in Part 6.

250 See R Kaspiw, 'Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation' (2007) 29 *Sydney Law Review* 131. For a critique of friendly parent criteria in United States jurisdictions, see M Dore, 'The Friendly Parent Concept: A Flawed Factor for Child Custody' (2004) 6 *Loyola Journal of Public Interest Law* 41.

5.2.32. In a similar vein, the court must consider (s 60CC(4)):

... the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

- (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child; and
 - (ii) spending time with the child; and
 - (iii) communicating with the child ...

Parenting orders in cases involving family violence

5.2.33. Although courts are clearly directed to give paramount consideration to the interests of the children who are the subject of a parenting order, there is scope for courts to consider the impact of parenting arrangements on parents, and other significant people who are involved in the children's lives. In cases in which family violence is an issue, courts are required to consider the impact of a proposed order on people other than the child – for example, on other members of the child's family. Under s 60CG(1), a court is required to ensure that, 'to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration', the order:²⁵¹

- (a) is consistent with any family violence order; and
- (b) does not expose a person to an unacceptable risk of family violence.

5.2.34. (As noted in paragraph 5.2.20, in the FL Act a 'family violence order' is an order made under a prescribed State or Territory law).

5.2.35. The court may include terms in the order to protect the safety of the people affected by the order (s 60CG(2)).²⁵²

²⁵¹ This section does not preclude a court from making an order under Part VII that is inconsistent with a family violence order where it is considered to be in the best interests of a child to do so. The relationship between parenting orders and such State/Territory orders is discussed in more detail in Part 6.

²⁵² Orders or injunctions for the personal protection of a child or another person affected by a parenting order may also be available under s 68B.

Common types of parenting orders

Orders about parental responsibility

5.2.36. ‘Parental responsibility’ means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children (s 61B). In the absence of any court order to the contrary, each parent of a child who is under 18 has parental responsibility for that child (s 61C). Parents may exercise that responsibility independently or jointly.²⁵³ Whether parents are married, live together, live with a child or are separated, they each continue to have parental responsibility in respect of their children and can exercise that responsibility independently of each other, unless and until a court makes an order changing the way in which responsibility is allocated. Similarly, if a child no longer lives with his or her parents, but is cared for by another person, the parents would still have parental responsibility for the child unless a court orders otherwise.

5.2.37. A court exercising jurisdiction under Part VII of the FL Act may be asked to make an order about parental responsibility for a child, effectively departing from the general rule described above. An order about parental responsibility has significant implications, including for orders about with whom the child spends time. Importantly, however, orders about parental responsibility are distinct from orders about where a child lives and with whom the child spends time – it is possible (albeit unusual) for a parent to have parental responsibility in relation to a child but not to spend time with that child, or for a child to spend time with a parent who does not exercise parental responsibility for them.

5.2.38. The 2006 amendments to the FL Act introduced a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child (s 61DA(4)). However, by virtue of s 61DA(2), the presumption does not apply:

if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

- (a) abuse of the child or another child who, at the time, was a member of the parent’s family (or that other person’s family); or
- (b) family violence.

5.2.39. The presumption in favour of equal shared parental responsibility operates slightly differently in proceedings for an interim order. In interim proceedings, a court may not have the opportunity to assess all the evidence on which the parties intend to rely. In such cases, ‘the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied ...’ (s 61DA(3)). This allows courts some scope not to apply the presumption where there is some evidence of family violence, but that evidence is yet to be tested.²⁵⁴

²⁵³ *Goode v Goode* (2007) 36 Fam LR 422, 434.

²⁵⁴ See *Goode v Goode* (2007) 36 Fam LR 422

5.2.40. A parent of a child who has experienced domestic violence perpetrated by the other parent may, therefore, seek an order to the effect that it would not be in the best interests of the child for parental responsibility to be shared equally between his or her parents. In interim proceedings, the applicant may argue that the court should err on the side of caution and not apply the presumption until their claims about family violence or child abuse can be examined in full.

Consequences of shared parental responsibility

5.2.41. If parents share parental responsibility for a child equally, they are required to consult with each other when making decisions about 'major long-term issues', and make such decisions jointly (s 65DAC). 'Major long-term' issues are those about the care, welfare and development of the child of a long-term nature, and include issues about (s 4(1)):

- (a) the child's education (both current and future); and
- (b) the child's religious and cultural upbringing; and
- (c) the child's health; and
- (d) the child's name; and
- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

5.2.42. Forming a relationship with a new partner will be a major long-term issue for this purpose if 'the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent' (see the definition in s 4(1)).

5.2.43. Clearly, an order for equal shared parental responsibility for their child would make it extremely difficult, if not impossible, for parents to have no further contact with each other after separation. This may be an issue in cases involving domestic violence, particularly those featuring patterns of controlling behaviour, if the victim of violence is obliged to continue to interact with the perpetrator.

Orders about spending time with children

5.2.44. Decisions about parental responsibility are also significant because they affect the way in which courts make orders about children spending time with their parents.

5.2.45. If a court making a parenting order decides that parental responsibility for a child will be shared equally between the parents, then the court must consider whether it is in the best interests of the child, and reasonably practicable, for the child to spend equal time with both parents (s 65DAA(1)(a) and (b)). If so, then the court must consider making an order to that effect (s 65DAA(1)(c)).

5.2.46. If the court does not order that the child is to spend equal time with both parents, it must consider whether an order that the child spend 'substantial and significant' time with both parents would be in the child's best interests and reasonably practicable (s 65DAA(2)).²⁵⁵

5.2.47. How a court determines what is in a child's 'best interests' is discussed above. In addition to being in a child's best interests, an order that the child spend equal or substantial and significant time with both parents must be 'reasonably practicable'. Reasonable practicability is assessed having regard to the following factors (s 65DAA(5)):

- (a) how far apart the parents live from each other; and
- (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- (d) the impact that an arrangement of that kind would have on the child; and
- (e) such other matters as the court considers relevant.

5.2.48. In circumstances of high conflict, or where parents are not able to communicate with each other (for example, because one parent is fearful of the other, or parents' interactions are characterised by violent behaviour) it may not be 'reasonably practicable' for a child to spend equal or substantial and significant time with both parents, even if ideally it would be in the child's interests to do so.²⁵⁶

Special requirements in cases involving allegations of child abuse or family violence

5.2.49. If, in an application for an order under Pt VII, a document is filed which alleges family violence or abuse of a child by one of the parties to the proceeding, or alleges that there is a risk of family violence or child abuse, s 60K requires the court hearing the application to:

- consider what interim or procedural orders (if any) should be made to enable appropriate evidence about the allegation to be obtained as expeditiously as possible, and to protect the child or any of the parties to the proceedings;
- make such orders of that kind as the court considers appropriate; and
- deal with the issues raised by the allegation as expeditiously as possible.

²⁵⁵ 'Substantial and significant time' is defined in s 65DAA(3) so as to include involvement in the child's daily routine.

²⁵⁶ An order was made on this basis in *Safford & Safford* [2007] FMCAfam 878 (29 October 2007). Brown FM found that it would be in a child's interests to spend substantial and significant time with his father, but that arrangement was not 'reasonably practicable' because of the poor relationship between the parents.

5.2.50. In particular, the court must consider:

- whether orders should be made under s 69ZW to obtain reports from State and Territory agencies in relation to the allegations (s 68K(3)); and
- whether orders should be made, or an injunction granted, under s 68B (s 68K(4)).

Family dispute resolution and family counselling

5.2.51. The 2006 amendments to the FL Act introduced new threshold requirements that must be satisfied before parties can commence proceedings for an order under Part VII in relation to children.

5.2.52. Family Dispute Resolution (FDR) is a cornerstone of the 2006 amendments to the FL Act. FDR is defined as (s 10F):

a process (other than a judicial process):

- (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- (b) in which the practitioner is independent of all of the parties involved in the process.

5.2.53. The FL Act envisages that, ideally, parties will participate in an FDR process and may reach agreement on some or all of the issues in dispute, thus avoiding or limiting the need for any judicial determination. Parties can confirm their agreement in the form of a parenting plan, or seek court orders by consent.

FDR and orders under Part VII

Requirement to provide a certificate from an FDR practitioner before an application for a Part VII order is heard

5.2.54. A court must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner under s 60I(8) of the FL Act (s 60I(7)), or one of the exceptions in s 60I applies.

5.2.55. FDR practitioners can give a number of different kinds of certificate under s 60I(8), according to the circumstances. An FDR practitioner can certify that:

- a person did not attend FDR because the other party or parties refused or failed to attend;
- a person did not attend FDR because the practitioner considers that it would not be appropriate to conduct FDR;
- a person attended FDR and all attendees made a genuine effort to resolve the issue(s) between them;
- a person attended FDR, but the person or another of the parties did not make a genuine effort to resolve the issue or issues.²⁵⁷

5.2.56. Effectively, s 60I requires most applicants for an order under Part VII at least to make contact with an FDR provider, and in some instances to attempt FDR, before their application for an order under Part VII can be heard. However, there are exceptions (described below) in cases of family violence and child abuse.

When is a certificate not required?

5.2.57. There are several bases on which an applicant for a Part VII order can be exempted from the requirement to obtain a certificate from an FDR practitioner (see s 60I(9)). In particular, the FL Act recognises that FDR is not an appropriate method of resolving disputes where there has been family violence by one of the parties, or in cases involving child abuse. Section 60I(7) does not apply if the court is satisfied there are reasonable grounds to believe that (s 60I(9)(b)):

- (i) there has been abuse of the child by one of the parties to the proceedings; or
- (ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or
- (iii) there has been family violence by one of the parties to the proceedings; or
- (iv) there is a risk of family violence by one of the parties to the proceedings.

257 The Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 introduces a new basis on which an FDR practitioner can issue a certificate under s 60I(8). Under new s 60I(8)(d), a practitioner will be able to certify that a person began attending family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the practitioner considers, having regard to the matters prescribed by the regulations, that it would not be appropriate to continue the family dispute resolution.

- 5.2.58. Under s 60I(9)(d), a certificate is not required if ‘the application is made in circumstances of urgency’. Also, if one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason), the parties will not be required to obtain a certificate (s 60I(9)(e)).
- 5.2.59. Alternatively, if an applicant makes contact with an FDR practitioner, but the practitioner determines that it would not be appropriate to attempt FDR to resolve the issues that would be the subject of the order, then the practitioner can provide the parties with a certificate to that effect. Regulations made under the FL Act prescribe matters that FDR practitioners may take into account when determining whether it is appropriate to conduct FDR. Regulation 62 of the Family Law Regulations 1984 provides that:
- (2) In determining whether family dispute resolution is appropriate, the family dispute resolution practitioner must be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:
 - (a) a history of family violence (if any) among the parties;
 - (b) the likely safety of the parties;
 - (c) the equality of bargaining power among the parties;
 - (d) the risk that a child may suffer abuse;
 - (e) the emotional, psychological and physical health of the parties;
 - (f) any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.
- 5.2.60. FDR practitioners are required to assess parties before commencing FDR, and to determine in advance whether FDR is appropriate in the circumstances of the parties.²⁵⁸

Other uses of FDR certificates

- 5.2.61. Courts have the power under s 13C to order parties to proceedings under the FL Act to attend family counselling, participate in FDR or attend another course or service, even if the court is aware that the case involves domestic violence or child abuse. A court can consider the type of certificate provided by an FDR practitioner when considering whether to make an order under s 13C.

²⁵⁸ Family Law Regulations 1984, r 62.

5.2.62. Certificates issued by FDR providers may also be relevant when a court is considering whether to award costs against a party (see s 117).

Screening and disclosure

5.2.63. Clearly, the mechanisms in the FL Act designed to exempt families with a history of domestic violence from the requirement to participate in FDR rely substantially on at least one of the parties to a dispute acknowledging and disclosing that family violence has occurred, or that they fear family violence. Unless this fact is disclosed, a court will approach the application by applying the general rule and requiring the applicant to produce a certificate from an FDR practitioner. Similarly, FDR practitioners need to obtain accurate information from the parties during initial assessment/screening processes in order to make an informed decision about whether FDR is an appropriate way of attempting to resolve their disputes.²⁵⁹

Divorce

Applications for a divorce order

5.2.64. The sections of the FL Act dealing with divorce do not make special provision for cases involving domestic violence. In general, the prerequisites for an order for divorce are (s 48):

- that the marriage has broken down irretrievably; and
- the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order.²⁶⁰

5.2.65. A court cannot make a divorce order if it is satisfied that there is a reasonable likelihood of cohabitation being resumed (s 48(3)).

5.2.66. A consequence of the requirement that parties must have separated and lived apart for at least 12 months before applying for a divorce order is that divorce is not available quickly to a person who has left a violent marriage. However, as outlined above, the FL Act allows courts to make a range of orders for the personal protection of parties in a 'matrimonial cause' which can assist in overcoming the short-term difficulties faced by victims of domestic violence who have separated from their spouse but are not eligible to apply for a divorce. Orders in relation to the division of marital property are also available before a divorce is finalised.

259 See *Family Law Regulations 1984*, rr 62 and 64. The Attorney-General's Department has produced guidance material to assist practitioners in 'screening' for family violence before, and during, FDR: Attorney-General's Department, *Framework for Screening, Assessment and Referrals in the Family Relationships Centres and Family Relationships Advice Line* (July 2008).

260 In some circumstances, it is possible to have lived separately and apart while still residing under one roof.

Short marriages

- 5.2.67. The FL Act imposes special requirements on people who apply for a divorce within their first two years of marriage. If a couple has been married for less than two years, the FL Act will generally prevent them from applying for a divorce order unless they have ‘considered reconciliation’ with the assistance of a family counsellor or other nominated individual or organisation (s 44(1B)). Parties are required to file a certificate to the effect that they have considered reconciliation, signed by their counsellor or equivalent (s 44(1B)).
- 5.2.68. Courts have a power to dispense with this requirement if the court is satisfied that ‘special circumstances’ exist which mean that an application for a divorce order should proceed even though the parties have not obtained assistance and considered reconciliation (s 44(1C)). The FL Act does not provide guidance as to what may constitute ‘special circumstances’. We have not identified any reported decisions of courts exercising jurisdiction under the FL Act in which the meaning of the phrase ‘special circumstances’ in this context is considered.

Property and financial settlements

- 5.2.69. The FL Act provides a number of mechanisms for dividing property at the end of a marriage.²⁶¹ Property settlement is a complex area of family law. While recognising that the availability and adequacy of arrangements for the division of property will impact upon parties’ ability to end their marriage, it is beyond the scope of this Report to examine in detail the principles governing the distribution of marital assets after divorce. Below we briefly describe some aspects of property division which may be relevant to cases involving family violence.

Binding financial agreements

- 5.2.70. Before parties marry, or during the course of their marriage, they can make a financial agreement about (ss 90B and 90C):
- (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and before divorce, is to be dealt with;
 - (b) the maintenance of either of them:
 - (i) during the marriage; or
 - (ii) after divorce; or
 - (iii) both during the marriage and after divorce.

²⁶¹ As noted above, property settlement between de facto couples is not currently within the scope of the FL Act.

- 5.2.71. Parties can also make a financial agreement after a divorce order is made (s 90D).
- 5.2.72. Financial agreements are only binding if they are signed by both parties and each party has obtained independent legal advice before signing the agreement (s 90G). A financial agreement can only be terminated by agreement, or by its replacement with a new financial agreement (s 90J).
- 5.2.73. Courts have limited power to set aside a financial agreement when certified as having been made after both parties have received independent legal advice. In particular, the FL Act does not deal explicitly with situations in which one party to a binding financial agreement was influenced by family violence or other coercive behaviour to sign the agreement. Such a situation may be addressed by s 90K(1)(e) which allows a court to set aside an agreement, if, in respect of the making of a financial agreement, a party to the agreement engaged in conduct that was 'in all the circumstances, unconscionable'. If an agreement is set aside, a court may make such order(s) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons (s 90K(3)).

Dividing marital property

- 5.2.74. When determining how to divide marital property, courts are required by s 79(4) to take into account a range of financial and non-financial contributions made by each party to the marriage. These include:
- the direct and indirect financial contribution made by each party to the property of the parties;
 - non-financial contributions made by each party to the property of the parties;
 - the parties' contribution to the welfare of the family (including contributions made in the capacity of homemaker or parent);
 - any child support obligations of the parties towards the children of the marriage.

5.2.75. There is nothing in the FL Act which allows a court to take into account the fact that a party to a marriage has experienced domestic violence, or that a party to the marriage has been a perpetrator of domestic violence. However, there is case law suggesting that, in some limited circumstances, one party's course of violent conduct during the marriage may be relevant to the assessment of the value of the other party's contributions.²⁶² Although the application of this principle is very limited, it does allow courts to recognise that a person's contributions to a marriage may be made more onerous by their prolonged experience of family violence.

²⁶² See *In the Marriage of Kennon* (1997) 22 Fam LR 1.



3 Protection orders and injunctions

Protection orders and compliance mechanisms

- 5.3.1. Courts exercising jurisdiction under the FL Act can make orders for the personal protection of victims of domestic violence. The FL Act also provides for sanctions when a person contravenes such an order.

Protection orders and injunctions

- 5.3.2. A court may make orders or grant injunctions:
- for the personal protection of a child, a parent or a person who has contact with a child under a Part VII order (s 68B); or
 - in proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship (s 114).
- 5.3.3. The difference between an ‘order’ and an ‘injunction’ made under s 68B or s 114 is unclear.²⁶³ Briefly, the High Court has read ‘injunctions’ as including both prohibitory and mandatory injunctions²⁶⁴ – that is, injunctions that forbid or prohibit certain action, and injunctions that compel a person to do something. Given this inclusive interpretation of the word ‘injunction’, it is difficult to identify the relevant difference between an ‘order’ that a person do or refrain from doing something, and an injunction in the same terms.
- 5.3.4. For convenience, and in particular to distinguish orders made under ss 68B and 114 from those made under other provisions of the FL Act (for example, a parenting order), in this section we refer only to ‘s 68B injunctions’ and ‘s 114 injunctions’.

²⁶³ See A Dickey, *Family Law*, (5th ed, Lawbook Co, 2007) 683-4.

²⁶⁴ *R v Bell; ex parte Lees* (1980) 146 CLR 141.

Who may apply?

- 5.3.5. Section 69C(2) provides that an application for an injunction in relation to a child under s 68B may be made by:
- a parent of a child;²⁶⁵
 - the child himself or herself;
 - a grandparent of the child; or
 - any other person concerned with the care, welfare or development of the child.
- 5.3.6. An application for an injunction under s 114 can only be made in proceedings in respect of circumstances arising out of a marital relationship (s 114(1)).²⁶⁶
- 5.3.7. Currently, orders and injunctions are not available under the FL Act for the personal protection of a member of a de facto couple, where there are no children in the family.²⁶⁷

Grounds

- 5.3.8. In contrast to the State, Territory and New Zealand protection orders legislation, the FL Act does not set out specific grounds which must be made out by an applicant for a s 68B or s 114 injunction. An FL Act applicant does not need to show, for example, that the person has reasonable grounds to fear, and in fact fears, that another person will be physically violent towards him or her. Rather, a court may grant 'such injunctions as it considers appropriate for the welfare of the child' (s 68B(1)) and may do so 'in any case in which it appears to the court to be just or convenient to do so' (s 68B(2)). Likewise, under s 114, a court may make 'such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate'.

Content/effect of an injunction

- 5.3.9. If proceedings are instituted in a court exercising jurisdiction under Part VII of the FL Act for an injunction in relation to a child, the court may grant such injunction as it considers appropriate for the welfare of the child (s 68B). These include:
- (a) an injunction for the personal protection of the child; or
 - (b) an injunction for the personal protection of:
 - (i) a parent of the child; or
 - (ii) a person with whom the child is to live under a parenting order; or
 - (iii) a person with whom the child is to spend time under a parenting order; or

²⁶⁵ In Western Australia, only if the parents of the child are or have been married to each other.

²⁶⁶ See also paragraph (e) of the definition of 'matrimonial cause' in s 4(1).

²⁶⁷ The *Family Law Amendment (De Facto Financial Matters and Other Measures)* Act 2008 will not change the scope of s 114, so as to extend to members of de facto couples, nor does the Act make any new provision to enable members of a de facto couple to obtain an order for their personal protection under the FL Act.

- (iv) a person with whom the child is to communicate under a parenting order; or
- (v) a person who has parental responsibility for the child; or
- (c) an injunction restraining a person from entering or remaining in:
 - (i) a place of residence, employment or education of the child; or
 - (ii) a specified area that contains a place of a kind referred to in subparagraph (i); or
- (d) an injunction restraining a person from entering or remaining in:
 - (i) a place of residence, employment or education of a person referred to in paragraph (b); or
 - (ii) a specified area that contains a place of a kind referred to in subparagraph (i).

5.3.10. Section 114 gives a court exercising jurisdiction in a matrimonial cause the power to grant such injunctions as it considers proper with respect to the matter to which the proceedings relate, including:

- (a) an injunction for the personal protection of a party to the marriage;
- (b) an injunction restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or the premises in which the other party to the marriage resides are, situated;
- (c) an injunction restraining a party to the marriage from entering the place of work of the other party to the marriage;
- (d) an injunction for the protection of the marital relationship;
- (e) an injunction in relation to the property of a party to the marriage; or
- (f) an injunction relating to the use or occupancy of the matrimonial home.

5.3.11. The effect of an injunction under s 68B or s 114 will vary between proceedings, depending on the circumstances in each particular case. It is clear from the terms of these provisions, however, that ss 68B and 114 are intended to give courts exercising jurisdiction under the FL Act a wide discretion to make orders ‘for the personal protection’ of parents and children.

5.3.12. The FL Act leaves it to the courts to determine the range of threats or harms that can be addressed by an injunction for ‘personal protection’. It is clear that ‘personal protection’ is not limited to protection from physical threats, but can include protection of a person’s mental health and wellbeing and their ability to live free from unwanted interference and harassment.²⁶⁸

²⁶⁸ See *In the Marriage of Kemsley* [1984] FLC 91-567 at 75, 590.

The reported decisions of courts exercising jurisdiction under the FL Act suggest that ss 68B and 114 injunctions do tend to restrict physical encounters between the protected person and the person to whom the injunction is directed, including restrictions on a person's movements, their presence in specified locations (e.g. a family home or children's school) and communication between the parties (e.g. telephone calls, letters, emails etc).

Inclusion of children

- 5.3.13.** Section 68B allows a court to make such orders or grant such injunction as it considers appropriate for the welfare of the child who is the subject of proceedings. An injunction can be made under that section for the personal protection of a child, but also for the personal protection of other people who are connected to the child – e.g. a person with whom the child is to spend time or communicate under the terms of a Part VII order (s 68B(1)(b)).
- 5.3.14.** If, in the context of an application for an order under Part VII in relation to a child (other than an application under s 68B for an injunction for the child's protection), there are allegations that there has been, or is at risk of, family violence or abuse of the child, then the court hearing the application is obliged to consider making an injunction under s 68B (s 60K(4)).
- 5.3.15.** Section 114 gives courts a broad power 'to make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate'.²⁶⁹

Related orders/measures

- 5.3.16.** Injunctions under s 68B may intersect with, or operate in parallel to, other orders made under Part VII, particularly in relation to contact between parents and children under a parenting order. For instance, it is possible to include terms in parenting orders regulating the way in which parents have contact with children and with each other, and restraining parents from engaging in certain behaviour (e.g. restraining parents from using corporal punishment, or from denigrating the other parent in the presence of a child).

²⁶⁹ It would appear that injunctions under s 114 can also relate to children. The definition of 'orders under this Act affecting children' in s 4(1) and paragraph (b) of the definition of 'order under this Act' in s 112AA clearly contemplate that an injunction under s 114 could be made for the personal protection of a child.

Interaction between s 68B and s 114 and State and Territory ‘family violence orders’

5.3.17. Section 114AB(1) makes it clear that ss 68B and 114 are not intended to exclude or limit the operation of prescribed State and Territory laws dealing with domestic violence, personal protection orders, etc. that are capable of operating concurrently with those sections. However, s 114AB(2) prevents a person who has taken proceedings under such a State or Territory law from taking proceedings under s 68B or 114 in respect of the same matter, subject to limited exceptions. Section 114AB(2) would thus generally prevent an applicant from seeking a protection order in similar terms under State or Territory law and the FL Act, where the orders would operate at the same time.

Geographical coverage of orders

5.3.18. An injunction made under the FL Act is enforceable throughout Australia, in accordance with its terms. For example, if an injunction under s 68 prohibits a person from coming within a 100m radius of a child or the child’s mother, that injunction will be effective if the child and mother relocate, either permanently or temporarily, to another State or Territory.

Breach of injunctions and penalties for breach

5.3.19. Division 13A of the FL Act deals with the consequences of a person’s failure to comply with orders affecting children. Those orders include injunctions granted under ss 68B. They also include injunctions granted under s 114, but only in so far as the injunction is for the protection of a child (see s 70NAA and the definition of ‘order under this Act affecting children’ in s 4(1)).

Contravention of an injunction ‘affecting children’

5.3.20. Section 70NFB(2) sets out the sanctions a court may impose where satisfied that, without reasonable excuse, a person has contravened (among other orders) a s 68B injunction. The orders that can be made include, relevantly:

- in certain cases, a community service order;
- an order requiring the person to enter into a bond;
- an order fining the person not more than 60 penalty units (currently \$6,600); and
- an order imposing a sentence of imprisonment, generally for a period of 12 months or less.

Contravention of a s 114 injunction

5.3.21. Section 112AD(2) sets out the sanctions a court may impose where satisfied that, without reasonable excuse, a person has contravened (among other orders) a s 114 injunction, in so far as the injunction is not for the protection of a child. The orders that can be made include, relevantly:

- an order requiring the person to enter into a bond;
- an order imposing a sentence by order on the person, or make an order directed to the person, in accordance with section 112AG (which allows for matters such as community service, periodic detention, weekend detention, etc.); or
- fine the person not more than 60 penalty units; or
- impose a sentence of imprisonment, generally for a period of 12 months or less.

Powers of arrest

5.3.22. If a police officer believes, on reasonable grounds, that a person (the respondent) has breached an injunction for another person's personal protection, by:

- causing, or threatening to cause, bodily harm to the person protected by the injunction; or
- harassing, molesting or stalking that person;

the police officer may arrest the respondent without warrant (ss 68C(1), 114AA(1)).

5.3.23. When a person is arrested for suspected breach of an injunction, ss 68C(3) and 114AA(3) require the arresting officer to:

- ensure that the person is brought before the court that granted the injunction, or another court with jurisdiction under the FL Act, by close of business on the next working day;
- take all reasonable steps to ensure that the person who sought the injunction is informed of the arrest before the person is brought to court; and
- keep the arrested person in custody until the end of the next working day, unless a court orders otherwise.

5.3.24. When the arrested person is brought before a court, if there is no application for him or her to be dealt with for breach of the injunction the court must order that the person be released immediately (ss 68C(3), 114AA(4)(b)). If there is such an application before the court, the court must proceed to hear and determine the application (ss 68C(3), 114AA(4)(a)). If those proceedings are not determined by the close of business on the next working day after the person was arrested, the person may be kept in custody until the first of the following events occurs:

- the court makes its decision;
- the court orders that the person be released; or
- the court adjourns the hearing for a period of more than 24 hours.

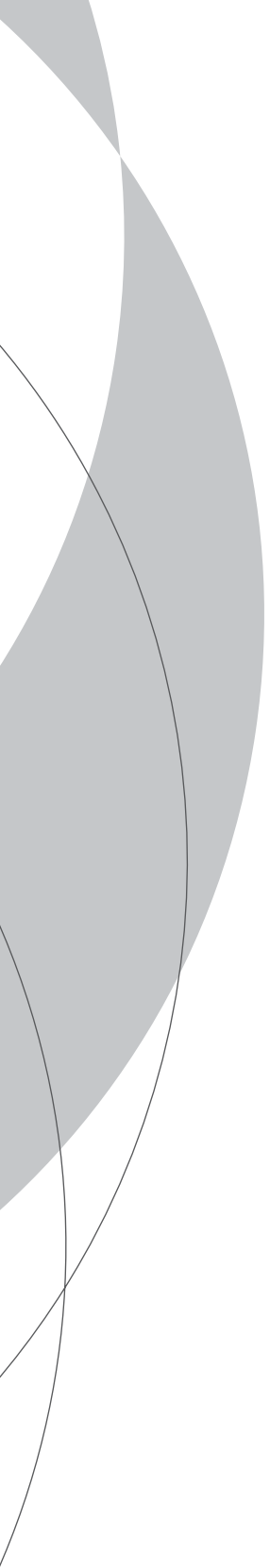
Appendix to Part 5

Prescribed laws for the purposes of the definition of 'family violence order':

- *Crimes Act 1900* (NSW);
- *Property (Relationships) Act 1984* (NSW);
- *Crimes (Family Violence) Act 1987* (Vic);
- *Domestic and Family Violence Protection Act 1989* (Qld);
- *Restraining Orders Act 1997* (WA);
- *Criminal Law (Sentencing) Act 1988* (SA);
- *Domestic Violence Act 1994* (SA);
- *Summary Procedure Act 1921* (SA);
- *Youth Court Act 1993* (SA);
- *Family Violence Act 2004* (Tas);
- *Justices Act 1959* (Tas);
- *Domestic Violence and Protection Orders Act 2001* (ACT);
- *Domestic Violence Act* (NT);
- *Domestic Violence Act 1995* (Norfolk Island).

Prescribed laws for the purposes of s 114AB:

- *Part 15A of the Crimes Act 1900* (NSW);
- *Crimes (Family Violence) Act 1987* (Vic);
- *Domestic and Family Violence Protection Act 1989* (Qld);
- *Peace and Good Behaviour Act 1982* (Qld);
- Parts 1 to 6 and Divisions 1 and 2 of Part 9 of the *Restraining Orders Act 1997* (WA);
- *Domestic Violence Act 1994* (SA);
- *Family Violence Act 2004* (Tas);
- Part XA of the *Justices Act 1959* (Tas);
- *Domestic Violence and Protection Orders Act 2001* (ACT);
- *Domestic Violence Act* (NT).



Part 6: Overlap and
conflict between the
Family Law Act
and State/Territory
protection orders
legislation



1 Introduction

- 6.1.1. This Part identifies and analyses areas of overlap and potential conflict between the FL Act and the State and Territory laws providing for the making of domestic violence protection orders or similar (see Part 2 of this Report).

Terms used in Part 6

- 6.1.2. For convenience, in this Part we refer to the relevant State and Territory laws, collectively, as ‘the State/Territory protection orders legislation’. In the FL Act, relevant orders made under State/Territory protection orders laws that are prescribed, for the purposes of the FL Act,²⁷⁰ are referred to as ‘family violence orders’ (see the definition of that term in s 4(1)). To avoid confusion, however, in this Part we refer to those orders as ‘State/Territory protection orders’. We refer to orders and injunctions for the personal protection of a person made under s 68B or s 114 of the FL Act as ‘FL Act protection orders/injunctions’.
- 6.1.3. It should also be noted that the FL Act uses the term ‘family violence’ rather than the term we use elsewhere in this Report, ‘domestic violence’. ‘Family violence’ is defined in s 4(1) of the FL Act, and its meaning, as defined, is narrower than that of cognate terms used in some of the State/Territory protection orders legislation. So as to maintain accuracy, therefore, in this Part we use the term ‘family violence’ when discussing relevant provisions of the FL Act.

Structure of Part 6

- 6.1.4. In Chapter 2 of this Part, we consider the potential for inconsistency between, on the one hand, State/Territory protection orders and, on the other, orders or injunctions made under the FL Act relating to the care of, or contact with, children. This is the area in which there is the greatest potential for conflict between the operation of the FL Act and the State/Territory protection orders legislation.
- 6.1.5. Chapter 3 is concerned with the interaction between State/Territory protection orders and FL Act protection orders/injunctions.
- 6.1.6. In Chapter 4, we briefly examine a number of matters that have emerged as key issues in relation to the operation of the FL Act and its relationship with State and Territory legislation.

270 The State and Territory Acts that have been prescribed for the purposes of the definition of ‘family violence order’ are listed in Attachment A to Part 5 of this Report. It should be noted that these are not wholly co-extensive with the State and Territory Acts examined in Part 2 of this Report, and also considered in this Part. This is because, as indicated in Part 2, the legislation in Victoria and the ACT is shortly to be superseded by new Acts and, for the purposes of this Report, we have examined these new Acts rather than the Acts that are currently in force in those jurisdictions. We assume that, upon commencement of the new Acts, they will be prescribed for the purposes of the definition of ‘family violence order’ in the FL Act.



2 Conflict and inconsistency between orders under the Family Law Act relating to children and State/Territory protection orders

- 6.2.1. There is considerable scope for inconsistency between State/Territory protection orders made by a State or Territory court, and relating to the members of a family (or extended family), and the orders that a different court, exercising jurisdiction under the FL Act, may make with regard to the care of or contact with children in the same family.
- 6.2.2. Inconsistency may be apparent on the terms of the orders. For example, an order under the FL Act may allow a parent to spend time with a child, whereas a State/ Territory protection order might state that the parent may not approach or communicate with the child. There is also the possibility of practical inconsistency between two orders, in the sense that it is difficult or impossible in practice to comply fully with both. An example would be where an order under Part VII of the FL Act allows a parent to have contact with a child, but a State/Territory protection order prohibits the parent from contacting the person with whom the child lives, making it practically difficult to arrange contact without breaching the latter order.²⁷¹
- 6.2.3. It is recognised widely that women are at increased risk of violence in the period following separation,²⁷² and that periods of contact with children, particularly the handing-over of children for contact, are also periods of elevated risk for women and children (including where contact is facilitated by a service provider).²⁷³ In this context, it is important that State/Territory protection orders and orders that facilitate contact with children operate cohesively and in a way that ensures the safety of all parties.

271 For examples of women's experience of conflicting orders, see VLRC, *Family Violence*, op cit; Sera's Women's Shelter, North Queensland Domestic Violence Resource Service and the North Queensland Combined Women's Services, *Dragonfly Whispers: The experiences of women who have lived with domestic violence and their journey through the Family Court* (2006); B Tinning, *Seeking Safety, Needing Support: A report on support requirements for women experiencing domestic violence and accessing the Family Court* (Sera's Women's Shelter, North Queensland Domestic Violence Resource Service and the North Queensland Combined Women's Services, 2006).

272 M Kaye, J Stubbs and J Tolmie 'Domestic Violence, Separation and Parenting: Negotiating safety using legal processes' (2003) 15(2) *Current Issues in Criminal Justice* 73; L Laing, 'Domestic Violence and Family Law' (Australian Domestic and Family Violence Clearing House, Topic Paper, 2003); P Jaffe, C Crooks and N Bala, *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the literature to identify promising practices* (Department of Justice Canada, Ottawa, 2005).

273 G Sheehan, R Carson, B Fehlberg, R Hunter, A Tomison, R Ip and J Dewar, *Children's Contact Services: Expectation and experience: final report* (Griffith Law School, Griffith University, Nathan, 2005); K Rendell, Z Rathus and A Lynch, *An Unacceptable Risk: A report on child contact arrangements where there is violence in the family* (Women's Legal Service, QLD, November 2000); Kaye et al, 'Child Contact Arrangements', op cit.

Rules governing the relationship between different orders

6.2.4. There are special provisions in the FL Act which govern the relationship between orders made under the State/Territory protection orders and orders and injunctions made under Part VII of the FL Act. The relationship between State/Territory protection orders and parenting orders and injunctions made under the FL Act is governed by Division 11 of Part VII of the FL Act. The purposes of that Division are (s 68N):

- to resolve inconsistencies between State/Territory protection orders and orders, injunctions and arrangements made under the FL Act that provide for a child to spend time with a person or require or authorise a person to spend time with a child;
- to ensure that orders, injunctions and arrangements made under the FL Act that provide for a child to spend time with a person or require or authorise a person to spend time with a child do not expose people to family violence;²⁷⁴ and
- to achieve the objects and principles set out in s 60B.

6.2.5. As discussed in Part 5, s 60B sets out the objects and principles that underpin Part VII of the FL Act. These purposes reveal an inherent tension in the way in which the FL Act deals with children and family violence, which is particularly apparent in the conflict that may arise between FL Act orders about contact with children and orders about family violence. The objects of Part VII include ensuring that children 'have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child' (s 60B(1)(a)). Similarly, one of the principles underlying Part VII is that 'children have a right to know and be cared for by both their parents ...' (s 60B(2)(a)) and 'children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents ...' (s 60B(2)(b)). However, another object of Part VII is to ensure that children's best interests are met by 'protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' (s 60B(1)(b)).

6.2.6. Section 60B does not state clearly which of the objects and purposes of Part VII should be given priority if there is a tension or conflict between them. Likewise, Division 11 does not indicate which of its purposes should prevail. It is, therefore, left largely to courts to determine whether children's rights to know, be cared for and spend time with both parents should prevail over the need to protect children from exposure to family violence.²⁷⁵

²⁷⁴ The protective purpose of Division 11 is not limited to the protection of children - the Division is intended to ensure that orders made under the FL Act do not expose anyone to family violence: s 68N(aa).

²⁷⁵ We note that, before Division 11 was overhauled in the 2006 amendments, the Family Law Council recommended to the Attorney-General that the Division should make clear that protection from family violence takes priority over other considerations: Family Law Council, *Family Law Council: Review of Division 11 – Family Violence* (16 November 2004).

Making an order or injunction under the FL Act that is inconsistent with an existing State/Territory protection order

- 6.2.7. The operation of the rules governing the relationship between FL Act orders and injunctions and State/Territory protection orders depends, in part, on the chronological sequence in which the orders were made – that is, which order was made first.

Facilitating contact with children

- 6.2.8. An FL Act order or injunction can effectively override an existing State/Territory protection order so as to facilitate contact between a child and another person. A State/Territory protection order that is inconsistent with an FL Act order or injunction that provides for or expressly or impliedly requires or authorises a person to spend time with a child is, to the extent of the inconsistency, invalid (s 68Q(1) of the FL Act).

- 6.2.9. The following people may apply for a declaration that a State/Territory protection order is inconsistent with an FL Act injunction or order (s 68Q(2)):

- the applicant for the FL Act injunction or order;
- the respondent to the application for an FL Act injunction or order;
- the person against whom the State/Territory protection order is directed (if that person is not the applicant or the respondent in the FL Act proceedings); or
- the person protected by the State/Territory protection order (if that person is not the applicant or respondent in the FL Act proceedings).

A person might apply for a declaration of inconsistency in order to make clear which of the orders prevails, and the extent (if any) to which the State/Territory protection order is invalid.

- 6.2.10. When a court makes an order or grants an injunction under the FL Act that is inconsistent with an existing State/Territory protection order, the court must comply with the requirements of s 68P(2) and (3). These include:

- specifying in the order or injunction that it is inconsistent with an existing State/Territory protection order;
- explaining how contact provided for in the order or injunction is to take place;

- explaining the purpose and effect of the FL Act order or injunction and its relationship with the existing State/Territory protection order to the parties, the person to whom the State/Territory protection order is directed, and the person protected by that order (if the person is not a party to the FL Act proceedings); and
- explaining to all parties the consequences of breaching the FL Act order or injunction and the process for seeking its variation or revocation.

Orders and injunctions that do not relate to children

- 6.2.11.** Sections 68P and 68Q of the FL Act are concerned with orders and injunctions that facilitate contact between a person and a child. As described above, such orders can override a State/Territory protection order to the extent of any inconsistency.
- 6.2.12.** As discussed in Part 5 of this Report, orders and injunctions that do not relate to contact with children are also available under ss 68B and 114 of the FL Act. There is potential for such an order to conflict with a State/Territory protection order. An example might be an injunction granted under s 114 for the personal protection of a party to a marriage, where there are no children. Such an injunction might prevent one party from entering the marital home, when that person is allowed to do so under the terms of a State/Territory protection order. Neither order expressly or impliedly authorises or requires a person to have contact with a child, so s 68Q does not apply; nevertheless, the two orders are clearly inconsistent.²⁷⁶
- 6.2.13.** Section 114AB(1) provides that ss 68B and 114 are not intended to exclude or limit the operation of a prescribed law of a State or Territory (i.e. the State/Territory protection orders legislation) that is capable of operating concurrently with those sections. It follows from s 114AB(1) that, if an order or injunction made under s 68B or s 114 is capable of operating concurrently with a State/Territory protection order both orders operate in parallel.
- 6.2.14.** Section 114AB(1) does not deal expressly with a situation in which orders made under the State/Territory protection orders legislation are not capable of operating concurrently with orders made under s 68B or s 114 of the FL Act. However, on general constitutional principles, an order made pursuant to a Commonwealth law will prevail over an order made under a State or Territory law to the extent that the orders are inconsistent with each other.²⁷⁷

²⁷⁶ As we observe at paragraph 2.2.9 to 2.2.18, s 114AB(2) limits the circumstances in which a person can apply for an order under s 68B or s 114 if they have already obtained a State/Territory protection order. However, there may be situations in which a State/Territory protection order and an injunction under s 68B or s 114 are in place at the same time in relation to the same parties.

²⁷⁷ Section 109 of the Constitution provides that when a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law prevails and the State law is invalid to the extent of the inconsistency.

6.2.15. A person affected by the inconsistency between multiple orders could apply to have any or all of the orders varied.²⁷⁸ However, until all the applicable orders are capable of operating in conjunction with each other, there is a risk that the protection they offer to victims of domestic violence could be compromised.

Making a State/Territory protection order that is inconsistent with an existing FL Act order or injunction

6.2.16. There is potential for inconsistency between orders and injunctions made under the FL Act and State/Territory protection orders subsequently made or varied.

6.2.17. As discussed in Chapter 3 of this Part, some courts exercise jurisdiction under State or Territory law and under the FL Act.²⁷⁹ Where such a court is asked to make or vary a State/Territory protection order, and the court also has jurisdiction under Part VII of the FL Act, s 68R provides a mechanism for avoiding inconsistencies between the two orders. When the court makes or varies the State/Territory protection order, it may also revive, vary, discharge or suspend (s 68R(1)):

- an FL Act parenting order, to the extent to which it provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child;
- any other order under the FL Act, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child;
- an injunction made under s 68B or s 114, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child; or
- an undertaking given to a court exercising jurisdiction under the FL Act, a registered parenting plan or a recognisance entered into under an order under the FL Act, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child.

6.2.18. The power under s 68R to alter existing FL Act orders and injunctions is subject to conditions. A court may not exercise its power under s 69R unless it is also making or varying a State/Territory protection order. A court may only revive, vary, discharge or suspend an FL Act order or injunction if there is material before the court that was not before the court that made the original order or injunction (s 68R(3)).

²⁷⁸ See, for example, s 70NBA of the FL Act (which allows a court to vary a parenting order if it is alleged that a person has contravened the order).

²⁷⁹ Some, but not all, of the courts that exercise jurisdiction under State/Territory protection orders legislation are courts of summary jurisdiction for the purposes of s 69J.

- 6.2.19. When a court is exercising its power under s 68R to revive, vary, discharge or suspend an order or injunction, it must have regard to whether contact with both parents is in the best interests of the child concerned (s 68R(5)). The court must also have regard to (s 68R(5)(b)):
- the need to resolve inconsistencies between State/Territory protection orders and orders, injunctions and arrangements made under the FL Act,
 - the need to ensure that orders, injunctions and arrangements made under the FL Act do not expose people to family violence; and
 - the overall objects and principles underlying Part VII.²⁸⁰
- 6.2.20. If, when the original order or injunction was made under s 68B or s 114, it was inconsistent with an existing State/Territory protection order, the court must be satisfied that it is appropriate to revive, vary, discharge or suspend the order or injunction because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction (s 68R(5)(c)).
- 6.2.21. A court may not discharge an FL Act order, injunction or arrangement in proceedings to make or vary a State/Territory protection order on an interim basis (s 69R(4)). FL Act orders, injunctions and arrangements may be revived, varied or suspended for the duration of an interim order (s 68T(1)).

Making a State/Territory protection order where there are no FL Act orders in place

- 6.2.22. A State/Territory protection order can be the first judicial response to domestic violence. Applicants may seek a protection order before they contemplate separation or family law proceedings. In such cases, it may be appropriate for the court making a protection order also to consider making orders under the FL Act dealing with parental responsibility and contact between parents and children. (Many courts with jurisdiction to make a State/Territory protection order also have jurisdiction under the FL Act which allows the court to make parenting orders (see paragraph 6.3.18 ff)).
- 6.2.23. Making orders about who children spend time with, at the same time that orders are made for the personal protection of the children or their parents, has several potential advantages. If a court makes orders under the FL Act and the applicable State/Territory protection orders legislation at the same time, it is less likely that the orders will conflict or that the parties will be uncertain as to which orders prevail.

²⁸⁰ See further ss 68N and 60B.

- 6.2.24. In some cases, it may also allow a parent who has experienced family violence to argue that the children are at such a risk of experiencing or witnessing further violence that, not only should a protection order be issued in favour of the victim, but the court should also order that the children spend no time with the person responsible for the violence, and that parental responsibility be exercised solely by the parent who has been subjected to that violence. An order of this kind would make it easier, for example, for a woman to take her children to a refuge or safe-house without needing to compromise her and their safety in order to allow the children to spend time with a violent former partner, and without the need to make a further, potentially lengthy, FL Act application to finalise arrangements for the children's care.²⁸¹
- 6.2.25. However, as we observe below, it appears that the magistrates who make protection orders are often unwilling to deal with issues about contact with children – these may be viewed as the domain of Federal Family courts, rather than State local courts.

Mitigating the risk of conflict between orders

- 6.2.26. The FL Act, and most State/Territory legislation, requires courts to take into account the existence of other relevant orders when considering an application.²⁸² In order to enable courts to do so, most State/Territory protection orders legislation also requires applicants to tell the court about relevant FL Act orders and, in some cases, about pending applications for relevant orders. The Table in the Appendix to this Part sets out the obligations imposed by each of the State and Territory Acts – when a court is required to be told of other relevant orders, what orders the court needs to be informed about, and who is required to provide the information to the court.²⁸³
- 6.2.27. The fact that an applicant is required to tell a court about other relevant orders, and that the court is required to take that information into account, does not, of itself, prevent the court from making an order that is inconsistent with the existing orders. The requirement to inform courts about relevant orders does, however, allow courts to obtain the information they need in order to exercise their powers so as to avoid inconsistency between different orders – for example, by using their power under s 68R of the FL Act to vary an existing parenting order so as to make it consistent with a new State/Territory protection order, or framing a new parenting order in terms that are consistent with existing State/Territory protection orders.

²⁸¹ It should be noted, however, that orders for no contact between a parent and child are made extremely rarely. Contact centres and other supervision mechanisms are generally used in order to facilitate some contact between a parent and child.

²⁸² *Domestic Violence and Protection Orders Act 2008* (ACT), s 31; *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 42; *Domestic and Family Violence Act 2007* (NT), s 19; *Domestic and Family Violence Protection Act 1989* (QLD), s 46C; *Domestic Violence Act 1994* (SA), s 6; *Family Violence Act 2004* (Tas), ss 14, 18; *Restraining Orders Act 1997* (WA), s 12. *The Victorian Crimes (Family Violence) Act 1987* does not explicitly require a court to take a FL Act order into account when making a protection order – however, if a court makes a protection order in respect of a child, it is required to determine whether there are FL Act orders that relate to the child's residence or contact between the child and the defendant (see s 4A). A number of provisions in the *Family Violence Protection Act 2008* (Vic) direct courts' attention to the relationship between orders made under that Act and FL Act orders – see ss 57, 90, 92, 102.

²⁸³ The FL Act and the State/Territory protection orders legislation does not require applicants to tell the court about any applicable orders or arrangements in place under child welfare laws.

6.2.28. Section 68R should also address, in part, the problem of courts being asked to make consent orders based on incomplete information. Previously, if parties applied for orders by consent, and did not tell the court hearing the application that there was a State/Territory protection order in place, the court might have made the orders sought without being able to consider how the FL Act orders would interact with the consent orders.²⁸⁴

How the law operates in practice

6.2.29. There is evidence that Division 11 of Part VII of the FL Act is not a complete answer to the problem of inconsistency between FL Act contact-related and State/Territory protection orders. Researchers and practitioners in family law continue to report that conflict between contact orders and State/Territory protection orders creates unsafe and traumatic situations for parents and children who have attempted to escape family violence.²⁸⁵ Below we examine several key areas of ongoing difficulty.

'Gaps' in the legislative framework

6.2.30. As discussed above, although there is considerable potential for inconsistency between FL Act orders (particularly parenting orders) and State/Territory protection orders, all of the relevant legislation includes provisions designed to avoid or remedy conflicts between orders made under different Acts. In summary, these measures include:

- rules obliging parties to tell courts about existing or pending orders that relate to contact with children and to family violence;
- procedural steps that must be taken when a court makes orders for contact with children under the FL Act if there is an inconsistent State/Territory protection order; and
- powers to revive, vary, discharge or suspend an order or injunction under the FL Act if a court makes or varies a State/Territory protection order.

6.2.31. However, as already noted, there are some 'gaps' in the coverage of these provisions. For example, the FL Act does not deal directly with conflict between orders made under that Act that do not relate to contact with children and State/Territory protection orders, where those orders are not capable of operating concurrently. As indicated above, for constitutional reasons, the FL Act order will prevail to the extent of any inconsistency. Similarly, the FL Act generally does not deal with conflicts between orders of a court exercising jurisdiction under the FL Act and orders made under child welfare laws in a State or Territory.

²⁸⁴ See Family Law Council, *Review of Division 11*, op cit, p 4.

²⁸⁵ Rendell et al, *An Unacceptable Risk*, op cit; Kaye et al, 'Child Contact Arrangements', op cit; VLRC, *Family Violence*, op cit; Sera's Women's Shelter, *Dragonfly Whispers*, op cit; Tinning, *Seeking Safety*, op cit.

Lack of a mechanism for ensuring that courts are informed about other relevant orders

- 6.2.32. As noted above, the State and Territory protection orders legislation and the FL Act generally require applicants for orders under each respective law to inform the court about other relevant State/Territory protection orders or FL Act orders that are in force, and any pending applications for such orders (see paragraphs 6.2.26 to 6.2.28). However, whether deliberately or inadvertently, some parties to FL Act or State/Territory protection order proceedings may not fully inform a court about other relevant orders or pending applications for orders. The problem is likely to be particularly acute where the parties to the proceedings are unrepresented. Applicants may also be unable to provide a court with copies of the relevant orders. Problems may arise if a court makes an order under the FL Act or State/Territory protection orders legislation in ignorance of existing orders.
- 6.2.33. At present there is no national repository of information encompassing State/Territory protection orders and FL Act orders that a court can access in order to determine whether there are already orders in force in relation to a particular family. The Pyke Paper discussed a number of options for overcoming the difficulties courts and police face in obtaining the necessary information, one of which was the establishment of a national database to provide reliable information about State/Territory protection orders and FL Act orders and injunctions.²⁸⁶ Another possibility put forward in the Pyke Paper was the making of regulations under the FL Act to facilitate sharing of information between courts exercising jurisdiction under that Act.²⁸⁷
- 6.2.34. A national database could be particularly useful to courts hearing ex parte applications for FL Act orders and/or State/Territory protection orders. The Pyke Paper cites the following example of a situation in which a court might be asked to make an order, ex parte, on the basis of incomplete information:

... in the Family Court, sometimes location orders are made where the parent of a child ... alleges that the other parent has disappeared with the child without their knowledge and seeks that the Court make a location order ... Whilst the Court may inquire as to whether there are any family violence orders in place, the reality is that it may not be in the interests of a person seeking a location order to inform the Court of the existence of such family violence orders.²⁸⁸

²⁸⁶ Pyke, op cit, pp 137-40.

²⁸⁷ Ibid.

²⁸⁸ Ibid, p 139.

Orders that are practically incompatible but not legally inconsistent

- 6.2.35. Division 11 of Part VII was reworked substantially when the FL Act was amended in 2006. The 2006 reforms aimed to make Division 11 easier to understand and use, and to implement some of the changes that the Family Law Council had proposed in 2004.²⁸⁹ Prior to the reform of Division 11 in 2006, research suggested that it was common for State/Territory protection orders to include an exception for conduct that was undertaken for the purposes of a contact order under the FL Act – for example, an order that a person not approach or contact their former partner, except for the purpose of contact with children pursuant to an order under the FL Act.²⁹⁰ The effect of these ‘standard’ formulae is that there is no direct inconsistency between the FL Act orders and the State/Territory protection order. Both are, in theory, capable of operating alongside each other. However, in terms of outcomes, carving out exceptions to a State/Territory protection order may privilege contact with children over ensuring the safety of the person ostensibly protected by the order.²⁹¹
- 6.2.36. Data concerning the operation of Division 11 in its present form are limited; it is not clear whether the 2006 amendments have affected the way in which State/Territory protection orders are made.

Lack of evidence in interim orders proceedings

- 6.2.37. Courts are often required to make interim orders to determine parenting arrangements pending a final hearing of an application under Part VII of the FL Act. These orders are made without the parties having an opportunity to put the whole of their evidence and argument before the court, and before evidence in support of allegations of family violence can be tested properly.
- 6.2.38. Even if parties to an application for an interim order about contact with children disclose to the court that there is a State/Territory protection order in place, evidence of that order may not, of itself, constitute evidence that family violence has occurred. Many State/Territory protection orders are granted on the basis that the person the subject of the order consents to it being made without admitting the allegations of the applicant.²⁹² In such a case, the existence of an order cannot be taken as evidence that violence has occurred in the past, or even that the applicant has a reasonable fear for his or her safety.
- 6.2.39. In this context, a court may be more likely to make an order under the FL Act that allows contact between children and a person against whom a State/Territory protection order has been made, at least until the allegations of violence can be tested in a full hearing. Courts may exercise caution by ordering that the contact be supervised or subject to other restrictions.

289 Family Law Council, *Review of Division 11*, op cit.

290 See Kaye et al, ‘Child Contact Arrangements’, op cit; Family Law Council, *Review of Division 11*, op cit; Kaye et al, ‘Separation and Parenting’, op cit.

291 For a discussion of the risks associated with standard exception clauses in family violence orders, see VLRC, *Family Violence*, op cit, pp 340-43.

292 See Family Law Council, *Review of Division 11*, op cit, 4; R Hunter and J Stubbs, ‘Model Laws or Missed Opportunity?’ (1999) 24(1) *Alternative Law Journal* 12.

Failure to use powers under s 68R of the FL Act when applications are made for family violence orders

- 6.2.40. There appears to be a broad consensus that the powers given to courts of summary jurisdiction to make, vary, suspend or discharge FL Act orders when making or varying a State/Territory protection order are under-utilised or are not being used effectively. Instead, protection orders tend to include terms that effectively defer to FL Act orders – for example, by providing that a parent may not have contact with a child except as provided under a parenting order.²⁹³
- 6.2.41. There is some suggestion that applicants, practitioners and magistrates are unfamiliar with the powers conferred by s 68R on courts making State/Territory protection orders.²⁹⁴ Magistrates in courts of summary jurisdiction may be unwilling to exercise their powers to change the orders that have been made by a superior, specialist court.²⁹⁵ Police applying for a protection order on behalf of a complainant may also be unwilling to seek changes to contact arrangements under the FL Act.²⁹⁶ It also appears that courts of summary jurisdiction frequently do not exercise their powers under s 68R to revive, vary, discharge or suspend contact orders at the same time as they make or vary a State/Territory protection order, for families who have not yet instigated proceedings under the FL Act.²⁹⁷
- 6.2.42. The Victorian Law Reform Commission recently recommended that magistrates in that jurisdiction undertake extensive training in relation to children, family violence and the impact of contact orders, to enable them more effectively to exercise their existing powers under the FL Act and State law.²⁹⁸

²⁹³ See Kaye et al, 'Child Contact Arrangements', op cit; Family Law Council, *Review of Division 11*, op cit; Kaye et al, 'Separation and Parenting', op cit.

²⁹⁴ VLRC, *Family Violence*, op cit; Kaye et al, 'Separation and Parenting', op cit.

²⁹⁵ Family Law Council, *Review of Division 11*, op cit, 4; Kaye et al, 'Separation and Parenting', op cit.

²⁹⁶ Kaye et al, 'Separation and Parenting', op cit; Family Law Council, *Review of Division 11*, op cit, 4; VLRC, *Family Violence*, op cit, pp 335-7.

²⁹⁷ VLRC, *Family Violence*, op cit.

²⁹⁸ *Ibid*, p 337.



3 Interaction between Family Law Act Orders/Injunctions and State/Territory domestic violence protection orders

Preliminary issue: definitions of family/domestic violence

- 6.3.1. The definition of 'family violence' in the FL Act (discussed in more detail in Part 5 of this Report) is largely coextensive with the equivalent definitions in State/Territory protection orders legislation.²⁹⁹ However, there are differences, which may be of significance in certain contexts.
- 6.3.2. The point of difference which is perhaps most likely to have significant implications relates to the use in the FL Act definition of a 'reasonable fear' requirement. As noted in Part 5, a person's conduct can only constitute 'family violence', for the FL Act, if it causes a member of that person's family 'reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety' (s 4(1)). In most other jurisdictions, cognate definitions do not use such a 'reasonable fear' formulation.
- 6.3.3. In practical terms, what may follow from the different formulation used in the FL Act is that, in a particular context, a finding under State or Territory law that a person has engaged in domestic violence, and the making of a protection order on that basis, does not necessarily mean that the same conduct will constitute 'family violence' for FL Act purposes. This could have significant implications where, for example, a court is determining what orders to make about parental responsibility, or the care of and contact with children, in proceedings under Part VII of the FL Act.

Overlap between State/Territory protection orders and FL Act orders/injunctions

- 6.3.4. The FL Act gives courts the power to make orders and injunctions for the personal protection of individuals (generally, parties to FL Act proceedings). These orders are described in detail in Part 5. To reiterate, courts may make orders under s 68B in proceedings relating to children, and under s 114 in matrimonial causes.

²⁹⁹ For a more detailed discussion of the similarities and differences between definitions of domestic violence (and cognate terms) in State and Territory domestic violence laws, see Chapter 1 of Part 3 of this Report.

Circumstances in which orders are available under the FL Act and State or Territory law

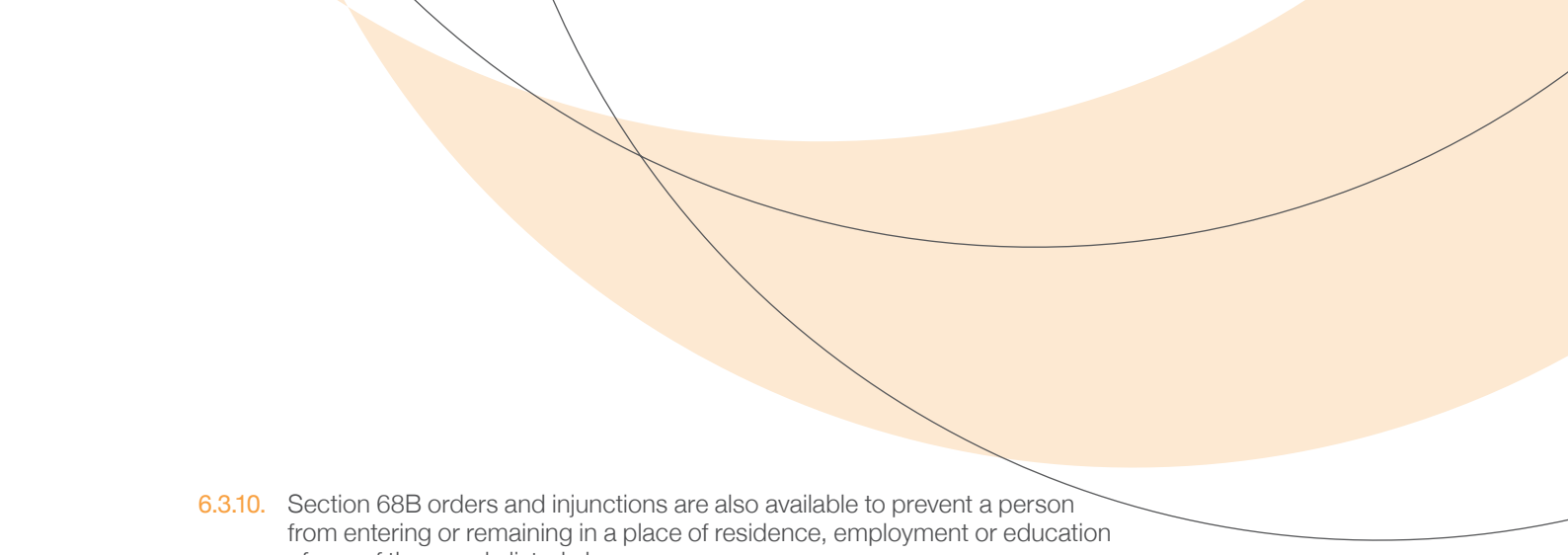
- 6.3.5. There is considerable overlap between the provisions of the FL Act dealing with orders and injunctions for the personal protection of a person, and State/Territory protection orders, at least in respect of married couples and families with children. For example, a woman experiencing family violence could obtain an order under State or Territory law to prevent the perpetrator of the violence from approaching, contacting or assaulting her and her children. A similar order could be made under s 68B or s 114 of the FL Act.
- 6.3.6. As a result, at least in theory, some victims of domestic violence have a choice between seeking a State/Territory protection order, or seeking a personal protection order or injunction under the FL Act.
- 6.3.7. In practice, however, we understand that victims of domestic violence will normally seek a State/Territory protection order at first instance, particularly if they are not already involved in other proceedings under the FL Act at the time the need for an order for personal protection arises.³⁰⁰ State/Territory protection orders are available from local courts, and can be sought with the assistance or at the instigation of local police. In practical terms, there is some suggestion that State and Territory police are more familiar with, and more likely to enforce, orders made under the law of their jurisdiction than orders made under the FL Act.³⁰¹

Cases in which orders are only available under State or Territory law

- 6.3.8. The FL Act and State/Territory protection orders laws do not overlap completely in terms of the orders that are available for the personal protection of a person who has experienced family violence.
- 6.3.9. Currently, FL Act orders and injunctions are available under s 68B for the personal protection of:
- a child;
 - a parent of the child;
 - a person with whom the child is to live under a parenting order;
 - a person with whom the child is to spend time under a parenting order;
 - a person with whom the child is to communicate under a parenting order; or
 - a person who has parental responsibility for the child.


³⁰⁰ VLRC, *Family Violence*, op cit, p 335.

³⁰¹ VLRC, *Family Violence*, op cit; Kay et al, 'Separation and Parenting', op cit.

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- 6.3.10.** Section 68B orders and injunctions are also available to prevent a person from entering or remaining in a place of residence, employment or education of one of the people listed above.
- 6.3.11.** Orders or injunctions are available under s 114 for the personal protection of a party to a marriage. Also available are orders or injunctions:
- restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides;
 - restraining a party to the marriage from entering the place of work of the other party to the marriage;
 - for the protection of the marital relationship;
 - in relation to the property of a party to the marriage; or
 - relating to the use or occupancy of the matrimonial home.
- 6.3.12.** As a result, if someone needs an order for their personal protection, and they are not married, or are not relevantly connected (either by parenthood or by virtue of an FL Act order) to a child, then protective orders would not generally be available under the FL Act.
- 6.3.13.** For individuals who cannot access protective orders under the FL Act, State/Territory protection orders will often be available. For instance, all State and Territory laws allow a person to obtain a protection order directed at their opposite sex or same sex de-facto partner, whereas such orders would only be available under the FL Act if they were made to ensure the protection of a child.

Application for similar orders under both the FL Act and State/Territory law

- 6.3.14.** Importantly, the FL Act prevents a person who has obtained or applied for a State/Territory protection order from also seeking an order in relation to the same matter under the FL Act (s 114AB(1)). If a person would otherwise be able to institute proceedings in respect of a matter under s 68B or s 114 of the FL Act, but the person elects to institute proceedings or take any other action in relation to that matter under State/Territory protection orders legislation, then, by virtue of s 114AB of the FL Act, the person cannot institute proceedings under s 68B or s 114 in respect of that matter.

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- 6.3.15.** This rule does not apply where (s 114AB(2)):
- the proceeding under State/Territory protection orders legislation has lapsed, been discontinued or dismissed; or
 - any orders made as a result of the proceeding under State/Territory protection orders legislation have been set aside or are no longer in force; or
 - if the person took other action (i.e. other than instituting a proceeding) under the State/Territory protection orders legislation, neither that person nor any other person is required to do or refrain from doing any act, at the time the proceedings are initiated under s 68B or s 114 of the FL Act.
- 6.3.16.** So, for example, if a person has applied for a protection order under State legislation, and that order is still in force, the person may not seek an order in the same terms under s 68B or s 114. As a result, although some individuals may be able to apply for orders under either the FL Act or State/Territory protection orders legislation, an applicant who has first sought an order under the State or Territory legislation would not be able to seek an order in respect of the same ‘matter’ under the FL Act.
- 6.3.17.** The relevant State/Territory protection orders legislation does not include any equivalent provision preventing a person from applying for a protection order if the person already has, or has applied for, an order or injunction in similar terms under the FL Act. Generally, there is an obligation on a person seeking a State/Territory protection order to inform the court of any relevant orders already in force under the FL Act, or any pending applications for such orders. However, the legislation does not prevent a court from making a State/Territory protection order that mirrors, adds to or departs from the terms of an order or injunction under the FL Act.

Overlapping jurisdiction

- 6.3.18. Many courts have jurisdiction to make orders under both the FL Act and State/Territory protection orders legislation.
- 6.3.19. Power to make State/Territory protection orders tends to be conferred on courts of summary jurisdiction. As described above, these courts are also given power under the FL Act to make certain types of orders, including parenting orders and interim parenting orders.
- 6.3.20. The fact that courts of summary jurisdiction can generally make orders under the FL Act and State/Territory protection orders legislation means that, in theory:
- applicants can bring proceedings under the FL Act relatively cheaply, and in courts that are reasonably accessible to them;
 - courts can make orders under the FL Act and State/Territory protection orders legislation that are consistent with each other; and
 - applicants can harness the mechanisms available under both legislative regimes in order to achieve maximum protection from family violence.
- 6.3.21. However, we note that the situation is more complex in practice. For a range of reasons, parties may have their FL Act matters dealt with in the Federal Magistrates Court or the Family Court of Australia while their applications for State/Territory protection orders are dealt with by other courts (e.g. State courts of summary jurisdiction). In particular, we note that s 69N of the FL Act makes provision for the transfer of contested matters from courts of summary jurisdiction to federal courts.³⁰²

³⁰² Where proceedings for a parenting order are instituted in a court of summary jurisdiction, the court can only hear and determine the proceedings if both parties consent. In the absence of such consent, the court must transfer the proceedings to the Family Court or another relevant court: see s 69N.



4 The Family Law Act and State/Territory Protection Orders Legislation: Discussion of key issues

6.4.1. It is beyond the scope of this Report to examine in detail the way in which the FL Act and State/Territory protection orders legislation operate in practice, or to recommend specific reforms. However, in preparing the Report we have drawn on recent Australian and international research and academic commentary on family law and domestic violence issues. On the basis of this research, we have identified several key issues relating to the operation of the FL Act and its relationship with State and Territory legislation. These issues are outlined briefly below.

Family Dispute Resolution (FDR) in the context of family violence


6.4.2. As noted in Part 5, separating parents are generally required to obtain a certificate from an FDR practitioner to show that they have at least attempted FDR before a court will hear an application for an order under Part VII of the FL Act. The FL Act provides that:

- the requirement to attempt FDR does not apply in cases where there has been, or is a risk of, family violence or child abuse; and
- an FDR practitioner may issue a certificate to the effect that FDR would not be appropriate in the circumstances of a particular family – such certificates may be apt in cases of family violence.

6.4.3. We note that these mechanisms do not necessarily mean that people who have experience of family violence or child abuse will not participate in FDR. Families in which there has been, or is a risk of, family violence or child abuse may still participate in FDR for a number of reasons, including the following.

6.4.4. Failure to disclose violence: as observed in Part 5, both the exception to the requirement to undertake FDR at all, and the possibility of obtaining a certificate from a practitioner stating that FDR is not appropriate, rely on disclosure of family violence to the court or to an FDR practitioner. Victims are known to experience significant difficulties in disclosing family violence, with the result that it commonly goes under-reported.³⁰³

303 See D Kirkwood, *Behind Closed Doors: Family Dispute Resolution and Family Violence* (Domestic Violence and Incest Resource Centre, 2007) p 27.

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- 6.4.5. Parties' choice to participate in FDR despite being exempt from the legal requirement to do so³⁰⁴: FDR may be perceived as a less expensive, faster or less traumatic way of resolving issues post-separation than a court process. Some victims of violence may feel pressured to reach an out-of-court agreement in order to expedite the process of separation and minimise the risk of further violence, or to agree for the sake of their children.³⁰⁵
- 6.4.6. The use of FDR in cases involving family violence and child abuse raises complex issues which are the subject of ongoing research and debate, both in Australia and internationally. While we have considered some of this material in researching this Part, it is beyond the scope of this Report to reach conclusions or make recommendations about how these issues should be resolved. We note only that the relevant research indicates that sophisticated systems are needed to enable FDR practitioners to 'screen' for violence and abuse in families, and to make assessments of the risks that participation in FDR might present.³⁰⁶ Also, the choice of some people who have experienced violence to participate in FDR raises questions about how FDR can best be delivered so as to ensure that, so far as possible, such vulnerable participants are in a position to bargain on an equal footing with their partners.³⁰⁷

Contact issues

'Standard' orders in favour of contact

- 6.4.7. It appears to have been relatively rare for a court to make an order under the FL Act that denies a parent contact with a child, including in cases involving allegations of family violence.³⁰⁸ As noted in Part 5, the 2006 reforms to the FL Act implemented a new model for decision-making about the time that children spend with parents, and included presumptions in favour of equal or substantial and significant time where parental responsibility is shared equally.³⁰⁹ Decisions are to be made on the basis of the best interests of the child, with courts directed to take account of the need to protect children from the risk of family violence and child abuse.

304 *The Family Law Regulations* 1984 provides that if, after considering certain prescribed matters, a family dispute resolution practitioner is not satisfied that family dispute resolution is appropriate, the family dispute resolution practitioner must not provide family dispute resolution: r 62(4). See Part 5, paragraph 5.2.59.

305 Kaye et al, 'Child Contact Arrangements', op cit, pp 103-4, 111-2.

306 In Australia, the Family Law Regulations require FDR practitioners to screen for domestic violence, and the FL Act allows a practitioner to certify that it is not appropriate for FDR to be attempted or to proceed. See, further: R Braaf and C Sneddon, 'Family Law Act Reform: the potential for screening and risk assessment for family violence' (Australian Domestic and Family Violence Clearinghouse, Issues Paper No 12, 2007).

307 D Kirkwood, *Behind Closed Doors*, op cit; R Field, 'Federal Family Law Reform in 2005: the problems and pitfalls for women and children of an increased emphasis on post-separation informal dispute resolution' (2005) *Queensland University of Technology Law and Justice Journal* 28; R Field 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence' (2004) 20 *Australian Feminist Law Journal* 65.

308 L Moloney, B Smyth, R Weston, N Richardson, L Qu and M Gray, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Australian Institute of Family Studies, 2007), p 100; A Shea Hart, 'Children Exposed to Domestic Violence: Undifferentiated needs in Australian family law' (2004) 18 *Australian Journal of Family Law* 170.

309 The Australian Institute of Family Studies is undertaking an evaluation of the 2006 family law reform package on behalf of the Australian Government. The evaluation will assess how the new family law system is working, and how families are faring under this new system. See <http://www.aifs.gov.au/institute/research/projects.html> (accessed 18 November 2008).

6.4.8. However, recent research suggests that orders to facilitate contact with children have tended to follow 'standard' formulae.³¹⁰ Where family violence is alleged, but the allegation is not supported by evidence, courts tend to make orders for contact arrangements that are similar to those made in cases where violence is not an issue.³¹¹ In this context we note that while allegations of violence may not be substantiated by evidence in FL Act proceedings for a range of reasons, it appears that the absence of evidence cannot be assumed to mean that the allegation is unfounded or untrue. Because family violence often goes unreported at the time it is committed, a party who later alleges that violence has taken place over the course of their relationship may be unable to produce any contemporaneous records to substantiate their claim.³¹² In addition, because many claims of violence are neither accepted or denied by the party alleged to have been violent, courts may not be required to make a positive finding as to whether or not the violence took place.³¹³ As the authors of the recent Australian Institute of Family Studies report into allegations of violence and child abuse in FL Act proceedings observed, 'legal decision-making may often be taking place in the context of widespread factual uncertainty.'³¹⁴ There is some evidence that courts take a more cautious approach to contact issues when allegations of family violence are substantiated by evidence; however, it remains rare for a court to deny a parent any contact with a child.³¹⁵

The impact of contact on children

6.4.9. There is a substantial body of research concerned with the impact of contact arrangements on children, and in particular on whether it is in children's best interests to have contact with a parent who is or has been violent.³¹⁶ This issue is particularly complex where children have not themselves been the direct targets of violence, but may have witnessed violence against a parent or other family member. Similarly, if contact arrangements are likely to be characterised by recurrent episodes of violence directed at one of the children's parents, there is a question about whether the benefit children derive from spending time with the perpetrator of violence outweighs the harm that results from being exposed to further family violence.³¹⁷ Contact may also give some violent parents the opportunity to continue to manipulate and control their former partners after separation.³¹⁸

310 Kaye et al, 'Child Contact Arrangements', op cit, 132.

311 Moloney et al, *Allegations of Family Violence*, op cit; R Kaspiew, 'Violence in Contested Children's Cases: An empirical exploration' (2005) 19 *Australian Journal of Family Law* 112, pp 122-3.

312 Moloney et al, *Allegations of Family Violence*, op cit, p 84.

313 *Ibid*, pp 87-91.

314 *Ibid*, p 97.

315 *Ibid*, pp 100 and 119; Kaspiew, 'Violence in Contested Children's Cases', op cit, pp 122-3 and 128-9.

316 See for example J McIntosh, 'Thought in the Face of Violence: A child's need' (2002) 26 *Child Abuse and Neglect* 229; A Morrell, J Dai, S Dunn, I Sung and K Smith 'Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother' (2005) 11 *Violence Against Women* 1076; Sheehan et al, *Children's Contact Services*, op cit; Kaye et al, 'Child Contact Arrangements', op cit, 93.

317 For a discussion of post-separation violence associated with contact, see Rendell et al, *An Unacceptable Risk*, op cit.

318 Kaspiew, 'Empirical Insights', op cit.

The New Zealand model – presumption against unsupervised contact

- 6.4.10. In New Zealand, legislation dealing with family violence and children takes a much more restrictive approach to facilitating contact between children and the perpetrators of family violence. Protection orders contain a standard condition that prohibits contact between the perpetrator and the person for whose protection the order is granted, except:³¹⁹
- as is reasonably necessary in any emergency;
 - as is permitted under any order or written agreement relating to the role of providing day-to-day care for, or contact with, or custody of any minor;
 - as is permitted under any special condition of the protection order; or
 - as is necessary for the purposes of attending a family group conference.
- 6.4.11. If, in an application for custody of or access to a child, a court finds that a party ‘has used violence against the child or a child of the family, or against the other party to the proceedings’, there is a presumption that a court must not make an order that the violent party provide day-to-day care for the child, or an order for unsupervised contact between that child and the violent party.³²⁰ The court may make such an order if the court is satisfied that the child will be safe while the violent party provides day-to-day care for the child or has contact with the child.³²¹
- 6.4.12. Although the New Zealand model is cited as an example of a progressive legislative response to the risk posed by unsupervised contact with violent parents, it has also been subject to criticism. There is ongoing debate about whether evidence supports the need for a presumption against unsupervised contact, and whether non-physical forms of abuse should be treated in the same way as physical violence.³²²

‘Friendly parent’ criteria

- 6.4.13. Some commentators have identified difficulties with the application of ‘friendly parent’ criteria in cases involving family violence. ‘Friendly parent’ criteria are those which direct a court to have regard to the attitudes and behaviour exhibited by each parent towards the other parent in the context of making orders about the time that children spend with each parent. In the FL Act, s 60CC(4)(b) has been called a ‘friendly parent’ criterion.³²³

³¹⁹ *Domestic Violence Act 1995* (NZ) s 19.

³²⁰ *Care of Children Act 2004* (NZ) s 60(3).

³²¹ *Care of Children Act 2004* (NZ) s 60(4).

³²² See, generally, A Perry, ‘Safety first? Contact and family violence in New Zealand: an evaluation of the presumption against unsupervised contact’ (2006) 18 *Child and Family Law Quarterly* 1.

³²³ Kaspiew, ‘Violence in Contested Children’s Cases’, op cit, 136; B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (OUP, 2007) p 292.

6.4.14. Friendly parent criteria may discourage disclosure of family violence in Part VII proceedings – women who cannot adduce sufficient evidence to prove their claims of past violence may be advised not to raise the issues at all, for fear of being labelled ‘unfriendly’ or hostile. (This message may be reinforced by the risk of an adverse costs order against a person who is found to have knowingly made a false allegation or statement – see s 117AB).³²⁴ The friendly parent criterion may also deter women from seeking orders that prevent violent parents from having any contact with their children, for fear that this application may itself result in such applicants being labelled ‘unfriendly’.

Interaction between the FL Act and State/Territory child welfare jurisdiction

6.4.15. Examination of the complex interaction between the FL Act and child welfare legislation in each Australian jurisdiction is beyond the scope of this Report.³²⁵ However, it does appear that for some families with experience of family violence, child welfare laws add an additional layer of complexity to their encounters with the legal system. In addition to the interaction between the FL Act, the applicable State or Territory protection orders legislation and any relevant criminal laws, child welfare legislation may also be relevant. If the arrangements and orders in place under each legislative regime do not operate cohesively, then children’s safety and wellbeing, and that of their parents, may be compromised.

The connection between family violence and child abuse

6.4.16. Some forms of family violence that are directed towards children are, clearly, a form of child abuse.³²⁶ However, violence between other family members can have significant consequences for children, even if they are not directly the targets of the violent behaviour. Exposure to family violence is known to have significant developmental and social effects on children.³²⁷ Increasingly, such exposure is itself recognised as a form of child abuse.³²⁸

6.4.17. Family violence between adult partners is a key predictor of other instances of child abuse, including sexual abuse of children.³²⁹ Familicide, including the murder of children, is also linked to prior histories of family violence.³³⁰

324 In this regard, it is important to note that recent research indicates that the proportion of allegations of family violence and child abuse in FL Act proceedings which are clearly ‘false’ is small. However, some people face significant difficulties in adducing evidence of family violence in proceedings, particularly where they have not disclosed the violence previously to police, doctors etc. See, further: Moloney et al, *Allegations of Family Violence*, op cit.

325 For more detailed discussion, see Family Law Council, *Family Law and Child Protection: Final Report* (September 2002).

326 See for example the definitions of ‘family violence’ and ‘abuse of a child’ in s 4(1) of the FL Act.

327 A Worrall, J Boylan and D Roberts, ‘Children’s and Young People’s Experience of Domestic Violence involving Adults in a Parenting Role’ (Social Care Institute for Excellence Research Briefing, June 2008); J McIntosh, ‘Thought in the Face of Violence’, op cit; L Laing, ‘Children, Young People and Domestic Violence’ (Australian Domestic and Family Violence Clearing House, Issues Paper No. 2, 2000); M Sudermann and P Jaffe (1999), *A Handbook for Health and Social Service Providers and Educators on Children Exposed to Women Abuse/Family Violence*, (Family Violence Prevention Unit, Health Canada) www.hcsc.gc.ca/hppb/familyviolence/html/children_exposed/english/index.htm.

328 See, for example E Somer and A Braunstein, ‘Are Children Exposed to Interparental Violence Being Psychologically Maltreated?’ (1999) 4 *Aggression and Violent Behaviour*, 449-456; Sudermann et al, *A Handbook*, op cit.

329 Jaffe et al, *Making Appropriate Parenting Arrangements*, op cit; VLRC, *Family Violence*, op cit, p 22.

330 C Harris Johnson, ‘Familicide and Family Law: A study of filicide-suicide following separation’ (2006) 44(3) *Family Court Review* 448.

Child abuse in FL Act proceedings

- 6.4.18. Allegations of abuse of children have been described as the 'core business' of the Family Court.³³¹ Child abuse is alleged in a small but significant portion of contested FL Act proceedings. These cases are often complex, and require considerable time and resources in order to test allegations and determine suitable parenting orders. The Family Court has instituted programs designed specifically to manage cases involving child abuse as effectively as possible. Currently, cases involving serious allegations of physical and sexual abuse of children are referred to the courts' Magellan program. Cases in the Magellan program are subject to close case-management and often feature significant involvement by child welfare services and court counsellors.³³²
- 6.4.19. Generally, issues of child abuse and child welfare are matters within the jurisdiction of the States and Territories. However, contested FL Act cases involving children frequently involve allegations of child abuse. In such cases, there may be overlap or conflict between the jurisdiction of a court under the FL Act, the jurisdiction of State and Territory Children's Courts, and the role and responsibilities of State/Territory child welfare authorities.

State child welfare jurisdiction

- 6.4.20. Ordinarily, if there are allegations that a child is being abused, State or Territory child welfare authorities will have a statutory responsibility for the child's protection. This may involve intervening in a family in order to prevent further abuse, notifying police of activity which may constitute a crime, or bringing proceedings in State or Territory courts that have jurisdiction to make orders about the welfare of children.

Interaction between State child welfare legislation and the FL Act³³³

- 6.4.21. The FL Act allows, and in some cases requires, courts and court personnel to engage with State and Territory 'prescribed child welfare authorities' to respond to allegations of child abuse. When Part VII proceedings have been commenced in a State or Territory, the prescribed child welfare authority will be an officer of the State or Territory who is responsible for the administration of the child welfare laws in that jurisdiction, or some other person prescribed under the FL Act (see s 4(1)).

³³¹ See, for example, J Stewart, 'Specialist Domestic/Family Violence Courts within the Australian Context' (Australian Domestic and Family Violence Clearing House, Issues Paper No 10 2005) p 25; Moloney et al, *Allegations of Family Violence*, op cit. p 47; Hon A Nicholson, CJ and M Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24 *Melbourne University Law Review* 756, 778.

³³² See further D J Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia's magellan case management model* (Australian Institute of Family Studies, October 2007).

³³³ See, generally, F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlaps in the Area of Child Protection' (2002), 16(1) *International Journal of Law, Policy and the Family* 38.

6.4.22. Courts exercising jurisdiction under the FL Act also have specific responsibilities when child abuse is alleged in FL Act proceedings. An official of the court is obliged to notify the relevant child protection authority if a party to a FL Act proceeding files a notice of an allegation of child abuse (s 67Z). Certain persons, including court personnel, FDR practitioners and lawyers independently representing the interests of a child, have responsibilities to notify a child welfare authority if the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused (s 67ZA).

6.4.23. In addition, child welfare authorities have the right to intervene in cases in which it is alleged that a child has been abused or is at risk of being abused (s 92A). Courts may request the intervention of child welfare officers in FL Act proceedings that affect, or may affect, the welfare of a child (s 91B).


6.4.24. However, the FL Act also provides that in some cases the operation of State and Territory child welfare laws effectively takes precedence over courts' jurisdiction under the FL Act (in a reversal of the usual relationship between Commonwealth and State laws operating on the same subject matter). A court may not make an order under the FL Act that applies to a child while the child is under the care of a person under a child welfare law unless (s 69ZK(1)):

- the order is expressed to apply to the child only when the child ceases to be under a person's care under the child welfare law; or
- a child welfare officer of the relevant State or Territory has consented to the institution or continuation of the FL Act proceedings in which the order is made.

If it appears that orders may be made under a child welfare law for a child to be taken into care, then a court may adjourn proceedings under the FL Act (s 69ZK(2)).

Overlap between the FL Act and State and Territory welfare jurisdiction

6.4.25. In general terms, State and Territory child welfare legislation covers some of the same ground as the FL Act, in the sense that it is concerned with the care, protection and welfare of children. Children's Courts may have jurisdiction to make orders about matters that may also be the subject of FL Act orders – for instance, orders about the persons with whom a child is to live or spend time. (As noted above, if there are orders in place under State or Territory welfare laws, these may take precedence).

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- 6.4.26. Matters arising in one area may lead to proceedings in another – for instance, a State welfare authority may arrange for a child to be cared for by a relative, which might then give rise to proceedings under the FL Act for the conferral on that relative parental responsibility in relation to the child.³³⁴ Conversely, evidence in FL Act proceedings may raise child protection issues which must be notified to State child welfare authorities, and which it is those authorities responsibility to act upon.
- 6.4.27. The overlap between the FL Act and State and Territory child welfare laws can result in there being multiple proceedings on foot in relation to the same family at the same time, or in rapid succession. This can be particularly problematic given the inherent vulnerability of the parties, particularly children whose welfare has already been compromised. Children may be required to give evidence in a number of proceedings, there may be delay or uncertainty with respect to their living arrangements and they may, in the interim, be exposed to risk of further abuse.³³⁵

³³⁴ Ibid.

³³⁵ Ibid; Family Law Council, *Family Law and Child Protection*, op cit.

Appendix to Part 6

Legislation	When must a court be told about an order?	What orders must the court be told about?	Who is required to inform the court about an order?
<i>Family Law Act 1975</i> (s 60CF)	Proceedings under Part VII	A State/Territory protection order that applies to the child or a member of the child's family	A party to the proceedings who is aware that the order applies to the child or a member of the child's family Note: a person who is not a party to the proceedings may also inform the court about an order
<i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) (s 42)	Application for a final apprehended violence order Application for an interim apprehended violence order Application to vary a final or interim apprehended violence order	Any relevant parenting order, or pending application for a parenting order, of which the applicant is aware	Applicant
<i>Domestic Violence and Protection Orders Act 2008</i> (ACT) (s 70(2)(d)) (due to commence in 2009)	Application by a police officer for an emergency order	A parenting order, recovery order, or injunction or order under s 68B or s 114 that expressly or impliedly authorises a person to spend time with a child	Police officer applying for an emergency order
<i>Domestic and Family Violence Act 2007</i> (NT) (s 90(1))	Application for a domestic violence order	Any Part VII order in force in relation to the defendant, or pending application for such an order, of which the applicant is aware	Applicant for a DVO Police officer applying for a police DVO

Legislation	When must a court be told about an order?	What orders must the court be told about?	Who is required to inform the court about an order?
<i>Domestic and Family Violence Protection Act 1989 (Qld)</i> (s 46B)	Application for a domestic violence order	Any relevant family contact order, or pending application for such an order, of which the complainant is aware	Application for a domestic violence order
<i>Domestic Violence Act 1994 (SA)</i> (s 7)	Applicant for a domestic violence order	Any relevant contact order, or pending application for such an order, of which the applicant is aware	Complainant (including a member of the police force)
<i>Family Violence Protection Act 2008 (Vic)</i> (s 89) (due to commence in 2009)	There is no duty on an individual to inform the court of relevant FL Act orders. However, the court is obliged to inquire as to whether there are any FL Act orders or child protection orders in force if the court is making a family violence intervention order in relation to a parent of a child	In practice, a court is likely to ask applicants for a protection order whether there are FL Act orders in place. Similarly, police officers who are contemplating applying for a family violence safety notice are likely to enquire of the respondent and affected family member as to whether there are any FL Act or child protection orders that may be inconsistent with the proposed terms of the notice (see s 24(c))	

Legislation	When must a court be told about an order?	What orders must the court be told about?	Who is required to inform the court about an order?
<i>Restraining Orders Act 1997</i> (WA) (s 66)	Application for a restraining order	Any family law order or pending application for such order of which the applicant is aware	Applicant for a restraining order (if a person applies on behalf of someone else, the applicant must take reasonable steps to obtain details from the person they represent about any family orders or pending applications for family orders)
<i>Family Violence Act 2004</i> (Tas) ss 14-15	Application for a police family violence order Application for a family violence order	For an application for a police family violence order, any relevant Family Court order For an application for a family violence order, any relevant Family Court order or pending application for such an order of which the applicant or affected person is aware	Applicant for a police family violence order or family violence order

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