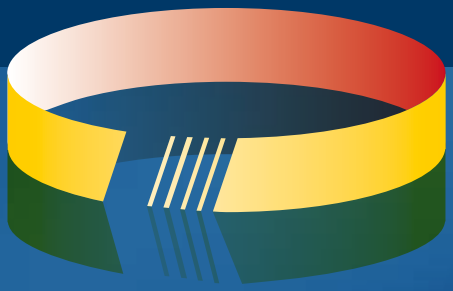
Department of Communities
fair, cohesive and vibrant communities



Review of the *Domestic and Family Violence Protection Act 1989*

Consultation paper

March 2010

Queensland Government

Table of Contents

Abbreviations

ALRC	Australian Law Reform Commission
ACT	Australian Capital Territory
CPA	*Child Protection Act 1999*
DOC	Department of Communities
DFVPA	*Domestic and Family Violence Protection Act 1989*
DVO	Domestic Violence Order
FLA	*Family Law Act 1975* (Cth)
IPA	*Information Privacy Act 2009*
IPP	Information Privacy Principles
MA	*Migration Act 1958* (Cth)
NPP	National Privacy Principles
NSW	New South Wales
NT	Northern Territory
NZ	New Zealand
PA	*Privacy Act 1988* (Cth)
QPS	Queensland Police Service
SA	South Australia
Strategy	*For our Sons and Daughters: a Queensland Government strategy to reduce domestic and family violence 2009–2014*
Time for Action	*Time for Action: the National Council's Plan to Reduce Violence against Women and their Children, 2009–2021*
WA	Western Australia

Minister's foreword

Message from the Minister

The number of deaths caused by domestic violence in Queensland is estimated at 60 in the last five years, while in 2007, the National Homicide Monitoring Program found just over half the female victims of homicide in Australia died at the hands of their partner.

Domestic violence costs the Queensland community around $3.2 billion each year. While this financial burden alone demands urgent action, the immeasurable social cost to the victims makes it imperative that we do everything we can to stop domestic and family violence.

As part of Queensland Government's responsibility to protect the community from domestic and family violence, we are undertaking a review of the *Domestic and Family Violence Protection Act 1989*.

The Act plays a very important role in providing safety and protection for people experiencing domestic and family violence.

This is the first time a comprehensive review has been undertaken since the Act was introduced more than 20 years ago. Over that time, the number of applications for domestic violence orders has increased from 2957 in 1990 to 21 071 in 2009.

While protecting victims of domestic and family violence and holding perpetrators accountable for their behaviour is an important part of the legislation, we also want to ensure the Act reflects the needs of women and children today.

The review will take into consideration work at the national level such as the 2009 report of the National Council's report, *Time for Action: the National Council's Plan to Reduce Violence against Women and their Children, 2009–2021*.

The review is timely as it coincides with the Australian Law Reform Commission's examination into the inter-relationship of Federal, state and territory laws that relate to the safety of women and their children.

Additionally, the Queensland Government's five-year strategy, *For our Sons and Daughters: a Queensland Government strategy to reduce domestic and family violence 2009–2014* is the first whole-of-government response to the domestic and family violence in Queensland. The strategy includes the new Death Review Panel — a team of experts who will investigate all domestic violence-related deaths in Queensland over the past five years.

Domestic violence is a complex matter and requires comprehensive solutions. The Queensland strategy involves supporting victims and helping them get their lives back on track and making perpetrators accountable for their actions. It is part of our commitment to providing a fairer, healthier environment for all Queenslanders.

I thank you for taking the time to participate in the review of the *Domestic and Family Violence Protection Act 1989*. Domestic violence does not discriminate. It affects individuals, families, neighbours and communities. We need to *act as one* against domestic and family violence.

Karen Struthers MP

Minister for Community Services and Housing
and Minister for Women

Submissions invited

You are invited to provide input into the review of the *Domestic and Family Violence Protection Act 1989*. You can use the submission form attached to this consultation paper or provide your submission in another format.

Submissions can be made on issues specifically raised in the consultation paper or on any other topic that relates to the terms of reference.

The consultation paper is designed to prompt discussion and promote development of submissions regarding the review. The consultation paper briefly outlines some legislative issues that have been raised by stakeholders in recent years and legislative approaches in other jurisdictions. They are included in the consultation paper to stimulate submissions and do not indicate proposed government policy.

The review welcomes the provision of research to support submissions. Written submissions will be analysed and the findings will be used to develop legislative amendments.

Submit your views by 31 May 2010:

Post: Domestic Violence Legislation Review Team
Child Safety, Youth and Families, Community Participation
Department of Communities
GPO Box 806
Brisbane QLD 4001
Email: legislationproject@communities.qld.gov.au
Online: www.getinvolved.qld.gov.au

The *Domestic and Family Violence Protection Act 1989* and the Domestic and Family Violence Protection Regulation 2003 can be accessed at www.legislation.qld.gov.au

Information about violence prevention in Queensland can be obtained through the Department of Communities website at www.communities.qld.gov.au

The consultation paper can be viewed online or downloaded from the Consult Queensland website at www.getinvolved.qld.gov.au

For further information, phone 1800 173 307.

Domestic violence support and advice

For confidential support and advice for women affected by domestic and family violence, phone DVConnect Womensline on 1800 811 811 (24 hours, 7 days a week). Note: This number is not recorded on your phone bill.

Anonymous and confidential advice is available for men who are affected by domestic and family violence or who use violence and abuse in their relationships by telephoning Mensline on 1800 600 636 (9 am to midnight, seven days a week).

Introduction

Background

In July 2009, the Queensland Government launched *For our Sons and Daughters: a Queensland Government strategy to reduce domestic and family violence 2009–2014* (Strategy). The Strategy aims to reduce domestic and family violence for prevention, identification and early intervention, better connecting human services and justice responses, strengthening justice responses to hold perpetrators responsible, and improved planning and coordination across agencies. It identified five areas for reform:

1. prevention
2. early identification and intervention
3. connected victim support services
4. perpetrator accountability
5. system planning and coordination.

One initiative under the Strategy is the review of the *Domestic and Family Violence Protection Act 1989* (the DFVPA). The Department of Communities (DOC) is leading the review which is aimed at ensuring the legislation is effective and efficient in protecting victims of domestic and family violence and holding perpetrators accountable for their behaviour.

Recent achievements

Since the release of the Strategy, implementation of the accompanying Program of Action 2009–10 has commenced. For example, $2.7 million has been allocated to the Breaking the Cycle of Domestic and Family Violence pilot project in Rockhampton which commenced in November 2009. The trial will test an integrated response to domestic and family violence in Rockhampton with the aim of ensuring that victims are provided with timely access to the supports they need.

The Death Review Panel has also been established and will make practical recommendations and consider options for an ongoing review mechanism in Queensland. The Queensland Government will consider any legislative amendments required to support the panel.

The Domestic and Family Violence Safety Upgrades initiative is currently being trialled in three locations: Townsville, Sunshine Coast and Gold Coast. This initiative will support victims to stay in their homes and encourage the use of ouster conditions which exclude the perpetrator from the residence. Safety Upgrades services will assess the safety and security needs of victims and, where appropriate, arrange for enhancement of home security.

In addition, in 2009–10, the Department of Communities has allocated more than $35 million to non-government agencies to deliver responses to people affected by domestic and family violence and to work towards its prevention. This includes:

- $17 million to provide crisis supported accommodation to women and their children escaping domestic and family violence who require a safe place to go
- $16.9 million to provide domestic and family violence prevention and support services
- $384 699 other one-off funding initiatives.

National initiatives

At the national level, the Australian Government has released *Time for Action: the National Council's Plan to Reduce Violence against Women and their Children, 2010–2022* (Time for Action). *Time for Action* focuses on six outcome areas: it seeks to ensure that communities are safe and free from violence; that relationships are respectful; that services meet the needs of women and their children; that responses are just; that perpetrators stop their violence and are held to account; and that systems work together effectively.

Of particular relevance to this review is the intersection between the DFVPA and Commonwealth laws, namely the *Family Law Act 1975* (FLA) and the *Migration Act 1958* (MA), and the development of a mechanism for the national registration of protection orders. The review will also closely monitor the progress and outcomes of the Australian Law Reform Commission (ALRC) review of the inter-relationship of Commonwealth and state and territory laws relating to the safety of women and their children, due to be finalised in July 2010 as well as other relevant reviews at the national level.

Domestic and family violence legislation in Queensland

Domestic and family violence is defined within the Strategy as *abusive and violent behaviour used by one person to control and dominate another person within a domestic relationship*.

The DFVPA provides for the safety and protection of victims of domestic and family violence where a spousal, intimate, personal, family or informal care relationship exists. Domestic and family violence legislation recognises that violence in the domestic and family context is unique. The legislation tries to address violence that has occurred and manage the potential for future violence to occur, usually within the context of an ongoing relationship. It can also recognise that some behaviours which would not necessarily constitute a criminal offence may constitute an act of domestic and family violence. Thus, the legislation uses a mix of civil and criminal responses to address domestic and family violence.

The main elements of the DFVPA are to:

- provide for domestic violence orders (DVOs) which are civil orders (that is, between two persons) that aim to protect one person (an aggrieved), and in some situations a person who is a relative or associate of an aggrieved (a named person). This requires a person who has committed domestic violence (a respondent) to be of good behaviour towards an aggrieved and any named person and not commit domestic violence — this is the civil response. A DVO can impose a number of other conditions — for example the DVO may require the respondent to refrain from having contact with an aggrieved or a named person.
- provide protection for victims of domestic violence by allowing the courts to make temporary DVOs
- provide protection for children who are victims of domestic violence or who live in homes where domestic violence is occurring by allowing children to be named on DVOs or in certain cases have a DVO in their own right
- enable the courts to impose criminal sanctions against respondents who breach DVOs — this is the criminal response

- empower police to detain perpetrators who commit domestic violence and allow police to make applications for DVOs on behalf of an aggrieved person
- allow the courts to register interstate protection orders.

The DFVPA intersects with a number of other pieces of legislation, primarily the *Family Law Act 1975* (Cth) (FLA) and the *Criminal Code Act 1899*. While the *Child Protection Act 1999* (CPA) does not formally intersect with the DFVPA, the provisions of the CPA do allow for immediate intervention where a child is at risk of harm.

These pieces of legislation, together with the provision of services to assist and protect victims of domestic and family violence, and programs to help perpetrators stop violent and abusive behaviour, form the domestic and family violence protection system in Queensland.

Why is a review necessary?

In 2003, significant amendments were made to specific aspects of the DFVPA including the types of relationships considered within the legislation. However, the DFVPA has not been comprehensively reviewed since it was introduced 20 years ago.

There is currently a focus on domestic and family violence at a national level. There is also significant national reform work being undertaken in relation to homelessness and child protection. Given these reform agendas, and the high rate of homelessness as a result of domestic and family violence, a Queensland legislative review is timely. In addition, the legislative review is appropriate given the increase in reported incidences of domestic violence in Queensland (from 2957 applications for domestic violence orders in 1989–90 to 21 071 in 2008–09) and a high number of intimate partner homicides (70 to 80 each year nationally).

Research and consultation undertaken in the development of *For our Sons and Daughters: a Queensland Government strategy to reduce domestic and family violence 2009–2014* highlighted some legislative issues in need of review. It was noted that most other Australian states and territories have reviewed their domestic and family violence legislation in recent years. An increasing focus on stronger criminal justice responses to domestic and family violence, with a complementary system of civil protection orders, has emerged through these reforms.

The prevalence of domestic and family violence among Indigenous people continues to be an issue of concern. Research into the effectiveness of the current legal responses in addressing domestic and family violence among Indigenous people has been commissioned by the Department of Communities. Professor Chris Cunneen has presented the report *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* (the Cunneen Report), including 15 recommendations, of which six relate to potential legislative reform.

The Cunneen Report is part of the Queensland Government's broader *Indigenous Criminal Justice Research Agenda* (ICJRA). The ICJRA, which is coordinated by the Department of the Premier and Cabinet (Criminal Justice Research), is a whole-of-government strategic research program which aims to expand Queensland-specific knowledge of Indigenous crime, victimisation, justice and community safety.

The recommendations of the Cunneen Report are not Queensland Government policy but will be considered as part of this review. The report can be accessed at www.communities.qld.gov.au

Scope of the review

The terms of reference for the review have been developed to facilitate analysis of a range of issues relevant to the legislation and stakeholders' interests.

The review will:

1. ensure the legislation supports the implementation of *For our Sons and Daughters: a Queensland Government strategy to reduce domestic and family violence 2009–2014*
2. ensure the legislation reflects contemporary understandings of domestic and family violence — for example, the types of relationships and behaviours covered by the legislation
3. examine existing mechanisms and alternative options to ensure the legislation:
   - protects those who experience domestic and family violence from further violence
   - provides for the safety and wellbeing of children and young people affected by domestic and family violence
   - holds those who commit domestic and family violence accountable
4. examine the efficiency and effectiveness of the operation of the legislation, including its intersection with other Acts, and determine whether any legislative refinements are necessary
5. examine other matters pertaining to the efficiency and effectiveness of the legislation as required by the Minister.

Structure of the consultation paper

The consultation paper focuses on the following areas which have been identified as underpinning domestic and family violence protection legislation best practice. The following areas have been identified through the development of the Strategy, research, input from stakeholders to the department in recent years, and practices in other jurisdictions:

1. prevention
2. civil and criminal approaches
3. protection of victims
4. perpetrator accountability
5. system planning and coordination.

Prevention

The consultation paper seeks feedback about potentially broadening and strengthening definitions regarding behaviours and relationships concerning domestic and family violence with potential inclusion of principles in the legislation.

Civil and criminal approaches

The consultation paper seeks feedback on current civil and criminal approaches. In particular, the paper sets out information about how the civil and criminal justice systems work together in relation to domestic and family violence; notes that in some jurisdictions a stand-alone domestic violence offence exists, and seeks feedback on whether the criminal justice response should be increased in Queensland and how this might best be achieved. The consultation paper also examines issues associated with cross- applications and the identification of the primary aggressor.

Protection of victims

The consultation paper seeks feedback on how the legislation can improve support and safety for victims and their children. In particular, whether the DFVPA should be amended to specifically include the protection of children in its purpose. It also considers the appropriate interaction between the DFVPA and the FLA in terms of access to children. Other issues include: whether the Queensland Police Service (QPS) should have the capacity to issue a DVO; whether the legislation needs amendment to provide a more appropriate response to Indigenous domestic and family violence; and whether the legislation can provide a more appropriate response to other highly vulnerable people such as people with a disability or mental illness and people from culturally and linguistically diverse backgrounds.

Perpetrator accountability

Presently, the DFVPA provides for conditions to be attached to orders and penalties for breaches of orders. The consultation paper seeks feedback on how the legislation can improve perpetrator accountability through greater enforcement of punitive measures (for example, taking into consideration the number of breaches before prosecution), conditions on orders (including ouster conditions), appropriateness of the range and level of penalties and sentencing, and behaviour change programs.

System planning and coordination

The consultation paper seeks feedback on how the legislation can better facilitate collaboration between agencies involved in dealing with domestic and family violence, in particular information sharing.

You are invited to make submissions on the issues raised in this consultation paper or on any issues that are relevant to the Terms of Reference for the review. Please note that the process concerns a review of legislation, rather than specific service delivery considerations, and your submission should therefore focus on legislative amendments.

Throughout the paper, the terms ‘domestic and family violence’ and ‘domestic violence’ are used interchangeably and this arises from the different use of terminology in the legislation of other Australian and overseas jurisdictions.

Areas for consideration

1. PREVENTION

1.1 Definition of behaviours covered by the Act

The definition of domestic and family violence has implications for how this type of violence is treated by police, the courts, and the community. The definition needs to be clear and broad enough to reflect current understanding of this form of violence and ensure that an appropriate response is available for addressing violence which has occurred, while managing the potential for future violence.

The adequacy of the definition of domestic and family violence needs to be considered, including, for example, whether ongoing, subtle forms of control and abuse are adequately covered under the legislation.

The approach in Queensland

Domestic and family violence in Queensland is defined as *abusive and violent behaviour used by one person to control and dominate another person within a domestic relationship* (For our Sons and Daughters, 2009).

The DFVPA defines domestic and family violence in terms of particular behaviours within domestic relationships, and provides examples of these behaviours. Behaviours constituting domestic and family violence relate to:

(a) wilful injury

(b) wilful damage to the other person's property

(c) intimidation or harassment of the other person

(d) indecent behaviour to the other person without consent

(e) a threat to commit an act mentioned in paragraphs (a) to (d) (s.11(1)).

Examples of intimidation or harassment contained in the DFVPA relate to overt forms of behaviour (such as following an estranged spouse, repeatedly telephoning an ex-boyfriend, or threatening to withdraw an aged parent's care if the pension cheque is not signed over).

The DFVPA is limited in the behaviours which are considered to be domestic violence. Subversive types of abuse such as emotional and economic abuse are not specifically recognised within the legislation, nor is there recognition of sexual abuse or other forms of physical abuse which sit outside of wilful injury. This may limit the circumstances under which a DVO may be issued. Extending the definition of domestic violence to include other forms of behaviours may assist those victims who are currently unable to access a DVO.

Approaches in other jurisdictions

In the other Australian jurisdictions, domestic or family violence is defined in terms of conduct, damage or abuse relating to the types of behaviours noted above, including the threat to carry out these behaviours.

In some states, particularly Tasmania and Victoria, more emphasis is given to economic and emotional abuse. This approach recognises that these are more subtle forms of abuse that risk not being addressed if a definition of domestic and family violence focuses on 'violent' behaviours. Emotional abuse is an ongoing process of non-physical violence that unreasonably exerts power over another person. Descriptions of economic abuse refer to coercive or deceptive controls over another person's financial situation.

Issues to be considered

In considering any change to the type of behaviours that should be covered by domestic and family violence legislation, the following issues need to be taken into account:

- ensuring that the definitions capture a range of behaviours that are broad enough to recognise non-violent forms of abuse
- it may be difficult to prove non-violent kinds of abuse
- there may be resourcing implications if definitions are made broader.

Question
1.1.1 Does the current definition of domestic and family violence adequately acknowledge all forms of behaviour constituting domestic and family violence? Should the definition be changed to include, for example, physical abuse, sexual abuse, emotional abuse or economic abuse?

1.2 Definition of relationships covered by the Act

How domestic relationships are defined and interpreted by police, the courts and the community has implications for how acts of violence are dealt with and therefore whether the mechanisms in the DFVPA can be applied.

In most Australian jurisdictions, including Queensland, domestic relationships are defined as: spousal relationships; intimate personal relationships; family relationships; or informal care relationships. These relationships involve dependency and commitment, where one person has influence over the life or actions of another.

Concerns have been raised as to whether the definition of 'intimate personal relationship' reflects contemporary relationships. If a particular relationship is not considered to be a 'domestic relationship' for the purposes of the DFVPA, a victim of violence within that relationship would not be able to seek the protection of a DVO.

In addition, concerns have been raised over the adequacy of the definitions of relationships including people in same sex relationships and where elderly people are being cared for by relatives.

The approach in Queensland

The term 'intimate personal relationship' in the DFVPA refers to a personal relationship between two persons, whether or not the relationship is or was of a sexual nature, if:

(a) the persons date or dated each other

(b) their lives are or were enmeshed to the extent that the actions of one of them affect or affected the actions or life of the other (s.12A(2)).

In deciding whether an intimate personal relationship exists, a court may have regard to the following:

(a) the circumstances of the relationship, including, for example, trust and commitment

(b) the length of time for which the relationship has existed or did exist

(c) the frequency of contact between the persons

(d) the level of intimacy between the persons (s.12A(3)).

Intimate personal relationships may exist whether the two persons are the same or the opposite sex.

A 'family relationship' exists between two persons if one of them is the relative of the other. The DFVPA recognises the wider concept of 'relative' that applies to Aboriginal and Torres Strait Islander people, members of communities from non-English speaking backgrounds and people with particular religious beliefs.

Approaches in other jurisdictions

The NT, Victoria and NZ have similar indicators to Queensland regarding the existence of an intimate personal relationship. Tasmania limits its legislative protection to people aged 16 years and over who are in a significant relationship which takes into account: duration of the relationship; nature and extent of common residence; whether or not a sexual relationship exists; degree of financial dependence or interdependence; arrangements for financial support between the parties; ownership, use and acquisition of property; degree of mutual commitment to a shared life; care and support of children; and performance of household duties.

Issues to be considered

In considering the range of relationships covered by legislation, the following matters need to be taken into account:

- recognising the types of relationships which exist within the community
- ensuring that any characteristics considered in determining whether a particular relationship exists does not inadvertently exclude relationships which should be covered
- there may be resourcing implications to support legislative change.

Questions
1.2.1 What relationships should be covered by the DFVPA? What characteristics should the definitions include?
1.2.2 Does the DFVPA provide adequate protection for older people, people in blended family relationships, or lesbian, gay, bisexual, transgender or intersex people who experience domestic violence? If not, how should this protection be strengthened?

1.3 Principles enshrined in the Act

The inclusion of principles can make clear the purpose of legislation and contextualise its intent in accord with the stated purpose. The development of legislative principles could present an opportunity to articulate key policy directions, frame the approaches for dealing with domestic violence through the legislation, and assist in the interpretation of the legislation. However, legislative principles can be seen as being too prescriptive.

The approach in Queensland

There are no principles specified in the Queensland legislation, though the purpose set out in section 3A outlines the intent of the DFVPA, which provide for the safety and protection of a person if a defined domestic relationship exists by allowing the court to make a DVO.

By comparison, for example, the overarching principle of the CPA is that the welfare and best interests of the child are paramount. This encompasses every child's right to protection from harm, the family's primary responsibility for children, the exercise of powers that are open, fair, and respect for the rights of people affected by this exercise; and the responsibility of the State to protect a child in the absence of parents. The *Juvenile Justice Act 1991* includes a Charter of Juvenile Justice Principles which provides guidance to all persons involved in the administration of that Act.

Approaches in other jurisdictions

All states and territories provide some form of overarching policy framework either as a purpose, object or principle within their respective domestic violence legislation.

The Victorian family violence legislation includes principles relating to the promotion of non-violence, the unacceptability of family violence, and the role of the justice system in treating the views of victims of family violence with respect. The SA legislation states that the legislation is to provide for the making of restraining orders in cases of domestic violence.

The NSW legislation provides a lengthy statement relating to the protection of all persons, including children, the prevention of violence consistent with the Declaration of Elimination of Violence against Women and United Nations Convention on Rights of the Child, empowering courts to make apprehended violence orders and ensuring safe, speedy and inexpensive access to the court system.

Issues to be considered

In considering whether principles should be adopted, the following issues need to be taken into account:

- the inclusion of principles may provide advantages for the administration of the legislation and in setting a broader policy framework
- principles can be broad and aspirational or specific and directive
- stakeholders are likely to have a wide range of views about matters that should be included in a set of principles.

Questions
1.3.1 Should the Queensland domestic violence legislation include general guiding principles?
1.3.2 If principles are included, should they be broad or specific?
1.3.3 If principles are included, who should be guided by them?

2. CIVIL AND CRIMINAL APPROACHES

2.1 Civil and criminal responses to domestic and family violence

The legal response to domestic violence in Queensland (and in other jurisdictions in Australia) relies on a combination of a DVO (which operates out of the court's civil jurisdiction) and criminal sanctions. In Queensland an aggrieved, or a person authorised by the aggrieved, can make an application for a DVO. Police officers can also make applications for DVOs on behalf of an aggrieved (civil) and/or decide at the outset whether there is sufficient evidence to charge a person with a criminal offence (criminal).

Failure to comply with a term of a DVO can lead to a breach offence. Breach offences are criminal offences and are dealt within the criminal jurisdiction of the courts.

In relation to civil court proceedings, the required standard of proof is 'the balance of probabilities'. In criminal proceedings, however, the prosecutor is required to prove the elements of the offence 'beyond a reasonable doubt'. The higher standard of proof for criminal matters places a heavier onus upon investigating police to collect sufficient evidence to prove their case. This may make it more difficult for police to charge a criminal offence, and the civil process of applying for a DVO may be utilised in some situations where a criminal response could also be applied.

In some jurisdictions, a stand-alone offence of domestic violence exists.

The legislation needs to strike a balance between these civil and criminal responses to domestic violence.

The approach in Queensland

In Queensland, a decision to charge an individual with a breach or any other criminal offence rests with the investigating police officer.

Aside from the breach provisions, the DFVPA does not contain any other criminal sanctions for domestic violence-related offences. The Queensland Criminal Code provides for a range of offences that may cover behaviours that constitute domestic violence, such as assault and stalking.

Police are obliged under the DFVPA to investigate all incidents of domestic violence and are policy bound to investigate criminal offences which occur within the context of a domestic incident. Police policy also requires proper investigation of an incident which may include taping of evidence, taking statements, making notes and gathering the evidence required to prove the matter to the appropriate standard of proof.

Police are bound by policy to apply for a DVO for an aggrieved where they have investigated an incident and determined that there is sufficient evidence to the requisite civil standard.

There are guidelines which determine whether or not a criminal matter should be prosecuted and these require firstly that there is sufficient evidence to prove the offence and secondly that prosecution of the matter is in the public interest. The reluctance of an aggrieved to proceed is one factor that is considered in making a decision about whether or not to prosecute and this may be decisive in cases involving lower level offences. In more serious cases (for example, charges involving grievous bodily harm or attempted murder), the public interest may determine that the matter should go forward even if the aggrieved is reluctant to proceed.

Approaches in other jurisdictions

In some other states and territories, a pro-arrest or pro-prosecution approach[1] (through policy and/or legislation) imposes obligations on police to investigate reports of domestic violence and to charge any criminal offences which are disclosed. This may occur even if the victim does not wish police to pursue criminal charges.

In Victoria, where a pro-arrest or pro-prosecution approach has been adopted, victims in criminal proceedings have the opportunity to express their concerns through case conferencing processes. Case conferences are convened if a victim does not want to initiate or proceed with criminal charges. The process involves discussing the reasons for the victim's concerns and explaining prosecution and court processes with a view to alleviating their concerns or fears. This may help to address the issue of disempowerment of victims that can arise in the context of a pro-arrest or pro-prosecution approach.

There are approximately 34 states of the United States of America where domestic violence is a criminal offence. Offences of domestic violence typically encompass different categories of behaviour with different penalties being prescribed according to the severity of the behaviour and the existence of any previous convictions. For example, in Missouri, the legislation can cover a range of behaviours from the infliction of physical injury to a person (even if done recklessly or negligently) to isolating a person by restricting their access to other people, telecommunication devices or transportation.

Issues to be considered

There are some issues to be considered in determining the appropriate balance between civil and criminal responses:

- an increased criminal response is thought to convey a 'zero tolerance' message to the community and ensure accountability of perpetrators
- victims may be less inclined to report domestic violence or seek help if they think criminal charges may result
- once charges are laid, a victim may be reluctant to attend court to give evidence. A number of factors, many of them outside the control of the victim, explain a reluctance to initiate or proceed with criminal charges. For example, they may be subject to threats from a respondent or they may hold concerns about being re-traumatised through court processes. Some of these issues could be addressed by introducing case conferencing processes in Queensland.

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[1] In Victoria, the Victorian Police Code of Practice has established a 'pro-arrest' policy. Section 4.2.1 of the Code describes the pro-arrest policy as follows: "Police will investigate all family violence incidents reported to them, ensuring that appropriate use is made of their powers of arrest. If a power of arrest exists and police do not arrest the offender, they must be able to justify why they took alternative action and record the reasons on LEAP. Where any doubt exists, attending police must seek advice from their supervisor. Arrest of an offender is based on the evidence available. The decision to arrest is the responsibility of the police, not the victim".
The New South Wales Domestic and Family Violence Policy articulates its pro-prosecution policy as follows: "The NSW Police Force enforces a pro-prosecution response to the investigation and management of domestic and family violence. Charges will be laid against offenders where evidence exists to support criminal charges".

- the elements of some criminal code offences can be difficult to prove to the relevant criminal standard, particularly if the victim is reluctant to proceed. Defences, such as self-defence, provocation or accident, could also be raised.
- increased criminalisation through creation of a separate offence of committing domestic violence could cover a wide range of behaviours that constitute domestic violence, with different penalties depending on the severity of the behaviour and the existence of any previous convictions (as is the case in many states in the United States of America)
- there may be resourcing implications if the criminal justice response is increased.
- increased criminalisation increases the risk of arrest among vulnerable groups such as women, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, and people with a disability (this could include intellectual, psychiatric, cognitive or physical impairment).

Questions
2.1.1 Does the balance between civil and criminal responses need to change? If so, how?
2.1.2 Should an increased criminal justice response rely on the existing range of offences, for example, assault, wilful damage?
2.1.3 Should a separate offence of 'committing domestic violence' be created?

2.2 Identification of primary aggressor — cross-applications

Another issue that can impact on both civil and criminal processes is the identification of the primary aggressor. When police attend an incident, it may be difficult to ascertain the party who is the real perpetrator of the violence in the relationship. Both parties may provide attending police with conflicting versions of the events and self-defence may have been involved. In relation to the civil processes, this can lead to the police applying for a DVO on behalf of each of the parties involved in a domestic incident. DVO applications that are made in these circumstances are referred to as 'cross-applications'.

The *Time for Action* report recognises the role that proper evidence gathering processes can play in eliminating dual arrests and cross-applications by identifying the following action: 'focus police practices and accountability on gathering evidence to support criminal charges where relevant; and elimination of the occurrence of dual arrests and cross-orders, in the investigation of domestic and family violence allegations'.

The approach in Queensland

The DFVPA does not currently contain guidelines for identifying the primary aggressor in a domestic violence incident.

Approaches in other jurisdictions

Some states in the United States of America have primary aggressor laws which are designed to reduce the rate of dual arrests by requiring police officers to consider a number of factors such as history of domestic violence, the comparative extent of injuries (where both parties exhibit injuries) and the existence of self-defence.

Issues to be considered

Problems in identifying the primary aggressor, especially in the context of an increased criminal response, could lead to miscarriages of justice if the wrong person is charged with an offence arising from a domestic violence incident. Unless appropriate investigation techniques are utilised, there is a risk of increased rates of arrest among vulnerable groups such as women, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, and people with a disability (this could include intellectual, psychiatric, cognitive or physical impairment).

A more comprehensive investigation of domestic violence incidents could involve using evidence kits (checklists and other tools which deal specifically with domestic violence incidents), photographing injuries, examining the history of the relationship, and taking statements from independent witnesses such as health professionals and neighbours. This is likely to have some implications for police by increasing the time (and therefore cost) associated with investigating domestic violence incidents.

Question
2.2.1 Should legislative amendments be made to assist in identifying the primary aggressor and/or ensuring the legislation protects the at-risk party?

3. PROTECTION OF VICTIMS

3.1 Children and domestic and family violence

Protection of children who witness violence

The Australian Bureau of Statistics *Personal Safety Survey 2006* reports that 61 per cent of people who experienced violence from a previous partner and 49 per cent of those who experienced violence by a current partner had children in their care during the relationship. Witnessing domestic and family violence can cause children emotional harm and lead to children experiencing behavioural issues, learning difficulties and difficulty relating to others.

Children who witness domestic violence are affected in a range of ways by domestic and family violence legislation. Responses include naming a child on the order of the aggrieved as a protected person, issuing an order to protect a child in their own right, or not specifying witnessing domestic violence as an act that allows for the making of an order to protect a child at all.

The approach in Queensland

In Queensland, it is reported that domestic and family violence is a factor in 39 per cent of households where children are assessed as in need of protection. The CPA allows for intervention by the DOC and police where a child is suspected of being in need of protection. Police are policy bound to report all incidents of domestic violence to Child Safety Services where a child normally resides with the respondent or the aggrieved.

In circumstances where a child who normally resides with the respondent or the aggrieved is exposed to domestic and family violence, the DFVPA allows the child to be named on a DVO as a relative of the aggrieved. This provides the child with protection as specified by the conditions of the DVO.

The DFVPA is limited with regards to children who witness domestic and family violence. Currently, the DFVPA allows a child to be named on an order where there has been:

(a) wilful injury

(b) wilful damage to property of the relative or associate

(c) intimidation or harassment

(d) a threat to commit an act mentioned in paragraphs (a) to (c). (s.21).

The DFVPA does not specifically recognise a child witnessing domestic and family violence as an act that allows the child to be named as a protected person on a DVO.

Despite the substantial interrelationship between domestic violence and child abuse, the section of the DFVPA which deals with the purpose of the legislation does not specifically provide for the protection of children.

Approaches in other jurisdictions

The NT, Victoria, WA and NZ each has specific provisions allowing an order to be made to protect a child who has been exposed to domestic violence against another person.

Victoria and NZ have additional protective measures which deem that allowing a child to be exposed to domestic violence or to witness domestic violence is in itself an act of domestic violence committed by the perpetrator of the violence.

Issues to be considered

In considering how legislation should deal with children who have witnessed domestic violence, the following matters need to be taken into account:

- the intersection between domestic violence legislation and child protection legislation should be clear
- domestic violence legislation needs to balance the protection of the aggrieved and protection of the child in his/her own right
- naming a child on a DVO can impact on a child's ability to have contact with the respondent parent/relative and may impact on family law matters (see discussion below).

Questions
3.1.1 Should the DFVPA specifically include the protection of children in its purpose?
3.1.2 Should the definition of domestic violence under the DFVPA be amended to include situations where children witness or are otherwise exposed to domestic and family violence?
3.1.3 Should the DFVPA specify that a child be named on a DVO where that child has witnessed or been exposed to domestic and family violence?
3.1.4 Should the DFVPA be amended to create a separate set of considerations for the naming of children (as distinct from 'relative of the aggrieved' referred to in the current legislation) on a DVO?

Intersection between family law and domestic violence law

The FLA intersects with state and territory domestic violence legislation through its capacity to make parenting orders about children including where a child should live and with whom a child should spend time. While these provisions operate despite any state or territory order, the FLA does allow a state or territory court to amend or suspend a family law order where it is inconsistent with making or varying of a DVO. The intersection of these laws is one of the terms of reference of the ALRC inquiry to address issues concerning violence against women and their children.

Two significant reports were released on 28 January 2010: the *Evaluation of the 2006 family law reforms* by the Australian Institute of Family Studies; and the *Review of legislation, practice and procedures relating to family violence in the Family Courts* by Professor Richard Chisholm AM. The findings and recommendations of these reports will be taken into account in the review.

The approach in Queensland

The DFVPA requires that the court be informed of and consider the relevance of a family law order when making, varying or revoking a DVO. Section 68R of the

FLA allows a court (in making or varying a DVO) to revive, vary, discharge or suspend a parenting order, recovery order or injunction where it requires or authorises a person to spend time with a child. This is meant to provide a consistent approach to ensuring the safety of the aggrieved and the child.

There is currently no provision in the DFVPA which highlights the powers given to state courts under the FLA. This means that it is possible that there may be inconsistency between family law orders and domestic violence orders, and this can lead to uncertainty for the aggrieved, the respondent and the police.

A further concern exists in relation to consent orders. These are a special type of DVO that is made with the consent of both parties, that is, both parties agree to the making of the order without any admissions that behaviour has occurred. While ordinarily for a DVO a court must be satisfied that domestic violence has occurred (and is likely to occur again), it is not clear whether this requirement applies to consent orders, particularly in situations where the respondent indicates that consent is provided without making any admissions to the court. The existence of these orders can be raised in family law matters, which can lead to difficulties in assessing untested information and the impact it should have on family law matters.

Approaches in other jurisdictions

All states and territories require that a court be advised of and consider any relevant family law order when making, varying or revoking of a DVO.

All states and territories have power under the FLA to revive, vary, discharge or suspend the family law order to the extent that it is inconsistent with the family violence intervention order. Victoria is the only state that references this power in its own legislation.

Similarly, all states and territories allow for a court to make consent orders. In many there is no requirement for the court to receive admissions from the respondent or be satisfied that domestic violence has occurred. Tasmania and WA do however expressly provide that a consent order is not an admission of guilt. Tasmania also requires the court to record that admissions were not made in relation to alleged domestic violence.

Issues to be considered

In considering the appropriate intersection with the FLA, the following matters need to be taken into account:

- the ALRC may make recommendations that impact on Queensland's legislation
- whether any changes to the way consent orders are made would have any unintended consequences, including whether they become more difficult to obtain, possibly compromising victim safety.

Questions
3.1.5 Should the DFVPA clarify that a court must consider the provisions of section 68R of the FLA when making or varying a DVO?
3.1.6 Are any amendments required to the way consent orders are made under the DFVPA?

Children as aggrieved and respondents

Children as aggrieved

The issue of whether a child should be able to be named as an aggrieved on an application for a DVO where a family relationship exists is particularly relevant for older children who have removed themselves from an abusive parent or carer and are living independently.

Children as respondents

In some jurisdictions, children can be named as respondents where a family relationship exists. This can provide protection to people who are in a family relationship with a child who perpetrates violence. Children named as respondents on a DVO, however, have a significant risk of entering the criminal justice system (because of potential breaches) and experiencing homelessness (because of non-contact condition).

The approach in Queensland

Under the DFVPA a child can be named as an aggrieved or a respondent on a DVO where they are or have been in a spousal, intimate personal or informal care relationship with the other party.

There is no capacity for a child experiencing domestic violence at the hands of a parent or relative to take protective measures other than through the CPA, which may ultimately result in their removal from the family home. Nor is there an alternative within the domestic and family violence legislation for family members experiencing domestic violence at the hands of a child to be afforded protection.

Approaches in other jurisdictions

In other Australian jurisdictions children have the capacity to apply for a DVO either as an applicant in their own right or through an adult acting for their interests.

In Victoria, an order can be made against a child for a period not exceeding 12 months unless there are exceptional circumstances. The ACT and WA also have the capacity to name a child as a respondent. However, the child must be over the age of 10 years.

Issues to be considered

Issues to be considered in strengthening the capacity for children to apply for orders as an aggrieved include:

- ensuring that the interaction between domestic violence and child protection systems is clear
- whether a legislative response is the most appropriate response in such situations or whether other interventions are more appropriate in the circumstances
- how to ensure that a child can be adequately represented in the proceedings
- whether there should be any age restrictions
- the need for support services to supplement the legislative response.

Issues in relation to naming children as respondents to protection orders where family relationships exist include:

- the risk of drawing young people into the criminal justice system for behaviour which may not otherwise be criminal (for example, making a telephone call in breach of an order containing a non-contact condition)
- how to ensure that a child can be properly represented in the proceedings
- whether there should be any age restrictions
- the need for support services to supplement the legislative response
- DVOs could be used instead of other more appropriate interventions
- the ability of children to understand orders and breaches.

Questions
3.1.7 Should children or adults on behalf of children be able to apply for a domestic violence order against family members?
3.1.8 If yes, how should this occur and what age limits should be imposed?
3.1.9 Should the DFVPA enable domestic violence orders to be taken out against children in a family relationship with the aggrieved?
3.1.10 If yes, how should this occur and what age limits should be imposed?

3.2 Indigenous people and domestic and family violence

In 2008–09, Aboriginal and Torres Strait Islander people were around seven times more likely to have a domestic violence order made on their behalf than non-Indigenous persons (22.7 per 1000 persons compared with 3.4 per 1000 persons), Aboriginal and Torres Strait Islander respondents were around 9 to 10 times more likely to have a domestic violence order imposed on them by the court than non-Indigenous respondents (30.4 per 1000 persons compared with 3.3 per 1000 persons).[2]

The approach in Queensland

At present the DFVPA does not provide for any reference to additional requirements or issues that may apply to domestic violence in Indigenous communities. However, some matters are provided for, for example in relation to the definition of 'relative' in the DFVPA it refers to the 'wider concept' of relative for Aboriginal and Torres Strait Islander people (s.12C). Also, the DFVPA adopts the same definition of 'parent' as set out in the CPA, and that definition refers to the concept of 'parent' in Aboriginal and Torres Strait Islander custom.

[2] Data was not reported by remoteness as there was considerable movement across remote regions. For example, around 71 per cent of Aboriginal and Torres Strait Islander matters were heard in outer regional/remote/very remote areas while only 58 per cent of aggrieved persons lived in these areas.

The DFVPA also requires the court to ensure an aggrieved or respondent understand the implications of a DVO and, by way of example, provides that this can occur with the assistance of a community government, Torres Strait Islander local government, community justice group or group of Elders.

The Strategy affords a high priority to reducing harm to women and children in Indigenous communities and lists one of its key indicators as reduced incidents of domestic and family violence in Indigenous communities.

DOC recently released the research report *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* by Professor Chris Cunneen (available at www.communities.qld.gov.au). It contains a number of significant findings and recommendations which will be considered as part of the review, including:

- recommendation 1: investigate extension of police powers to provide for police issued short-term emergency DVOs
- recommendation 3: alignment of penalties for breach with the Model Domestic Violence Laws and repeal of time constraints regarding breaches
- recommendation 11: simplifying applications and orders
- recommendation 12: that magistrates impose a condition on orders to direct a respondent to attend a community justice group to have the order and the unacceptability of violent behaviour explained
- recommendation 13: magistrates directing attendance at programs
- recommendation 14: the role of community justice groups and greater involvement of JP courts.

Approaches in other jurisdictions

In Tasmania and SA, the domestic violence legislation does not make specific reference to Aboriginal and Torres Strait Islander people. The WA legislation makes reference to the 'wider' concepts of relative which is dependent on culture and religion. The legislation in the NT, NSW, Victoria and the ACT specifically recognises the extended concepts of 'family' and 'relative' in Indigenous communities.

Issues to be considered

The following issues need to be considered in assessing whether the DFVPA appropriately responds to Aboriginal and Torres Strait Islander persons:

- the relationship between domestic violence legislation and the criminal law and the potential for more Aboriginal and Torres Strait Islander persons to be drawn into the criminal justice system
- whether legislation of itself can have an impact on the high occurrence of domestic and family violence among Aboriginal and Torres Strait Islander persons
- the differences in circumstances for Aboriginal and Torres Strait Islander people in urban versus remote locations
- the need for support services to supplement the legislative response.

Questions
3.2.1 Does the DFVPA adequately reflect modern Indigenous family relationships?
3.2.2 What legislative changes could be made to the DFVPA to improve outcomes for Aboriginal and Torres Strait Islander people?

3.3 Immediate police response to domestic and family violence

Police officers attending domestic incidents are bound either by legislation or policy to carry out an investigation to determine if domestic violence has occurred. Police must then collect any available evidence to support an application for a DVO.

Follow-up processes from domestic violence incidents include: applying to the court for a DVO; investigating any criminal offences arising from the incident: preparing relevant court documents; and attending court and serving applications and associated court documents on the respondent and the aggrieved.

In some jurisdictions, police can issue domestic violence orders without the court's intervention. These can be for a short period (24 to 72 hours) or over an extended period (up to 12 months).

The approach in Queensland

In 2007–08, 19 906 applications were made for DVOs in Queensland. Of these, 12 496 were made by police. The average time attending a confirmed domestic incident is approximately two hours.

Under the DFVPA, a police officer is required to undertake an investigation and after forming a reasonable belief that domestic violence has occurred and is likely to reoccur that officer can apply for a DVO. A DVO can include a number of conditions, depending on the circumstances of each case.

Where an urgent DVO is required, police can apply for a temporary protection order directly to a magistrate by telephone, facsimile or other electronic means. This can provide access to the provisions of the DFVPA in rural and remote areas (where courts may sit infrequently) or in high risk or emergency situations. The temporary order is intended to provide protection to an aggrieved until the next specified court date, at which time the court may be in a position to make a final determination on whether or not a DVO should be granted. If a determination is not made on the next court date, and a further adjournment is required, an application must be made for the temporary order to continue.

In rural and remote courts, where sittings are infrequent, the current process under the DFVPA has the capacity to be lengthy. The aggrieved or police may be required to apply for an additional temporary DVO until the matter can be heard.

Continued adjournments and reapplications not only have serious resource implications for the courts and the police, they also have the capacity to continually re-victimise the aggrieved.

Approaches in other jurisdictions

Domestic violence orders can be made by the courts in all Australian states and territories. In Victoria, Tasmania, WA and the NT police are empowered to make the equivalent of a DVO or notice in varying capacities.

These orders are typically short term (24 to 72 hours) and act in a temporary capacity, until the person is brought to court. Tasmania allows police to make a full order for 12 months without court intervention (representing 60 per cent of all orders). Complex matters, however, must be directed to the courts for determination.

In Victoria, a police officer attending an incident can apply to another officer who is the rank of Sergeant or above for a 'family violence safety notice' (police issued order). The officer should be satisfied of the following matters: the respondent is an adult; the respondent does not have cognitive impairment; there are no FLA or child protection orders in force that may be inconsistent with the proposed family violence safety notice; there is no family violence intervention order in place between the parties; and the family violence safety notice is necessary to ensure the safety of the affected family member, or to preserve property, or to protect a child who has been subjected to family violence. The family violence notice should only be made outside of normal business hours (before 9 am or after 5 pm on weekdays, or on Saturdays, Sundays, or public holidays).

Issues to be considered

In considering whether the DFVPA needs amending in relation to the issuing of orders, the following needs to be taken into account:

- police issued DVOs may benefit victims of domestic violence by providing immediate protection and reducing the often time consuming and stressful court process
- in rural and remote areas where courts are not always readily available, a police issued DVO has the capacity to reduce the number of matters presented to the courts in the first instance
- there is a risk that a sharp increase in orders may result, including cross-orders, with the consequential risk of entry into the criminal justice system
- resource implications with the need for increased police training.

Questions
3.3.1 Are any changes required to the DFVPA in relation to temporary protection orders?
3.3.2 Should police in Queensland have the capacity to issue a DVO?
3.3.3 If police are provided with the capacity to issue a DVO, under what circumstances could an order be issued?

3.4 Understanding legal processes

There is a range of people who may be disadvantaged in their ability to understand the processes and outcomes of proceedings relating to applications for DVOs, for example, people from culturally and linguistically diverse backgrounds or people with a disability (this could include physical, intellectual, cognitive and psychiatric impairment). There can also be circumstances where a person could be disadvantaged in that the trauma they may suffer through the court process could affect their ability to participate in the proceedings.

The approach in Queensland

Below are a number of mechanisms which give some recognition to individuals who may be disadvantaged in their ability to understand the proceedings.

- The DFVPA requires the court to be satisfied that the respondent and the aggrieved person understand the nature, purpose, and legal implications of processes and outcomes. Failure to comply with this provision does not affect the validity of a DVO (although there may be implications, in relation to subsequent criminal breach proceedings, if the order is breached).
- The DFVPA allows for a guardian to apply for an order on behalf of an aggrieved and also provides that a court can notify the Adult Guardian in certain circumstances after an order is made involving a party who has impaired capacity. There is no requirement to notify the Adult Guardian before or during proceedings.
- The current protection order application form contains questions relating to whether or not an interpreter is required, whether a party has impaired capacity and (if so) whether the Adult Guardian has been informed.

There are a number of safeguards set out in other pieces of legislation in Queensland that offer protection or assistance for people who may otherwise be disadvantaged in their ability to participate in the court process. These include: the entitlement to an interpreter in criminal proceedings; the appointment of a 'litigation guardian' for people who do not have the capacity to understand civil proceedings (including proceedings under the DFVPA); and 'special witness' provisions that apply to witnesses in criminal and civil proceedings in certain circumstances and provide for such safeguards as video-taping of evidence, directions from the court as to the questions that can be asked, and the availability of a support person.

Approaches in other jurisdictions

In SA, a statutory right to an interpreter exists for a person who does not demonstrate sound proficiency of the English language in any civil or criminal proceedings or when being questioned by police.

In Victoria, the Magistrates Court's Family Violence and Stalking Protocols places an obligation on the Registrar to organise an interpreter where this is required. The *Family Violence Protection Act 2008* also contains significant restrictions on the cross-examination of protected witnesses. A court can declare a person a protected witness if it is satisfied that the person has a cognitive impairment or is someone who otherwise needs the protection of the court.

Question
3.4.1 What legislative amendments would assist people who are disadvantaged in their ability to understand and participate in domestic and family violence proceedings to receive better outcomes through the courts?

4. PERPETRATOR ACCOUNTABILITY

4.1 Breaches of domestic violence orders

Breaching a DVO is a criminal offence in itself. Breaches can vary from making a telephone call in breach of a non-contact condition to severe physical violence. Penalties for breach vary across jurisdictions. Issues raised to date include:

- finding the appropriate balance between commencing criminal proceedings for the breach as well as the behaviour that constitutes the breach
- the appropriateness of the level of penalties and of the range of penalties.

There are a number of factors that may impact on the decision of police to charge or prosecute a breach of a DVO and any associated criminal offences including the attitude of the victim towards criminal proceedings being pursued and the sufficiency of the evidence (which may be influenced by the attitude of the victim). Some breaches may also not be reported, as victims may have concerns about the perpetrator being sent to prison, or there may be threats of retribution. These can mean that some DVO breaches go unpunished.

Where police do charge a respondent with a breach, the circumstances giving rise to the breach can often constitute an offence under the criminal code such as assault or wilful damage. This means that the record of the offence is a breach of a DVO regardless of the seriousness of the circumstances of the breach and, as a consequence, the penalty may be lower than that which would have been imposed if the offender had also been charged with a criminal code offence. Further, any court dealing with subsequent offences may not have a clear picture of the criminal history which will only record 'Breach DVO' and will not detail the particulars or behaviours giving rise to the breach.

The approach in Queensland

The DFVPA creates a criminal offence where a respondent breaches the conditions of a DVO. The maximum penalty is 40 penalty units (currently $4000) or 12 months imprisonment, which increases to two years imprisonment if the respondent has previously been convicted on at least two different occasions in the previous three years. The same maximum penalties apply regardless of the behaviours that constitute the breach. Breaches can range from contravening conditions requiring the respondent to refrain from contacting an aggrieved to acts of physical violence.

Approaches in other jurisdictions

In NSW, Victoria, the NT, SA and WA, the maximum period of imprisonment for contravening a protection order is two years. In the ACT, the maximum period of imprisonment is five years. Tasmania has a tiered penalty system depending on the number of previous convictions with a maximum jail term (for a fourth or subsequent offence) of five years.

In WA, where a child (who is in a family or domestic relationship with the offender) witnesses an act of abuse that constitutes a breach, this is regarded as an 'aggravating factor' when the offender is sentenced. In NSW and the NT, the legislation differentiates breaches which involve an act of violence against a person (NSW) or harm to the protected person (NT).

Issues to be considered

In considering the appropriate response to breaches of DVOs, the following needs to be taken into account:

- increasing penalties may help reflect the seriousness of the offence and demonstrate that perpetrators will be held accountable for their actions
- expanding penalties to provide different penalties for different types of behaviour could also ensure perpetrators are held accountable and provide a more responsive outcome depending on individual circumstances
- increasing penalties may make victims more reluctant to report breaches
- increasing penalties might result in a higher percentage of not guilty pleas
- the development of penalties geared towards domestic violence offenders such as behaviour change programs (discussed in section 4.3) or Indigenous community justice programs, may provide courts with a greater range of effective alternatives to fines
- fines can have adverse impacts on a perpetrator's family and may not be as effective a deterrent as other sentencing options such as community service or imprisonment.

Questions
4.1.1 How can legislative amendments strengthen (or make more effective) the links between the breach provisions and related criminal offences?
4.1.2 Should penalties for a breach of a DVO be increased and/or expanded to provide for different penalties for different types of behaviour?
4.1.3 Is the current range of sentencing options for breaches adequate?

4.2 Ouster condition

An ouster condition applied to a DVO excludes the respondent from a residence shared with the protected person, even where the respondent has a legal or equitable interest in the property. Ouster conditions are an important tool for the protection of the aggrieved and their children and ensuring that disruption is minimised.

There are concerns that the legislation does not currently enable courts to make ouster conditions where they are appropriate. This may have, in certain circumstances, the effect that the aggrieved and their children are either forced to remain in an unsafe situation or leave the home to seek safety. Where the aggrieved and their children leave the home, they are often directed to crisis accommodation or are at risk of becoming homeless. This can also impact on the victim's ability to attend work, for children to attend school, and for the family to access informal support networks (friends and family).

The approach in Queensland

The DFVPA allows for the court, in making or varying a DVO, to also impose conditions on the respondent that the court considers necessary in the circumstances, and desirable in the interests of the aggrieved, any named person and the respondent.

One of the conditions that can be imposed on the respondent is:

- prohibiting the respondent from doing all or any of the following in relation to stated premises even though the respondent has a legal or equitable interest in the premises
  - (v) remaining at the premises
  - (vi) entering or attempting to enter the premises
  - (vii) approaching within a stated distance of the premises (s.25(3)(b)).

Under the current legislation, a court is required to consider a range of matters in determining whether to impose an ouster condition, including the need to protect the aggrieved and any named persons, the welfare of a child of the aggrieved and the accommodation needs of all persons affected by the proceedings (s. 25(5) and (6)).

Approaches in other jurisdictions

All other Australian jurisdictions give courts the power to make ouster conditions. A key distinction between the jurisdictions is the focus or priority that is given to the safety and accommodation needs of the person protected by an order.

In Victoria, a court making a domestic violence order is required by legislation to consider whether the respondent should be excluded from the home. Tasmania also prioritises the protected person being able to choose to remain in, or return to, their home. In Victoria and NSW, courts are directed to give consideration to the interests of the protected person when deciding whether to make an ouster condition.

In the NT, there is a legislative presumption that the protection of the victim and their children is best achieved by their remaining in the home.

Issues to be considered

In giving consideration to the use of ouster conditions, the following should be taken into account:

- an increased use of ouster conditions may create an additional burden on public housing and accommodation services
- it is difficult to address the situation where the excluded person owns the home and takes steps to sell it or rent it out
- the impact of reconciliation by the parties
- how the safety of victims and children can be maximised.

Question
4.2.1 Are legislative amendments required to enable ouster conditions to be made where appropriate and to operate more effectively?

4.3 Behaviour change programs

In some jurisdictions, a DVO includes a condition that a person must attend a behaviour change program. There has been an increasing trend nationally to focus on placing accountability and responsibility on perpetrators and one of the strategies to address this has been to incorporate behaviour change programs into domestic violence proceedings whether at the civil or criminal stage.

Key legislative issues to consider in relation to behaviour change programs include when an order requiring attendance can be made, whether the order is mandatory or voluntary and the nature of the program. Behaviour change programs throughout Australia vary widely in terms of length of time, delivery method, focus (taking responsibility as opposed to addressing psychological issues), and involvement of protected persons.

Other important issues for consideration include the assessment of the respondent for suitability to attend a program, availability of programs, provision of culturally appropriate programs, provision of programs to meet the needs of specific community groups, and that practice standards apply to all programs offered.

Research to date has not identified a clear link between mandated attendance at behaviour change programs and a decrease in the use of violent behaviours. Research has indicated that outcomes are improved where there is an integrated community response to reinforce programs and conduct risk management, there is involvement of the person seeking safety, and that ongoing case management of repeat offenders is maintained.

For Indigenous offenders, programs which are situated in a cultural and spiritual context may be more appropriate.

The approach in Queensland

Queensland legislation does not provide specifically for the making of a condition requiring attendance at a behaviour change program. This does not, however, prevent a court from including such a condition in a DVO.

Further, pursuant to the *Penalties and Sentences Act 1992*, the court can attach a behaviour change program condition to a probation order when imposing a sentence for criminal offences. Failure to comply with the condition can result in the offender facing breach proceedings. The court can also adjourn breach proceedings to enable an offender to voluntarily undertake a program before being sentenced.

There is limited availability of programs in Queensland, however, referral to men's behaviour change programs as a condition of a probation order or as a pre-sentence option is occurring in some jurisdictions in Queensland.

Approaches in other jurisdictions

In Victoria, WA, Tasmania, the ACT, the NT and NZ specific provision is made for referral to behaviour change programs in the domestic violence legislation. In Victoria, the NT and NZ attendance can be mandated, with criminal penalties attached for non-compliance. In the NT, the consent of the respondent is required for the condition to be made. In WA and the ACT, courts can only recommend or refer people to programs. Only the Tasmanian legislation makes reference to behaviour change program orders in connection with sentencing for domestic violence offences.

Issues for consideration

The range of issues requiring consideration in relation to increasing or mandating the use of behaviour change programs includes:

- research is mixed on the impact of programs, although there is evidence of effectiveness particularly if the programs use an integrated model that also involves the victim
- requiring attendance at programs can improve perpetrator accountability
- ensuring a range of culturally appropriate programs is widely available across the state may be difficult (for example, the availability of qualified facilitators or other geographical factors may be impediments)
- whether attendance should be voluntary or mandated and also whether it should be considered at the stage of a DVO being issued or as a sentencing option where a breach has occurred
- the consequences of non-attendance
- possible resourcing implications to support legislative change.

Questions
4.3.1 Should behaviour change programs be imposed on perpetrators at the protection order stage, as a sentencing option for criminal proceedings, both, or not at all?
4.3.2 Should behaviour change programs be mandated or voluntary?

5. SYSTEM PLANNING AND COORDINATION

5.1 Confidentiality and information sharing

Domestic and family violence protection processes can require parties to reveal highly intimate, personal information about their relationships, their personal circumstances, physical, sexual and other forms of abuse, and impacts on children. Improper use of that information can cause distress to victims, cause damage to reputations and may undermine court processes if the information is used in such a way that leads to unfairness in proceedings.

However, providing services and protection to victims requires a certain amount of information to be provided to various people and agencies involved in the domestic and family violence protection system, for example, service providers, police officers and other government officers. If legislative provisions about sharing information are overly restrictive, the efficient provision of services and integrated responses can be compromised. For example, the victim may have to tell their story numerous times to numerous agencies, compounding the stress of the situation and perhaps contributing to a reluctance to report domestic violence in the first place.

Legislation generally allows information to be shared with consent. Also, provisions may allow for information sharing without consent in emergency or high-risk situations. The balance must be struck between protecting people's privacy and enhancing victim safety.

The approach in Queensland

The *Information Privacy Act 2009* (IPA) requires government agencies to comply with Information Privacy Principles (IPPs) which regulate the collection, storage, access to, amendment of and disclosure of personal information. Personal information can be disclosed to an entity other than the individual to whom the information relates if that person has consented to the disclosure of the information or if it is felt that the disclosure is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of an individual or public health, safety or welfare. This is subject to other laws that deal with specific situations — for example, in relation to child protection matters, different laws regulate the collection and sharing of information in certain circumstances relevant to a child's protection or welfare.

The Commonwealth *Privacy Act 1988* (PA) applies national privacy principles (NPPs) to the collection, use, storage and disclosure of personal information by many non-government agencies. The NPPs permit disclosure of information for a secondary purpose (a purpose other than the primary purpose for the collection of the information) where there is a serious and imminent threat to an individual's life, health or safety or a serious threat to public health or public safety. As with the IPA, the PA would also permit disclosure that is authorised or required by law.

Proceedings under the DFVPA are closed to members of the public. The DFVPA restricts the publication or other dissemination of proceedings to the public or a section of the public. A 'member of a profession' can share information if this occurs in connection with the practice of that person's profession. It is not clear whether 'member of a profession' applies to all people who may be involved in providing domestic violence support services.

Approaches in other jurisdictions

In Tasmania, integrated case coordination operates in each of the four police districts and involves representatives from the Police Victim Safety Response team, Police Prosecutions, Family Violence Counselling and Support Services, Court Support and Liaison Service, Child Protection and Special Needs Liaison Service. The Integrated Case Coordination meets weekly to determine the appropriate course for each new and active family violence case. An electronic case management support system, the Integrated Case Coordination Management System (ICCMS), is in the process of development.

The Tasmanian *Family Violence Act 2004* has a provision that specifically provides for information sharing. It states that a 'personal information custodian' (as defined by the *Personal Information Protection Act 2004*) does not breach information protection by collecting, using or disclosing personal information for the purpose of furthering the objects of the Act. A 'personal information custodian' is defined as a public sector body or any body, organisation or person who has entered into a 'personal information contract' relating to personal information. A 'personal information contract' means a contract between a personal information custodian and another person (whether a personal information custodian or not) relating to the collection, use or storage of personal information.

In London, the Multi Agency Risk Assessment Conference (MARAC) project sets up teams comprised of organisations including police, domestic violence support services, accommodation services, probation services, accident and emergency departments, drug and alcohol services and child welfare services. The MARAC teams consider complex and high risk domestic violence cases. Information sharing can generally only occur with the consent of the victim unless the matter is high risk. A set of information sharing protocols has been developed and includes Data Protection Guidelines which dictate (inter alia) that the information should be relevant and appropriate to the purposes for which it is being shared, and should be accurate and stored securely.

Issues to be considered

Following are the benefits of information sharing:

- domestic violence issues frequently interact and overlap with other legal areas such as child protection, family law, criminal law and migration law. Allowing government agencies and service providers to share information provides a holistic approach which will assist in decision-making processes and ensuring people are provided with the assistance they need
- non-government agencies such as domestic violence support services can undertake their functions more effectively
- Information sharing can alleviate the inconvenience associated with victims having to supply the same information on a number of occasions to different service providers.

Some issues regarding information sharing and confidentiality include the following:

- a reluctance to report domestic violence due to concerns as to how the information will be used
- incorrect or untested information has the potential to damage a person's character. information must therefore be shared appropriately and stored securely

- where the information relates to Aboriginal and Torres Strait Islander people or people from culturally and linguistically diverse backgrounds, the organisations sharing the information should be sensitive to any cultural issues that may impact on how the information is shared and who it is shared with
- determining when it is appropriate to share information in high risk situations.

Question
5.1.1 Should information be able to be shared about an aggrieved and/or a respondent, in the context of ensuring an integrated approach to domestic violence? If so, what information and for what purpose?

6. Other issues

You may wish to provide a submission on aspects of the *Domestic and Family Violence Protection Act 1989* which have not been addressed in this consultation paper. For example, you may be able to suggest changes to the DFVPA which will enable it to interact more effectively with other legislation such as the *Weapons Act 1990* or Commonwealth *Migration Act 1958* and Migration Regulations 1994.

Please feel free to address any other legislative issues that are relevant.