

Report On The Review Of The *Protection Orders Act 2001*

Presented by Jon Stanhope MLA
Attorney General
April 2004

Contents

Contents	1
Abbreviations	2
1. The Review Process	3
Background.....	3
Review.....	3
	2. Legislative provisions – proposed amendments
2. Legislative provisions – proposed amendments	5
Objects and Principles.....	5
	Structure of the
legislation.....	6
Application Fees.....	7
The use of alternative dispute resolution.....	8
Undertakings.....	9
Who may apply for a protection order?.....	10
	Applications by
children.....	10
	Applications by third
parties.....	11
Applications by police officers.....	12
Court Initiated Orders.....	13
Grounds for a Domestic Violence Order.....	13
	Personal/physical
injury.....	15
	Who is a relevant
person?.....	16
Who is a relative?.....	17
Grounds for a personal violence order.....	18
	Reasonable fear or likelihood of future
violence.....	18
Grounds for a workplace order.....	19
Workplace interim orders.....	20
Grounds for making an interim order.....	21
What conditions or restrictions may an interim order contain?.....	22
Return of personal property.....	23
Length and crystallisation of interim orders.....	23
Grounds for making an emergency order.....	25
	Explanation of emergency
order.....	26
	Length of emergency protection
order.....	27
Enforcement and explanation of orders.....	27
Contravention of orders.....	28
Consent as breach.....	29
Extension of final orders.....	29
Amendment or revocation of final orders.....	30
Restriction on publication of information about proceedings.....	31

Children and protection orders.....32

3. The Model Domestic Violence Laws.....33

4. Final consideration.....36

Appendix 1 – Agency submissions



Abbreviations

Crimes Act	<i>Crimes Act 1900 (ACT)</i>
DVA	<i>Domestic Violence Agencies Act 1986 (ACT)</i>
FVIP	ACT Family Violence Intervention Program
MCA	<i>Magistrates Court Act 1930 (ACT)</i>
MDVL	Model Domestic Violence Laws 1999
the Act	<i>Protection Orders Act 2001 (ACT)</i>
DVCS	Domestic Violence Crisis Service
the Paper	<i>Protection Orders Legislation Review</i>

The review process

1. Background

The *Protection Orders Act 2001* (the Act) and the Protection Order Regulations (the Regulations) commenced on 27 March 2002. The purpose of the legislation was to consolidate the protection order provisions previously located in *the Domestic Violence Act 1986* and the restraining order provisions previously located in the *Magistrates Court Act 1930*.

2. Review

When the Act was passed it contained an obligation under sections 107(1) and 107(3) (now repealed) to examine the relevant sections of the Act and its regulations for consistency with Model Domestic Violence Laws, and review the operation of the provisions relating to domestic violence. The scope of the domestic violence and personal protection order provisions were also examined. For example, what should constitute domestic or personal violence for the purposes of the Act, who is a relevant person for the purpose of making an application for a domestic violence order, who may apply, and when the court may grant an order are considered.

While section 107(1) of the Act imposed a requirement that the Act and the regulations be reviewed for consistency with the Model Domestic Violence Laws no later than 27 March 2003, in October 2002 a decision was made to combine this review with the section 107(3) review.

The *Protection Orders Legislation Review* (the Paper) proposed a series of amendments to the Act and outlined and examined the validity of the objects, principles and structure of the Act. The Paper also considered the effectiveness of the legislation in achieving these objects and proposed amendments to address concerns that protection orders are being inappropriately sought and used.

The Paper was released for public comment in January 2004. In addition, copies of the Paper were posted to twenty-four agencies seeking their comments. Eleven agencies provided submissions on the Paper. The Department of Justice and Community Safety has considered the submissions presented as a response to the Paper.

Agency submissions have been copied and are attached in Appendix 1 to this report. Agencies were consulted on release of their submissions. Only those submissions approved for release have been attached. The submissions in Appendix 1 do not necessarily reflect the views of the ACT Government or the Department of Justice and Community Safety.

Legislative provisions – proposed amendments

3. Objects and Principles

The Paper considered the objects and principles of the Act and proposed changes to the legislation so that the objectives truly reflect the expectations and understanding of both the legislature and the community as to the reasons for the legislation's existence. The Paper considered whether the objectives should be limited to providing a mechanism to facilitate the safety and protection of people, particularly where people are involved in domestic relationships. The question was also asked as to whether there was an unwritten expectation that the legislation should go beyond proscribing particular conduct, by assisting people to resolve disputes or interpersonal conflicts through conferencing. Does the community see the legislation as providing a "wake-up" call to particular individuals that their behaviour is not acceptable in a civilised society, or a statement by the community as a whole that violence or harassment is not an appropriate response to interpersonal disputes?

The Act provides a mechanism to facilitate the safety and protection of people who experience domestic and personal violence. The stated objectives of the Act as set out in section 5 of the Act are:

- (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; and
- (b) to provide a mechanism to facilitate the safety and protection of people who experience domestic and personal violence.

The primary mechanism created by the legislation to give effect to section 5(b) of the Act is the protection order. Under the Act, the Magistrates Court may grant a protection order where satisfied that it is necessary to do so to protect the aggrieved person from further acts of violence.

Proposed amendment

The Paper proposed that the second objective of the Act could more accurately be articulated as: -

To, through the Protection Orders Act, provide a mechanism to facilitate the safety and protection of people who fear or experience violence by providing a legally enforceable mechanism to prevent violent conduct.

The Paper also proposed that section 5 should be expanded so that the objects of the Act include *to facilitate the resolution of disputes without resort to violence.*

Agencies who responded to this proposal expressed concern about inclusion in the object of 'to facilitate the resolution of disputes without resort to violence'. It was submitted that this suggested that there has not been any violence in the relationship prior to the application for a protection or domestic violence order by an aggrieved person.

Agencies also expressed concern over the word ‘disputes’, which was not seen as an appropriate word to describe a domestic violence situation. The final recommendation has been changed to reflect these concerns.

Recommendation

It is recommended that the objects of the Act be more accurately articulated as:

- *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; and*
- *provide a mechanism to facilitate the safety and protection of people who fear or experience violence by providing a legally enforceable mechanism to prevent violent conduct; and*
- *to provide a mechanism to facilitate the safety and protection of people who fear or experience violence by facilitating the resolution of conflict without resort to arbitration.*

Recommendation

It is further recommended that the Act be renamed as the *Domestic Violence and Protection Orders Act* to acknowledge the difference between domestic violence orders and personal protection orders, as outlined in the Act, and to recognise that domestic violence is a particular form of interpersonal violence that needs a greater level of protective response.

4. Structure of the legislation

The Paper looked at the structure of the legislation and considered whether the structure should be changed to accommodate the different orders – protection orders and domestic violence orders which are covered under the Act.

The structure of the Act broadly follows the process for making a protection order. Part 3 of the Act establishes the process for making an application. Part 4 sets out the grounds for making an order, the conditions that may be imposed and the offence provisions that will apply if an order is breached. Parts 5 and 6 empower the court to grant interim and emergency protection orders. Part 8 sets out the provisions for review.

Although the Act consolidates the protection order provisions under the DVA with the restraining order provisions under the MCA, the stated objectives in section 5 specifically acknowledge, “that domestic violence is a particular form of interpersonal violence that needs a greater level of protective response”. The distinction between orders restraining domestic and personal violence is retained to acknowledge the difference. Section 8 of the Act clearly provides that there are two types of protection order available under the legislation, a domestic violence order and a protection order. A domestic violence order may be made as a final, interim or emergency order. A personal protection order may be made as a workplace order or made other than as a workplace order. The orders may be made as an interim or final order. The orders vary in the type of conduct they restrain, and the length of time they operate.

It is often argued by agencies dealing with victims of violence that the legislative distinction is not enough, and that a separate Act is required, the principal argument being that stand alone legislation to address domestic violence keeps the issue prominent and maintains a political edge.

The ACT Legislative Assembly Select Committee on the Status of Women supported this view. In its recent report, the committee recommended that the government rework the legislation so that the provisions regarding domestic violence are contained in a stand alone Act.¹

Proposed amendment

The Paper proposed to maintain the legislation in one Act and argued that separate domestic violence legislation is not necessary. The position was expressed that by retaining the distinction between orders restraining personal and domestic violence, the Act adequately acknowledges the insidious nature of domestic violence, but has improved accessibility by consolidating the legislation and avoiding unnecessary duplication.

A number of agencies in their submissions expressed support for separate domestic violence legislation. The support was premised on the argument that domestic violence has different characteristics to other types of violence and should therefore be addressed in stand-alone legislation.

Recommendation

Notwithstanding the support expressed by agencies for separate domestic violence legislation it is recommended that no change be made at this time to the existing legislation as the current Act adequately acknowledges the nature of domestic violence and the greater level of protective response required.

5. Application Fees

The Paper addressed concerns that protection orders are being inappropriately sought and used for frivolous or vexatious purposes, and that this in turn has reduced the effectiveness of the legislation. The Paper also canvassed the introduction of a filing fee as an option to discourage unmeritorious protection order applications.

Regulation 66 provides that the court may, on the application of the respondent or on its own initiative, dismiss an application or stay a proceeding if it appears that no reasonable cause of action is disclosed, or that the proceeding is frivolous, vexatious or an abuse of process. Unmeritorious applications can be adequately identified and filtered by exercise of this discretion

Prior to exercising this discretion, the court may receive evidence on hearing, but is not required to do so. The court may dismiss or stay the application at any stage during the proceedings, but will generally do so when the application for the interim order is heard. If, upon making an application for a protection order, an interim order is sought, the court will hear and decide the application the same day or the next morning.

¹ Select Committee on the Status of Women in the ACT, *The Status of Women in the ACT*, 2002, 73.

In relation to the introduction of a filing fee, there is concern that a fee will discourage genuine applicants from seeking a protection order from the court. If a fee was introduced, a mechanism to waive the fee would also need to be introduced for applicants who may be experiencing financial hardship. Victims of violence and harassment would be required to complete additional paperwork and provide documentation establishing their financial position. Anecdotal evidence suggests that many applicants would not have the financial resources to pay a fee, and that it would frequently be required to be waived. Extra court resources may be required to consider and decide waiver applications and to recover the fee where appropriate.

Proposed amendment

The proposal outlined in the Paper did not support the introduction of a filing fee as it was submitted that the introduction of a fee would be inconsistent with section 7 of the Act which provides that the procedures under the Act are to be as simple, quick and inexpensive as is consistent with achieving justice. It was further submitted that a filing fee would place an extra burden on most applicants and could operate inequitably.

The majority of agencies who responded to the Paper supported the proposal not to introduce filing fees for applications.

Recommendation

Given the support expressed by agencies for the above proposal, it is recommended that no filing fee be introduced and no amendments to the Act be made.

6. The use of alternative dispute resolution

The Paper considered the effectiveness of dispute resolution as an alternative to arbitration and canvassed methods for encouraging a greater use of dispute resolution. While acknowledging the unequal bargaining power and vulnerability of victims of domestic violence and abuse, the Paper noted that there are many situations where mediation and other dispute resolution mechanisms may be more effective in resolving disputes.

One of the ways the Act facilitates the resolution of disputes (and thereby prevents further violence) is by facilitating discussion between the parties, through a Deputy Registrar, prior to the matter being heard by the court.

Upon an application being made to the court for a protection order, the Deputy Registrar will in most instances set a date for the parties to attend a preliminary conference. The purpose of the conference is to explore resolution of the application without the need to resort to arbitration. If not, the Deputy Registrar will use the conference as an opportunity to work out and limit the issues to be decided at the hearing, and to ensure that the parties are taking the measures necessary to allow the matter to be resolved as quickly as possible.²

Proposed amendment

² PO Regulations, reg 6.

The Paper did not propose to require parties to mediate a matter before a protection order will be granted, but supported the greater use of alternative dispute resolution where appropriate.

The Paper also proposed to extend the objects of the preliminary conference to find out whether the matter is amenable to mediation.

This proposal received majority support in principle, however many agencies had different views regarding the effectiveness of the proposal and expressed concern over the emphasis given to alternative dispute resolution in legislation dealing with domestic violence.

Agencies also expressed doubts over court staff's ability to adequately identify parties for whom mediation is a successful option.

Recommendation

Given the agency support for this proposal it is recommended that the objects of the preliminary conference be expanded to enable the court to find out whether the matter is amenable to mediation.

It is further recommended that guidance be given to the court to facilitate them to recommend mediation in appropriate circumstances and to provide parties with the contact details of relevant services.

7. Undertakings

The Paper canvassed the use of undertakings as a means of resolving a dispute and reducing the need for repeat protection orders. An undertaking is an agreement made by the parties to do or not do certain things. It may include conditions similar to those found in a protection order. Anecdotal evidence suggests that the conference and subsequent undertaking will generally resolve the dispute and the applicant will not reapply for a protection order. The parties to a protection order application may agree at the preliminary conference to withdraw the application and enter into an undertaking. While undertakings are unenforceable, they are used as an effective negotiating tool in preliminary conferences. They can also be used to create an order that is designed to avoid some of the consequences that automatically flow from a protection order thereby giving greater protection to people who experience domestic or personal violence.

Proposed amendment

The Paper did not propose to make undertakings enforceable on the basis that if an applicant requires protection, and is unwilling to withdraw the application on the basis of the respondent's unenforceable undertakings, they should seek the full protection of an order, and have the matter determined by the court.

The majority of agencies who responded to the Paper supported the proposal not to make undertakings enforceable. Many of the agencies also requested that undertakings be strengthened by providing that if an application is withdrawn on the basis of an undertaking, it can be revived, and that if an undertaking is breached, that can be grounds for obtaining an order.

Recommendation

Given the support expressed by agencies for the above proposal, it is recommended that undertakings not be enforceable and no amendments to the Act be made.

It is also recommended that amendments be made to the Act, that if an undertaking is entered into and an allegation of breach is alleged then that breach will constitute a ground for a domestic violence order.

8. Who may apply for a protection order?

The Paper considered the issue of who may apply for a protection order and whether a child should be able to make an application for a domestic violence or personal protection order without the assistance of a next friend. The Paper also considered issues relating to applications by third parties, police officers, and the court.

Under the current Act, an aggrieved person or a police officer may apply for a protection order. If the aggrieved person is under a legal disability they may only apply for an order by a next friend. However, a child may apply for a domestic violence order in the child's own right even though the child is a person with a legal disability.³

The previous provisions outlined in the MCA and the DVA provided for particular persons to make an application on behalf of an aggrieved person on the basis of his or her relationship to the aggrieved person. The relationships that were included were generally that of a close relative or a person who might be expected to have legal responsibility for the child, for example, a parent or guardian. However, as is explained in the Explanatory Memorandum to the Act:

The difficulty with specifying who may apply on behalf of a person under a legal disability as a class is that there is no guarantee that a specified person is able to effectively represent the interests of the aggrieved person. For example, a parent may no longer have the ability to exercise legal capacity in respect of a child for whom a guardian has been appointed. This is rationalised in the Bill so that the focus is on the ability of the person to make the application as a next friend of the aggrieved person, rather than on what may be a fairly arbitrary relationship.⁴

Applications by Children

The Paper sought comments from stakeholders and the community on how the best interests of the child be represented throughout the protection orders process.

Proposed amendment

The Paper proposed that a child or a young person who the court is satisfied understands the nature and consequences of a protection order application, should be able to make an application for a domestic violence or personal protection order without the assistance of a next friend.

The Paper also proposed the absence of an age limit, over which a child may make an application for a protection order. An age limit is not proscribed by the Act so that the

³ POA, Dictionary.

⁴ Protection Orders Bill 2002 (ACT), Explanatory Memorandum, 4.

age of the child, as opposed to the child's understanding of the proceedings and consequences of an order, is not a barrier to the child's application.

This issue received mixed reaction from the agencies that responded to the Paper. Some of the agencies supported the view that children should be able to apply for a protection order without the assistance of a 'next friend' and the absence of an age limit on applications for orders. Other agencies did not support the child as an applicant for an order if there is a person in *loco parentis* who can make an application on the child's behalf.

Recommendation

Notwithstanding the lack of mixed reaction from agencies in relation to above proposal, it is recommended that the Act be amended to provide that children should be able to apply for a protection order and a domestic violence order without the assistance of a 'next friend'.

It is further recommended that an age limit, over which a child may make an application for a protection order, not be proscribed. It is submitted that when considering an application by a child, the question should be "does the child or young person understand the proceedings and consequences of the order".

Applications by Third Parties

Section 11(5) of the Act provides that the right of another person to make a protection order application for an aggrieved person is not affected. For example, a parent, guardian of the Chief Executive of Family Services may institute proceedings on behalf of a child, or an agent or legal practitioner may act for a person.

The MDVL provisions take a different approach to the POA by providing that in addition to the aggrieved person or a police officer, the following persons may apply for an order on behalf of the primary applicant:

- (a) any person appointed by a primary applicant who is an adult;
- (b) a person appointed by a primary applicant who is a child of 14 years of age or more, if the court gives leave for the person to make the protection order application for the child; or
- (c) a person appointed by the court if the court feels that the primary applicant couldn't make the protection order application.⁵

However, it is unclear from these provisions whether the person appointed by the aggrieved person is acting as a legal or non-legal representative for the aggrieved person or as merely a support person, and whether they are a party to the proceedings.

Proposed amendment

The Paper did not propose to amend section 11 of the Act. It was felt that the current provisions are broad enough to enable a person to appoint another person, such as an

⁵ MDVL, s 10.

agent or legal representative, to act on their behalf in certain circumstances or to have a support person present when their application is heard or during the preliminary conference.

Only a few agencies commented specifically on the issue of applications by third parties. These agencies did not agree that the current provisions in the Act are broad enough to enable a person to appoint another person, such as an agent or legal representative, to act on their behalf in certain circumstances or to have a support person present when their application is heard or during the preliminary conference.

Recommendation

Notwithstanding the disagreement of agencies to the proposal to not amend section 11 of the Act, it is recommended that no amendment to the Act be made. This recommendation is based on the submission that the current provisions are broad enough to enable a person to appoint another person to act on their behalf

Applications by Police Officers

Section 11(3) of the POA provides that in addition to an aggrieved person, a police officer may make an application for, or help an aggrieved person to make an application for a protection order.

The Act places an obligation on a police officer to apply for an order only in emergency situations. The grounds for obtaining an emergency protection order under the Act are not as broad as the grounds for obtaining a protection order. They are considered reactive rather than preventative. Before a judicial officer may make an emergency protection order the judicial officer must be satisfied that:

1. there are reasonable grounds for believing that the respondent may cause physical injury to the aggrieved person if an order is not made; and
2. the aggrieved person is a relevant person in relation to the respondent; and
3. it is not practicable to arrest the respondent; and
4. it is outside the sitting hours of the Magistrates Court.⁶

If these elements do not exist, police may still make an application for a protection order on behalf of an aggrieved person during Court sitting hours, or take such action as is necessary to prevent a breach of the peace or to prevent the commission or repetition of an offence.

Section 11(3) is consistent with the FVIP, which focuses on police as primarily enforcers of the criminal law. The FVIP is a coordinated criminal justice and community response to violence within intimate and family relationships. One of the main achievements of the program is improved cooperation between police and victim support agencies such as the DVCS. DVCS is notified by police of all family violence incidents, and may assist a victim to make an application for an order.

The Paper highlighted concerns that orders made without the consent of the aggrieved person will be of little value, are highly likely to be breached, and will expose the aggrieved person to aid and abet proceedings.

⁶ POA, s 62.

The majority of the agencies who considered the issue of applications by police officers supported the proposal not to expand the powers of police to make applications other than in emergency situations as this may lead to inappropriate orders, which are breached, and may also expose the aggrieved person to aid and abet proceedings.

Recommendation

Given the agency support for not expanding the powers of police to make applications for an order, it is recommended that no amendments to the Act be made.

Court Initiated Orders

The Paper considered the current practice relating to court initiated orders and the conflict in the Act with the provisions of the MDVL. The Act currently provides that a protection order may be made upon application to the court. The MDVL recommends that the court also be empowered to make orders on its own initiative.

In considering court-initiated orders, the Paper addressed two concerns with the proposal. The first concern related to the information that a Magistrate or Prosecutor may have available to them at the time of criminal proceedings, and the argument that that information may not be sufficient or accurate enough to allow an appropriate protection order to be made. The aggrieved person will often not be present during the criminal proceedings, and as a result, unable to object or agree to the order being made.

The second concern related to issues of bail. If there are immediate safety concerns for the victim, bail may be refused or conditionally granted. The court, in sentencing the offender, may also make a recognisance order requiring the offender to be of good behaviour and to comply with a proscribed set of conditions. The conditions may be similar to those imposed by a protection order.

Proposed amendment

The Paper did not propose amending the legislation to allow the court to be able to make a protection order on its own initiative during criminal proceedings.

Agencies that responded to this proposal gave it their support.

Recommendation

Given the support by agencies for not empowering the court to make orders on its own initiative during criminal proceedings, it is recommended that no amendments to the Act be made.

9. Grounds for a Domestic Violence Order

The Paper examined the current grounds required to obtain a domestic violence order and whether the definition of ‘domestic violence’ captures all situations of domestic violence.

Section 40 of the Act provides that the court may make a domestic violence order if satisfied that the respondent has engaged in domestic violence. A person's behaviour is domestic violence if it:

- (a) causes physical injury to the relevant person; or
- (b) causes damage to the property of the relevant person; or
- (c) is directed at a relevant person and is a domestic violence offence; or
- (d) is a threat made to a relevant person or another person that if done, would fall under paragraph (a) (b) or (c); or
- (e) is harassing or offensive towards a relevant person.

The MDVL recommends expanding the definition to also expressly include 'threats to, or acts against pets and animals'. Threats of animal abuse or the abuse of pets is a powerful tool often used by abusers to inflict fear upon their victims. Recent studies have suggested that "more than half of all abused women have companion animals, that many of these women's companion animals are abused by the perpetrators as a means of hurting and controlling the women or their children, and that concerns for the safety of companion animals keep many women from leaving or staying separated from their abusers."⁷ Currently, acts against animals ordinarily tamed or kept in captivity fall within the definition of criminal damage to property.⁸

Proposed amendment

This Paper proposed to amend the Act to recognise the abuse of pets as an act of domestic violence.

Agencies who responded to this proposal gave it their full support. In supporting the proposal, it was recognised by the agencies that domestic animals are often used as a power source by the perpetrator of violence.

The Paper also canvassed a review of the schedule to the Act of Domestic Violence Offences. Currently, offences that are not recognised as domestic violence offences by the schedule or the definition in the Act, will not invoke the relevant provisions in other legislation such as the *Bail Act 1992* or Part 10 of the *Crimes Act 1900*. A review of family violence incidents in the ACT from 2000 to 2001 has found that there were 22 offenders prosecuted for damaging or destroying ACT property. A further four offenders were prosecuted for burglary.

Proposed amendment

The Paper proposed to expand the schedule of domestic violence offences to include the offence of burglary, and to expand the definition of a domestic violence offence to include an offence against s 4 of the *Crimes (Offences Against Government) Act 1989* of destroying or damaging government property.

Agencies who responded to this proposal gave it their full support. Agencies submitted that they were aware of many examples of domestic or family violence that

⁷ Fawcett N.R., Gullone E & Johnson J, 'The relationship between animal abuse and domestic violence: implications for animal welfare agencies and domestic violence organisation', *Australian Domestic Violence Clearing House Newsletter*, March 2002.

⁸ Destroying or damaging property is included in schedule 1 of the *Crimes Act 1900* (ACT) as a domestic violence offence.

do not involve physical injury and that many victims who experience both physical and emotional or financial abuse say that it is worse than physical abuse.

The Paper also proposed to recognise the risk posed by firearms in a domestic violence situation by expanding the definition of domestic violence to include as a domestic violence offence the offence of unlawful discharge of a firearm, possession or use of a prohibited weapon, and possession of prohibited articles.

Agencies who responded to this proposal gave it their full support. In supporting the proposal, agencies noted the increased risk of harm to the victim in situations where the aggressor possesses a firearm.

Recommendation

It is recommended that amendments be made to the definition of domestic violence in the Act to include threats to, or acts against pets and animals, and provide that a person's behaviour will be domestic violence if it causes personal injury, and not just physical injury, to someone.

It is also recommended that amendments be made to the Act to include as a domestic violence offence, the offence of:

- cruelty to animals (*Animal Welfare Act 1992, s7*)
- causing pain to an animal (*Animal Welfare Act 1992, s8*);
- administering poison to an animal (*Animal Welfare Act 1992, s12*);
- laying poison with the intention of killing or injuring an animal (*Animal Welfare Act 1992, s12*);
- administering electric shock to an animal (*Animal Welfare Act 1992, s13*);
- possession of an unregistered firearm (*Firearms Act 1996, s53*);
- possession of firearm so as to endanger life of another person (*Firearms Act 1996, s80*);
- unlawful discharge of a firearm (*Firearms Act 1996, s81*);
- possession or use of prohibited weapons (*Prohibited Weapons Act 1996, s5*);
- possession of prohibited articles (*Prohibited Weapons Act 1996, s6*);
- burglary (*Crimes Act 1900*); and
- destroying or damaging government property (*Crimes (Offences Against Government) Act 1989*).

10. Personal/physical injury

The Paper noted the inconsistency between the current definition of domestic violence and the definition of personal violence and sought comments on the possible broadening of the definition to domestic violence to include personal injury.

The Act provides that a person's behaviour will be personal violence if it causes *personal injury* to someone. The definition of domestic violence is not as broad because it is expressed in terms of conduct that causes *physical injury* to the relevant person. This inconsistency could mean that the court could not make a domestic violence order, but could make a personal protection order where the aggrieved

person was not subjected to physical violence but suffered mental distress to the relevant degree.

Proposed amendment

The Paper proposed to amend the definition of domestic violence to provide that a person's behaviour will be domestic violence if it causes personal injury to someone. The use of 'personal injury' will not only bring the definition of domestic violence into line with personal violence, but is consistent with other ACT legislation. For example, the *Victims of Crime (Financial Assistance) Act 1933* defines 'injury' as physical or mental injury and includes mental shock or nervous shock. This proposal was supported in the Paper by the argument that it would be inconsistent to, on the one hand recognise mental injury as one of the potential outcomes of crime, but on the other hand, not recognise it as sufficient basis for a domestic violence order, which is an order intended to prevent the commission of a crime.

In relation to the proposal to amend the definition of domestic violence to encompass 'personal injury' as well as 'physical injury', the majority of the agencies gave it their full support.

However, one agency expressed two different views. One view considered the amendment as appropriate because, although physical injury will continue to be sufficient, respondents will not be able to argue that mental or nervous shock is insufficient to establish this aspect of the definition. The other view held that it would be preferable to stay with the current definition of domestic violence, as cases that do not involve physical injury (broadly defined) can be adequately captured under the head of "harassing or offensive conduct".

This particular agency also submitted that it would oppose any additional requirement that applicants for domestic violence orders demonstrate that they have suffered mental or nervous shock, as this would turn the focus away from the conduct of the respondent and be unduly onerous for the applicant.

Recommendation

It is recommended that the definition of domestic violence be amended to provide that a person's behaviour will be domestic violence if it causes personal injury to someone. It is not anticipated that this will place any additional requirement on the applicant for a domestic violence order.

11. Who is a relevant person?

The Paper looked at the issue of who is a relevant person for the purpose of the Act and noted that the definition of "relevant person" is central to the definition of domestic violence and the scope of the domestic violence provisions in the Act. If a person is not a relevant person, they may still make an application for a personal protection order. A relevant person is currently defined as meaning:

- (a) a domestic partner of the original person; or
- (b) a relative of the original person; or
- (c) a child of a spouse of the original person; or

- (d) someone who normally lives, or normally lived in the same household as the original person (other than as a tenant or boarder).

“Domestic partner” is further defined to mean a person who lives with another person in a domestic partnership, and includes a spouse.⁹ A domestic partnership is two people, of the same or opposite sex, living together as a couple on a genuine domestic basis.

Proposed amendment

The Paper proposed to expand the definition of relevant person in the Act to include someone who is, or was in a domestic relationship with the original person, or a parent of a child of the original person.

This proposal acknowledges that the definition of ‘relevant person’ is central to the definition of domestic violence and the scope of the domestic violence provisions in the Act. Agencies who responded to this proposal gave it their full support.

Recommendation

Given the support for this proposal it is recommended that the definition of ‘relevant person’ in the Act be extended to include someone who is, or was in a domestic relationship with the original person, or a parent of a child of the original person. Although the definition refers to adults, it is proposed that the definition also extend to a person who is under 18 years of age. It is also recommended that the definition of relevant person include a parent of a child of the original person.

12. Who is a relative?

The Paper canvassed the extending the definition of ‘relative’ to include someone whom it is reasonable to regards as a relative.

The current provisions of the Act define a relative broadly to mean the original person’s:

- (a) father, mother, grandfather, grandmother, stepfather, stepmother, father-in-law or mother-in-law; or
- (b) son, daughter, grandson, granddaughter, stepson, stepdaughter, son-in-law or daughter-in-law; or
- (c) uncle, aunt, uncle-in-law, or aunt-in-law; or
- (d) nephew, niece or cousin; or
- (e) if the original person has a domestic partner, someone who would be a relative of the kind mentioned above if the person was legally married.

Proposed amendment

The Paper proposed extending the definition of relative for the purpose of the Act to also include someone whom it is reasonable to regard as a relative, especially considering that for some people the concept of a relative may be wider than is ordinarily understood. For example, indigenous people, members of communities with non-English speaking backgrounds, and people with particular religious beliefs.

⁹ *Legislation Act 2001* (ACT), s 169.

Proposal 12 recognises that for some people, such as members of communities with non-English speaking backgrounds, the concept of relative is wider than is ordinarily understood. Agencies who responded to this proposal gave it their full support.

Recommendation

Given the support for this proposal, it is recommended that the definition of ‘relative’ in the Act be extended to include someone whom it is reasonable to regard as a relative.

13. Grounds for a personal violence order

The Paper highlighted concerns about an increase in the number of personal violence orders being made by the court and queried whether the grounds for granting a personal violence order should be amended.

Section 40(2) of the Act provides that the court may make a personal violence order (other than a workplace order) if satisfied that ‘the respondent has engaged in personal violence towards the aggrieved person and may engage in personal violence towards the aggrieved person during the time the order is proposed to operate if the order is made’.

A person’s behaviour is personal violence if the person:

- (a) causes personal injury to someone or damage to the aggrieved person’s property; or
- (b) threatens to cause personal injury to the aggrieved person or damage to the aggrieved person’s property; or
- (c) is harassing or offensive to the aggrieved person.

A person’s behaviour is not personal violence however, if it is domestic violence.

Proposed amendment

Although concerns were expressed in the Paper about an increase in the number of personal protection orders being made by the court, the Paper did not propose to amend the grounds for granting an order. Instead, the Paper proposed focusing on filtering out unmeritorious applications, and encouraging greater use of alternative dispute resolution, particularly for these types of orders.

The majority of agencies who responded to this proposal supported greater encouragement of alternative dispute resolution.

Recommendation

It is not proposed to amend the grounds for granting a personal violence order as it is considered that section 40(2) provides adequate grounds under which the court may make such an order.

14. Reasonable fear or likelihood of future violence

Unlike the MDVL, the Act does not require the court, prior to making a protection order, to be satisfied that the respondent is likely to engage in domestic or personal violence, or that the aggrieved person fears (either reasonably or not) future acts of violence.

The Paper canvassed adoption of the MDVL and the imposition of a requirement or 'reasonable fear' or 'likelihood of future violence'.

The ACT Law Reform Committee recommended the deletion of the 'likely to occur' element and the requirement of 'fear for safety' in the offensive and harassing conduct ground so that proof of prior conduct would be sufficient.¹⁰ It considered that:

Whether conduct is likely to occur again, or a threat is likely to be carried out, is not an issue that can be the subject of strict objective proof. In practical terms, it is the fact of violence or harassment of offensive behaviour, or the threat of violence that indicate that the victim is at risk. Added to this is the general difficulty of attempting to predict the respondent's behaviour. Because of the diversity of domestic violence, it is not possible to prescribe an exhaustive list of the factors which could be relied upon to assess the 'likely to occur' element.¹¹

Proposed amendment

The Paper did not propose adopting a test of 'reasonable fear' or 'likelihood of future violence' as it was considered that in practice, it will be difficult to establish that the aggrieved person reasonably fears that the respondent will commit an act of domestic or personal violence against them without harassing, offensive or violent behaviour on the part of the respondent.

The provisions in the MDVL provide that a court may make a protection order if satisfied that the respondent is likely to engage in domestic or personal violence during the life of the order, or the applicant has a reasonable fear that the respondent will engage in an act of domestic or personal violence against them.

In considering this proposal agencies felt that the elements of the offence would be difficult to establish. The majority of agencies who responded to this proposal supported the position not to impose a test of 'reasonable fear' or 'likelihood of further violence'.

Recommendation

Given the potential problems in establishing a test of 'reasonable fear' or 'likelihood of future violence' it is not proposed to adopt this test. It is recommended that no amendments to the Act be made.

15. Grounds for a workplace order

The Paper considered the ACT Law Reform Commission's recommendation that the class of person who may make an application for a protection order be expanded to authorise the court to grant orders, on the application of police officers, school principals or those in charge of kindergartens or child care centres when there are reasonable grounds for suspecting that those in the workplace might be at risk from a person.¹²

¹⁰ ACT Community Law Reform Committee, *Report No.11 Domestic Violence – Civil Issues* 1996, 26.

¹¹ *Ibid*, 26-27.

¹² ACT Law Reform Commission, *Sexual Assault*, Report No 17, 2001, 63.

The grounds for granting a workplace order in the Act are similar to those for a personal protection or domestic violence order but only extend to conduct that occurs in relation to the workplace. Section 45 of the Act provides that the court may make a workplace order in relation to a workplace if satisfied that:

- the respondent has engaged in personal violence in relation to the workplace; and
- may engage in personal violence in relation to the workplace during the time the order is proposed to operate if the order is not made.

Proposed amendment

The proposals in the Paper supported this recommendation and proposed that the provisions be developed as part of the government's reforms to sexual assault offences and adoption of Chapter 5 of the Model Criminal Code.¹³

This proposal recognises the rights of employers and employees to a safe workplace. Agencies who responded to this proposal gave it their full support.

Recommendation

Given the support by agencies for this proposal it is recommended that amendments to the Act be made in anticipation of, and prior to, implementation of Chapter 5 of the Model Criminal Code.

It is recommended that amendments be made to the Act that would allow employers of kindergartens, childcare centres, school principals etc to be able to take out a workplace order against people who they believe pose a risk to students, children, employees etc in the workplace.

16. Workplace interim orders

The Paper considered the current practice in relation to the granting of workplace interim orders and canvassed possible amendments to the Act to further ensure safety at a workplace.

Currently, the provisions in the Act provide that upon making an application for a workplace order, an employer may seek an interim order. An interim order is designed to ensure the safety of the aggrieved person until the matter can be heard and decided by the court. The employer is the aggrieved person for the purpose of making an application for a workplace order.

While an interim workplace order may include any of the conditions listed in section 47(2)(What workplace orders may contain) an interim order may only be granted if the court is satisfied that it is necessary to ensure the safety of the employer (as the aggrieved person) until the application for the final order is decided. In many circumstances the employer will be a corporation or government and will not be at risk.

¹³ The Model Criminal Code was developed by a working party established by the Standing Committee of Attorneys General. Chapter 5: Sexual Offences Against the Person (Model Criminal Code Officers Committee), 199 recommends a new scheme of sexual offences.

Proposed amendment

The Paper proposed amendments to the Act to provide that the court may make an interim order upon application for a workplace order if satisfied that it is necessary to make the interim order to ensure the safety of the aggrieved person, or an employee, in the employee's capacity, until the application for a final order is decided.

This proposal recognises the importance of interim orders as a quick response to an immediate threat to safety of the aggrieved person or an employee of the aggrieved person. Agencies who responded to this proposal gave it their full support.

Recommendation

Given the support for this proposal it is recommended that amendments be made to the Act to provide that the court may grant an order if it is satisfied that it is necessary to ensure the safety of the aggrieved person or an employee of the aggrieved person.

17. Grounds for making an interim order

The Paper considered the current grounds in the Act for making an interim order and canvassed expanding the grounds so that the order can be used to prevent damage to the property of an aggrieved person.

Section 49 of the Act provides that the court may make an interim order if satisfied that it is necessary to ensure the safety and protection of the aggrieved person until the application for a final order is decided.

If there is an immediate threat to the safety of the aggrieved person, he or she may apply for an interim order upon making an application for a final order. An interim order is a temporary measure designed to protect a person until the matter can be heard and decided by the court.

Proposed amendment

The Paper proposed expanding the grounds for granting an interim order to also prevent substantial damage to the property of an aggrieved person.

Agencies who considered this proposal gave it their full support.

Recommendation

Given the support for this proposal it is recommended that amendments be made to the Act to provide that the Court may make an interim order if satisfied that it is necessary to prevent substantial damage to the property of the aggrieved person or a child of the aggrieved person.

18. What conditions or restrictions may an interim order contain?

The Paper examined the current provisions of the Act to see whether the interim order provisions needed to be amended to provide greater protection. An interim order will generally prohibit the respondent from being on premises where the aggrieved person lives or works, and may include any of the conditions specified in section 42(2) (What

final orders may contain). The court must be satisfied that the conditions imposed are necessary to ensure the safety of the aggrieved person.¹⁴

Proposed amendment

The Paper proposed to amend the Act to provide that in making an order the court may impose any condition it considers necessary to ensure the safety of the aggrieved person or a child of the aggrieved person.

This proposal recognises the importance of interim orders as a quick response to an immediate threat to safety of the aggrieved person. Agencies who responded to this proposal gave it their full support but cautioned against the use of the word ‘substantial’, mainly because of how this may be interpreted by the Court, recommending it either be deleted or defined in the Act.

Recommendation

Given the support for the proposal it is recommended that amendments be made to the amend the interim order provisions¹⁵ in the Act to provide that the Magistrates Court may make an interim order is satisfied that it is necessary to:

- 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 injury to a child of the aggrieved person.

Although concern was expressed by agencies over the word ‘substantial’, it is recommended that the word be retained in the amendments. The word ‘substantial’ is not commonly defined in legislative provisions or in legal judgements. The word is taken in its ordinary meaning and applied to the particular circumstances of a case. An attempt to define the word would restrict its varying applications. Neither is it recommended to replace the word with a similar word such as ‘considerable’ as the same meaning would apply.

Recommendation

It is also recommended that an interim order may:

- prohibit the respondent from being on premises where the aggrieved person lives or works; and
- do something mentioned in section 42 (What final orders may contain) only if the Magistrates Court is satisfied that it is necessary to ensure the safety of the aggrieved person or a child of the aggrieved person, or to prevent substantial damage to the property of the aggrieved person or a child of the aggrieved person.

19. Return of personal property

The Paper considered the current scope of the interim order provisions and canvassed whether an interim order could be used to require a person to return personal property. The Paper reflected the concerns expressed by people working with victims of violence that often, an aggrieved person who has fled and is unable to return to his or

¹⁴ POA, s 52(3).

¹⁵ POA, s.49.

her home, may be required to wait until the matter is heard by the court and a final order is made, to access personal items such as clothing and toiletries.

The Act currently provides that upon making a final order the court may prohibit the respondent from taking possession of, or require the respondent to return personal property reasonably required by the aggrieved person or a child of the aggrieved person.¹⁶ The court is not empowered to impose a similar condition as part of an interim order.¹⁷

Proposed amendment

The Paper proposed that the Act be amended to empower the court to make an interim order requiring the return of a restricted class of personal property, such as personal clothing, toiletries, books and photographs. The court will also have the discretion to identify items, which, according to the unique circumstances of the case, it considers are reasonably needed by the aggrieved person or a child of the aggrieved person.

The proposal to require the return of personal items recognises the problems faced by an aggrieved person who has fled and is unable to return to his or her home to access personal items. Agencies who responded to this proposal gave it their full support. In relation to this proposal, one agency recommended that the return of house and car keys is specifically included in the amendment.

Recommendation

Given the support for this proposal, it is recommended that amendments be made to the Act to require the return of a restricted class of personal property such as personal clothing, toiletries, books, photographs, house and car keys. It is also recommended that amendments be made to the Act to give the court discretion to identify items, which according to the unique circumstances of the case, it considers are reasonably needed, by the aggrieved person or a child of the aggrieved person.

20. Length and crystallisation of interim orders

The Paper in examining the provision of the Act relating to interim orders looked at the length of interim orders, interim order provisions and the rationale behind the current inclusion of an explicit time restraint on interim orders.

The Act provides that an interim order may be in force for a maximum period of 16 weeks. The court may only extend an order beyond this period if satisfied that there are special or exceptional circumstances (having regard to the principles for making protection orders) that justify the making of a further order.¹⁸

The inclusion of an explicit time restraint on the length of interim protection orders was prompted by the Supreme Court case of *Barkovic v Serenelli*¹⁹ in which an interim order was in force for a period of 21 months. In the context of a maximum period of 12 months for a final restraining order, this was considered unacceptable. The government of the day decided that a time limit should be introduced to ensure the

¹⁶ POA, s 42(3).

¹⁷ POA, s 51.

¹⁸ POA, s 59.

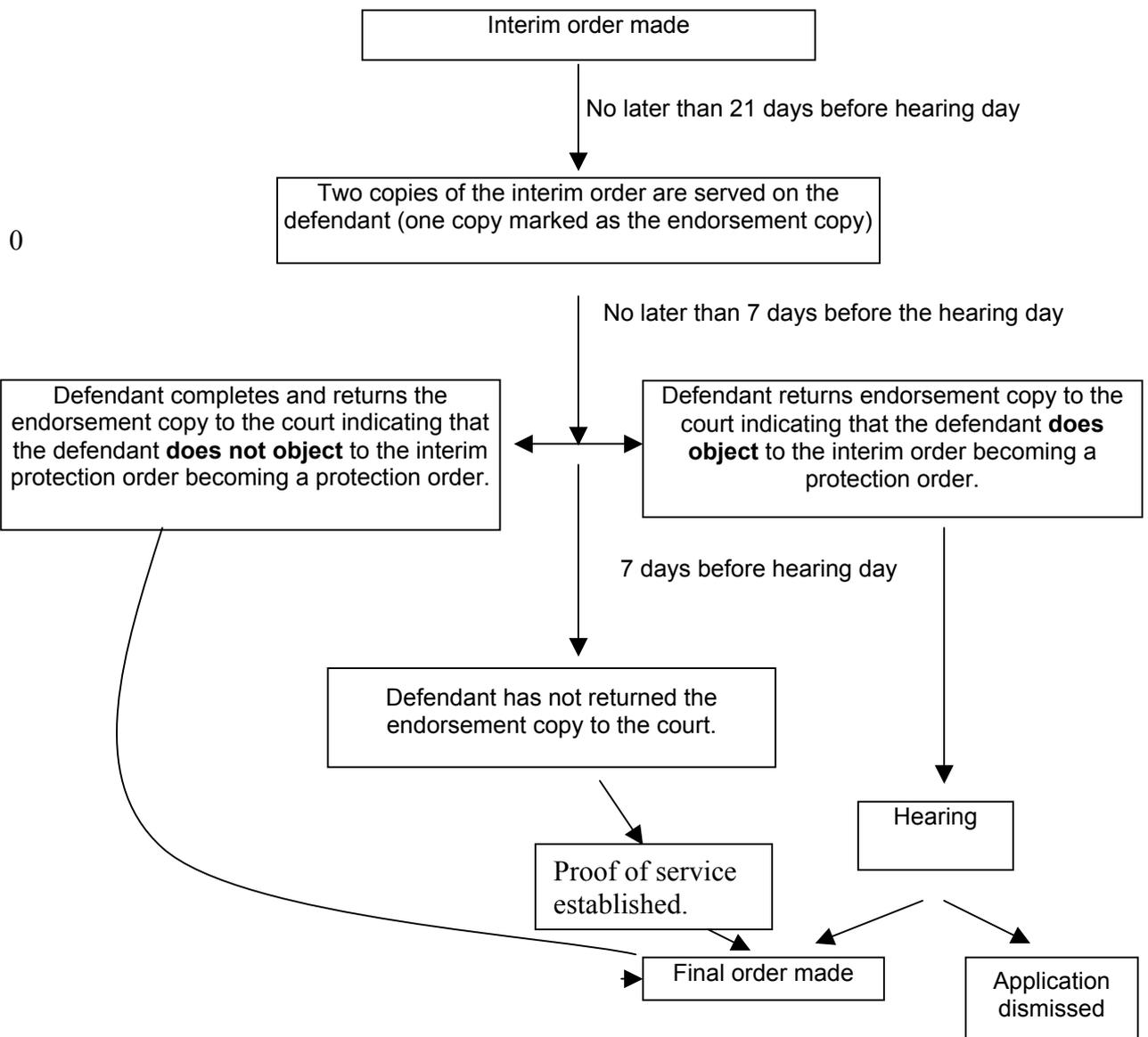
¹⁹ [2000] ACTSC 34.

quick resolution of matters. An interim order is generally made ex-parte and can place significant restrictions on the personal rights and freedoms of the respondent.

The Paper considered the crystallisation of interim orders in accordance with section 23 of the MDVL. Section 23 provides for the crystallisation of an interim order into a final protection order in the defendant’s absence, if the interim order has been served on the defendant, and he or she does not object to the final order being made. The provision attempts to reduce the number of times the applicant must appear before the court.

Proposed amendment

It is proposed that the Act be amended to provide that interim orders crystallise in accordance with section 23 of the MCVL. Under this section an interim order would become final as follows:



Agencies who considered this proposal welcomed the provision as an attempt to reduce the number of times the applicant must appear before the court.

Recommendation

It is proposed that the Act be amended to provide that interim orders crystallise in accordance with section 23 of the MCVL.

21. Grounds for making an emergency order

The Paper examined the emergency order provision in the Act and the grounds for making an emergency order.

The emergency order provisions in the Act provide a mechanism to afford protection to domestic violence victims out of court hours. Only a police officer may apply for an emergency protection order in respect of domestic violence matters. A judicial officer may make an emergency order on application if satisfied that:

- the respondent has behaved in a way that satisfies the judicial officer he or she may cause physical injury to the aggrieved person if an emergency order is not made; and
- it is not practicable to arrest the respondent, or there are no grounds to arrest the respondent.²⁰

The MDVL creates a similar, but broader order, named a ‘telephone interim protection order’. An attending officer may apply for a telephone interim order if it is not practicable to make an application to the court for a protection order, and the attending officer believes that it is necessary to ensure the safety of a protected person or to prevent substantial damage to any property of the protected person.²¹

The MDVL provides that an authorised justice may make a telephone interim protection order, if the justice is satisfied that the order is necessary to ensure the protection of the aggrieved person from an act of domestic violence (but not the protection of his or her property), or welfare of any child who may be affected by the defendants behaviour.

While it is incongruous that the grounds for applying for, and making an order would be different under the MDVL, the Paper outlined arguments in support of expanding the grounds for granting an emergency protection order to include the protection of property, or the safety of the aggrieved person or children of the aggrieved person. An emphasis is placed on safety from physical injury, rather than welfare, because of the emergency nature of the order and objects of the Act²²

Proposed amendment

The Paper proposed to amend the Act to provide that a judicial officer may make an emergency order on application by a police officer if he or she is satisfied that the respondent has behaved in 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 if an emergency order is not made.

²⁰ POA, s 62.

²¹ MDVL, s 9(2).

²² POA, s 5.

This proposal recognises the importance of emergency orders as a quick response to an immediate threat to safety and damage to property of the aggrieved person or a child of the aggrieved person. This proposal emphasises safety from physical injury because of the emergency nature of the order.

Agencies who considered this proposal gave it their support.

Recommendations

It is recommended that amendments be made to the Act to provide that a judicial officer may make an emergency order on application if he or she is satisfied that the respondent has behaved in 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 if an emergency order is not made.

22. Explanation of emergency order

The Paper examined the current provisions of the Act relating to emergency orders and explanation of those orders to the respondent. The Act requires that where an emergency order is made, police must personally serve a copy on the respondent, and as far as is practicable in the circumstances explain to the respondent the effect of the order and the consequences of contravening the order.

Proposed amendment

The previous provisions in the DVA also required the order to be served on the aggrieved person.²³ The Paper proposed to amend the Act to ensure that the aggrieved person is informed by Police of the purpose, terms and effect of the court order, and the consequences that may follow if the respondent fails to comply with the order.

This proposal recognises the importance of explaining to the respondent and the aggrieved person the effect of the order and the consequences of contravening the order. Agencies who considered this proposal gave it their full support.

Recommendation

Given the support for this proposal it is recommended that amendments be made to the Act to ensure that the aggrieved person is informed by Police of the purpose, terms and effect of the court order, and the consequences that may follow if the respondent fails to comply with the order.

23. Length of emergency protection order

The Act currently provides that an emergency order will remain in force for two days unless earlier revoked.²⁴ The order will also expire if a final order or interim order is made against the respondent in relation to the aggrieved person.²⁵

²³ DVA, s 19K.

²⁴ POA s.70.

²⁵ Ibid.

The Paper highlighted concerns expressed by agencies dealing with victims of violence that an aggrieved person is left without the protection afforded by either an interim or emergency order if an interim order is made, but has not been served on the respondent.

Proposed amendment

The Paper proposed to extend the operation of the emergency order until the interim order is served on the respondent.

This proposal arose as a result of concern that an aggrieved person is left without the protection afforded by either an interim order or an emergency order if an interim order is made, but has not been served on the respondent. Agencies who responded to this proposal gave it their full support.

Recommendation

Given the support for this proposal it is recommended that amendments be made to the Act to provide that an emergency order will remain in force until the earliest of the following happens:

- close of business on the second day after the day when the order is made;
- the order is revoked; or
- a final order or interim order is made and served upon the respondent in relation to the aggrieved person.

24. Enforcement and explanation of orders

The Paper examined the requirement currently imposed on the court when making an order and the respondent or the aggrieved person is present, to explain the order.

The court must explain to the respondent and the aggrieved person:

- the purpose, terms and effect of the order (including the consequences on his or her ability to hold a firearms licence);
- the consequences if the respondent fails to comply with the order; and
- how the order may be amended or revoked.

The Act also provides that the court must explain to the respondent that the order may be registered and enforced in another State, Territory or New Zealand.

The court must also explain to the aggrieved person that if they aid or abet the respondent to contravene the order they may commit an offence.²⁶

Proposed amendment

There is no similar requirement in respect of the applicant. The government proposes to rectify this anomaly.

This proposal seeks to improve the effectiveness, understanding, and observation of protection orders. This proposal received full agency support.

Recommendation

²⁶ See *Criminal Code 2002* (ACT), s 45.

Given the support for this proposal it is recommended that amendments be made to the Act to impose a requirement on the court, if it makes an order and the aggrieved person is present, to explain to the aggrieved person that the order may be registered and enforced in another State, Territory or New Zealand.

25. Contravention of orders

The Paper noted that the penalty units for a first offence are the same as a second or subsequent offence, despite the Act increasing the maximum period of imprisonment. The Paper considered the issue of a tiered approach to the setting of penalties and canvassed the idea of the courts retaining the discretion to impose a just and appropriate sentence having regard to the circumstances of the case. The Paper also canvassed the idea of amending the Act to provide that the maximum penalty for breach of a protection order shall be 50 penalty units (\$5000) and/or imprisonment for 5 years.

The Act currently provides that the maximum penalty for contravening a protection order is:

- (a) for a 1st offence - \$5000, imprisonment for 2 years or both; or
- (b) for a 2nd or subsequent offence - \$5000, imprisonment for 5 years or both.²⁷

Proposed amendment

The Paper proposed an amendment to the Act provide that the maximum penalty for breach of a protection order shall be 50 penalty units (\$5000) and/or imprisonment for 5 years. In determining a sentence, the court is required to have regard to a range of matters specified in section 342 of the *Crimes Act 1900* (ACT), including prior convictions.

Recommendation

It is recommended that the penalty provisions in the Act be amended to provide that the maximum penalty for contravening a protection order is 50 penalty units (\$5000), imprisonment for 5 years or both.

26. Consent as defence to breach

The Paper looked at the issue of consent as a defence to a breach of a protection order. Consent is currently not a defence to breach of a protection order if the aggrieved person consented to the breach. The MDVL working group considered and dismissed the development of such a defence.

Submissions were largely opposed to this defence being incorporated into the Model Domestic Violence Laws because of concerns that the “consent” may often have been a response to a fear or a threat. Further, it was stated in submissions that the defence failed to acknowledge that a domestic violence order is an order of a court, and not an agreement between two individuals which is capable of being varied at will.²⁸

Propose amendment

²⁷ POA, s 34.

²⁸ MDVL, page 215.

It was not proposed in the Paper to introduce consent as a defence to breach of a protection order.

This proposal follows consideration of ‘consent’ as a defence to breach of a protection order. The Model Domestic Violence Laws working group considered and dismissed the development of such defence because of concerns that ‘consent’ may have often been a response to a threat or a fear. Agencies who responded to this proposal agreed with the MDVL working group and did not support ‘consent’ as a defence to a breach of a protection order.

Recommendation

It is recommended that consent not be introduced as a defence to a breach of a protection order.

27. Extension of final orders

The Paper looked at provision in the Act relating to the extension of final orders and discussed issues occurring as a result of the current time restriction of one year on the extension of domestic violence orders. The Act provides that upon an application being made, the court must amend a final order that is a domestic violence order by extending it for a period of not more than one year unless satisfied that the order is no longer necessary to protect the aggrieved person from domestic violence by the respondent.²⁹

Proposed amendment

The Paper proposed to remove the time restriction of one year on the extension of domestic violence orders to bring it into line with personal protection orders which may be extended for any period nominated by the court.³⁰

Agencies who responded to this proposal gave it their full support.

Recommendation

Given the support for this proposal it is recommended that amendments be made to the Act to remove the time restriction of one year on the extension of domestic violence orders to bring it into line with personal protection orders which may be extended for any period nominated by the court.

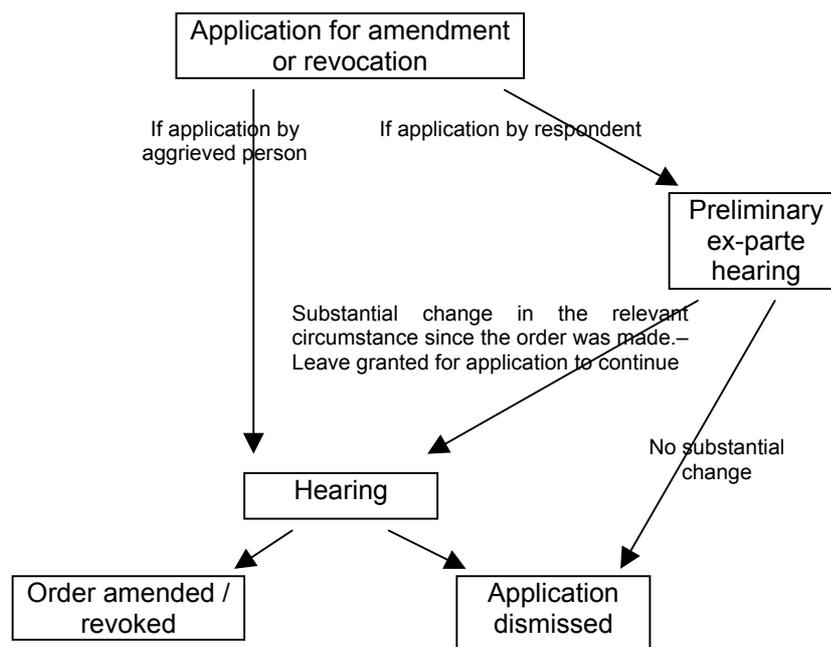
28. Amendment or revocation of final orders

The Paper examined the provision relating to the amendment or revocation of final orders. Section 13 of the Act provides that a party to a protection order, or someone else with sufficient interest in the protection order and with the leave of the court, may make an application to amend or revoke an order.

The MDVL recommends establishing a process that requires the court to conduct a preliminary ex-parte hearing to determine the merits of an application to amend or revoke a protection order as follows:

²⁹ POA, s 37(3).

³⁰ POA, s 37(4).



It is proposed that following the hearing the court may either grant leave for the application to continue if satisfied that there has been a substantial change in the relevant circumstances since the order was made, or dismiss the application if it is not satisfied there has been a substantial change.

Proposed amendment

The Paper proposed introduction of the provisions modelled upon section 28 of the MDVL.

Agencies who responded to this proposal gave it their full support.

Recommendation

Given the support for this proposal it is recommended that amendments be made to the Act to require the court to conduct a preliminary ex-parte hearing to determine the merits of an application by a respondent to amend or revoke an order.

29. Restriction on publication of information about proceedings

The Paper examined the current provisions of the Act relating to the publication of information about proceedings. There is currently no provision to expressly facilitate the transfer of a copy of the order to Adult Corrective Services. The court will sometimes make compliance with the conditions of a protection order a condition of bail for a person charged with an offence. This practice should be discouraged particularly where criminal charges have been brought and bail is required. It is inappropriate to rely on the general existence of a protection order as a bail condition, particularly given that the order can be amended or revoked without reference to the criminal proceedings. Corrective Services may also be responsible for the monitoring of an offender who is on parole or serving a community based sentence and has a protection order in place. Corrective Services require information about the conditions imposed by the order, and when the order is varied or revoked, in order to ensure compliance with the order, and to prevent inconsistent directions being given to offenders.

Section 100 of the POA prohibits the publication of information about the parties to a protection order proceeding. However, information may be provided to the director of public prosecutions or a police officer in relation to the exercise of the director or officer's functions.³¹ Information may also be circulated in accordance with an order of the Magistrates Court, or with the written permission of a Magistrate.³²

Proposed amendment

The Paper proposed amend the provisions of the Act to expressly allow for the provision of information about a protection order proceeding to the Director of Corrective Services in relation to the exercise of the director's duties.

This proposal acknowledges that importance of information exchange between the courts and Corrections. Agencies who responded to this proposal gave it their full support.

Recommendation

Given the support for this proposal it is recommended that amendments be made to the Act to expressly allow for the provision of information about a protection order proceeding to the Director of Corrective Services in relation to the exercise of the director's duties.

It is also recommended that amendments be made to the Act to expressly allow for the provision of information about a protection order proceeding to the Office of the Community Advocate in relation to the exercise of the community advocate's duties.

30. Children and protection orders

Many of the agencies in their submissions expressed concern over the lack of attention given in the Paper to the issue of children and protection orders. Agencies submitted that it was not clear from the Act that the best interests of children are a consideration in the process. The following recommendations reflect the concerns and views expressed by those agencies in relation to children and protection orders.

Recommendation

It is recommended that the Act be amended to provide that in situations where the violence by the respondent has not been directed at a child, but where the Court is satisfied that there is an unacceptable risk that the child is being exposed to domestic violence the Court shall include the child on the protection order.

Recommendation

It is recommended that the Act be amended to provide that in relation to the variation or revocation of an order including a child under the age of 16, the court must be satisfied that, in the case of revocation, the child is no longer in need of protection, and in the case of variation, the child is no longer in need of greater protection than that which will be afforded by the order as proposed to be varied.

³¹ POA, s 101(2)(c).

³² POA, s 101(2)(a).

The Model Domestic Violence Laws

The MDVL were developed by a working group of Commonwealth, State and Territory officials. They are intended to improve the quality and uniformity of laws relating to domestic violence. While each State and Territory has a mechanism by which victims of domestic violence may obtain a protection order,³³ the relevant legislation is often inconsistent. This can affect victims who choose to move interstate to start a new and safer life. The MDVL attempts to afford greater protection to victims of domestic violence by creating a model that reflects the best features of the law in each jurisdiction.

In developing the Paper and the recommendations for discussion that were outlined in the Paper, the MDVL and the protection orders under the Act were examined for consistency. While the Act and the regulations are similar to the provisions outlined in the MDVL, there are differences between the provisions in relation to applications by children, third parties, the court, and in the definitions of ‘domestic violence’, ‘relevant person’ and ‘relative’.

In relation to applications by children, the MDVL have an age limit over which a child may make an application for a protection order. In contrast to the MDVL³⁴, an age limit, over which a child may make an application on for a protection order, is not prescribed by the Act because the government considers that the question should not be “how old is the child?” but rather “does the child or young person understand the proceedings and consequences of

In relation to applications by third parties, the MDVL provisions take a different approach to the Act by providing that in addition to the aggrieved person or a police officer, the following persons may apply for an order on behalf of the primary applicant:

- (d) any person appointed by a primary applicant who is an adult;
- (e) a person appointed by a primary applicant who is a child of 14 years of age or more, if the court gives leave for the person to make the protection order application for the child; or

³³ See NSW—‘apprehended domestic violence orders’ under the *Crimes Act 1900* (15A); Victoria—‘intervention orders’ under the *Crimes Act (Family Violence) Act 1987*; Queensland—‘domestic violence orders’ under the *Domestic Violence (Family Protection) Act 1989*; Western Australia—‘restraining orders’ under the *Restraining Orders Act 1997*; South Australia—‘domestic violence restraining orders’ under the *Domestic Violence Act 1994*; Tasmania—‘restraint orders’ under the *Justices Act 1959* (Part XA); ACT—‘personal protection orders’ or ‘domestic violence orders’ under the *Protection Orders Act 2001*; Northern Territory—‘restraining orders’ under the *Domestic Violence Act 1992*.

³⁴ Section 10(2) of the MDVL provides that a protected person who is a child 14 years of age or more, may make an application for a protection order, if the court gives leave to the child to make the application.

- (f) a person appointed by the court if the court feels that the primary applicant couldn't make the protection order application.³⁵

It is not proposed to include these provisions in the Act as it is submitted that the current provisions are broad enough to enable a person to appoint another person, such as an agent or legal representative, to act on their behalf in certain circumstances or to have a support person present when their application is heard or during the preliminary conference.

The Act currently provides that a protection order may be made upon application to the court. The MDVL recommends that the court also be empowered to make orders on its own initiative. Section 15 of the MDVL provides that the court before which a person pleads guilty to, or is found guilty of, an offence that involves an act of domestic violence may, on its own initiative, make a protection order. The aggrieved person must not object to the order being made.

It is not proposed to amend the Act to enable the court to be able to make a protection order on its own initiative during criminal proceedings as it is submitted that the information that a Magistrate or Prosecutor may have available to them at the time of criminal proceedings, may not be sufficient or accurate enough to allow an appropriate protection order to be made.

In relation to the definition of 'domestic violence', the MDVL recommends expanding the definition of 'domestic violence' to also expressly include 'threats to, or acts against pets and animals'. This recommendation has been adopted in this Report.

In considering the definition of 'relevant person' in the Act, it is proposed to expand the definition to include someone who is, or was in a domestic relationship with the original person, or a parent of a child of the original person and to extend the definition of 'relative' to include someone whom it is reasonable to regard as a relative, especially considering that for some people the concept of a relative may be wider than is ordinarily understood. Similar provisions are recommended by the MDVL.³⁶

Unlike the MDVL, the Act does not require the court, prior to making a protection order, to be satisfied that the respondent is likely to engage in domestic or personal violence, or that the aggrieved person fears (either reasonably or not) future acts of violence. It is not proposed to amend the Act to include this requirement.³⁷

Section 23 of the MDVL provides for the crystallisation of an interim order into a final protection order in the defendant's absence, if the interim order has been served on the defendant, and he or she does not object to the final order being made. The provision attempts to reduce the number of times the applicant must appear before the court. It is proposed to include this provision in amendments to the Act.

³⁵ MDVL, s 10.

³⁶ Ibid.

³⁷ Ibid, 26-27.

The emergency order provisions in the Act provide a mechanism to afford protection to domestic violence victims out of court hours. Only a police officer may apply for an emergency protection order in respect of domestic violence matters. A judicial officer may make an emergency order on application if the officer is satisfied that:

- (a) the respondent has behaved in a way that satisfies the judicial officer he or she may cause physical injury to the aggrieved person if an emergency order is not made; and
- (b) it is not practicable to arrest the respondent, or there are no grounds to arrest the respondent.³⁸

The MDVL creates a similar, but broader order, named a ‘telephone interim protection order’. An authorised justice may make a telephone interim protection order, if the justice is satisfied that the order is necessary to ensure the protection of the aggrieved person from an act of domestic violence (but not the protection of his or her property), or welfare of any child who may be affected by the defendants behaviour.

While it incongruous that the grounds for applying for, and making an order would be different under the MDVL, the recommendation that the grounds for granting an emergency protection order include the protection of property, or the safety of the aggrieved person or children of the aggrieved person will have this result.

Section 13 of the Act provides that a party to a protection order, or someone else with sufficient interest in the protection order and with the leave of the court, may make an application to amend or revoke an order. This is different to the MDVL that recommend establishing a process that requires the court to conduct a preliminary ex-parte hearing to determine the merits of an application to amend or revoke a protection order. It is proposed to include this provision in an amendment to the Act.

³⁸ POA, s 62.

Final consideration

Legislative reform is only part of the answer to improving the response of the criminal justice system to domestic and personal violence. Policies and procedures which provide support to victims and improve the safety of people subject to violence are equally important.

The issues raised in the submissions were provided by people who deal with victims and perpetrators of violence on a daily basis. These people, and the agencies they represent, work within the framework, despite its inefficiencies and problems. The issues raised in the submissions were been identified by stakeholders as areas requiring reform. These issues have been considered in this Report and accompany a series of proposals and recommendation for reform. These are designed to ensure that the protection order system in the Territory provides fully for the safety and protection of people from violence, harassment, and intimidation.

Agencies were consulted on release of their submissions. Only those submissions approved for release have been attached.

The Government thanks the following agencies for their contributing submissions:

- Office of the Community Advocate;
- Act Health;
- Domestic Violence Crisis Service Inc;
- Domestic Violence Prevention Council;
- Women's Legal Centre (Act & Region) Inc
- The Law Society of the Australian Capital Territory
- Victims of Crime Co-ordinator
- Department of Disability, Housing & Community Services;
- Lone Father's Association;
- Victims Services Scheme; and
- Australian Federal Police – Territory Policing.