Domestic and Family Violence Protection Act 2012

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Domestic and Family Violence Protection Act 2012

This Act takes effect on 17 September, 2012. It updates and modifies the legal landscape about domestic violence, It was the last legislative Act of the Bligh government and was passed with the support of the then LNP Opposition.

The explanatory notes state:

> *"The Bill provides an accessible civil legal response for people seeking protection from domestic and family violence and aims to prevent future acts of violence, rather than focusing, as the criminal law does, on punishing an offender for past behaviour….*
>
> *A civil process enables a victim of domestic and family violence to make an application for a domestic violence order independently of the police. The standard of proof is lower than for criminal proceedings and this means less evidence is required to obtain a domestic violence order than to obtain a criminal conviction. While a domestic violence order carries the threat of criminal sanctions if it is not complied with, the making of an order does not immediately subject the respondent to a penalty. This is important, as victims of domestic and family violence often want the violence to stop, but do not want the respondent punished."*

The Minister for Community Services and Housing and Minister for Women, the Hon Karen Struthers in the second reading speech stated:

> *"I am very pleased to rise today to introduce into the House a bill which comprehensively strengthens and modernises Queensland's 20-year-old domestic and family violence laws. Every woman, man and child has the right to live free from violence and abuse. While it is recognised that anyone can be a victim or perpetrator of domestic violence, the facts show it is most often committed by men against women and children. In 2009-10, the Queensland Police Service recorded 49,372 domestic and family violence occurrences, an increase of 11.5 per cent on the previous year, and laid 8,033 charges for breach of a domestic violence order. The courts received 22,754 applications for domestic violence orders, an increase of eight per cent on the previous year.*

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People, predominantly women and children, die as a result of domestic and family violence. They suffer significant physical and emotional trauma, work and educational opportunities are affected, lives are disrupted and many victims of this type of violence become homeless.

The new Domestic and Family Violence Protection Bill 2011, which reflects contemporary understanding of domestic violence, is now ready for parliament's consideration….Queenslanders clearly told the government that, while they supported the current laws, they wanted to see them strengthened to provide greater safety for victims of domestic and family violence. They also wanted to see perpetrators of violence held more accountable for their behaviour. The bill's key focus is to maximise the safety and protection of victims and see perpetrators of violence held more accountable.

The bill includes a wider definition of violence; provides for immediate protection to victims; allows the police to detain a perpetrator for up to eight hours; provides greater guidance to identify the person most in need of protection; provides greater guidance on the impact of domestic violence on children; provides greater guidance on the use of ouster conditions to keep victims safe; and increases the maximum penalty available when a domestic violence order is breached to three years imprisonment.

The bill represents a contemporary civil response to domestic and family violence…"

The explanatory notes state:

"Policy objectives and the reasons for them

The review of the Domestic and Family Violence Protection Act 1989 is one of the key initiatives under For our Sons and Daughters: A Queensland Government strategy to reduce domestic and family violence 2009-2014.

The Queensland Government strategy was developed to address the significant human and economic costs of domestic violence. Women and children die or suffer significant physical or emotional trauma as a result of domestic and family violence, work and educational opportunities are affected, lives are disrupted and many victims of this type of violence become homeless.

In 2009-2010, the Queensland Police Service recorded 49,372 domestic and family violence occurrences, an increase of 11.5 per cent on the previous year, and laid 8033 charges for breach of a domestic violence order. Of the 62 recorded homicides in 2009-2010, 17 were identified as being related to domestic violence.

The Queensland Government strategy has the following aims:

- *to better protect victims by breaking the cycle of violence as early as possible;*
- *to support communities to promote respectful relationships;*
- *to provide effective safety and support programs for people who experience domestic and family violence; and*
- *to respond to people who use domestic and family violence early and hold them accountable.*
- *The Domestic and Family Violence Protection Bill 2011 addresses the aims of the Queensland Government strategy and focuses on effective and timely responses to provide for the safety of victims of domestic violence and their children and*

ensuring that perpetrators of violence are held accountable. As contemporary legislation, the Bill will make the law accessible to the community.

- *Domestic and family violence is not tolerated in Queensland. The Bill promotes this message through a preamble, which reflects:*
- *the aims of the Queensland Government strategy and the National Plan to Reduce Violence Against Women and their Children;*
- *Australia's obligations under international conventions relating to the elimination of violence against women and children; and*
- *views expressed during consultation.*

The Bill places greater responsibility for the use of violence on perpetrators of violence and increases the ability of the court to focus on the safety and wellbeing of victims.

The Bill also reflects contemporary understandings of domestic and family violence, particularly regarding the types of relationships and behaviours covered by the legislation. The nature and characteristics of domestic and family violence are reflected in the Bill and comprise behaviours used to exert power and control over another person. In addition, the definition of domestic and family violence specifically includes economic, emotional and psychological abuse. The definition also includes behaviour that is physically or sexually abusive, threatening or coercive, or behaviour that in any other way controls or dominates another person. The definition is comprehensive and captures the range of behaviours that, in a contemporary sense, are understood to characterise domestic violence.

In the 22 years since the Domestic and Family Violence Protection Act 1989 was introduced, the community's awareness of this form of violence has increased. This has been accompanied by a significant increase in the numbers of domestic violence applications, from 2957 in 1990 to 22,754 in 2009-2010. A more contemporary definition of domestic violence will assist police, the courts, support services and the community in identifying this type of violence and responding effectively to the safety needs of victims.

Lastly, the Bill aims to ensure that the person who is most in need of protection is identified. This is particularly important where cross-applications are made, which is where each party to a relationship alleges domestic violence against the other and which often result in cross-orders.
During consultation, stakeholders reported a disproportionate number of cross-applications and cross-orders and expressed the concern that in many instances domestic violence orders are made against both people involved.

This is inconsistent with the notion that domestic violence is characterised by one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them. Both people in a relationship can not be a victim and perpetrator of this type of violence at the same time.

A cross-application may be used by a respondent to continue victimising the aggrieved person, to exact revenge or to gain a tactical advantage in other court proceedings. Also, violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken…

Structure of the Bill

The Domestic and Family Violence Protection Bill 2011 is structured chronologically. It begins by introducing some of the important definitions in the Act, then progresses to

explaining important concepts about the operation of the Act, outlining the powers of the court to make orders, police functions and powers, procedural matters, appeals, and miscellaneous provisions.

The Bill aims to provide greater clarity and structure by using plain language, a logical order to the provisions, introducing more divisions and sub-divisions, and using clear headings for sections, parts and divisions. The proposed structure of the Bill will provide greater clarity to those who interpret and apply its provisions; particularly people who are self-represented in proceedings."

This Act was passed in the last week of the outgoing Bligh Government with the support of the LNP. It is to commence on 17 September 2012[2], at which point the *Domestic and Family Violence Protection Act 1989* is repealed[3].

Long title

This states:

"An Act to provide for protection of a person against violence committed or threatened by someone else if a relevant relationship exists between the persons, and to make amendments of the Criminal Code, the Evidence Act 1977, the Police Powers and Responsibilities Act 2000 and the Police Powers and Responsibilities Regulation 2000 for particular purposes, and to make minor or consequential amendments of this Act and other legislation as stated in a schedule".

Preamble

The preamble states:

"In enacting this Act, the Parliament of Queensland recognises the following—
1 Australia is a party to the following instruments—
• Universal Declaration of Human Rights
• United Nations Declaration on the Elimination of Violence Against Women
• United Nations Convention on the Rights of the Child
• United Nations Principles for Older Persons
2 Living free from violence is a human right and fundamental social value.
3 Domestic violence is a violation of human rights that is not acceptable in any community or culture and traditional or cultural practices can not be relied upon to minimise or excuse domestic violence.
4 Domestic violence is often an overt or subtle expression of a power imbalance, resulting in one person living in fear of another, and usually involves an ongoing pattern of abuse over a period of time.
5 Domestic violence can have serious impacts on people who experience it, including physical, emotional and psychological harm, and can result in death.
6 Perpetrators of domestic violence are solely responsible for their use of violence and its impacts on other people.
7 Domestic violence is most often perpetrated by men against women with whom they are in an intimate partner relationship and their children; however, anyone can be a victim or perpetrator of domestic violence.
8 Domestic violence is a leading cause of homelessness for women and children.

[2] Section 2
[3] S. 194

9 Children who are exposed to domestic violence can experience serious physical, psychological and emotional harm.
10 Behaviour that constitutes domestic violence can also constitute a criminal offence.

Minister Struthers stated in the second reading speech:

"The bill includes a preamble which provides the opportunity for us, as the Queensland parliament, to make a clear statement that domestic and family violence is not acceptable in Queensland communities. The preamble also enables us as the parliament to recognise domestic and family violence in the context of relevant international obligations, contemporary social values and human rights. The preamble identifies some of the features and impacts of domestic and family violence and recognises civil responses should operate with, not instead of, the criminal law."

The explanatory notes state:

"The Bill includes a preamble which provides the opportunity for the Queensland Parliament to make a clear statement that domestic and family violence is a violation of human rights and, as such, is not acceptable in Queensland communities. The preamble recognises domestic and family violence in the context of relevant international obligations, contemporary social values and human rights. It also identifies the nature, dynamics and impacts of domestic and family violence and recognises the civil response set out in the Act should operate with, not instead of, the criminal law."

Main objects

Section 3 of the Act provides:

" (1) The main objects of this Act are—
(a) to maximise the safety, protection and wellbeing of people who fear or experience domestic violence, and to minimise disruption to their lives; and
(b) to prevent or reduce domestic violence and the exposure of children to domestic violence; and
(c) to ensure that people who commit domestic violence are held accountable for their actions.
(2) The objects are to be achieved mainly by—
(a) allowing a court to make a domestic violence order to provide protection against further domestic violence;
and
(b) giving police particular powers to respond to domestic violence, including the power to issue a police protection notice; and
(c) imposing consequences for contravening a domestic violence order or police protection notice, in particular, liability for the commission of an offence."

Minister Struthers stated in the second reading speech:

"The bill also contains an expanded purpose which outlines the aims of the bill. These are to prevent or reduce domestic violence, maximise the safety and protection of victims, minimise the disruption to the lives of victims and ensure that perpetrators are held accountable for their actions. I am also pleased to announce the inclusion of principles in the bill. These will provide guidance to those involved in interpreting and administering the legislation, including police, courts, lawyers and members of the community. The overarching principle for administering this legislation is that the safety, protection and

wellbeing of people who fear or experience domestic violence, including children, are paramount.

This principle is to influence every decision made and every action taken under the new law. The preamble and principles provide an overarching framework for the operation of the legislation and will promote a consistent approach to the interpretation of this new law."

Principles

Section 4 provides:

" (1) This Act is to be administered under the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.
(2) Subject to subsection (1), this Act is also to be administered under the following principles—
(a) people who fear or experience domestic violence, including children, should be treated with respect and disruption to their lives minimised;
(b) perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people and, if possible, provided with an opportunity to change;
(c) if people have characteristics that may make them particularly vulnerable to domestic violence, any response to the domestic violence should take account of those characteristics;
(d) in circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, ***the person who is most in need of protection should be identified****;*
(e) ***a civil response under this Act should operate in conjunction with, not instead of, the criminal law****."(emphasis added)*

Principle (e) responds to the criticism that has existed since prior to the enactment and the cause of the enactment of the Domestic and Family Violence Protection Act 1989[4], namely that police failed to use the armoury of weapons available under the Criminal Code or other legislation, and since the enactment of the 1989 too rarely charged perpetrators.

The explanatory notes state:

"The Bill sets out principles to provide a framework for the Act's administration. The principles are to provide guidance to police, lawyers, courts and members of the community when applying and interpreting the Act.

[4] "On face value, one could argue that current Queensland criminal law can or does deal with domestic violence. The Queensland criminal law as set out in the Criminal Code and other specific statutes constitutes as offences, a range of behaviours including the kinds of physical assaults experienced by victims of domestic violence. With the exception of rape by one's husband, on which we say more later, the punching, kicking, biting, whipping and stabbing, as well as the burns, attempted strangulations and deprivation of liberty reported by victims are all covered by the current criminal law. What is clear, however, is that the majority of spouses who abuse their partners in these ways are not being charged with criminal offences – their behaviour is not subject to the processes of the criminal law." Report of the Queensland Domestic Violence Task Force, *beyond these walls, 1988 p.147; H Douglas and L Godden "The decriminalisation of domestic violence, 2005."*

The provisions dealing with the objects of the Act, the guiding principles and the preamble will bring the Queensland legislation in line with the domestic and family violence legislation in other jurisdictions. They are also consistent with recommendations made by the Australian Law Reform Commission in its Family Violence – A National Legal Response report, released in November 2010, and with feedback from consultation for the review of the Domestic and Family Violence Protection Act 1989."

The basic test has changed

Under the 1989 Act there is a 3 step test in order to obtain a protection order.

1. That the parties are in a domestic relationship;
2. That an act or a number of acts of domestic violence have occurred;
3. That further acts are likely.

A protection order under the 2012 Act may be made if the court is satisfied that:

1. A relevant relationship exists between the aggrieved and the respondent[5];
2. The respondent has committed domestic violence against the aggrieved[6];
3. The protection order is *necessary* **or** *desirable* to protect the aggrieved from domestic violence.

Significantly the previous test of further acts of domestic violence being likely or that the threat is likely to be carried out has been removed. This is following criticism by the Australian Law Reform Commission[7].

Ground one: Relevant relationship

Section 13 says that there are 3 types of relationships:

- Intimate personal relationships;
- Family relationships;
- Informal care relationships.

At first glance this appears that spousal relationships have been abolished. They have not. Section 14 says that there are 3 types of intimate personal relationships:

- Spousal relationships;
- Engagement relationships;
- Couple relationships.

Spousal relationship

This is set out in section 15:

" (1) A spousal relationship exists between spouses.

[5] Section 37(1)(a), section 8(1).
[6] Section 37(1)(b), section 8(1).
[7] That "likely" was too heavy a burden to prove. I question though, whether "necessary" or "desirable" is any significantly different test. I suggest that to determine whether it is "necessary" or "desirable", it is really necessary to look at the risk of further acts of domestic violence and which one for all intents and purposes looks at the likelihood of further acts of domestic violence being committed.

Note—
A reference to a spouse includes a de facto partner. For definitions of spouse and de facto partner, see the Acts Interpretation Act 1954, sections 36 and 32DA.
(2) A spouse, of a person, includes—
(a) a former spouse of the person; and
(b) a parent, or former parent, of a child of the person.
Example of a former parent of a child—
a birth parent who stops being a parent of a child under the Surrogacy Act 2010, section 39(2)(b)
(3) For subsection (2)(b), it is irrelevant whether there is or was any relationship between the parents of the child."

The definition of "spousal relationship" is now wider because of the widening of the definition of "parent". This is defined in section 16:

" (1) A parent, of a child, means—
(a) the child's mother or father; and
(b) anyone else, other than the chief executive (child protection), having or exercising parental responsibility for the child.
(2) However, a parent of a child does not include—
(a) a person standing in the place of a parent of the child on a temporary basis; or
(b) an approved foster carer for the child; or
(c) an approved kinship carer for the child.
(3) A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.
(4) A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.
(5) In this section—
approved foster carer see the Child Protection Act 1999, schedule 3.
approved kinship carer see the Child Protection Act 1999, schedule 3."

Example of relationship covered under the new Act not covered under the old

Bob and Martha had a child, Billy. By virtue of an order of the Family Court, parental responsibility for Billy vests in Bob, Bob's sister Penny, and Penny's partner Veronica.

Mary, Bob, Penny and Veronica are therefore parents of Billy for the purposes of section 16.

Martha commits an act of domestic violence towards Veronica. Veronica may now be able to obtain a protection order against Martha as Martha is Billy's mother and Veronica is exercising parental responsibility within the meaning of the terms of the Family Law Act in section 16(1)(b) of this Act. By section 15(3): *"It is irrelevant whether there is or was any relationship between the parents of the child."*

This example demonstrates why it is necessary to ensure that parties make full disclosure of the existence of orders under the Family Law Act or under the Child Protection Act.

Engagement relationship

This is defined under section 17:

"An engagement relationship exists between 2 persons if the persons are or were engaged to be married to each other, including a betrothal under cultural or religious tradition."

It is a repeat of section 12A(1) of the 1989 Act.

Couple relationship

This is defined under section 18:

"(1) A couple relationship exists between 2 persons if the persons have or had a relationship as a couple.
(2) In deciding whether a couple relationship exists, a court may have regard to the following—
(a) the circumstances of the relationship between the persons, including, for example—
(i) the degree of trust between the persons; and
(ii) the level of each person's dependence on, and commitment to, the other person;
(b) the length of time for which the relationship has existed or did exist;
(c) the frequency of contact between the persons;
(d) the degree of intimacy between the persons.
(3) Without limiting subsection (2), the court may consider the following factors in deciding whether a couple relationship exists—
(a) whether the trust, dependence or commitment is or was of the same level;
(b) whether 1 of the persons is or was financially dependent on the other;
(c) whether the persons jointly own or owned any property;
(d) whether the persons have or had joint bank accounts;
(e) whether the relationship involves or involved a relationship of a sexual nature;
(f) whether the relationship is or was exclusive.
(4) A couple relationship may exist even if the court makes a negative finding in relation to any or all of the factors mentioned in subsection (3).
(5) A couple relationship may exist between 2 persons whether the persons are of the same or a different gender.
(6) A couple relationship does not exist merely because 2 persons date or dated each other on a number of occasions."

This is slightly different to section 12A(2) and to (5) of the 1989 Act which provides as follows:

"12A What is an intimate personal relationship
(2) Also, an intimate personal relationship exists between 2 persons, whether or not the relationship involves or involved a relationship of a sexual nature, if--
(a) the persons date or dated each other; and
(b) their lives are or were enmeshed to the extent that the actions of 1 of them affect or affected the actions or life of the other.
(3) In deciding whether an intimate personal relationship exists under subsection (2), 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.
(4) An intimate personal relationship may exist whether the 2 persons are the same or the opposite sex.
(5) The lives of 2 persons are not enmeshed merely because the persons date or dated each other on a number of occasions."

The significance of the changes include:

- It is possible, to have a cyber relationship that would be covered under the Act where the parties live in different parts of the State, have never met but have had daily contact on Facebook, Twitter, text message and by phone. It was problematic as to whether that could happen under the old s.12A
- The reference to "enmeshment" which was always a struggle to determine as to whether or not someone was in an intimate personal relationship with someone else, has been removed.
- The shopping list has been lengthened.
- Even if none of the items in the shopping list have been satisfied, there may still be the relationship.

Family relationship

This is defined under section 19:

> *"(1) A family relationship exists between 2 persons if 1 of them is or was the relative of the other.*
> *(2) A relative of a person is someone who is ordinarily understood to be or to have been connected to the person by blood or marriage.*
> *Examples of an individual's relatives—*
> *an individual's spouse, child (including a child 18 years or more), stepchild, parent, step-parent, sibling, grandparent, aunt, nephew, cousin, half-brother, mother-in-law or aunt-in-law*
> *Examples of an individual's former relatives—*
> *• the person who would be the individual's mother-in-law if the individual was still in a spousal relationship with the person's son or daughter*
> *• the person who would be the step-parent of the individual if the spousal relationship between the person and the person's former spouse, the individual's parent, had not ended*
> *• the individual's step-siblings when the parent they do not have in common has died*
> *(3) For deciding if someone is connected by marriage, any 2 persons who are or were spouses of each other are considered to be or to have been married to each other.*
> *(4) A relative of a person (the first person) is also either of the following persons if it is or was reasonable to regard the person as a relative especially considering that for some people the concept of a relative may be wider than is ordinarily understood—*
> *(a) a person whom the first person regards or regarded as a relative;*
> *(b) a person who regards or regarded himself or herself as a relative of the first person.*
> *Examples of people who may have a wider concept of a relative—*
> *• Aboriginal people*
> *• Torres Strait Islanders*
> *• members of certain communities with non-English speaking backgrounds*
> *• people with particular religious beliefs*
> *(5) In deciding if a person is a relative of someone else—*
> *(a) a subsection of this section must not be used to limit another subsection of this section; and*
> *(b) each subsection is to have effect even though, as a result, a person may be considered to be a relative who would not ordinarily be understood to be a relative."*

It is the same as the definition under the 1989 Act in section 12B.

Informal care relationship

This is provided for under section 20:

> *"(1) An informal care relationship exists between 2 persons if 1 of them is or was dependent on the other person (the carer) for help in an activity of daily living.*
> *Examples of help in an activity of daily living—*
> *• dressing or other personal grooming of a person*
> *• preparing a person's meals or helping a person with eating meals*
> *• shopping for a person's groceries*
> *• telephoning a specialist to make a medical appointment for a person*
> *(2) An informal care relationship does not exist between a child and a parent of a child.*
> *(3) An informal care relationship does not exist between 2 persons if 1 person helps the other person in an activity of daily living under a commercial arrangement.*
> *Example for subsection (3)—*
> *The relationship between a person and a nurse who visits the person each day to help with bathing and physiotherapy is not an informal care relationship because the nurse visits the person under a commercial arrangement made between the person and the nurse's employer.*
> *(4) For subsection (3)—*
> *(a) a commercial arrangement may exist even if a person does not pay a fee for the help provided under the arrangement; and*
> *Example for paragraph (a)—*
> *The provision of help by a voluntary organisation for which a person does not pay a fee may still be under a commercial arrangement.*
> *(b) an arrangement is not a commercial arrangement because 1 person receives a pension or allowance, or reimbursement for the purchase price of goods, for the help provided under the arrangement; and*
> *(c) an arrangement is not a commercial arrangement if 1person pays a fee for the help provided under the arrangement because of domestic violence committed by the other person."*

There is no change between that definition and the definition under section 12 of the 1989 Act.

Ground 2: Domestic violence

Minister Struthers stated in the second reading speech:

> *"A significant area of reform is the definition of domestic violence contained in the bill. The definition of domestic violence has significant implications for how this type of violence is identified and treated by police, the courts, support services and the community. To enable effective responses to domestic and family violence in Queensland, the bill includes a wider and more contemporary definition of domestic violence. A contemporary understanding of domestic violence refers to a person being subjected to an ongoing pattern of abusive behaviour by an intimate partner or family member. This behaviour is motivated by a desire to dominate, control and oppress and to cause fear. Although any act of aggression in a relationship is unacceptable, domestic violence refers to this particular type of abuse. It is this type of abuse that is the focus of the bill.*
>
> *The definition of domestic violence included in the bill is wider than the definition in the current domestic violence laws. It includes behaviour that is physically or sexually abusive; emotionally, psychologically or economically abusive; threatening or coercive; or behaviour that in any other way controls or dominates another person causing fear. By*

including this wider definition, the breadth of behaviours used to control and dominate in a relationship characterised by domestic violence will be captured. This means that police, magistrates, lawyers and members of the public will be more readily able to identify situations where domestic violence has occurred. This change is consistent with the views expressed during consultation and with the recommendations made by the Australian Law Reform Commission in its report Family violence—a national legal response released in November 2010."

The explanatory notes state:

"Definition of domestic violence

The Domestic and Family Violence Protection Act 1989 currently defines domestic violence through a series of specific behaviours, including wilful injury, wilful damage of property, intimidation or harassment of a person, and indecent behaviour without a person's consent.

The definition of 'domestic violence' set out in clause 8 of the Bill reflects the contemporary understanding of domestic violence, and includes behaviour that is physically or sexually abusive, emotionally, psychologically or economically abusive, threatening or coercive, or behaviour that in any other way controls or dominates another person causing fear.

This definition takes account of recommendations made by the Australian Law Reform Commission in its Family Violence – A National Legal Response report, released in November 2010, current research, feedback from consultation and definitions used in other jurisdictions.

The definition of domestic violence is contained in section 8 which provides:

Meaning of domestic violence
" (1) ***Domestic violence*** *means behaviour by a person (the* ***first person****) towards another person (the* ***second person****) with whom the first person is in a relevant relationship that—*
(a) is physically or sexually abusive; or
(b) is emotionally or psychologically abusive; or
(c) is economically abusive; or
(d) is threatening; or
(e) is coercive; or
(f) in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.
(2) Without limiting subsection (1), domestic violence includes the following behaviour—
(a) causing personal injury to a person or threatening to do so;
(b) coercing a person to engage in sexual activity or attempting to do so;
(c) damaging a person's property or threatening to do so;
(d) depriving a person of the person's liberty or threatening to do so;
(e) threatening a person with the death or injury of the person, a child of the person, or someone else;
(f) threatening to commit suicide or self-harm so as to torment, intimidate or frighten the person to whom the behaviour is directed;
(g) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the person to whom the behaviour is directed, so as to control, dominate or coerce the person;

(h) unauthorised surveillance of a person;
(i) unlawfully stalking a person.
(3) A person who counsels or procures someone else to engage in behaviour that, if engaged in by the person, would be domestic violence is taken to have committed domestic violence.
(4) To remove any doubt, it is declared that, for behaviour mentioned in subsection (2) that may constitute a criminal offence, a court may make an order under this Act on the basis that the behaviour is domestic violence even if the behaviour is not proved beyond a reasonable doubt.
(5) In this section—
***coerce**, a person, means compel or force a person to do, or refrain from doing, something.*
***unauthorised surveillance**, of a person, means the unreasonable monitoring or tracking of the person's movements, activities or interpersonal associations without the person's consent, including, for example, by using technology.*
***unlawful stalking** see the Criminal Code, section 359B."*

The definition is very similar to the definition of "family violence" to take effect in June 2012 as set out above under the *Family Law Act*.

The definition of "domestic violence" is significantly wider, at first blush, than the definition under the 1989 Act.

Comparison of new and old definitions

New[8]	**Old**[9]
Physically abusive.	Wilful injury.
Comment: *Physically abusive* is considerably different from *wilful injury* as the former does not require actual injuries.	
Sexually abusive.	Indecent behaviour to the other person without consent.
Emotionally abusive.	Intimidation or harassment.
Psychologically abusive.	Intimidation or harassment.
Economically abusive.	No direct comparison unless it was able to be shown to have been intimidation or harassment.
Threatening.	Threat to commit wilful injury, wilful damage, intimidation or harassment or indecent behaviour to the other person without consent; or intimidation.
Coercive.	Intimidation.
In any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.	No direct comparison, although it may be intimidation, harassment or threat.

Examples under section 8(2)	
New	**Old**
Causing personal injury to a person or	Wilful injury or threat to commit that act.

[8] Section 8 Domestic and Family Violence Protection Act 1989.
[9] Section 11 Domestic and Family Violence Protection Act 1989.

threatening to do so.	
Coercing a person to engage in sexual activity or attempting to do so.	This was problematic as the previous definition required "without consent", whereas the consent may have been given under coercion. Coercive behaviour may have been intimidation or harassment.

Ground 3: Necessary or desirable

The explanatory notes state:

> *The current grounds of which a court must be satisfied in determining whether or not to make a protection order are that:*
>
> - *an act of domestic violence has occurred;*
> - *a domestic relationship exists; and*
> - *the person who committed domestic violence is likely to commit domestic violence again or, if the act of domestic violence was a threat, that the person is likely to carry out the threat.*
>
> *The Bill replaces the 'likelihood' element with a requirement that a court be satisfied that an order is necessary or desirable to protect an aggrieved from domestic violence.* ***This change focuses the court on the protective needs of the aggrieved and whether imposing conditions on the respondent's behaviour is necessary or desirable to meet these needs. The court may still consider evidence which suggests that domestic violence may occur again, or a threat may be carried out, however the court does not need to be satisfied that such an event is 'likely'. Further, a court can look at other factors, including whether an aggrieved is in fear, when it is determining this element.***
>
> ***The new grounds also require a court to consider the guiding principles in deciding whether an order is necessary or desirable for the protection of the aggrieved. The priority of the Bill is the safety and wellbeing of the aggrieved and the grounds for making a protection order are directed toward achieving this aim.*** *These measures are also consistent with the objective of ensuring that orders are only made for the benefit of the person who is in need of protection and are intended to reduce inappropriate cross applications and cross-orders."*(emphasis added)

There is also a qualifier contained in section 37(2):

> ***"****(2 In deciding whether a protection order is necessary or desirable to protect the aggrieved from domestic violence, the court—*
> *(a) must consider the principles mentioned in section 4; and*
> *(b) may consider whether a voluntary intervention order has previously been made against the respondent and whether the respondent has complied with the order."*

A voluntary intervention order requires the respondent to attend a perpetrator's program but the court may only make or amend a voluntary intervention order if the respondent:

A. is present in court; and
B. agrees to the order being made or amended; and
C. agrees to comply with the order as made or amended .

Minister Struthers stated in the second reading speech:

> *"Intervention order*
>
> *The Bill also provides for an order to be made requiring a respondent to attend an approved intervention program or counselling. The current Act provides a broad power for courts to impose conditions that the court considers necessary and desirable in the interests of the aggrieved, any named person and the respondent. It is not clear whether this power extends to ordering a respondent to attend a program or counselling. The Bill provides a clear power for the court to make an order requiring a respondent to attend an approved intervention program or counselling."*

Who can a domestic violence order protect?

There is greater clarification as to who is protected. Section 24 provides:

> *"(1) As well as the aggrieved, the following persons can be protected by a domestic violence order—*
> *(a) a child of the aggrieved;*
> *(b) a child who usually lives with the aggrieved;*
> *(c) a relative of the aggrieved;*
> *(d) an associate of the aggrieved.*
> *(2) A **child who usually lives with the aggrieved** means a child who spends time at the residence of the aggrieved on a regular or on-going basis.*
> *(3) An **associate** of the aggrieved means either of the following persons if it is reasonable to regard the person as an associate—*
> *(a) a person whom the aggrieved regards as an associate;*
> *(b) a person who regards himself or herself as an associate of the aggrieved.*
> *Examples of persons who could be associates of the aggrieved—*
> *• a person who is the current spouse or partner of the aggrieved*
> *• a person who works at the same place as the aggrieved*
> *• a person who lives at the same place as the aggrieved*
> *• a person who provides support or assistance to the aggrieved, including, for example, a friend or neighbour*
> *(4) A person mentioned in subsection (1) is protected by being specifically named in the domestic violence order under section 52 or 53.*
> *(5) The person may be specifically named in the domestic violence order when it is made or at a later time if it is varied.*
> *(6) The specifically named person is called a **named person**."*

The new section 24 specifically refers to "child of the aggrieved" and "the child who usually lives with the aggrieved".

Example of a child who usually lives with the aggrieved

Fred and Ethel are married. It is their second marriage. Ethel was previously married to Ricky. Ethel and Ricky have a child, Lucy. Due to the long distance between Ricky and Ethel, Lucy lives with Ricky full time, but spends her holidays with Fred and Ethel. If Fred were the aggrieved, then Lucy is the child who usually lives with the aggrieved as she "spends time at the residence" of Fred and Ethel "on a regular or on-going basis".

The explanatory notes state as to naming children on orders:

> *"Currently, the Domestic and Family Violence Protection Act 1989 does not provide any specific guidance to a court when it is considering whether to include a child as a named person on a domestic violence order. When a person, including a child, is named on an order, the respondent's behaviour towards the named person is subject to the conditions which relate to that person. The general requirements for including a relative or associate on an order apply, and these refer to the occurrence, or likely occurrence, of an act of 'associated domestic violence', which is violence directed at a relative or associate.*
>
> *The effects on children of witnessing or being exposed to domestic violence are well documented and can include medium and long term psychological harm. The Bill includes specific considerations for including children on orders which include whether naming the child is necessary or desirable to protect the child from being exposed to domestic violence.*
>
> *What it means for a child to be 'exposed' to domestic violence is defined in clause 10 as the child seeing or hearing, or otherwise experiencing the effects of domestic violence committed by a respondent. A non-exhaustive list of examples of being exposed to domestic violence is set out in the provision."*

Section 10 of the Act provides:

> *"A child is exposed to domestic violence if the child sees or hears domestic violence or otherwise experiences the effects of domestic violence.*
>
> *Examples of being exposed to domestic violence:*
>
> *overhearing threats of physical abuse*
>
> *overhearing repeated derogatory taunts, including racial taunts*
>
> *experiencing financial stress arising from economic abuse*
>
> *seeing or hearing an assault*
>
> *comforting or providing assistance to a person who has been physically abused*
>
> *observing bruising or other injuries of a person who has been physically abused*
>
> *cleaning up a site after property has been damaged*
>
> *being present at a domestic violence incident that is attended by police officers"*

The definition is the same as that contained in amendments to the Family Law Act that take effect in June, 2012.

Who can apply for a protection order?

Section 25 sets out who can apply:[10]

[10] See also section 32.

- An aggrieved;
- An authorised person for an aggrieved;
- A relevant police officer;
- A person acting under another Act for the aggrieved, for example a guardian for a personal matter or an attorney for a personal matter.

There is no substantive change to these provisions as compared to section 14 of the 1999 Act.

Temporary protection orders

Section 27 sets out the bases for making temporary protection orders:

- Police officer applies for a temporary protection order.
- The applicant has sought a temporary ex-parte variation.
- The applicant for a protection order has sought an ex-parte order.
- There is the adjournment of the hearing of an application for a protection order.[11]
- The court adjourns the hearing of an application for a variation of a domestic violence order.[12]
- The court adjourns the making of a protection order on its own initiative in sentencing proceedings.[13]
- The court adjourns Children's Court proceedings in which the court on its own initiative makes a protection order.[14]

The test is essentially the same as under the 1989 Act. The court has to be satisfied before it makes a temporary protection order that:

- A relevant relationship exists between the aggrieved and the respondent; and
- That the respondent has committed domestic violence against the aggrieved.

However, neither of these is required if a temporary protection order is sought as part of a variation of an existing protection order presumably because a court would have been satisfied previously about a relevant relationship existing and that presumably the purpose of the order is to prevent further acts of domestic violence occurring when there is already an order prohibiting acts of domestic violence. The evidence required for obtaining a temporary protection order is only "that the court considers sufficient and appropriate having regard to the temporary nature of the order" [15] which is a repeat of the requirement under the 1989 Act[16].

The test for temporary protection orders in variation applications is that the court must be satisfied "that the temporary protection order is necessary or desirable to protect the aggrieved, or another person named in the domestic violence order, from domestic violence, pending a decision on the application for the variation."[17]

Mandatory conditions

There will be two mandatory conditions:[18]

[11] Section 44(a).
[12] Section 44(b).
[13] Sections 42, 44(c).
[14] Sections 43, 44(c).
[15] Section 46.
[16] Section 39A(2).
[17] Section 48(2).
[18] Sections 28 and 56(1)(a).

1. The respondent must be of good behaviour and must not commit domestic violence or associated domestic violence.

2. If a child of the aggrieved, or a child who usually lives with the aggrieved, is a named person in the order, the respondent must not expose the child to domestic violence.

Service of applications

An application for a protection order must be personally served by a police officer on the respondent.[19]

Cross applications

The courts will have the ability if an application is made in one court and a cross application is filed in another court to transfer the matter to the other court or to hear both applications together.[20]

There will still be the requirement to serve the cross application at least one business day before the day of the hearing of the original application;[21] remembering that service now must be effected by police.[22]

Minister Struthers stated in the second reading speech about cross applications:

> *"The Bill's objective is to ensure that victims of domestic and family violence are provided with protection against future acts of domestic violence. One of the issues I have been particularly interested in addressing in the Bill is the concerning number of cross-applications that come before the court under the current legislation. This is where each party to a matter alleges domestic violence against the other.*
>
> *During consultation, stakeholders reported a disproportionate number of cross-applications and expressed the concern that in many instances domestic violence orders are made against both people involved. This is inconsistent with an understanding of domestic violence that comprises one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them. It is not reasonable to accept, except in exceptional circumstances, that both people in a relationship can be a victim and perpetrator of this type of violence. For example, violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken.*
>
> *It is disturbing that legislation with the purpose of providing for the safety of victims of domestic violence appears to be used, in some instances, to further victimise vulnerable Queenslanders. Often in these circumstances, victims of violence consent to orders against them to avoid further court appearances or the prospect of a hearing which will require them to give evidence before the court. This is contrary to the purpose of the laws and does not provide a fair outcome to victims.*
>
> *As a result of this feedback, the Bligh Government is refocusing the law to ensure that the person most in need of protection is identified. This will be achieved by including guidance in the principles for administering the Act. As mentioned earlier, the Bill*

[19] Section 34(1).
[20] Section 41(2).
[21] Section 49(1)(c).
[22] Section 34(1).

provides for an overarching principle that the safety, protection and wellbeing of people who fear or experience domestic violence is paramount.

One of the five principles that sit under the priority principle is that, where there are conflicting accounts of domestic violence or indications that both people in a relationship are committing acts of violence, including for their self-protection, the person who is most in need of protection should be identified.

A further measure to reduce the number of cross-applications is included in the provisions relating to the making of police protection notices. The Bill does not permit cross-notices being issued. It is likely that this provision will reduce the number of cross-orders that are ultimately made."

Changes with ex-parte orders

There is a significant changes as to the test required in obtaining ex-parte orders. It is expected that it will be considerably easier to obtain them. Under the 1989 Act, the requirement was that it appeared to the court:

(a) The aggrieved or a named person is in danger of personal injury; or
(b) Property of the aggrieved or a named person is in danger of substantial damage.

From talking to various domestic violence advocates, it appears that different magistrates had different views of that section. Some followed it literally. Others were much more liberal in making temporary protection orders on an ex-parte basis.

The new test will merely be whether the court *"is satisfied that the making of a temporary protection order despite the respondent having not been served with the application is necessary or desirable to protect the aggrieved, or another person named in the application, from domestic violence".*[23]

Consent orders

Under the 1989 Act there has been a controversy between the views of some magistrates that before a consent order can be made the magistrate must be satisfied, based on the application before him or her that an act or a number of acts of domestic violence have occurred and that, therefore, further acts are likely; and the views of other magistrates that because the form has been agreed to then that is all that is required.[24]

There has also been differing practice as to whether or not orders can be made on a "without admission" basis. Some magistrates from my experience have readily done so and others have refused, saying that it is not provided for in the legislation.

There will now be two requirements:

1. There is a consent of the parties to the making of an order or the parties do not oppose the making of the order.
2. The court must be satisfied the relevant relationship exists between the aggrieved and the respondent.[25]

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[23] Section 47(2).
[24] Section 33 of the *1989 Act*.
[25] Section 51.

Significantly the court does not need to be satisfied that there have been acts of domestic violence or that the protection order is necessary or desirable to protect the aggrieved from domestic violence.[26] This may be significant for those with proceedings under the *Family Law Act*, or those who may have issues under the *Migration Regulations*.

The form of order can be made *"whether or not the respondent admits to any or all of the particulars of the application"*.[27]

The order cannot be consented to by an aggrieved when it is a police application unless the aggrieved is not present in court and cannot, after all reasonable enquiries, be contacted to give consent and the applicant police officer reasonably believes that the order promotes the safety, protection and wellbeing of the aggrieved, and any named person or any child affected by the order.[28] Children and associates will be named separately.[29] The court can conduct a hearing in relation to the particulars of the application before making a consent order;[30] and may refuse to make or vary an order if it believes in doing so *"may pose a risk to the safety of an aggrieved, any named person, or any child affected by the order"*.[31]

The test in relation to associates is that naming the relative or associate *"is necessary or desirable to protect the relative or associate from associated domestic violence"*.[32] The test in relation to children is that:

> *"naming the child in the order is necessary or desirable to protect the child from –*
> *(a) Associated domestic violence; or*
> *(b) Being exposed to domestic violence committed by the respondent."*[33]

The test under the 1989 Act was that the associate had either been subject to domestic violence or that it was *"likely"*. The change in words here is significant. The criticism of domestic violence advocates of some magistrates was that even in cases where the respondent had punched the aggrieved in the face when the aggrieved was holding the baby, it was not "likely" that the baby would be subjected to associated domestic violence. Clearly under this test it would be necessary or desirable to protect the child from being exposed to domestic violence.

There will now be a requirement upon the court to enquire as to whether there are any children, irrespective of whether their names are mentioned in the application.[34] The clear inference from the legislation is an intention wherever possible for children to be named.

There is also the requirement to obtain information from the Department of Communities (Child Safety Services) if the respondent contests the naming of the child in the order or the imposition of any conditions concerning the child.[35]

If there is a named person who is an adult there is a standard condition that the respondent is to be of good behaviour towards and not commit associated domestic violence against them.[36] If

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[26] Section 51.
[27] Section 51(1)(c).
[28] Section 51(4).
[29] Sections 52 and 53.
[30] Section 51(5).
[31] Section 51(6).
[32] Section 52.
[33] Section 53.
[34] Section 54.
[35] Section 55.
[36] Section 56(1)(b).

there is a named person who is a child the standard condition is to be of good behaviour towards the child, not commit associated domestic violence against the child and not expose the child to domestic violence.[37]

Other conditions

The court may impose any other condition the court considers necessary in the circumstances and desirable and interest to the aggrieved, any named person or the respondent.[38] The principle of paramount importance to the court must be the principle of the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.[39]

The test of "necessary" and "desirable" is identical to that under the 1989 Act (section 25(2)). The paramount importance test has changed. The 1989 Act requirement is:

> *"The following matters are to be of paramount importance to the court when it imposes conditions on the respondent –*
> *(a) the need to protect the aggrieved and any named person;*
> *(b) the welfare of the child of the aggrieved."*[40]

There are similar example conditions set out under the new Act as there were under the 1989 Act. Sections 58, 59; section 25 1989 Act.

However, there are changes:

The "no contact" provision under the 1989 Act allowed a lawyer to contact the aggrieved or named person or another person, including a lawyer to locate the aggrieved or named person for a purpose authorised by an Act.[41]

It has not been uncommon for solicitors to write letters on behalf of a respondent to the aggrieved seeking contact between the respondent and the children. To do so when there is a "no contact" order would appear to be an offence unless there were proceedings of some kind on foot at that time. This is because the definition of "lawyer" in section 60:

> *"means a lawyer who has represented the respondent in relation to a proceeding."*

In other words, if there are no proceedings on foot of any kind, then the lawyer making contact with the aggrieved when there is a "no contact" clause against the respondent may be a party to an offence, e.g., aiding and abetting the breach of a no contact order by his or her client.

There is the ability for a victim advocate to contact the aggrieved or named person.[42]

It is essential in my view that standard no-contact clauses issued by magistrates under the new Act have a standard exception for contact via lawyers, so that matters to do with children and property settlement can be negotiated without the necessity of commencing proceedings, perhaps prematurely.

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[37] Section 56(1)(c).
[38] Section 57(1).
[39] Section 57(2).
[40] Section 25(5) *1989 Act*.
[41] Section 25(7) *1989 Act*.
[42] Section 61.

No contact clauses between parents and children

There will now be a requirement that the condition:

> *"must limit contact between the respondent and the child only to the extent necessary for the child's safety, protection and wellbeing".*
> *Note – In considering whether to impose a condition, under section 57(2), the principle of paramount importance to the court must be the principle of the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount."*[43]

There is now the ability to provide for an order for the protection of an unborn child to take effect on the birth of the child.[44] The explanatory notes state:

> *"This condition will enable a court to make an order for the protection of an unborn child where an aggrieved is pregnant at the time a domestic violence order is made. The condition takes effect when the child is born. This is to address the concern that an aggrieved does not have the capacity to apply for a variation of an order to include, as a named person, a recently born child in the period of time immediately following his or her birth. This period of time can be a time where an aggrieved and a new born child are particularly vulnerable."*

Ouster orders

In addition to any other conditions that the court considers, the court needs to consider the following:

(a) Whether the aggrieved and any child living with the aggrieved can continue to live safely in the residence if the ouster condition is not made;
(b) The desirability of preventing or minimising disruption to the aggrieved and any child living with the aggrieved, including by minimising disruption to their living arrangements allowing them to continue, or return, to live in the residence;
(c) The importance of the aggrieved and any child living with the aggrieved being able to maintain social connections and support that may be disrupted or lost if they can not live in the residence;
(d) The need to ensure continuity and stability in the care of any child living with the aggrieved;
(e) The need to allow child care arrangements, education, training and employment of the aggrieved and any child living with the aggrieved to continue without interruption;
(f) The particular accommodation needs of the aggrieved and any child who may be affected by the ouster condition;
(g) The particular accommodation needs of the respondent.
Examples of particular accommodation needs for paragraphs (f) and (g) –
- accommodation needs that relate to a disability or impairment;
- accommodation needs that relate to the number, or age, of the children who require accommodation.[45]

The court must give reasons for imposing or not imposing the condition.[46] The court can impose a return condition[47] and consideration needs to be given as to whether police need to attend to supervise.[48]

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[43] Section 62(2).
[44] Section 67.
[45] Section 64(2).
[46] Section 64(3).
[47] Section 65.

Minister Struthers stated in the second reading speech:

> *"Ouster condition*
>
> *The Bill includes greater guidance for the court when considering whether to make ouster conditions. The court will also be required to provide reasons if it does not impose an ouster condition when it is sought.*
>
> *Ouster conditions prevent a respondent from remaining at, entering or attempting to enter certain premises. This may include premises where the respondent and the aggrieved live or lived together, or where the aggrieved or a named person lives, works or frequently goes. The ouster condition can also apply to premises in which the respondent has a legal interest, such as a property owner or tenant.*
>
> *Exposure to, or fear of, domestic violence is a leading cause of homelessness. It is easier to find accommodation for a single person than for a mother and children. The Bill increases the clarity about the considerations for the court in order to ensure that ouster conditions are made safely, to protect victims of violence.*
>
> *The other important feature of ouster provisions is that disruption is minimised for the victim of violence. This extends further than living arrangements and includes people's social and community connections. Maintaining connections and supports can be critical to the ability of victims of violence, including children, to recover after the experience of living with, or being exposed to, domestic violence."*

The explanatory notes state:

> *"The Bill proposes that a court can issue an ouster condition that prevents a respondent from remaining at premises, entering or attempting to enter premises, or approaching within a stated distance of premises (clause 63(1)). This condition can apply to premises in which the respondent has a legal or equitable interest, or where the aggrieved and respondent live or have lived together (clause 63(2)).*
>
> *The making of an ouster condition impacts on the rights and liberties of an individual.*
>
> *The effect of an ouster condition is largely carried over from the provisions of the Domestic and Family Violence Protection Act 1989 (sections 25 and 25A). Additional guidance is provided in the Bill about the matters that are to be considered by a court when it is deciding whether to make an ouster condition (clause 64(2)). Also, clause 64(3) requires a court to give reasons for imposing or not imposing an ouster condition when one is sought.*
>
> *The overriding consideration for the court in deciding whether to impose any condition, including an ouster condition, is that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount. Further, the court only considers whether to impose conditions on a respondent after first deciding that the respondent has committed domestic violence against the aggrieved.*
>
> *The matters to be considered by a court include a number of matters specific to the needs of the aggrieved and any child living with the aggrieved (clause 64(2)(a) to (f)) and the accommodation needs of the respondent (clause 64(2)(g)). By setting out these specific*

[48] Section 66.

considerations, the court will have increased guidance on matters relevant to the safety, welfare and wellbeing of the aggrieved and any children of the aggrieved in imposing an ouster condition, while retaining the need to consider the accommodation needs of the respondent.

Although the Bill does not prevent an ouster condition being made in the absence of notice to a respondent, this should only occur in situations where a temporary order is sought on an urgent basis before there is an opportunity to serve a respondent (clause 47). The ouster condition only becomes enforceable once the respondent is served. The respondent will have the opportunity to present submissions to the court at the next return date.

The considerations included in the ouster provisions enable the court to balance considerations relevant to the safety and welfare of the aggrieved and any children of the aggrieved with the accommodation needs of the respondent. The processes in the Bill for hearing matters ensure that a respondent is provided with an opportunity to respond to an application for an ouster condition. In addition, the requirement to provide reasons ensures there is transparency in how the considerations have been applied in the decision-making process."

Disclosure of family law orders

There is a positive obligation to an applicant to disclose any family law order.[49] This is defined as any order, injunction, undertaking, plan or recognisance mentioned in section 68R of the *Family Law Act* or the equivalent section 176 of the *Family Court Act 1997* (WA).[50] Those orders are:

(a) *A parenting order, to the extent to which it provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child; or*
(b) *A recovery order (as defined in section 67Q) or any other order under this Act, to the extent to which it expressly or impliedly requires or authorises a person to spend time with the child; or*
(c) *An injunction granted under section 68B or 114, to the extent to which it expressly or impliedly requires or authorises a person to spend time with the child; or*
(d) *To the extent to which it expressly or impliedly requires or authorises a person to spend time with the child;*
    (i) an undertaking given to, and accepted by, a court exercising jurisdiction under this Act; or
    (ii) a registered parenting plan within the meaning of ss.63C(6); or
    (iii) a recognisance entered into under an order under this Act.[51]

Section 68R

This has been seen as a rarely used provision. This section of the *Family Law Act* enables magistrates to make temporary, 21 day variations or suspensions of contact or residence orders. It has proved very difficult at times to persuade magistrates to exercise power under section 68R. Indeed, magistrates at times have not known of the existence of section 68R.

[49] Section 77.
[50] Section 76.
[51] Section 68R(1) *Family Law Act.*

There is now a positive requirement before making or varying any domestic violence order for the court to have regard to any family law order of which the court has been informed and if there is any order by which contact may have been ordered:

> "*consider whether to exercise its power, under the Family Law Act 1975 (Cth), section 68R … to revive, vary, discharge or suspend the family law order"*.[52]

There are two significant limitations on that power under section 68R:

- The court must not diminish the standard of protection given by a domestic violence order for the purpose of facilitating consistency with the family law order.[53] In other words, the court can decide to make a protection order that is seemingly at odds with an order under the *Family Law Act*.

- The court must give the parties to the proceeding a reasonable opportunity to present evidence and to prepare and make submissions about the exercise of the power,[54] but that limitation does not apply if the court is deciding whether or not to make an ex-parte temporary protection order.[55]

Variation applications

An application for a variation may be made by:

- The aggrieved;
- The respondent;
- A named person;
- An authorised person for the aggrieved;
- A person acting under another Act for the aggrieved, respondent or a named person; or
- A police officer.[56]

The application must:

- Be in the approved form;
- State the grounds on which it is made;
- State the nature of the variation sought;
- If not made by a police officer – be verified by a statutory declaration;
- Be filed in the court.[57]

A named person may only seek variation in relation to the naming of that person in the order or a condition relating to the named person.[58]

There is no longer the requirement to serve the application on the Commissioner of Police,[59] but instead the Clerk of the Court gives a copy to the closest police station "where the respondent lives or was last known to live".[60] Significantly, however, under section 95 a court must not vary

[52] Section 78(1)(b).
[53] Section 78(2).
[54] Section 79(3).
[55] Section 78(4), section 47.
[56] Section 86.
[57] Section 86(2).
[58] Section 86(4).
[59] Section 51(4)(b) *1989 Act*.
[60] Section 87(2)(b)(ii).

a domestic violence order unless it is satisfied that the Police Commissioner has been given a copy. The Police Commissioner is notified by the Clerk of the Court which must occur within one business day after the day of the application is made or an order is granted[61].

There is a requirement that if the applicant is anyone other than the respondent the application must be served by police on the respondent[62] and if the application for a variation is the respondent it must be served on the aggrieved and "any named person who is affected by the application for the variation"[63] which presumably would include the parties' children.

Applicants for variation other than the respondent may seek that the matter be heard ex-parte.[64]

The court must consider whether a variation proposed to be made may adversely affect the safety, protection or wellbeing of the aggrieved or any named person. When considering whether to make the variation the court must have regard to –

(a) An expressed wish of the aggrieved or named person; and
(b) Any current contact between the aggrieved or named person and the respondent; and
(c) Whether any pressure has been applied, threat has been made, to the aggrieved or named person by the respondent or someone else for the respondent; and
(d) Any other relevant matter.

Length of protection orders

They can continue to be made up to two years or for a longer period if there are special reasons.[65]

Role of police/Police protection notices

The explanatory notes state:

> *"Police functions and powers*
>
> *The Bill includes some changes to the powers that police officers have when they are responding to domestic violence incidents or dealing with people who have committed acts of domestic violence. This will increase the capacity of the police to provide quick and effective responses for victims of domestic violence. These changes include:*
>
> • *Obligation of police officer to investigate domestic violence: The Domestic and Family Violence Protection Act 1989 places an obligation on a police officer to investigate suspected domestic violence and to take action, as appropriate, to respond. The Bill makes it clear that* ***this obligation is in addition to a police officer's responsibility to investigate a criminal offence*** *and also includes a requirement for an officer to make a written record of his or her reasons for not taking any action after an investigation.*
> • *New power to issue a police protection notice: A police protection notice is a short-term response to low to medium-level domestic violence incidents that will provide immediate protection to the aggrieved. A notice will act as an*

[61] Section 95
[62] Section 88(1).
[63] Section 88(3).
[64] Section 90(2).
[65] Section 97.

application to the court for a protection order. A police protection notice also includes the option of a 24 hour 'cool-down' condition, whereby the respondent to the notice is required to leave a stated premises and not approach or contact the aggrieved during the 'cool-down' period. A respondent who breaches a notice can be charged with an offence which may result in up to 2 years imprisonment. Police protection notices will be particularly effective in remote and rural areas where courts sit less frequently.

- *Police powers of detention: The detention powers of police are to be used in high risk situations, where there is a danger of injury to a person or damage to a person's property. The proposed changes will allow a person's detention to continue for up to 8 hours while a person is intoxicated and incapable of understanding the requirements of an order, application, or release conditions, and for up to 4 hours where a person's demeanour may present an ongoing danger of injury or property damage. Police officers will also have the ability to apply to a magistrate for an extension of the initial four hour detention period for a further four hours in limited circumstances. The detention powers are subject to strict requirements and include obligations to record particulars about the detention in the enforcement acts register that is required to be kept under the Police Powers and Responsibilities Act 2000.*

- *Power to require a respondent to remain for the purpose of service:*

This power will enable police to require a person named as a respondent to an application or order to remain at a location for the time reasonably necessary for the police officer to serve the respondent or advise the respondent of the conditions of an order if the officer does not have a copy of the order. This power will also apply while a police protection notice is issued and served. This will improve the safety of victims of domestic and family violence by increasing the opportunities for police to ensure that service requirements are met which means that protection orders can be made by the court and domestic violence orders can be enforced."(emphasis added)

In addition to taking the respondent into custody at the scene, the police can, instead, issue a notice at the scene naming the respondent as a respondent, stating that the respondent must be of good behaviour towards the aggrieved and must not commit domestic violence against the aggrieved and have a cool-down condition lasting not greater than 24 hours prohibiting the respondent from doing any or all of the following:

(a) Entering, attempting to enter, or remaining at, stated premises, or approach within the stated distance of stated premises;
(b) Approaching, attempting to approach, within a stated distance of the aggrieved;
(c) Contacting, attempting to contact, or asking someone else to contact, the aggrieved.[66]

Significantly police cannot issue a cross notice.[67]

If police issue a police protection notice that includes a cool-down condition, police must consider the accommodation needs of the respondent and take any reasonable steps necessary to ensure the respondent has access to temporary accommodation.[68] A police protection notice is taken to be an application for a protection order made by a police officer.[69] If there is a conflict

[66] Sections 101, 105, 106, 107.
[67] Section 103.
[68] Section 108.
[69] Section 112.

between a police protection notice and an existing domestic violence order and it is not possible for the respondent to comply with both, the existing domestic violence order prevails.[70]

Taking respondents into custody

Police will still have the power to do so for up to 8 hours;[71] but during which time police cannot question the respondent about their involvement in the commission of an offence or suspected offence.[72] Police can obtain an extension of the period of detention but the application to the court must be made in a way that gives the respondent or the respondent's lawyer "a reasonable opportunity to prepare and make submissions".

The extended period of detention in any case is limited to 8 hours.[73]

There is still legality for police to obtain temporary orders by fax or phone.[74]

Police will now be able to require a respondent to stay at a place for up to an hour or "a longer reasonably necessary time, having regard to the particular circumstances" to await service of an application for a protection order, a protection order or a police protection notice; it being an offence not to comply with the direction unless the person has a reasonable excuse.[75] However, the great limitation on this power is that:

> *"A police officer must remain in the presence of the person while the person remains at the appropriate place."*[76]

Court proceedings

The UCPR apply:

> *"only to the extent that –*
> *(a) this Act expressly states that a rule applies; and*
> *(b) the application of the rule is not inconsistent with this Act."*[77]

Section 142(2) sets out provisions of the UCPR that apply, set out below:

Provision that applies	**Summary**
Chapter 1 preliminary including Rule 5(3)	"In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way."
Rule 5(4)	"The court may impose appropriate sanctions if a party does not comply with these Rules or an order of the court."
Rule 8	Starting proceedings.
Rule 13	Proceeding incorrectly started by claim instead of application.
Rule 32	Oral applications may be made including to impose conditions required in the interests of

[70] Section 114.
[71] Section 119(3).
[72] Section 120.
[73] Section 123.
[74] Section 130; section 54 *1989 Act*.
[75] Section 134.
[76] Section 134(7).
[77] Section 142(1).

Provision that applies	Summary
	justice to prevent prejudice to the other parties.
Rule 94	Who may be a litigation guardian.
Rule 95	Appointment of litigation guardian.
Rule 100	Definitions for service chapter.
Rule 102	DX may be used subject to a practice direction from the Chief Justice.
Rule 103	Service to occur the same day has to occur by 4pm.
Rule 106	Manner of personal service.
Rule 109	Personal service: persons with impaired capacity.
Rule 110	Personal service: prisoners.
Rule 112	How ordinary service is performed.
Rule 116	Substituted service.
Rule 117	Informal service.
Rule 120	Affidavit of service.
Rule 121	Identity of person served.
Rule 122	Special requirements for service by fax.
Chapter 4, Part 6	Rule 123 Service outside Queensland, ie in accordance with the Service and Execution of Process Act 1992.
Chapter 4, Part 7	Ordinary service outside Australia.
Chapter 11, Part 4, other than Rules 417, 418 and 419 subpoenas.	Rule 417 An order for the payment of any loss or expense incurred in complying with the subpoena.
	Rule 418 Loss and expenses for compliance with the subpoena.
	Rule 419 Conduct money in addition to payment of amounts payable as normal witness expenses.
Chapter 18 Appellant proceedings- appeals to the Court of Appeal : Rule 971 to the extent it relates to a filing fee for an appeal.	Filing fees.
Any other provisions prescribed under a Regulation.	Not stated at this time.

Unless the application of the *Justices Act* or in respect of Children's Court proceedings the *Children's Court Act* is inconsistent with the *2012 Act*, the provisions of those Acts apply.[78]

There is the ability of the court to issue directions in relation to a particular proceeding before the court.[79]

Evidence

The test under the *1989 Act*[80] remains essentially the same, namely the court is not bound by the rules of evidence

> *"or any practices or procedures applying to courts of record"*

[78] Section 143.
[79] Section 144.
[80] Section 84 *1989 Act*.

and

"may inform itself in any way it considers appropriate".[81]

Children's witnesses

There remain the same limitations on issuing subpoenas to children to produce documents or compelling them to be witnesses.[82]

Protected witnesses

If the aggrieved, a child, or a relative or associate of the aggrieved who is named in the application that relates to the proceeding gives evidence, the court must consider whether to make any of the following orders:

(a) That the particular witness give evidence outside the courtroom by use of an AV link;
(b) That the protected witness give evidence outside the courtroom and be recorded, then replayed in the courtroom;
(c) That a screen or one way glass can be placed so that the protected witness cannot see the respondent;
(d) While the protected witness is giving evidence that the respondent be in another room with access to an AV link;
(e) That the protected witness have a support person;
(f) Accommodate the protected witness in such a way to minimise his or her distress if he or she has a physical or mental disability; and
(g) Any other alternative arrangement the court considers appropriate.[83]

If a child is the protected witness then there are mandatory requirements.[84]

Similarly if the respondent is self-represented the court may order that the respondent not cross examine the protected witness in person. If the court is satisfied that the cross examination is likely to cause a protected witness to:

(a) Suffer emotional harm or distress; or
(b) Be so intimidated as to be disadvantaged as a witness,

and if the protected witness is a child the court must make an order that the respondent may not cross examine in person.[85]

Subpoenas

Instead of summonses under the *1989 Act*, the court may issue subpoenas.[86]

Costs

Ordinarily each party bears their own costs.[87]

Costs orders can still be made if the application is:

[81] Section 145.
[82] Section 148.
[83] Section 150.
[84] Section 150(3).
[85] Section 151.
[86] Section 154.
[87] Section 157(1).

- Malicious;
- Deliberately false;
- Frivolous; or
- Vexatious.[88]

Those costs orders are made against the applicant. The significant change is a requirement that the court must *"hear"* and *"decide to dismiss"* on one of the four stated grounds. There was not previously the stated requirement to *"hear"* and *"decide"*.[89]

There has been some controversy as to whether or not magistrates can award substantial costs in cases where an application meets one of the four statutory criteria. Some magistrates have been of the view that the provisions of the UCPR apply and that therefore substantial costs orders can be made. Other magistrates have been of the view that the provisions of the *Justices Act* apply and therefore there is a very limited costs making power, namely $1,500 when instructions of preparation for the hearing including attendance on day one of the hearing, up to $250 for other court attendances other than the hearing of the complaint, and up to $875 for each day of the hearing after day one.[90]

It would appear that the quantum of costs has been decided in favour of those who follow the *Justices Act* view because the *2012 Act*, in adopting the *Justices Act* generally, does not incorporate Chapter 17A of the UCPR which deals with costs.

Confidentiality

There has been a repeat of the previous clauses relating to closed court and the restriction on publication.[91] However, there is a slight change to "publish" so that the legislation is no longer identical to s.121 of the *Family Law Act*, as the explanatory notes state:

> *"Publish is defined in clause 159(3) in terms of publishing 'to the public'. This is wider than the current meaning of publish in section 82 of the Domestic and Family Violence Protection Act 1989, which also refers to 'a section of the public'. This means that the Bill does not need to specify all of the exemptions that are referred to in the current provision. The proposed definition of publish will not include a person who is required to copy or forward documents to another person where this is undertaken in the course of representing or assisting a person who is involved in proceedings.*
>
> *The exceptions, set out in clause 159(2), include: circumstances where the court orders publication; notices which are displayed in court; publication of genuine research or in a recognised series of law reports, where individuals are not able to be identified; or where consent has been obtained by the individuals to whom the information relates.*
>
> *It is considered that these provisions effectively balance the need to protect individuals from the publication of highly sensitive and personal information and the need to facilitate the openness and accountability of court processes. Court processes are still subject to scrutiny, through publication in recognised law reports and genuine research, and also through the appeal provisions in part 5, division 5 of the Bill. Further, a court has the discretion to open a court in appropriate circumstances."*

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[88] Section 157(2).
[89] Section 61 *1989 Act.*
[90] Schedule 2 *Justices Regulation 2004.*
[91] Sections 158, 159; 81; 82 *1989 Act.*

There is a general prohibition on supplying of copies of the court documents.[92]

Appeals

Appeals are required to be filed within 28 days.[93] An appeal must be started on the evidence of proceedings before the court that made the decision being appealed, however the appellant court may order the appeal be heard afresh, in whole or part.[94]

Registration of interstate orders

These can still be registered.

Offence of breach of order

Penalties have been beefed up. Under the *1989 Act* the maximum penalty is $4,000 or one year's imprisonment but if the respondent has previously been convicted on at least two different occasions of an offence under that section within the last three years the maximum penalty is two years.[95]

The penalty will now be $6,000 or two years imprisonment but if **an** offence has been committed in the last five years the maximum penalty is $12,000 or three years imprisonment.

The new section 180 is significant. It provides:

> ***"180 Aggrieved or named person not guilty of offence***
> *For the purposes of the Criminal Code, section 7, an aggrieved or other person named in a domestic violence order, police protection notice or release conditions, does not aid, abet, counsel or procure the commission of an offence against section 177, 178 or 179, and is not punishable as a principal offender, because the person encourages, permits or authorises conduct by the respondent that contravenes the domestic violence order, police protection notice or release conditions."*

The purpose of section 180 is clear. It is designed to ensure that aggrieveds are not charged as parties to an offence.

Example of section 180:

Wilma has obtained a protection order against Fred. The terms of the protection order include a "no contact" clause. Wilma phones Fred and leaves a message on his voicemail asking him to phone her back. He does so. Fred commits a breach of the protection order. Wilma does not, even though she *"encouraged, permitted or authorised conduct"* by Fred *"that contravenes the domestic violence order"*.

Limitation period

Offences under the *1989 Act*, as summary offences, had to be prosecuted within one year of the offence being committed. The 2012 Act says that the proceedings must be started within a year

[92] Section 160.
[93] Section 165(4).
[94] Section 168.
[95] Section 80 *1989 Act.*

after the offence is committed or "one year after the commission of the offences comes to the complainant's knowledge, but within two years after the commission of the offence".[96]

Conclusion

There has been a comprehensive rewrite of what constitutes domestic violence. The definitions under the Family Law Act and in the 2012 Act are complementary.

The changes to the Family Law Act swing the balance much more in favour of protection from violence.

As Minister Struthers indicated, the *2012 Act* is a substantial rewrite of the *1989 Act* but it maintains the overall framework of the original legislation. It continues to provide a civil response to acts of domestic violence. The *2012 Act* clearly emphasises that police have a duty to also exercise their power to investigate any possible offences and if necessary charge. It remains to be seen as to whether police will take up the challenge consistently.

It will, in my view, be considerably easier to have action taken against perpetrators of violence, easier to obtain ouster orders and considerably easier to obtain temporary protection orders. It is likely that police will issue notices on the scene commonly when they do not take the respondent into custody. We should expect that orders will now be much easier to obtain naming children.

Sending perpetrators to perpetrator courses is certainly a good step, provided the courses are of adequate quality and there is adequate funding.

It remains to be seen as to whether magistrates will decline to make mutual orders given the stated purpose of the Act that "the person who is most in need of protection should be identified".

Thank you.

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[96] Section 182.