



DEPARTMENT OF JUSTICE

DOMESTIC VIOLENCE ACT

ISSUES PAPER

Note: Any views or legal opinions expressed in this issues paper do not necessarily represent the policies of the Northern Territory Government or the Minister for Justice and Attorney-General.

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EXECUTIVE SUMMARY

Section 1: Introduction

This Issues Paper seeks comment for the review of the *Domestic Violence Act* (the DVA).

Section 2: Current Framework

The DVA, introduced in 1992, provides for a specific civil response to domestic violence, consistent with similar laws in other Australian States and Territories.

Section 3: The Extent of Domestic Violence and the Use of Restraining Orders in the Northern Territory

The use of restraining orders under the DVA has steadily increased since 1999. In particular the percentage of applications under the Act made against Indigenous men is significant.

Section 4: Relationship Between the Criminal Justice System and the DVA

The DVA provides a civil remedy for domestic violence that is separate to criminal prosecutions for domestic violence.

Has the availability of restraining orders in the Northern Territory had an impact on the use of criminal law to respond to domestic violence?

What might be included in the legislation for restraining orders to ensure that they are not used as an inappropriate alternative to criminal law responses?

Should the legislation contain legal remedies and/or responses to domestic violence in addition to the remedy of restraining orders?

Section 5: The Effectiveness of Restraining Orders

The effectiveness of restraining orders under the DVA has not been researched in the Northern Territory. Australian research on the effectiveness of similar laws in other states indicates that restraining orders can be effective in reducing violence and increasing a sense of safety for survivors of domestic violence.

Section 6: Title of the Legislation

The DVA uses the term 'domestic violence' while family violence is also widely used.

Should the Northern Territory legislation adopt a different name?

Should the legislation refer to family violence as well as, or instead of, domestic violence?

Section 7: Objectives of the Legislation

The DVA does not contain any express objectives.

Should the legislation contain specific objectives and/or principles? If so, what should they include?

Section 8: Application of the DVA

The DVA applies to a wide range of 'domestic relationships' including marriage and de facto relationships, family relationships, same sex relationships and relatives according to Aboriginal tradition or contemporary social practice.

Is the definition of domestic relationship in the DVA broad enough to include people who require protection from domestic violence?

Should the definition of domestic relationship be extended to include people who are engaged or betrothed to be married (including engagement or betrothal under cultural or religious traditions)?

Should the legislation also apply where a person is seeking to have a personal or intimate relationship with another person, or where there has been a 'dating' relationship that has not developed into an intimate relationship?

Should the legislation make provision for restraining orders to be made in cases where there is no domestic relationship?

Should the criteria that might apply to orders available for people who are not in a domestic or personal relationship be different to those that apply to orders available to people in a domestic relationship?

Section 9: Applying for a Restraining Order

A person in a domestic relationship with the defendant can apply for a restraining order under the DVA. The Police may also apply on behalf of a person.

Does the DVA adequately provide for people under the age of 18 years, and others who may not have the capacity to make an application in their own name?

Should the DVA provide a procedure for an adult, or specified class of persons such as police officers, Family and Children's Services (FACS) workers, to make an application on behalf of a child?

Is it necessary for the DVA to expressly provide that a restraining order may be made for or against a person under the age of 18 years?

The DVA sets out grounds for obtaining a restraining order.

Are the existing grounds in the DVA for making a restraining order adequate?

Is section 4(1) clear and easily applied? Do these grounds cover all of the behaviour that might occur in a violent relationship – for example sexual abuse, economic abuse, emotional abuse, intimidation?

Should the grounds for obtaining a restraining order include a test of whether the violent behaviour will continue, or that the threat is likely to be carried out? Or should restraining orders be granted solely on the basis of the defendant's prior behaviour towards the victim?

Should the legislation include matters that the Court must consider when it is deciding whether to make a restraining order? What should those considerations include?

Section 10: The Role of Police

Police have specific powers under the DVA to apply for restraining orders, and to make restraining orders. They play an important role in ensuring that people have access to the protection of a restraining order.

Does section 6 of the DVA set out clearly when police should make an application for a restraining order?

Has the introduction of restraining orders that can be made by police improved protection for people at risk of being harmed by domestic violence? Have the provisions operated fairly for people at risk of violence as well as defendants?

Should there be improved processes for police in remote areas to make applications for restraining orders using video conferencing or telephone during normal Court hours?

Should the DVA require police to take any other action, or provide assistance to victims of domestic violence?

Section 11: Making a Restraining Order

The Court has a wide discretion to make orders that are necessary or desirable to prevent the defendant acting in the apprehended manner.

This includes making an order to restrain, or limit the defendant's access to premises, including the place where the defendant is living, or an order for the return of personal property.

The DVA does not prescribe any standard orders that the Court should make as part of a restraining order, or impose any limitation on the length of an order.

Should the legislation include a provision that allows or requires the Court to make an order in related criminal proceedings?

Does the DVA give adequate guidance on when orders should be made restraining or limiting the defendant's access to premises?

Should the legislation create a presumption for orders to be made that permit an applicant with children remaining in the family home? If so, how should such a presumption apply to rented accommodation?

Have any difficulties arisen in relation to the power of the Court to make an order for the return of property? Should the term 'personal property' be defined? If so, what should it cover?

Should the legislation contain some guidance about 'standard orders' that might be made by the Court?

Should the legislation allow the Court to make orders in relation to rehabilitation and treatment programs?

Should the legislation stipulate a maximum period of time that an order can remain in force?

Should the legislation specifically give the Court the power to make an order indefinitely until it is either revoked or varied?

Should the DVA include criteria for the Court to apply when deciding whether to make an ex parte interim order?

Is there a need for the legislation to provide a specific power for the Court to make an interim order, and to adjourn the application for a further hearing?

Should the DVA provide a specific process for the Court to make an interim order where the application is being defended? For example should the DVA permit the Court to make an interim order on the basis of evidence adduced by the parties, with no cross examination of the parties or witnesses?

Do the provisions in the relation to consent order operate efficiently and effectively?

Section 12: Interstate Orders

Restraining orders (or their equivalent) made in other Australian states and territories and New Zealand can be registered in the Northern Territory. Registrations means that the interstate order is enforceable in the Northern Territory.

Should police be required to register interstate orders on the request of a person protected by the order?

Section 13: Variation and Revocation of Restraining Orders

A party to a restraining order proceeding can apply to the Court to vary or revoke an order. Police may also obtain a variation or revocation by telephone application to a Magistrate.

Should the legislation limit the circumstances in which a party can apply for variation or revocation of an order?

Should an application to extend an existing order be treated as a variation?

Section 14: Evidence and Procedure

Should the legislation provide that the Court should be closed when hearing matters under the DVA?

Should the legislation allow the Court to prohibit the publication of the details of restraining order proceedings?

Does the provision in the DVA that limits the right of an unrepresented defendant to directly cross examine the applicant operate effectively and fairly?

Should the vulnerable witness provisions in the *Evidence Act* specifically apply to applicants for restraining orders who give oral evidence in Court?

Should there be any change to the rule in the DVA regarding costs?

Section 15: Explanation of the Order

A Court making a restraining order has some obligations to explain the nature and effect of an order when it is made with the consent of both the defendant and the applicant.

Should a Court be required to give an explanation about the party's rights and obligations whenever it makes an order, including an interim order, or a variation to an order?

Should the Court also be required to give some simple written information in addition to information given verbally in Court?

Should the Court be required to give an explanation in a language and manner likely to be understood by an applicant and defendant?

Section 16: Breach of Restraining Orders: Offence and Penalties

The offence of breach of restraining order carries a maximum penalty for a first offence of \$2000 or six months imprisonment. For a second or subsequent offence the Court must impose a sentence of not less than seven days imprisonment.

The offence is classified as regulatory which means that most of the provisions in the Criminal Code in relation to criminal responsibility do not apply.

What is an appropriate penalty for the offence?

Should the offence carry a mandatory minimum penalty?

What should be the fault element for the offence?

Section 17: Appeals

Do the appeal provisions operate adequately?

Section 18 Operation of the DVA for People Who Live in Remote Areas?

What provisions should the legislation contain to facilitate access to remedies in the legislation for people in remote areas?

1 INTRODUCTION

This issues paper has been prepared to seek contributions from the community on a review of the *Domestic Violence Act* (“DVA”). The issues paper is designed to give an overview of the DVA, to identify issues that may need to be considered in the review of the DVA and to assist individuals and organisations to prepare submissions to the review.

The review of the DVA, and this issues paper, are both informed by recent Australian and international developments in relation to domestic violence laws.

Tasmania recently introduced a new *Family Violence Act 2004*. The Victorian Law Reform Commission is undertaking a review of the *Crimes (Family Violence) Act 1987*. The New South Wales Law Reform Commission delivered a report on Apprehended Violence Orders in October 2003 that makes a number of recommendations with respect to the legislation in New South Wales. Western Australia amended their *Restraining Orders Act* in 2004 to introduce a range of changes to their laws, including some specific provisions in relation to children and domestic violence.

Key date

Submissions on the review of the DVA should be made by 30 September 2006.

For further information contact

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How to make a submission

Anyone can make a submission. It can be as short and informal as a letter or email, or it can be a more substantial document. A submission does not have to address all of the issues identified in the paper, and it does not have to be confined to the issues identified in the paper. Electronic copies of submissions should also be sent whenever possible. Submissions will be publicly available.

Submissions should be sent to

Review of Domestic Violence Act
Policy Division
Department of Justice
GPO Box 1722
DARWIN NT 0801

or by email to kate.halliday@nt.gov.au

2 CURRENT FRAMEWORK

Legislation to provide for a specific civil response to domestic violence has been gradually introduced, and refined, in Australian States and Territories since the late 1980's.

The Northern Territory first introduced legislation in 1988 to specifically address domestic violence. This included amendments to the *Police Administration Act*, the *Justices Act* and the *Bail Act*.¹

A separate Act, the DVA was introduced in 1992, which gave the Court power to make a restraining order against a person who has caused personal injury to their spouse, or damage to property in the possession of their spouse, or behaved in a provocative or offensive manner toward the spouse such as was likely to lead to a breach of the peace. The Act has undergone a number of ad hoc amendments² since its introduction in 1992 with no comprehensive review.

3 THE EXTENT OF DOMESTIC VIOLENCE AND THE USE OF RESTRAINING ORDERS IN THE NORTHERN TERRITORY

Recorded data available from police and Court records can give some indication of the extent of domestic violence in the Northern Territory. It is however understood that many incidents of domestic violence are not reported to police, or do not lead to an application for a restraining order.

Court data on applications under the DVA gives a good indication of the use of restraining orders.

Table 1 shows the number of applications made under section 4 of the DVA, from 1999 to 2005. Table 2 shows applications made by Police under section 6 of the DVA.

The tables also give a breakdown of defendants to applications according to gender and Indigenous status. The number of applications lodged with the Court, and orders sought by Police under section 6, have risen steadily over this time period. Most applications are sought against men, with a significant proportion of applications sought against Indigenous men.

¹ Northern Territory, *Parliamentary Debates (Hansard)* Legislative Assembly, 30 November 1988 at 5254.

² In 1994 the DVA was amended to extend protection of the DVA to family members and others falling within a 'domestic relationship' including a wide range of blood relatives, relatives according to Aboriginal tradition and contemporary social practice, and people who reside or have resided with each other. In 1996 section 10 of the DVA was amended to require a Court that finds a person guilty of a second or subsequent offence of breach of a restraining order to impose a sentence of imprisonment of not less than seven days. In 1998 amendments to the DVA to provide that a person is in breach of a domestic violence order if they fail to comply with a perpetrator's program order, made under section 78K of the *Sentencing Act* in existence at the same time as the restraining order. In 2003 the DVA was amended so that the provisions in the Act would extend to same sex relationships. In 2005 the *Domestic Violence Amendment (Police Orders) Act 2005* amended the DVA to allow authorised police officers to issue restraining orders in certain circumstances. This Act also repealed the *Domestic Violence Amendment Act 2001* which had been passed by the Legislative Assembly but not commenced.

Table 1**Applications made under section 4 of the DVA 1999 - 2005**

Year	1999	2000	2001	2002	2003	2004	2005
Total number of applications	930	1264	1518	1580	1665	1731	2553
% of applications made against Indigenous men	67	72	74	66	72	71	72
%of applications made against non Indigenous men	17	15	14	18	14	14	13
% of applications made against Indigenous women	12	12	11	12	11	12	12
% of applications made against non indigenous women	3	2	4	3	2	2	2

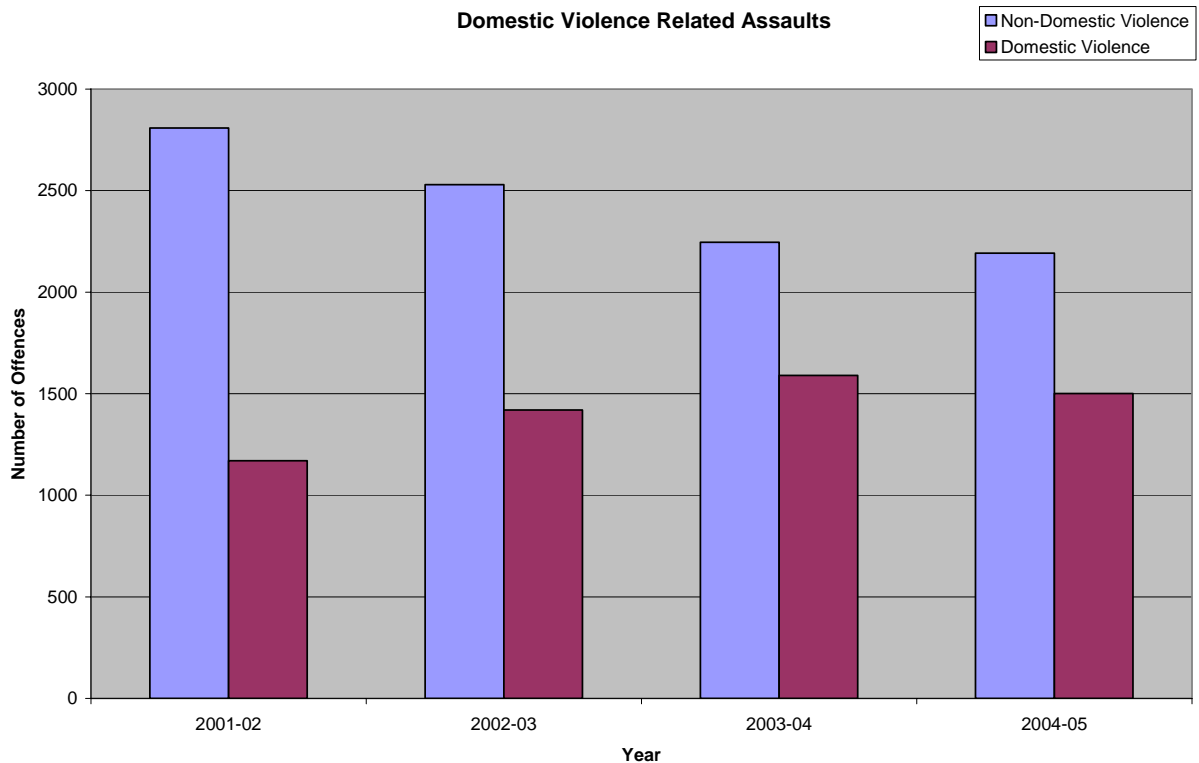
Note: percentages are rounded up to the nearest whole number, a small amount of applications are made against people where no information is recorded about gender or Indigenous status.

Table 2**Applications for urgent restraining orders (applications by Police under section 6 of the DVA) 1999 -2005**

Year	1999	2000	2001	2002	2003	2004	2005
Total number of applications	116	271	411	502	683	769	1236
% of applications made against Indigenous men	77	80	74	75	80	76	74
% of applications made against non Indigenous men	17	16	18	19	15	16	17
% of applications made against Indigenous women	5	3	7	5	4	7	9
% of applications made against non Indigenous women	0	0	1	1	1	1	2

Note: percentage figures are rounded up to the nearest whole number..

Recorded assaults are another indicator of domestic violence. The Northern Territory Crime and Justice Statistics now provide information regarding domestic violence related assaults that are reported to Police. Table 3 reproduces information compiled by the Office of Crime Prevention for the June quarter 2005 report. Again this information indicates an increase in the number of *reported* domestic violence assaults.

Table 3 Recorded domestic violence related assaults

4 RELATIONSHIP BETWEEN THE CRIMINAL JUSTICE SYSTEM AND THE DOMESTIC VIOLENCE ACT

The DVA is primarily concerned with providing a civil remedy for people experiencing domestic violence and it does not contain any offences, other than the offence of breach of a restraining order. The DVA is not concerned with criminal justice responses to DV unless a person contravenes a restraining order. It does provide Police with some additional powers to respond to domestic violence however these relate solely to the role of Police in making applications under the DVA for a restraining order, or making an interim restraining order. Proceedings under the DVA are generally heard independently of any related criminal proceedings although in practice both the Court and parties involved often seek to have matters heard together to ensure consistency.

By contrast the recent Tasmanian legislation³ aims to ‘provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence.’ This Act contains new and specific family violence offences of economic abuse⁴ and emotional abuse or intimidation.⁵ It also provides a broader framework for Police to take other forms of preventative action such as the use of risk screening and safety audits by Police.⁶ In addition, under the Tasmanian legislation, when a Court makes a family violence order it can also make orders with respect to residential tenancy agreements to overcome problems where the Court makes an order that permits a party to remain in a house that is subject to a residential tenancy agreement in the names of both parties, or solely in the name of the party no longer permitted to reside in the house.⁷

When Police attend a domestic violence incident they have considerable discretion regarding the action they take either under the DVA or the general criminal law. There is some concern that the availability of restraining orders can lead to overuse by Police in preference to arresting or charging perpetrators with criminal offences. When domestic violence restraining orders were originally introduced in Australia a number of commentators expressed concern about the risk that the availability of such orders would act as an excuse for Police and Courts to avoid the use of criminal prosecutions in relation to domestic violence.⁸

Some recent research in Queensland has explored the limited use of criminal law to respond to domestic violence, and the increasing use of restraining orders as a response to domestic violence, even in cases that involve serious allegations of violence. That research indicated that action under the criminal law was taken in a small minority of restraining order court files, even though the history of violence noted on the file in support of the application for the restraining order made serious allegations of violence. The research also identified, through interviews with domestic violence workers, concerns about the reluctance of police to treat domestic violence as criminal activity. At the same time domestic violence workers identified

³ *Family Violence Act 2004* (Tas).

⁴ Section 8 *Family Violence Act 2004* (Tas).

⁵ Section 9 *Family Violence Act 2004* (Tas).

⁶ Section 10(2)(b) *Family Violence Act 2004* (Tas).

⁷ Section 17 *Family Violence Act 2004* (Tas).

⁸ Julie Stubbs ‘The Effectiveness of Protection Orders – a National Perspective’ paper given at Challenging the Legal System’s Response to Domestic Violence Conference, Brisbane 23-26 March 1994.

that the criminal justice system did act as a deterrent to violence, and also has an important symbolic role in 'naming' domestic violence as criminal behaviour.⁹

A recent review by the Queensland Crime and Misconduct Commission also identified an issue of reliance by police attending domestic violence incidents on civil processes, and limited investigation by police of potential criminal charges in relation to those incidents.¹⁰

Issues

Has the availability of restraining orders in the Northern Territory had an impact on the use of criminal law to respond to domestic violence?

What might be included in the legislation for restraining orders to ensure that they are not used as an inappropriate alternative to criminal law responses?

Should the legislation contain legal remedies and/or responses to domestic violence in addition to the remedy of restraining orders?

5 THE EFFECTIVENESS OF RESTRAINING ORDERS

There are few evaluations of the effectiveness of protection or restraining orders in Australia. Effectiveness might be measured by a range of criteria including the cessation of violence, change in the nature and prevalence of violence, and changes in the capacity of victims of domestic violence to deal with violence and their relationship with the perpetrator. Focussing on one measure of success is likely to provide only a partial picture of the impact of the availability of restraining orders.¹¹

The effectiveness of restraining orders has not been researched in the Northern Territory. In 1992 the Darwin Community Legal Service conducted some research in relation to the effectiveness of legal assistance and support for people seeking a restraining order under section 100AB of the *Justices Act*. This research evaluated the operation of the Domestic Violence Legal Help Pilot (operated by the Darwin Community Legal Service) and concluded that the existence of the service resulted in an increase in the number of successful applications for restraining orders.¹²

Apprehended violence orders ("AVOs") under the New South Wales legislation were evaluated in 1986 and 1997. The most recent evaluation, conducted by the New South Wales Bureau of Crime Statistics and Research, had three objectives: to determine whether AVOs granted by New South Wales Local Courts reduced the risk, frequency or severity of violence experienced by protected persons from defendants, to determine whether protected persons were satisfied with the services provided by the police or chamber magistrates at the time of applying for the current

⁹ Heather Douglas and Lee Godden 'Intimate Partner Violence: Transforming Harm into a Crime' www.murdoch.edu.au/elaw/issues/v10n2

¹⁰ Queensland Crime and Misconduct Commission 'Policing Domestic Violence in Queensland Meeting the challenges' March 2005.

¹¹ See generally the discussion in Stubbs above note 15.

¹² Darwin Community Legal Service 'Domestic Violence Legal Help An evaluation on the first three months operation of the service' October 1992.

AVO and to determine whether the defendant had been drinking alcohol during any reported incidents of physical assault or threats of physical assault.¹³

The effectiveness of legal intervention for young women has also been researched as part of the Australian Longitudinal Study on Women's Health ("the Women's Health Research").¹⁴ This study focussed on the effectiveness of police intervention and Court orders for young women who reported being in a violent relationship.

The results of both of these studies indicate that protection or restraining orders are effective in reducing violence and increasing a sense of safety for survivors of domestic violence. The women's health research also indicated that both contacting the police and obtaining a Court order was more effective than only contacting the police. This research also indicated that women who seek legal protection are more likely to have experienced more severe levels of violence. The research notes that seeking legal protection rarely made things worse for the women.

The New South Wales research found that AVOs reduced, or in some cases eliminated, violence for most people participating in the survey and that this occurred even where the protected person maintained some contact with the defendant. A small proportion of people participating in the survey reported no improvement in their life after obtaining an order. The report proposes possible reasons why orders are effective in preventing violence including fear by defendants of the consequences of breaching an order, that the process provided a clear signal to the defendant that the person was serious about stopping the violent behaviour and that the Court or application process acted as a catalyst for other changes in the life of the protected person that reduced the risks of violence.

6 TITLE OF THE LEGISLATION: DOMESTIC AND FAMILY VIOLENCE

The DVA only refers to 'domestic violence'. The term family violence is also widely used to describe violent and abusive behaviour that occurs in families and in intimate relationships.

Some recent changes in other Australian jurisdictions to domestic violence laws have incorporated the use of the term family violence as well as domestic violence. The Tasmanian, Victorian, Western Australian and Queensland legislation now use the terms 'family violence' and 'domestic violence'.

Issue

Should the Northern Territory legislation adopt a different name?

Should the legislation refer to family violence as well as, or instead of, domestic violence?

¹³ Lily Tromboli and Roseanne Bonney 'An evaluation of the NSW apprehended violence order scheme' NSW Bureau of Crime Statistics and Research.

¹⁴ Margrette Young, Julie Biles and Annette Dobson 'The effectiveness of Legal Protection in the Prevention of Domestic Violence in the Lives of Young Australian Women' Trends and Issues in Crime and Criminal Justice March 2000 Australian Institute of Criminology.

7 OBJECTIVES OF THE LEGISLATION

The DVA does not contain any express objectives. It can be implied that the objectives of the DVA are to provide legal protection, additional to the criminal law, from domestic violence and to provide a mechanism for the enforcement of this legal protection.

Similar legislation in other jurisdictions often contains express objects, guiding principles or a preamble to provide a context for the application of the legislation. These can provide some indication of the overriding need to provide protection for people who have experienced domestic violence, and information about the nature and prevalence of domestic violence.

The Tasmanian *Family Violence Act 2004* contains an objects clause which states that in the administration of the Act, the safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations.¹⁵

The objectives contained in the New South Wales legislation include the protection of persons who have experienced domestic violence, the reduction and prevention of domestic violence, and the enactment of legislation that is consistent with the UN Declaration on the Elimination of Violence against Women.¹⁶

The South African *Domestic Violence Act 1998* contains a preamble which provides that:

'domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective.'

The preamble also refers to international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all forms of Discrimination Against Women and Children and the Rights of the Child.

Objectives and principles in legislation can also make a statement regarding the unacceptability of violence in relationships,¹⁷ and the need for perpetrators to take responsibility for their actions and to stop the violence.¹⁸

Issues

Should the legislation contain specific objectives and/or principles? If so, what should they include?

¹⁵ Section 3 *Family Violence Act 2004* (Tas).

¹⁶ Section 562AC(1) *Crimes Act 1900* (NSW).

¹⁷ *Domestic Violence Act 1995* (NZ).

¹⁸ Rosemary Hunter and Julie Stubbs 'Model Laws or Missed Opportunity?' 24(1) *Alternative Law Journal* 1999 12.

8 APPLICATION OF THE DVA

8.1 Who May Obtain A Restraining Order?

The DVA applies to a wide range of family and intimate relationships including same sex relationships.

Restraining orders are available to people who are in a 'domestic relationship' with the perpetrator.

A person is in a domestic relationship with another person if he or she is or has been a relative of the other person, namely:

- a spouse, father, mother, grandfather, grandmother, stepfather, stepmother, father-in-law, mother-in-law, son, daughter, granddaughter, stepson, stepdaughter, son-in-law, brother, sister, half-brother, half-sister, brother-in-law, daughter-in-law, uncle, aunt, uncle-in-law, aunt-in-law, nephew, niece or cousin;
- a relative according to Aboriginal tradition or contemporary social practice;
- a great-uncle, great-aunt, great-great-nephew, great-great-niece, great-great-grandfather, great-great-grandmother, great-great-granddaughter or great-great-grandson of the other person;
- where the person has or had the custody or guardianship of, or right of access to, the other person, or is or had been subject to the custody or guardianship of the other person or that other person has or has had a right of access to the person; and
- where a person ordinarily or regularly resides, or has resided with the other person, or is or has been a relative of a child of the other person.¹⁹

The DVA is clearly limited to violence that occurs in the context of family or intimate relationships and does not cover disputes that might arise between other people who are not related or connected in some way through family or intimate relationships, for example neighbours.

However there may be some relationships connected with family and intimate relationships that are not covered by the DVA. For example the Queensland legislation applies to people in carer relationships (where the parties do not live together), and to people who are engaged to be married (including a betrothal under cultural or religious tradition).²⁰

Issues

Is the definition of "domestic relationship" in the DVA broad enough to include people who require protection from domestic violence?

Should the definition of 'domestic relationship' be extended to include people who are engaged or betrothed to be married (including engagement or betrothal under cultural or religious tradition)?

¹⁹ Section 3 *Domestic Violence Act* (NT).

²⁰ Section 12 *Domestic and Family Violence Protection Act 1989* (Qld).

Should the legislation also apply where a person is seeking to have a personal or intimate relationship with another person, or where there has been a 'dating' relationship that has not developed into an intimate relationship?

8.2 Legal Protection For People Not In A Domestic Relationship

Restraining orders under the DVA are not available for disputes between people whose relationship does not fall within the definition of 'domestic relationship'.

In other jurisdictions the type of legal protection offered to people in family or intimate relationships is also extended to others, although in some cases this is through parallel legislation. For example in New South Wales the *Crimes Act* provides for Apprehended Domestic Violence Orders and Apprehended Personal Violence Orders (APVOs). An APVO is available for any person who fears that they will be the victim of some form of physical, psychological or emotional abuse.²¹

In the Northern Territory section 99 of the *Justices Act* provides a civil remedy for other forms of personal violence between people who are not in a domestic relationship. Under section 99 the Court, may on the complaint of any person, order that the defendant enter into a recognisance, with or without sureties to keep the peace, or to be of good behaviour towards the complainant. If the defendant fails to comply with the order, the defendant may be imprisoned for a period not exceeding six months. It is unclear whether the Court can make specific orders in relation to the future behaviour of the defendant as it can under the DVA and the terms of an order under section 99 are generally limited to requiring the person subject to the order to keep the peace, or be of good behaviour.

One problem in relation to orders made under section 99 of the *Justices Act* is that they are not enforceable by the police. Where the defendant breaches an order made under section 99 the original complainant must file a further complaint with the Court.

The Australian Capital Territory legislation combines family violence orders and personal violence orders in the *Domestic Violence and Protection Orders Act 2001*. The Court may make a personal violence order if it is satisfied that the respondent has engaged in personal violence towards the aggrieved person, and may engage in personal violence during the period during which the order is proposed to operate.²² Personal violence includes personal injury, threats to cause personal injury and harassing or offensive behaviour.²³

The *Restraining Orders Act 1997* (WA) allows a Court to make a violence restraining order and misconduct restraining order against a person where there is no family or domestic relationship between the parties. An order can be made when a person commits an act of personal violence, or where a respondent has behaved in an intimidating or offensive manner, or causes damage to the other person's property, or behaves in a manner that is likely to lead to a breach of the peace. Personal violence includes assaulting, causing injury, kidnapping, depriving a person of their liberty, pursuing someone with intent to intimidate a person or threatening to commit these acts.²⁴

²¹ Part 15A *Crimes Act 1900* (NSW).

²² Section 40(2) *Domestic Violence and Protection Orders Act 2001* (ACT).

²³ Section 10 *Domestic Violence and Protection Orders Act 2001* (ACT).

²⁴ Sections 6 and 34 *Restraining Orders Act 1997* (WA).

In those jurisdictions where orders can be made in cases where there is no family or domestic relationship between the parties the legislation continues to make a clear distinction between domestic or family violence, and other forms of violence. This recognises that domestic or family violence is a distinct form of behaviour that requires specific responses.

A review of the Australian Capital Territory legislation conducted in 2001 considered concerns regarding an increase in the number of personal protection orders being issued by the Court. The review concluded that the grounds for a personal violence order should not be changed, but some consideration was given to filtering out of unmeritorious applications, and encouraging greater use of alternative dispute resolution in relation to these matters.²⁵

In New South Wales the Court acts as a 'gatekeeper' in relation to apprehended personal violence orders, made between people where there is no intimate or family relationship. The Court has a discretion to refuse to issue process (a summons or a warrant) for an order if the Court is satisfied that the complaint is frivolous, vexatious, without substance, or has no reasonable prospect of success. In determining whether to exercise the discretion to refuse to issue process the Court must consider whether the matter is amenable to mediation, or other forms of dispute resolution.²⁶

Issues

Should the Northern Territory legislation make provision for restraining orders to be made in cases where there is no domestic relationship?

Should the criteria that might apply to orders available for people not in a domestic or personal relationship be different to those that apply to orders available to people in a domestic relationship?

²⁵ Report on the Review of the Protection Orders Act 2001 ACT Attorney-General.

²⁶ Section 562AK *Crimes Act 1900* (NSW).

9 APPLYING FOR A RESTRAINING ORDER

9.1 Who can apply?

A person in a domestic relationship with the defendant, can apply for a restraining order. The Police may also apply on behalf of a person.²⁷

A person may also apply on behalf of another person in a domestic relationship with the defendant, which is intended to cover situations where a person does not have the capacity to make an application in their own name. Most commonly this would be where the application is for the benefit of a child or a person with a disability.

When police made an application under the DVA on behalf of a person they are not required to act on the instructions of the person, or seek the person's consent to the application being made.

Issues

Does the DVA adequately provide for people under the age of 18 years and others who may not have the capacity to make an application in their own name?

Should the DVA provide a procedure for an adult, or specified class of persons such as police officers, Family and Children's Services (FACS) workers, to make an application on behalf of a child?

Is it necessary for the DVA to expressly provide that a restraining order may be made for or against a person under the age of 18 years?

9.2 Grounds For Obtaining An Order

The grounds for obtaining a restraining order are set out in section 4(1) of the DVA.

A restraining order can be made when:

The defendant has:

- assaulted or caused personal injury to the person, or
- damaged property in the possession of the person; or
- threatened to assault or cause personal injury to a person, or
- threatened to damage property in the possession of the person;

and unless restrained the defendant is likely to again assault, damage property, or carry out the threat to assault or damage property, or

- the defendant has acted in a provocative or offensive manner towards the person and the behaviour is such as is likely to lead to a breach of the peace, including but not limited to, behaviour that may cause another person to reasonably fear violence or harassment and the defendant is, unless restrained, likely to again behave in the same or similar manner.

²⁷ Section 4 *Domestic Violence Act* (NT).

These criteria also apply to interim orders made by Police under the new section 6A of the DVA as well as orders made by the Court.

The grounds in section 4(1) are framed in terms of criminal offences such as assault, offensive conduct and criminal damage. Section 4 also requires the Court to make an assessment about whether the defendant will continue to behave in the manner complained of in the future.

The grounds for making a restraining order do not explicitly include other types of behaviour commonly accepted as constituting domestic violence and, more importantly, commonly experienced by victims of domestic violence as part of the overall controlling behaviour by the perpetrator. This behaviour includes sexual abuse, economic abuse that involves standover tactics or threats in relation to money, forcing a person to request money from friends and family, preventing a person from associating with friends and family, cutting of hair, public humiliation such as stripping of clothes, forcing a person to buy drugs or alcohol and forcing a person to consume drugs, alcohol or other substances.

9.3 Alternative Approaches

Other jurisdictions take a different approach to defining the grounds or events that can justify a restraining order.

In New South Wales the Court may make an apprehended domestic violence order where the person to be protected has reasonable grounds to fear, and in fact fears, any of the following:

- the commission by the other person of a personal violence offence (personal violence offence is defined as a wide range of criminal offences or the attempt to commit such an offence);
- the engagement of the other person in conduct that amounts to harassment or molestation that, in the opinion of the Court, is sufficient to warrant the making of the order; and
- the engagement of the other person in conduct in which the other person intimidates or stalks the person being conducted, that in the opinion of the Court, is sufficient to warrant the making of the order.²⁸

Under this approach it is not necessary to prove that the defendant has actually committed any particular act as long as the applicant can demonstrate reasonable grounds for fearing that an act will occur.

Another approach is to only require proof of a particular act (often defined as an act of domestic violence) for an order to be made. For example in the Australian Capital Territory, it is not necessary for the Court to be satisfied that the defendant is likely to continue to engage in violence.²⁹ The Australian Capital Territory recently reviewed the operation of its legislation and considered whether the Act should be amended to include a test of likelihood of further violence, or reasonable fear of further violence, as part of the grounds for obtaining an order. The report on the review of the Act recommended that no such amendments be made. The report endorsed the view of the Australian Capital Territory Law

²⁸ Section 562AE *Crimes Act 1900* (NSW).

²⁹ Section 40 *Domestic Violence and Protection Orders Act 2001* (ACT).

Reform Committee that whether conduct is likely to occur in the future, or a threat carried out, is difficult to prove and that the evidence of previous violence or threats itself indicates the level of risk to the person seeking an order.³⁰

Under the South African *Domestic Violence Act* the Court must make an order when a respondent has committed an act of domestic violence. The definition of domestic violence in the legislation includes physical abuse, sexual abuse, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent and other controlling or abusive behaviour towards the applicant.³¹

Recent amendments to the Western Australian *Restraining Orders Act 1997* defines 'act of domestic violence' as including 'behaving in an ongoing manner that is intimidating, offensive or emotionally abusive towards the person'.³² Under the Western Australian Act the Court can also make an order for a child when the child has been exposed to an act of domestic violence committed against a person who is in a domestic relationship with the child, or where there is a fear that the child will be exposed to an act of domestic violence.³³ 'Exposed to an act of domestic violence' includes seeing or hearing the act, or witnessing physical injuries that resulted from the act.³⁴

Under the Tasmanian legislation a family violence order may be made if the Court is satisfied on the balance of probabilities, that a person has committed family violence, and that person may again commit family violence.³⁵ Family violence is defined as conduct including assault, sexual assault, threats, coercion, intimidation or verbal abuse, abduction, stalking within the meaning of section 192 of the *Criminal Code* (Tas), or attempting or threatening to commit those acts. Family violence also specifically includes economic abuse, emotional abuse or intimidation, or contravening an external family violence order, an interim family violence order, a family violence order or a police family violence order.³⁶

Issues

Are the existing grounds in the DVA for making a restraining order adequate?

Is section 4(1)(c) clear and easily applied? Do these grounds cover all the behaviour that might occur in a violent relationship – for example sexual abuse, economic abuse, emotional abuse, intimidation?

Should the grounds for obtaining a restraining order include a test of whether the violent behaviour will continue, or that the threat is likely to be carried out? Or should restraining orders be granted solely on the basis of the defendant's prior behaviour towards the victim?

³⁰ Report on the Review of the Protection Orders Act 2001, April 2004.

³¹ Section 1 *Domestic Violence Act 1998* (Republic of South Africa).

³² Section 6(1)(b) *Restraining Orders Act 1997* (WA).

³³ Section 11B *Restraining Orders Act 1997* (WA).

³⁴ Section 3 *Restraining Orders Act 1997* (WA).

³⁵ Section 16 *Family Violence Act 2004* (Tas).

³⁶ Section 7 *Family Violence Act 2004* (Tas).

9.4 Relevant Considerations

In addition to stipulating the grounds for making an order the legislation can also require a Court to take certain matters into account when it is deciding whether to make a restraining order.

The South Australian *Domestic Violence Act 1994* sets out factors that the Court must have regard to in considering whether or not to make a restraining order. These include the need to ensure that family members are protected from domestic violence, the welfare of any affected children, the accommodation needs of family members, how the order would affect contact with children and hardship that may be caused to the defendant. The first two factors, the need to protect family members from domestic violence and the welfare of children, are of primary importance.³⁷

The Tasmanian *Family Violence Act 2004* sets out matters to be considered when making a family violence order including that the safety and interests of the person for whose benefit the order is sought, and any affected child, are of paramount importance.³⁸

Issues

Should the legislation include matters that the Court must consider when it is deciding whether to make a restraining order? What should those considerations include?

10 THE ROLE OF POLICE

The DVA provides police with some specific powers in addition to the powers they have to investigate and enforce the criminal law. Police can apply for a restraining order on behalf of a person under section 4 and section 6 of the DVA, and following recent amendments to the Act authorised police officers may also make restraining orders in certain circumstances under section 6A of the DVA.³⁹ In addition the *Police Administration Act* gives police the power to enter premises where they believe on reasonable grounds that a person has suffered personal injury at the hands of another, or is at imminent danger of suffering personal injury at the hands of another, or where they believe a person has contravened a condition of a domestic violence restraining order.⁴⁰

Due to social and geographic conditions in the Northern Territory, where a considerable proportion of the population live in small communities outside of the major urban centres, the Police play a significant role in providing access to the protection of a restraining order, either by making an application by telephone to a Magistrate or issuing a temporary restraining order. Many people live in or near communities that are serviced by a circuit court that visits a community for one or two days every month, or in some cases every two months.

In cases where it is not practicable to obtain an order from the Court under section 4, police may apply by telephone, facsimile or other electronic means for an order under section 6.

³⁷ Section 6 *Domestic Violence Act 1994* (SA).

³⁸ Section 18 *Family Violence Act 2004* (Tas).

³⁹ *Domestic Violence Amendment (Police Orders) Act 2005*.

⁴⁰ Section 126 *Police Administration Act* (NT).

Alternatively, under section 6A of the Act an authorised police officer⁴¹ may make an interim restraining order if it is not practicable in the circumstances to obtain an order under section 4(1), it is necessary to ensure the immediate safety of the person for whose protection the order is to be made, and the Court might have reasonably made an order under section 4(1). The last requirement means that the police officer must be satisfied of the grounds for making an order in section 4(1) of the DVA.

An order made by a police officer under section 6A must be confirmed by the Court as soon as practicable. This time will vary according to the location of the parties. A defendant also has the right to seek a review of a police interim order which can be heard by telephone, or other electronic communication.⁴² The police officer must advise the defendant of their right to seek a review, and must facilitate the review by contacting the Magistrate, and providing information to the Magistrate.

Police also have the power to apprehend and detain a person for up to four hours where they intend to apply for a restraining order under section 6, or issue a restraining order under section 6A of the DVA.

When Police make an application under sections 4 or 6, or issue an interim order under section 6A, they are not required to act in accordance with the instructions of the person to be protected by the order, nor are they required to seek the consent of the person before they make an application or an interim order.

In some jurisdictions the ability of police to apply for telephone or emergency orders is limited to cases where a defendant may cause physical injury to the aggrieved person.⁴³

Under the Western Australian *Restraining Orders Act 1997* a police officer may make a 'police order', if the officer reasonably believes that a person has committed an act of family and domestic violence. A 'police order' is an interim restraining order which is either for a period of 24 hours or 72 hours.⁴⁴

The Tasmanian *Family Violence Act 2004* allows certain police officers to make a police family violence order if the officer is satisfied that a person has committed, or is likely to commit, a family violence offence. A police family violence order operates for a period of 12 months, unless it is revoked or varied, and does not have to be confirmed by a Court. However a Court may vary or revoke the order on the application of a police officer, an affected person, the person to whom it is issued or any other person to whom leave is granted.⁴⁵

Legislation can also oblige police to take other types of actions, or responses, to domestic violence other than applying for, or making a restraining order. The South African *Domestic Violence Act 1998* requires police who attend an incident of domestic violence to provide such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment. If reasonably possible to do so, they must give a notice to a complainant containing prescribed

⁴¹ Section 6A (10) defines authorised police officer as a police officer of or above the rank of Senior Sergeant, or the officer in charge for the time being of a police station.

⁴² Section 6B *Domestic Violence Act* (NT).

⁴³ Section 62 *Domestic Violence and Protection Orders Act 2001* (ACT).

⁴⁴ Section 30F *Restraining Orders Act 1997* (WA).

⁴⁵ Section 14 *Family Violence Act 2004* (Tas).

information in the language of the complainant's choice, and if reasonably possible, explain to the complainant the content of the notice, including the remedies at his or her disposal under the Act, and the right to lodge a criminal complaint if applicable.⁴⁶

Issues

Does section 6 of the DVA set out clearly when police should make an application for a restraining order?

Has the introduction of restraining orders that can be made by police improved protection for people at risk of being harmed by domestic violence? Has the provision operated unfairly for people at risk of domestic violence, or defendants?

Should there be improved processes for police in remote areas to make applications for restraining order using video conferencing or telephone during normal Court hours?

Should the DVA require police to take any other action, or provide assistance to victims of domestic violence?

11 MAKING A RESTRAINING ORDER

11.1 Orders In Related Criminal Proceedings.

The DVA does not provide for a Court to make an order in related criminal proceedings.

Under the New South Wales *Crimes Act* if a person pleads guilty to, or is found guilty of an offence against section 562AB of the *Crimes Act*, the offence of stalking or intimidation with intent to cause fear of physical or mental harm, or a domestic violence offence, the Court must make an order for an apprehended violence order for the protection of the person against whom the offence was committed, as if a complaint for an apprehended violence order had been made.⁴⁷ Additionally, when a person is charged with an offence against section 562AB of the *Crimes Act* or a domestic violence offence, the Court must make an interim apprehended violence order against the defendant for the protection of the person against whom the offence appears to have been committed.⁴⁸

Issue

Should the Northern Territory legislation include a provision that allows or requires the Court to make an order in related criminal proceedings?

11.2 Scope And Nature Of Orders That Can Be Made.

Section 4(1A) of the DVA gives the Court a wide discretion to make orders that are necessary or desirable to prevent the defendant acting in the apprehended manner including orders requiring the return of personal property to the defendant or the applicant.

⁴⁶ Section 2 *Domestic Violence Act* 1998 (Republic of South Africa).

⁴⁷ Section 562BE *Crimes Act* 1900 (NSW).

⁴⁸ Section 562BF *Crimes Act* 1900 (NSW).

Section 4(8) permits the Court to make an order restraining the defendant from entering premises, or limiting the defendant's access to premises, whether or not the defendant has a legal right or equitable interest in the premises. Before making such an order the Court must consider the effect of making or refusing the order on the accommodation of, and any children of or in the care of, the persons affected by the proceedings. The objective of this provision is to make it clear that an order can be made under the DVA excluding the defendant from their home and allowing the victim, and any children, to remain in the family home.

However Australian research on enabling women and children experiencing domestic violence to stay safely in their home notes that the legal system has not been responsive to women who do wish to stay in their home. This research indicates that many people involved in administering the law work under an assumption that women and children who have experienced domestic violence should leave the relationship, and the family home, in order to escape the violence. As a result the use of legal remedies to support women to remain in the home, and that exclude the defendant from the home, have been under utilised.⁴⁹

Research conducted by Shelter NT for Northern Territory Housing indicates that women felt strongly about women and children having to leave their home to escape violence rather than the perpetrator of violence leaving the home. The advantage of women and children staying in the home is that it promotes stability and allows ongoing contact with regular schools, friends, doctors and other existing support networks.⁵⁰

There is concern that where a victim of domestic violence has left their home to be safe, and sought refuge in temporary accommodation, and the perpetrator has remained in the home, that the Court is reluctant to make an order that the perpetrator leave the home. This reluctance may arise from a view that in these cases it is more desirable that the parties seek a property settlement, or sole occupancy order, under the *Family Law Act*, or *De Facto Relationships Act*. However the reality for many people is that they do not have access to these remedies because of lack of appropriate and affordable legal assistance, or that a property settlement or orders under this legislation are not appropriate because the home is rented accommodation.

Issues

Does the DVA give adequate guidance on when orders should be made under section 4(8)?

Should the legislation create a presumption in favour of an applicant with children remaining in the home? If so, how should such a presumption apply to rented accommodation?

11.3 Return Of Personal Property

Section 4(1A) of the DVA allows the Court to make orders requiring the return of personal property to the applicant, the person on whose behalf the application is made or the defendant. The DVA does not define personal property.

⁴⁹ Health Outcomes International 'Improving Women's Safety Literature Review October 2002' Partnerships Against Domestic Violence.

⁵⁰ Shelter NT "Home Territory – The Community View"

Issue

Have any difficulties arisen in relation to this provision?

Should the term 'personal property' be defined in the DVA? If so, what should it cover?

11.4 "Standard" Orders

The DVA does not prescribe any standard orders. Consequently, the form of orders that are made by the Court has been developed on an ad hoc basis, and depends largely on the drafting of orders sought in applications filed in the Court, and the practice of individual Magistrates.

Orders that are commonly used include:

- that a defendant not approach or contact the protected person;
- that a defendant not assault or threaten the protected person;
- that a defendant not approach or contact the protected person, save for contact through a solicitor or another third party for the purposes of making arrangements in relation to the children; and
- that a defendant not contact or approach the protected person when affected by alcohol, or consuming alcohol.

Generally it is up to the applicant to specify what orders they would like the Court to make. Where a person seeking an order is represented they are in a better position to consider the types of orders that will suit their circumstances. The Court cannot advise a protected person about the type of order they should seek.

Concerns arise where restraining orders are made that do not suit the social circumstances and needs of the parties, particularly where a 'no contact' order is made, and the person protected by the order then has some contact with the defendant. In some situations the parties may be subject to a wide range of social, family and economic pressures that lead to contact notwithstanding that there is an order in place prohibiting contact between them.

There is also some concern regarding orders that are made where the parties have children and where there are, or it is likely that there will be, orders or agreements made regarding contact arrangements with the children. In these cases it is desirable that orders made under the DVA should contain provision for these future arrangements. This might be achieved through the use of standard orders where it is likely, on the material before the Court, that contact arrangements will need to be made.

Issue

Should the legislation contain some guidance about 'standard orders' that might be made by the Court?

11.5 Orders To Attend Counselling

Some jurisdictions have introduced specific legislation that permits the Court to make an order, as part of a restraining order, that a defendant undertake a rehabilitation program.

The DVA does not contain any specific provision allowing the Court to require a defendant to participate in program as part of the conditions of a restraining order. Section 78K of the *Sentencing Act* allows the Court to make a perpetrator program order where the Court finds the person guilty of a domestic violence offence, or an offence under section 10 of the DVA. 'Domestic violence offence' includes personal violence offences under the Criminal Code where the victim is in a domestic relationship with the offender.⁵¹

The New Zealand *Domestic Violence Act* provides that on making a protection order, the Court must direct the respondent to attend a specified programme, unless the Court considers that there is good reason for not making such a direction.⁵² The applicant for a protection order may also request a Registrar to authorise the provision of a programme to the applicant, a child of the applicant's family or a specified person.⁵³

In Victoria the Family Violence Court Division may make an order requiring the defendant to attend such counselling, to be provided by a person or body specified in the order.⁵⁴ The purpose of this is to increase the defendant's accountability for the violence he or she has used against a family member and to encourage the defendant to change his or her behaviour.⁵⁵

The *Domestic Violence and Protection Orders Act 2001*, ACT provides that the Magistrates Court may recommend that the respondent, the aggrieved person or another relevant person take part in a program of counselling, training, mediation, rehabilitation or assessment.⁵⁶

Issue

Should the legislation allow the Court to make orders in relation to rehabilitation and treatment programs?

11.6 Length Of Orders

A person seeking an order can also ask for an order to last for a specific time. The DVA does not impose any upper limit on the time that orders will remain in force and it does not expressly permit (or prohibit) orders to be made indefinitely until they are varied or revoked. To an extent a practice has developed where it is considered standard for an order to be made for 12 months. This has however caused some problems for people who live in remote areas due to the delays in serving orders on defendants, and delays in gaining assistance to extend orders.

⁵¹ 'Domestic violence offence is defined in section 78H of the *Sentencing Act* (NT), it includes assault under section 188 of the *Criminal Code*, cause grievous harm under section 181 of the Code and cause bodily harm under section 186 of the Code.

⁵² Section 32 *Domestic Violence Act* 1995 (NZ).

⁵³ Section 29 *Domestic Violence Act* 1995 (NZ).

⁵⁴ Section 8D *Crimes (Family Violence) Act* 1987 (VIC).

⁵⁵ Section 8A *Crimes (Family Violence) Act* 1987 (VIC).

⁵⁶ Section 39 *Domestic Violence and Protection Orders Act 2001* (ACT).

Issues

Should the legislation stipulate a maximum period of time that an order can remain in force?

Should the legislation specifically give the Court the power to make an order indefinitely until it is either revoked or varied?

11.7 Power To Grant Interim Orders

The Court may grant a temporary, or interim, restraining order in the absence of the defendant and without summoning the defendant to the Court.⁵⁷ This process is used where a person is seeking urgent protection, and there is insufficient time to file and serve the defendant with the application, or where the applicant fears that the defendant will harm them, or threaten to harm them as a result of being served with an application for an order. An interim restraining order is effective as soon as the defendant is served with the order and the application.

However the DVA does not contain any specific criteria for when an interim order should be made. In practice it appears that the Court applies the considerations that are relevant to deciding whether to make an ex parte injunction. This involves considering both the prejudice that might flow to the defendant if an order was made, and the harm that might flow to the applicant if an order was not made.

Where a defendant appears in Court in response to an application for a restraining order, and does not consent to any order being made, the Court must generally hear evidence, including cross examination, from both the applicant and the defendant before it can decide whether to make an order. In most cases the Court must adjourn the application because it does not have sufficient time to hear the evidence and the parties may require time to prepare to give evidence. In these cases, because the applicant has no protection until the date of the hearing, an applicant will often apply for an interim order to be made. The DVA does not set out any specific process for an interim order to be made in this circumstance.

One option is for the Court to use a process similar to the one used by the Family Court in relation to interim orders. Under this process the Court would make a decision on the basis of affidavits from each of the parties without any cross examination of the witnesses. A variation of this process might be that the Court makes a decision on the basis of affidavit material as well as giving the defendant the right to make submissions to the Court regarding the nature of the interim orders that might be made.

⁵⁷ Section 4(3) *Domestic Violence Act (NT)*.

Issues

Should the DVA include criteria for the Court to apply when deciding whether to make an ex parte interim order?

Is there a need for the legislation to provide a specific power for the Court to make an interim order, and to adjourn the application for further hearing?

Should the DVA provide a specific process for the Court to make an interim order where the application is being defended? For example, should the DVA permit the Court to make an interim order on the basis of evidence adduced by the parties, with no cross examination of the parties or witnesses?

11.8 Consent Orders

Section 5 of the DVA allows the Court, or the Registrar, to make an order with the consent of the defendant and person making the application, or the person on whose behalf an application was made. A consent order may be made even where the defendant does not admit, or has expressly denied, the allegations made in the application. The Court, or the Registrar, must explain to the defendant the purpose and effect of the proposed order, the consequences that may follow if the defendant fails to comply with the order, and how the order may be varied or revoked.

An existing order may also be varied or revoked by the Court, or Registrar, with the consent of the defendant, and the person who made the application or on whose behalf the application was made. An application to vary or revoke can be made by any party to the order.⁵⁸

Issue

Are these provisions efficient and effective?

11.9 Undertakings

The DVA does not make any provision for undertakings to be accepted by the Court by the parties to an application for a restraining order as an alternative to making an order. There are different views about whether the Court has the power to accept undertakings, and whether those undertakings are actually enforceable. Even if undertakings were enforceable, they could not be enforced as if they were a restraining order, and it would be up to the party complaining of a breach of the undertaking to take legal action. The police have no role in enforcing undertakings given in lieu of an order.

One problem with using undertakings is that parties may not understand the difference between an undertaking, and an order made under the DVA, and the consequences of accepting an undertaking rather than seeking an order. The Court does not have the power to compel an applicant to accept undertakings.

⁵⁸ Section 9 *Domestic Violence Act* (NT).

12 INTERSTATE ORDERS

Part 3 of the DVA provides for recognition of external restraining orders, which are orders made in other Australian jurisdictions and in New Zealand.

Other Australian jurisdictions also provide for the registration of Northern Territory restraining orders.⁵⁹ An application in writing must be made to the relevant court for registration of an interstate order. In most cases, including registration under the DVA, the application for registration must include some evidence that the restraining order was served on the defendant.⁶⁰

Registration of interstate orders allows for enforcement, and variation, of the order in the jurisdiction where it is registered. In addition notice of registration is passed on to the police in that jurisdiction.

Notice of registration of an external restraining order in the Northern Territory does not have to be given to the defendant, except where the person who applied for the registration has consented to that service.⁶¹

Police in the Northern Territory may also enforce interstate orders that have not been registered in the Northern Territory where they believe on reasonable grounds that an external restraining order is in force against a person in the Northern Territory.⁶²

In Western Australia the *Restraining Orders Act 1997* specifically provides that an application for registration of an interstate order may be made by a police officer on behalf of the person protected by the order.⁶³

Issues

Should police be required to register orders on the request of a person protected by an order?

13 VARIATION AND REVOCATION OF RESTRAINING ORDERS

A party to a proceeding in which a restraining order has been made may, at any time apply to the Court for a variation or revocation of the order.⁶⁴ Where such a restraining order is varied or revoked, a copy of the varied order or notice of revocation must be served on the defendant and the Commissioner of Police should be notified.

A member of the Police Force may also obtain a variation or revocation by telephone from a magistrate without notice to the defendant where it is not practicable for a member of the Police Force to obtain from the Court a variation of the order, notwithstanding that the person against whom the order is made has not been given an opportunity to answer any allegation in the application.⁶⁵

⁵⁹ Section 86 *Domestic Violence and Protection Orders Act 2001* (ACT), section 18AA *Crimes (Family Violence) Act 1987* (Vic), section 76 *Restraining Orders Act 1997* (WA), section 562T *Crimes Act* (NSW), section 14 *Domestic Violence Act 1994* (SA), section 42 *Domestic and Family Violence Protection Act 1989* (Qld), section 27 *Family Violence Act 2004* (Tas).

⁶⁰ Section 17 *Domestic Violence Act* (NT).

⁶¹ Section 18(5) *Domestic Violence Act* (NT).

⁶² Section 11 *Domestic Violence Act* (NT).

⁶³ Section 75 *Restraining Orders Act* (WA).

⁶⁴ Section 8 *Domestic Violence Act* (NT).

⁶⁵ Section 8A *Domestic Violence Act* (NT.)

A party to a restraining order may also apply to the Court for a variation of a restraining order without notice to the other party.⁶⁶

Some concern has arisen in relation to applications under section 8, particularly where they are initiated by a defendant soon after an order is made, or where the defendant did not attend the final hearing of the matter. In these situations the application to vary may operate as a de facto review of the decision of the Magistrate who made the final order. One response is for the legislation to provide that a Court may only make an order for variation or revocation where it is satisfied that there has been a change in circumstances, or may refuse to revoke or vary where the Court considers that the application is in the nature of an appeal or review of the original decision to make a restraining order.⁶⁷ An alternative response is to require a defendant to seek leave from the Court before they are permitted to proceed with an application to vary or revoke.

The South Australian *Domestic Violence Act 1994* provides that an application for variation or revocation of a DV restraining order may only be made by the defendant with the leave of the Court, and leave is only to be granted if the Court is satisfied there has been a substantial change in the relevant circumstances since the order was made or last varied.⁶⁸ Under the Tasmanian *Family Violence Act* an application to vary, extend or revoke a family violence order may only be made with the leave of the Court.⁶⁹

One problem has been identified in relation to situations where an application is made to vary an order to extend the period of its operation. In many cases these applications are made just prior to the expiration of an order because the applicant believes they need the ongoing protection of a restraining order. There is some debate as to whether this should be done by way of a fresh application (under section 4 of the DVA), or by way of an application to vary. However if such application were made under section 4 there is a risk that the application will fail if the defendant has not engaged in any conduct referred to in section 4 (the grounds for making a restraining order) during the term of the order. Further if the legislation required a substantial change in circumstances before the Court could vary an order then an application to vary an order may be defended on the basis that circumstances have not changed, particularly where the order has not been breached by the defendant.

Issues

Should the legislation limit the circumstances in which a party can apply for variation or revocation of an order?

Should an application to extend an existing order be treated as a variation?

14 EVIDENCE AND PROCEDURE

When determining an application for a restraining order the Court may rely on hearsay evidence.⁷⁰

⁶⁶ Section 8B *Domestic Violence Act* (NT).

⁶⁷ For example section 562F(4A) *Crimes Act 1900* (NSW).

⁶⁸ Section 12 (1a) *Domestic Violence Act 1994* (SA).

⁶⁹ Section 20 *Family Violence Act 2004* (Tas).

⁷⁰ Section 12 *Domestic Violence Act* (NT).

A Court may also order that all or any person/s (except the parties) remain outside of the Court, if the Court thinks it fit while it hears a case.⁷¹

Under the *Evidence Act* the Court may prohibit the publication of the name of a party, or a witness in the proceeding, or evidence given in the proceeding, where the evidence is likely to offend public decency, or it is in the interests of the administration of justice.⁷²

Issues

Should the legislation provide that the Court should be closed when hearing matters under the DVA?

Should the legislation allow the Court to prohibit the publication of the details of restraining order proceedings?

When a Court is hearing an application under the DVA, and the defendant is not legally represented, it may order that the defendant may not directly cross examine the applicant and must put any questions for the applicant through the Court or another person authorised by the Court.⁷³

Does this provision operate effectively and fairly?

The vulnerable witness arrangements contained in the *Evidence Act* are available for a witness under the age of 16 years, a witness who suffers from an intellectual disability, a witness who is a victim of a sexual assault or a witness, or a witness who, in the opinion of the Court, is under a special disability because of the circumstances of the case or the circumstances of the witness.⁷⁴ Applicants for a restraining order who are required to give evidence in Court are not automatically classed as a vulnerable witness. Witnesses who are classified as vulnerable under the *Evidence Act* are entitled to be accompanied by a support person in Court, for the Court to be closed while they give evidence, and to give their evidence by way of closed circuit television or to use a screen in Court.

Issue

Should the vulnerable witness arrangements apply specifically to applicants for restraining orders who are required to give oral evidence in Court?

14.1 Costs

A Court cannot award costs against an applicant in relation to an application for a restraining order unless the Court is satisfied that the making of the application was unreasonable and in bad faith.

Issue

Should there be any change in relation to the rule regarding costs?

⁷¹ Section 13 *Domestic Violence Act* (NT).

⁷² Section 57 *Evidence Act* (NT).

⁷³ Section 20AD *Domestic Violence Act* (NT).

⁷⁴ Section 21A *Evidence Act* (NT).

15 EXPLANATION OF THE ORDER

15.1 Explanations Required

A Court making a restraining order has some obligations to explain the nature and effect of orders. Where an order is being made with the consent of both the applicant and defendant the Court must explain, or cause to be explained, the nature and effect of the proposed order, the consequences that may follow if the defendant fails to comply with the proposed order and how the order might be varied or revoked.⁷⁵

The Court must explain to the defendant, or the defendant's legal representative (in the absence of the defendant) that the restraining order may be registered and enforced without notice to the defendant in a State or another Territory of the Commonwealth or New Zealand if there is a law in force in the relevant jurisdiction to provide for the registration and enforcement of restraining orders made under the DVA.⁷⁶

Otherwise the Court is not required to provide any explanation when an order is made.

Issues

Should a Court be required to give an explanation about the party's rights and obligations whenever it makes an order, including an interim order, or a variation to an order?

Should the Court also be required to give some simple written information in addition to information given verbally in Court?

Should the Court be required to give the explanation in a language and manner likely to be understood by an applicant and defendant?

⁷⁵ Section 5(5) *Domestic Violence Act* (NT).

⁷⁶ Section 12(A) *Domestic Violence Act* (NT).

16 BREACH OF RESTRAINING ORDERS: OFFENCE AND PENALTIES

The DVA provides for an offence of breach of restraining order that carries a maximum penalty, for a first offence, of \$2000 or 6 months imprisonment.⁷⁷ If a person is found guilty of a second or subsequent offence the Court must impose a sentence of not less than seven days imprisonment but not more than six months.⁷⁸

The offence of breach of a DV order is classified as “regulatory”⁷⁹, which means that most of the provisions in the *Criminal Code* in relation to criminal responsibility do not apply to someone charged with the offence of breach of restraining order. This means that a person charged with this offence cannot raise a defence of mistake of fact.

The mandatory sentencing provision was inserted into the DVA in 1996. Prior to this the minimum sentence for a third or subsequent breach was 7 days imprisonment however this could be wholly suspended by the Court. It has been argued that the mandatory imprisonment, and the classification of the offence as regulatory, can result in unfair outcomes for persons who are found guilty of the offence of breach of restraining order.

As a general principle offences are categorised as regulatory when it is appropriate to exclude the tests of criminal responsibility in Part II of the *Criminal Code* (such as honest and reasonable mistake) because their availability would undermine the objective of the offence.

If the offence of breach of restraining order was not classified as regulatory then the defence of mistake of fact would be available and it would be open for a person accused of the offence to argue that they are excused from responsibility for the offence because the protected person, by their words or actions, lead the accused to believe that the order had been changed or revoked.

Victims of Domestic Violence are vulnerable to direct or indirect pressure from a defendant to change or revoke an order. In addition perpetrators of Domestic Violence commonly seek to blame the victim for their own violent behaviour. Given that the legislation exists to provide protection for victims of Domestic Violence it must be framed to take account of these dynamics.

A further consideration is that the DVA permits both a defendant or protected person to make an application to vary or revoke a restraining order. In cases where the parties have agreed about a proposed change to the terms of an order, for example where they have agreed to resume living together, it is relatively simple for either party to seek a change in the orders from the Court.

In the case of *Tudor-Stack v Hill* [2003] NTCA 15 it was argued that section 26(1)(d) of the *Criminal Code*, which does apply to regulatory offences, applied to the offence of breach of restraining order. Section 26(1)(d) excuses a person from criminal responsibility if they were acting pursuant to authority, permission or licence lawfully given.

⁷⁷ Section 10(1) *Domestic Violence Act* (NT)

⁷⁸ Section 10(1A) *Domestic Violence Act* (NT)

⁷⁹ “Regulatory offences” under Northern Territory law are essentially strict and absolute liability offences under general law or legislation such as the Commonwealth *Criminal Code* 1995.

This case involved an order that prevented the accused from living with the other party, in this case his wife. The defendant argued that the protected person had given permission for him to return to live with her, and that therefore she had authorised the breach of the order. At the hearing for the offence of breach of the restraining order the magistrate found that the defendant resumed living with the protected person (the wife) after he had received assurance from the protected person that something had been done about the order. Further the Magistrate found that it was not unreasonable for the defendant to have believed that the order had been changed to permit him to live with the protected person. However the magistrate held that no defence was available to the accused under section 10(3) of the DVA or section 26(1)(d) of the *Criminal Code*.

The accused appealed against this decision to the Supreme Court which held that section 26(1)(d) was not available because the Court made the restraining order, and only the Court can vary its terms or revoke it. The protected person was not able to lawfully authorise a breach of the order. The Court's decision in this case was clearly concerned with promoting the certainty of restraining orders and protecting the victim from pressure or threatening conduct from the defendant.

The *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005*⁸⁰ will, when commenced, introduce new provisions into the Criminal Code regarding criminal responsibility.⁸¹ These new provisions will only initially apply to offences set out in Schedule 1 of the Act, and declared offences. The Act specifies four types of fault elements for criminal offences – intention, knowledge, recklessness or negligence. An offence can specify the fault element that applies to the offence, and where the offence does not specify a fault element, default elements of either intent or recklessness apply.

The *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* also allows for an offence to be designated as one of strict liability or absolute liability. These two categories are designed to replace “regulatory” offences. Because punishing a person for unintended actions or unforeseen consequences is generally neither useful or fair, the use of strict or absolute liability offences should be confined to cases where punishment for conduct alone is justifiable.

An offence of strict liability is one in which no fault elements (i.e. intention, knowledge, recklessness or negligence) are required. A defence of mistake of fact under section 43AX is however available. This defence is made out if a person satisfies the Court that they had a mistaken but reasonable belief about facts, which if correct would have meant their conduct did not constitute an offence.

For an offence of absolute liability there are no fault elements, and there is no defence available based on mistaken belief.

For offences with a fault element other than negligence, that is intention, knowledge and recklessness, a person is not criminally responsible for the offence if the person was under a mistaken belief, or ignorant of facts, and the mistaken belief or ignorance negates the fault element. Under this provision the mistake does not have to be reasonable, but the Court may consider whether the mistaken belief was

⁸⁰ This Act has not yet commenced operation.

⁸¹ The Act inserts a new Part IIA into the Criminal Code that contains the criminal responsibility provisions.

reasonable in all the circumstances in determining whether the person was actually under a mistaken belief.⁸²

The Western Australian *Restraining Orders Act 1997* provides that a person who breaches a restraining order commits an offence and is liable to a penalty of \$6,000 or imprisonment for two years or both.⁸³

The *Domestic Violence Act 1994 SA* provides for an offence of contravention of a restraining order that carries a maximum penalty of imprisonment for two years.⁸⁴

Other jurisdictions have adopted penalties that increase for second and subsequent offences. For example in Tasmania a person who contravenes a Family Violence Order, Police Family Violence Order or interim Family Violence Order, is guilty of an offence and is liable in the case of a first offence to a fine not exceeding 20 penalty units, or imprisonment for a term not exceeding 12 months. In the case of a second offence, an offender is liable to a fine not exceeding 30 penalty units, or imprisonment for a term not exceeding 18 months, in the case of a third offence, a fine not exceeding 40 penalty units or imprisonment for a term not exceeding two years and in the case of a fourth or subsequent offence, to imprisonment for a term not exceeding five years.⁸⁵

In Victoria a person who breaches or contravenes an intervention order is liable, for the first offence, to a penalty not exceeding 240 penalty units or imprisonment for a term of not more than two years or both. For a subsequent offence an offender is liable to imprisonment for a term not exceeding five years.⁸⁶

Issues

What is an appropriate penalty for the offence?

Should the offence carry a mandatory minimum penalty?

What should be the fault element for the offence of breach of restraining order?
Should it be an offence of strict or absolute liability?

17 APPEALS

The appeal provisions in relation to orders made under the DVA are located in the *Justices Act*.⁸⁷ A party may appeal a decision on a ground involving an error or mistake on a question of fact or law, or both fact and law.

Issue

Do these provisions operate adequately for the DVA?

⁸² Section 43AW Criminal Code (NT)

⁸³ Section 61 *Restraining Orders Act 1997* (WA).

⁸⁴ Section 15 *Domestic Violence Act 1994* (SA).

⁸⁵ Section 35 *Family Violence Act* (Tas).

⁸⁶ Section 22 *Crimes (Family Violence) Act 1987* (VIC).

⁸⁷ Section 163 *Justices Act* (NT).

18 OPERATION OF THE DVA FOR PEOPLE WHO LIVE IN REMOTE AREAS

Many people in remote areas do not have access to Courts, specialist legal or advocacy services and rely substantially on police for assistance when they require the protection of a restraining order. They also rely on police to assist when they need to make an application to vary an existing order.

Section 8A of the DVA allows a police officer to apply to a Magistrate for a variation of a restraining order by telephone.

The *Domestic Violence Amendment (Police Orders) Act 2005* requires police to facilitate a review of a police order, at the request of a defendant, by contacting a magistrate by telephone (or other electronic communication), and providing the magistrate with information regarding the matter. The magistrate may then vary or revoke the order.⁸⁸ The primary objective of this provision is to provide defendants in remote areas with access to timely review of a police order, without having to wait for the next sitting of the circuit Court in the area.

In addition the *Evidence Act* provides for Courts in the Northern Territory to permit a party to appear before the Court by way of a 'communication link', that is, telephone and audio visual links. The Court must not permit a party to appear by a communication link unless the necessary facilities are available or can be made available, and it is more convenient than requiring the parties to attend at the place where the Court is sitting.⁸⁹

The *Evidence Act* does not require the Court to provide or pay for the facilities for the parties. Video conferencing and telephone conferencing facilities exist at Courts in Darwin, Alice Springs, Tennant Creek and Katherine.

Issue

What provisions should the legislation contain to facilitate access to remedies under the legislation for people in remote areas?

⁸⁸ Section 6B *Domestic Violence Act* (NT).

⁸⁹ Section 49E *Evidence Act* (NT).

Appendix A

Domestic Violence Legislation in Australia

1. Australian Capital Territory *Domestic Violence and Protection Orders Act 2001*
2. New South Wales *Crimes Act 1900 (Part 15A)*
3. Northern Territory *Domestic Violence Act 1992*
4. Queensland *Domestic and Family Violence Protection Act 1989*
5. South Australia *Domestic Violence Act 1994*
6. Tasmania *Family Violence Act 2004*
7. Victoria *Crimes (Family Violence) Act 1987*
8. Western Australia *Restraining Orders Act 1997*