

Intervention Orders (Prevention of Abuse) Bill 2009

REPORT

This Bill reforms laws for the restraint of domestic and personal violence. It repeals the *Domestic Violence Act 1994* and the parts of the *Summary Procedure Act 1921* that govern personal restraining orders, and makes consequential changes to other Acts.

This Government is concerned about the prevalence of domestic violence and its potentially lethal consequences. A recent discussion paper about domestic and family violence death reviews released by Queensland's Domestic Violence Death Action Group (*Dying to be Heard*, 2008) put it like this:

Domestic Violence is described as the use of violence by one person to control another and is used to describe any abuse that occurs in intimate relationships.

The abuse may take the form of physical, emotional, sexual, spiritual, social, and financial abuse. Abusive behaviours may range from intimidation, stand over tactics and threats to serious assaults, rape, strangulation and death. The abuse may continue long after the relationship has ended and it is well recognised that many women have either left the relationship or are in the process of leaving when they are killed. Often the threats made to victims are not idle threats and each year a significant number of adults and children continue to die as a result of domestic / family violence.

By this Bill, the Government fulfils its commitment to review the rape, sexual assault and domestic violence laws, announced in November 2005 as part of the whole-of-Government policy initiative *Our Commitment to Women's Safety in South Australia*. Our review of domestic violence laws began with the public release of a discussion paper we commissioned from barrister Maurine Pyke Q.C. Her recommendations and a simultaneous review of domestic violence laws by the Victorian Law Reform Commission (resulting in the enactment of the Victorian *Family Violence Protection Act 2008*) form the background to this legislation.

The Bill brings together laws restraining domestic violence and laws restraining other forms of personal violence. The aim is to make these laws easier to understand and enforce and to emphasise that our society does not tolerate personal violence of any kind, whether it occurs within a domestic relationship or not. Nevertheless, there is strong emphasis on domestic abuse and there is no doubt that these laws will mostly be used by people seeking to protect

themselves and their children from domestic abuse. For that reason the Bill acknowledges, in its definition of abuse, not only the obvious physical forms of violence but also the brutal and controlling behaviour that is typical of violence that takes place under cover of a private, familial relationship and can be concealed from the world at large, trapping the victim in a nightmare world from which there is little hope of escape. It also extends the kinds of relationship that will be considered 'domestic' and continues to require the courts to give priority to proceedings for the restraint of domestic abuse.

The Bill retains many of the features of the current *Domestic Violence Act 1994* and the personal restraining order provisions of the *Summary Procedure Act 1921*:

- An interim and final civil restraint process (now also adopted by most other Australian jurisdictions) using a civil standard of proof;
- A requirement for courts to give priority to domestic violence restraint (intervention) proceedings;
- Terms of restraint (called 'intervention' in this Bill) that exclude an alleged perpetrator from the family home, regardless of the alleged perpetrator's legal or equitable entitlements to the property;
- Prohibitions relating to firearms and problem gambling orders;
- A bar on applications by defendants to apply to vary or revoke an intervention order if there has been no substantial change in circumstances since the order was made or last varied;
- Police powers to arrest and detain a person for contravention of an intervention order;
- Police applications to the court by telephone or other electronic means (now to be regulated by rules of court);
- A requirement for applicants to inform the court of any relevant contact or Family Court order, and for courts to consider the effect of an intervention order on the contact between a child and the person subject to the intervention order proceedings;
- A power in the Magistrate's Court, when making an intervention order, and to the extent of its powers under section 68R of the *Family Law Act 1975* (Cth.), to revive, vary, discharge or suspend relevant orders relating to children under Part 7 of the *Family Law Act* to the extent that they are inconsistent with the proposed intervention order;

- The Youth Court having the same jurisdiction as the Magistrates Court to make an intervention order where the person for or against whom protection is sought is a child or youth, and to vary or revoke any previous intervention orders;
- A maximum penalty of two years imprisonment for breach of an intervention order, so that it remains a summary offence. (Of course, if the conduct constituting the breach also constitutes another criminal offence, such as assault or causing harm or damage to property, the perpetrator will also be liable for the penalty for that offence. That penalty will be aggravated because in committing the offence the defendant was acting in contravention of an intervention order designed to prevent just that sort of conduct (s5AA *Criminal Law Consolidation Act 1935*).

New features introduced by the Bill are:

- Binding objects and principles for intervention designed to promote a common approach by those enforcing the Act to perpetrator accountability and to the protection of victims of abuse and their children;
- A definition of abuse that includes not only physical injury and damage to property, but also, specifically, emotional or psychological harm and an unreasonable and non-consensual denial of financial, social or personal autonomy;
- A definition of the relationships within which an act of abuse is to be considered domestic abuse that includes not only relationships between spouses or partners and children but also those between grandchildren and grandparents, brothers and sisters, within an Aboriginal kinship group and between a carer and the person cared for;
- An acknowledgement of the damaging effect on children of experiencing and being exposed to domestic or personal abuse. This is expressed in the principles for intervention and the way they are to be applied, in the class of persons for whose protection an intervention order may be made, in requirements for courts and police to consider the interests and needs of children in determining applications for intervention, in an emphasis on consistency between intervention orders and relevant family court or child protection orders, in offering special arrangements for the taking of evidence of victims, including children, in making it possible for domestic violence victims and their children to stay in the family home if they choose rather than routinely move out to a shelter, in ensuring that relevant Government departments are aware of intervention orders affecting children, in prohibiting the publication of

reports of intervention proceedings that would identify victims and their children, and so on.

- Improved police powers to intervene in situations of domestic or personal abuse, including the power to issue an interim intervention order, to direct a person to remain in a certain place and if necessary to detain the person while arrangements are made to protect the victim or to facilitate the preparation and service of orders;
- Express police powers to search for weapons and articles required to be surrendered by an intervention order;
- Simplified processes that reduce opportunities for perpetrator manipulation;
- A power in the court to dismiss an application that is frivolous, vexatious, without substance or has no reasonable prospect of success, with a presumption against dismissal in cases of domestic abuse and in cases where the defendant is alleged to have committed an offence of personal violence or stalking;
- A power in the court, when the protected person and the defendant live in rented premises under a tenancy agreement to which the defendant is a party, and when the intervention order excludes the defendant from those premises, to assign the tenancy to the protected person or other persons (not including the defendant), in circumstances where it would be unreasonable for a landlord to withhold consent to the assignment;
- An ability for police or the court, by interim order, to require a defendant to be assessed for an intervention program to deal with associated problems of substance abuse, problem gambling, anger management or mental health and for the court then to order the defendant to undertake such a program;
- Provision for courts to protect victims or witnesses who give evidence in court in these applications from distress or embarrassment by the use of special arrangements, such as physical screens and C.C.T.V., and by limiting the ways a defendant may cross-examine them so that the defendant cannot do so in person;
- The registration of interstate and New Zealand intervention orders in a way that requires the court to take into account the implications of service on the safety of a protected person;

- A prohibition on the publication of reports of proceedings for domestic and personal abuse that would tend to identify the person or persons whom the application seeks to protect and their children, any other person involved in the proceedings (not including people acting in an official capacity or the defendant), and any child of the defendant;
- An intervention order to prevail over a child protection order to the extent of any inconsistency, with a power in the Youth Court to deal with any inconsistency by varying or revoking the child-protection order;
- The exemption of protected persons from guilt for an offence of aiding, abetting, counselling or procuring the commission of the offence of contravening an intervention order, provided no other protected person is affected by the commission of the offence.
- Notification requirements that ensure all relevant public-sector agencies (that is, those responsible for education, families and communities, and child protection and the South Australian Housing Trust) are aware that intervention orders have been made, varied or revoked; and
- Authority for public sector agencies and organisations contracted to provide services to them to provide information to police on request to locate a defendant for service.

I turn now to the practical scheme of the Bill.

What is an intervention order?

Intervention orders are orders restraining a person from doing certain things and, if necessary, requiring the person to do other things. The order may be issued for the protection of anyone against whom it is suspected the defendant will commit an act of abuse or any child who may hear or witness or otherwise be exposed to the effects of an act of abuse committed by the defendant against another person. The order may be issued to protect more than one person.

What can an intervention order do?

The terms of an intervention order (whether interim or final) can include any form of restraint that is needed to protect the victim from abuse: for example, prohibitions on contact in person or by texting, phoning or emailing, prohibitions on proximity and exclusion from the family home.

The order can require the defendant to do certain things: for example, to surrender specified weapons or articles. When an order requires surrender of weapons or articles, police may

search the defendant or the defendant's possessions or enter and search places where the weapon or article is suspected to be and take possession of it, using reasonable force to do so.

An intervention order can also require the alleged perpetrator to be assessed for, or to undertake, an intervention program dealing with substance abuse, problem gambling, anger control or mental health. If a defendant is assessed as eligible for a program, and there are services available for the defendant to undertake it, the court may order the defendant to do so without the defendant's agreement.

The order may also contain terms that protect children affected by the violence and ensure their continuing safety and security.

Grounds for issuing an intervention order

The grounds for issuing an intervention order against a person, whether interim or final, are simple. Grounds exist if it is reasonable to suspect that the defendant will, without intervention, commit an act of abuse against a person, and if the issuing of the order is appropriate in the circumstances.

These grounds are anticipatory. There is no need for proof of the commission of an act of abuse before an intervention order is issued.

Who may issue an intervention order?

Both police and the courts can issue interim intervention orders, and on the same grounds, but only a court may confirm an interim order; dismiss an application for an intervention order, substitute an intervention order for an interim one; or vary or revoke an intervention order. (The Commissioner of Police may, however, revoke an interim order that was issued by a police officer. This power is intended for situations where the issue was clearly inappropriate or there was some mistake in the process.)

An interim intervention order issued by police serves as an application to the court for an intervention order. A defendant who is served with the interim order is taken to have been served with a summons to appear in court on the date specified in the order for the hearing of that application (within eight days of the date of the issue of the interim order). When police issue an interim order, there is no preliminary hearing by the court, as there would be when a person applies directly to the court for an interim order; there is only a final hearing to determine what to do with the interim order that the police have issued.

This new police power, combined with improved powers to hold a defendant pending preparation and service of process and while making arrangements for the security of the victim, is designed to give victims and their children immediate protection from abuse without the need to go to court first, in circumstances where the alleged perpetrator can be served on the spot and is therefore instantly bound by the order. A similar effect can be achieved under the current law by telephone application to a magistrate when the alleged perpetrator is present, but as a matter of practice this process is usually reserved for out-of-hours situations. The ability to apply to a magistrate by telephone or other means is preserved in this Bill for situations where it is not possible, or it is inadvisable, for police to issue an interim order and it would take too long to wait for the next sitting of the court to obtain one.

When can police issue an interim intervention order?

Police may issue an interim intervention order if there are grounds to do so and if the defendant is present to be served with the order or in custody. The issue of the order must be authorised by a police officer of the rank of sergeant or above, although investigating police officers of lower rank may do so with written or telephone authorisation from the more senior officer. There are no other limits on this power.

An interim order issued by police can require the defendant to stay in a particular place until the order is prepared and served, for as long as it takes. If the defendant won't stay as required by police or it looks like the defendant is not going to stay, the police may arrest and detain the defendant without warrant for as long as it takes to prepare and serve the order, but for no longer than two hours or such longer period as is approved by the court (no more than eight hours in aggregate).

The police will have their own *pro-forma* interim intervention orders, incorporating all information relevant to an application for intervention, including information about current relevant orders for parenting or child protection or firearms or problem gambling, the terms of interim intervention that have been imposed, and the date and time when the court will hear the application and determine whether the interim order is to be confirmed, substituted or dismissed. It will include a form by which the defendant can consent to the terms of the order and another by which the defendant is to provide an address for future service.

Additional police powers

The Bill gives police extensive powers to hold and detain defendants to intervention orders, aimed at better protecting victims of abuse.

Having served an intervention order on a defendant, police may arrest and detain the defendant to prevent further immediate abuse and allow measures to be taken to protect any person protected by the order, for as long as is necessary to prevent immediate abuse or for these measure to be taken, but for no longer than six hours or such longer period as is approved by the Court (and this no more than 24 hours in aggregate). This power is expected to be used only in cases where there is an immediate risk of violence to the protected person should the defendant not be detained.

When an intervention order requires the defendant to surrender a weapon or article, police may search the defendant and anything in the defendant's possession for that weapon or article or enter premises or a vehicle to take possession of it, and may use reasonable force to do so.

Police may also arrest and detain a person in custody without warrant for suspected breach of the interim order or a final order, as long as the person is brought to court as soon as possible, and no more than 24 hours later, for the court to deal with the alleged offence. If the alleged breach occurs on a weekend or public holiday, the 24 hours does not include that period. This means that a person who is arrested for breach of an intervention order on, say, the Friday night of long weekend will be detained in custody for three days before the person comes to court.

Police obligations to provide copies of orders they issue

As well as serving the defendant, police must give a copy of each order they issue to the Principal Registrar of the Magistrates Court and each person protected by the order. That is because the order is taken to be an application to the court, and must be lodged with the court and the people to whom it applies as if it is such an application. The Registrar must then provide copies to relevant public sector agencies (the departments responsible for the *Children's Protection Act 1993*, the *Education Act 1972*, and the *Families and Community Services Act 1972* and the South Australian Housing Trust).

Finally, police must give the Registrar a copy of the defendant's address for service, if supplied, so that the court can locate the defendant for the service of its orders and notices.

Other options for police

The police may still apply to the court for an interim intervention order without issuing one themselves. This will usually happen when the defendant is not present or available for service when police want to intervene or when police are not sure how to make an interim order that is consistent with a current Family Court or child protection order.

Locating the defendant for service

When police apply for an interim intervention order they may have difficulty finding the defendant, and unless the application is served on the defendant the court cannot make a final determination. Information from public sector agencies and people under contract to provide services to such agencies may often help police find the defendant, but sometimes it is not clear whether the State's Information Privacy Principles authorise them to release this information to police. The Bill provides that information that is in the control of such an agency or person must be made available to police on request if it could reasonably be expected to assist in locating a defendant on whom an intervention order is served.

Who may apply to the court for an intervention order?

An application to the court for an intervention order may be made regardless of whether police have been called out to an incident and regardless of whether there has been a previous act of abuse. A person need not have been abused already to invoke these laws, which are designed as much to protect from apprehended abuse as from further abuse.

Anyone needing protection from an act of domestic or personal abuse may apply.

An adult may make an application and may do so through another person with the court's permission.

A child may apply either on the ground that the defendant may commit an act of abuse against the child or simply on the ground that the child may hear or witness or otherwise be exposed to the effects of an act of abuse committed by the defendant against any person.

If the defendant or a person proposed to be protected is a child who is the subject of an order made under s38 of the *Children's Protection Act 1993*, the Minister responsible for that Act may apply. It is expected that the Minister may do so when applying for new orders or variations of existing orders under the *Children's Protection Act 1993* about the child.

A child who is entitled to apply may do so in person if aged 14 or over, with the permission of the court. Otherwise, the child's application must be through a parent or guardian, someone the child usually lives with, or another suitable person who has been approved by the court.

Police may apply in their own right, whether they have the consent of the alleged victim or not, if they have not already issued an interim intervention order.

All these people, and also the defendant, may apply for a variation or the revocation of an intervention order. The defendant, however, may apply only with the permission of the court,

which will not be granted unless there has been a substantial change in relevant circumstances since the order was issued or last varied.

Preliminary hearing of application for order

When a person applies to the court for an intervention order in circumstances where the police have not already issued an interim order, the court must hold a preliminary hearing as soon as practicable and without summoning the defendant. It will then either make an interim order or dismiss the application.

An interim intervention order made by a court comes into effect only when served on the defendant, as does a police-issued interim order.

The interim intervention order will set a date for a hearing at which the application will be determined finally.

The court can adjourn the determination hearing for a limited time if satisfied that the interim order has not been served or there is other good reason for the adjournment.

Hearing to determine application for intervention order

At this hearing, the court has three options:

- to confirm the interim intervention order (whether issued by police or the court);
- to issue an intervention order in substitution for the interim order (this will usually happen when a term of the interim order needs to be changed); or
- to dismiss the application and revoke the interim order.

If the interim order is confirmed, it continues in force as an intervention order against the defendant *without any further requirement for service*, because the defendant has been given full notice of the hearing date and what will happen at the hearing and has been told that the interim order is ongoing until revoked or substituted. When a defendant fails to appear at this hearing, the order may be confirmed without hearing further from the defendant. It can also be confirmed when the defendant has consented to the order, even if the defendant disputes some of its terms, without hearing further from the defendant.

The court will substitute another order if there are terms in the interim order that need to be changed - either at the instance of the person for whom protection is sought or the defendant. A substituted order must be served on the defendant before it has effect, but, until it is served, the interim order will remain in force.

If the court dismisses the application and revokes the interim order, revocation takes effect immediately but the defendant must be served with written notice of the revocation.

How long does an intervention order last?

All intervention orders, whether interim or not, have continuing effect: they continue in force, subject to any variation or substitution by the court, until revoked.

Intervention orders are to be ongoing because no court can predict, when making an order restraining a defendant from being violent, what may happen when the defendant is no longer subject to that restraint. That is for the defendant to establish, much later, in an application to revoke the order, by reference to the defendant's conduct since the making of the order (inasmuch as that has any relevance at all to the defendant's future conduct when not so restrained), to changes in the defendant's circumstances or the circumstances of the victim or both, to changes in their relationship and to a range of other relevant factors.

The continuing nature of intervention orders means they cannot be made for a specified period or until a particular event occurs. It also means that an intervention order cannot lapse. If, for example, an intervention order is varied, the order as in force before it was varied continues to bind the defendant until the amended (substituted) order is served.

The transition provisions bring restraining orders made under the current laws within this regime. If such an order were given an expiry date and, after this new legislation comes into operation, is brought before a court for variation or revocation, the court must, if it decides to continue the order in original or varied form, turn the order into a continuing order. The original order cannot be extended for a fixed term.

How are the terms of the order made known to the defendant and protected persons?

The terms of an intervention order and any associated orders will be set out in the orders themselves.

In addition, though, the issuing authority (police or the court) must try to ensure that the defendant and those protected by the order understand what these orders mean by explaining their terms and effect (but a failure to do so will not invalidate the order). For example, if the order is an interim one, issued by police, the police officer must ensure that the defendant understands that this is an application to the court and serves as a summons to appear in court for a hearing on the date specified in the summons, as well as explaining each individual term of the order.

The issuing authority must also explain how these orders interact with any current *Family Law Act* (Cth.) or *Children's Protection Act* (S.A.) orders of which the authority is aware.

Finally, the explanation must include that a protected person cannot give permission to contravene the order.

Court obligations to provide copies of its orders

As well as serving the defendant, the Principal Registrar must give a copy of each interim order and each intervention order that it issues, and each notice of variation or revocation of either kind of order, to:

- The Commissioner of Police;
- Each person protected by the order;
- The applicant, if the applicant was not the police or a person protected by the order;
- The relevant public sector agencies (the Departments administering the *Children's Protection Act 1993*, the *Family and Community Services Act 1972* and the Education Act 1972I and the South Australian Housing Trust).

In this way not only those directly affected by the order but all relevant agencies and Government authorities, whether already providing services to a person or family affected by the order or not, will become aware that an order has been made, its current status and its terms at the earliest possible moment and can take this information into account when providing their services.

There are also requirements for the court to notify relevant authorities of any associated orders it makes - problem gambling orders and tenancy orders - and to notify the relevant public sector agencies of any foreign intervention order it registers.

Housing options for victims

Some victims of domestic violence choose to move out of their home, despite the defendant being subject to a restraining order excluding the defendant from the home, for their own safety and the safety of their children.

Others who are confident that the order will protect them from future violence may wish to stay in the home, particularly when there are children in the household whose schooling and social lives would be disrupted by a move. Until now, there have often been legal or practical barriers to staying in the home.

The Bill contains measures to help victims of abuse either leave home safely or stay in their home.

First, it allows an intervention order to prohibit the perpetrator from being anywhere near the family home, even though the perpetrator may own or rent it. The aim is to encourage victims of abuse and their children to stay in the family home if they want to and so prevent their lives being unnecessarily disrupted.

Secondly, it offers a means of longer-term security to protected persons who wish to stay in the home. The Bill allows the court, when making an intervention order that excludes a defendant from rented premises in which the defendant lives with the protected person, to make another order by which the defendant's interest in the tenancy agreement is assigned to the protected person or to some other person or persons other than the defendant.

For these purposes a tenancy agreement will include not only agreements for residential tenancies under that Act but also residential parks agreements and agreements for the tenancy of rooming houses.

This measure takes into account the needs of the landlord (that the new tenant will comply with the obligations under the tenancy agreement, such as payments for rent and utilities charges) and prevents the order being made if incompatible with the legal obligations of the landlord (for example, when the landlord is a registered housing co-operative and the proposed assignee is not eligible for membership of that co-operative or, although eligible, is not willing to accept the responsibilities of membership, or when the landlord is the South Australian Housing Trust and the proposed assignee does not meet the eligibility requirements).

These orders do not terminate the tenancy agreement but allow it to continue in terms that are consistent with the assignment of a tenant's rights in a residential tenancy agreement under s74 of the *Residential Tenancies Act*.

This provision does not prevent applications by other parties to the agreement to the Residential Tenancy Tribunal or to the South Australian Housing Trust under the provisions of their Acts.

Finally, the Bill contains measures to help victims who decide to move out of the home, leaving the defendant in residence. It is common for such a defendant to continue the abuse by denying the victim or the children access to the home to collect personal possessions or by denying the victim access to the family car to transport children to and from school or to shop for the family. If there is already a restraining order in place that does not refer to personal

property, the defendant will often invoke the no-contact terms of that order to deny such access.

To countermand this, the Bill allows the court or police to order the defendant to return specified personal property to the protected person, and to do so in a way specified in the order; to allow the protected person to recover or have access to or make use of specified personal property, again in a way specified in the order (for example by giving the protected person access to the former home at a particular time); and to allow the protected person to do these things under police protection or in the company of a specified person, if desired.

Child defendants

The legislation contemplates that sometimes a child will be the defendant to an intervention order. It allows the Youth Court to hear such matters as if it were a Magistrate's Court and to make intervention orders against children, using all the special safeguards afforded to children by that court. (The Youth Court may also make intervention orders itself, in appropriate cases, protecting a child.).

Of course, if a child breaches an intervention order, the matter will be heard in the Youth Court in the same way as would any other criminal offence committed by a child.

Protected persons exempt from liability for aiding and abetting breach of intervention order

The Bill exempts a person who is protected by an intervention order from liability for aiding, abetting or procuring its breach, unless the conduct, so abetted, also contravenes this order or any other intervention order against the defendant for another protected person.

This provision recognises the power imbalance between parties to abuse and the potential for subtle manipulation by the perpetrator of the victim by way of pay-back or retribution or in an attempt to reconcile without regard to the order. Of course, when the protected person is overborne by threats to aid and abet a breach of an intervention order, there is a defence of duress. But even if there is no duress, the criminal law should not be used against an abused person unless this person has assisted a breach that puts the safety of other people protected by this or another order at risk.

Police report that there are some occasions when a victim of abuse will manipulate the defendant to breach the order, to get the defendant into further trouble. These rare cases do not warrant an exception to this exemption. We expect that in cases where there would, but for this

exemption, be good grounds for a charge against a protected person for aiding and abetting a breach of an intervention order (that is, where there is no suggestion of coercion or duress), police should simply apply to the court for a variation or revocation of the intervention order on the ground that it is not working as intended. The court can then review the terms of the order and rectify the problem to the extent possible. The possibility of such a review may well deter this kind of manipulation by protected persons.

In conclusion

In enacting these reforms, Parliament will be sending a clear message that it will not tolerate the use of violence to control or intimidate another person, particularly in a domestic setting; that it recognises and abhors the lasting psychological and emotional damage to children from exposure to such violence; that it expects perpetrators to accept full responsibility for their violent behaviour; and that the paramount consideration is always the protection and future safety of the victims of abuse and the children who are exposed to it.

It will also be offering perpetrators of domestic or personal abuse the means to deal with associated problems of substance abuse, mental health, problem gambling and anger control, in the expectation that they will then be able to reflect upon and appreciate the effects of their abusive behaviour on others, take responsibility for it and learn to treat other people, particularly those close to them, with respect and care.

EXPLANATION OF CLAUSES

Part 1—Preliminary

1—Short title

2—Commencement

These clauses are formal.

3—Interpretation

This clause provides necessary interpretative provisions for the measure.

4—Application of Act outside State

This clause ensures that the measure applies in relation to a defendant wherever the defendant resides and to abuse wherever it occurs.

This is similar in effect to current section 4(3) of the *Domestic Violence Act 1994* and section 99(2a) of the *Summary Procedure Act 1921*.

Part 2—Objects of Act

5—Objects of Act

This clause describes what the measure achieves and the purposes designed to be achieved.

The measure brings together the provisions relating to domestic violence restraining orders under the *Domestic Violence Act 1994* and other restraining orders for violence under the *Summary Procedure Act 1921*. Violence amongst more remote family members, carers and others currently dealt with under the *Summary Procedure Act 1921* is to be dealt with under this measure.

Part 3—Intervention and associated orders

Division 1—General

Note—

This Division is designed to set out the substantive framework for the issuing of intervention orders with the following Divisions dealing with matters of procedural detail and associated problem gambling and tenancy orders.

6—Grounds for issuing intervention order

The grounds for issuing an order are that it is reasonable to suspect that the defendant will, without intervention, commit an act of abuse against a person and the issuing of the order is appropriate in the circumstances. This reflects section 4(1) of the *Domestic Violence Act 1994* and section 99(1) of the *Summary Procedure Act 1921* and continues the South Australian approach which allows for an order to be made in anticipation of violence, rather than only after the event.

7—Persons for whose protection intervention order may be issued

This clause provides that an order may be made, not only for the person against whom the act of abuse is directed, but also for any child who may hear or witness, or otherwise be exposed to the effects of an act of abuse against another.

This emphasises the importance of considering the broader implications of abuse for children.

It is also made clear that an order can protect persons other than a person who applies for the order.

8—Meaning of abuse—domestic and non-domestic

This clause describes the many potential aspects of abuse. It refers to physical, sexual, emotional, psychological and economic abuse and recognises that abuse may result in—

- physical injury; or
- emotional or psychological harm; or
- an unreasonable and non-consensual denial of financial, social or personal autonomy; or

- damage to property in the ownership or possession of the person or used or otherwise enjoyed by the person.

Extensive examples are included of the types of acts that may result in emotional or psychological harm or an unreasonable and non-consensual denial of financial, social or personal autonomy. These concepts are designed to expand on and more effectively describe what is currently referred to as intimidating or offensive behaviour in section 4(1) and (2) of the *Domestic Violence Act 1994* and section 99(1) and (2) of the *Summary Procedure Act 1921* and the range of examples included has been significantly expanded.

Some of the examples are drawn from the corresponding Victorian legislation.

This clause also sets out when abuse will be considered to be domestic abuse. This covers a broader category of relationships than is currently captured by the concept of family member in the *Domestic Violence Act 1994* (generally limited to spouses or partners and children). The new concept extends to the relationship between grandchildren and grandparents, brothers and sisters, an Aboriginal kinship group, and so on, and also between a carer and the person cared for.

9—Priority for intervention against domestic abuse

This clause requires proceedings relating to intervention against domestic abuse to be given priority, as far as practicable.

This equates to section 18 of the *Domestic Violence Act 1994*.

10—Principles for intervention against abuse

The principles set out in this clause are to guide the police and magistrates in the issuing of intervention orders.

Subclause (1)(a) and (b) describes at a high level the pervasiveness and character of abuse in our society. This is designed to guard against prejudices and uninformed views about abuse.

Subclause (1)(c) sets out the primary aim of preventing abuse. There is a similar emphasis in section 6 of the *Domestic Violence Act 1994* and section 99(5) of the *Summary Procedure Act 1921*.

Subclause (1)(d) reflects an increased focus on encouraging defendants to accept responsibility and take steps to avoid committing abuse and on assisting protected persons and children.

Subclause (2) sets out other matters that must be taken into account. Currently, courts are required to take into account certain Family Law Act orders and the matters set out in paragraphs (b) and (d) (see section 6 of the *Domestic Violence Act 1994* and section 99(5) of the *Summary Procedure Act 1921*). This is expanded to include Children's Protection Act orders, agreements and orders relating to the division of property and other legal proceedings between the defendant and protected persons.

11—Ongoing effect of intervention order

It is made clear that intervention orders are ongoing (that is, that they do not expire after a specified time period).

12—Terms of intervention order—general

The clause sets out examples of the types of prohibitions and requirements that may be included in an intervention order. These include, most significantly, excluding a defendant from a residence or prohibiting the defendant from engaging in particular conduct.

The terms are similar to those set out in section 5 of the *Domestic Violence Act 1994*.

The clause provides that if a defendant is excluded from rented premises, then despite any other Act or law the protected person may change the locks and the defendant may not terminate the tenancy agreement. These are new aspects to the law.

13—Terms of intervention order—intervention programs

This clause authorises the Court to impose a new requirement for the defendant to undertake an intervention program. This is part of the focus on trying to get the defendant to accept responsibility and to take action to avoid committing acts of abuse. Assessment in relation to such a program can be required as a term of an intervention order. The assessment and programs are to be managed by the Courts Administration Authority's intervention program manager, along the same lines as those that may be imposed as a condition of bail or as a term of a bond.

14—Terms of intervention order—firearms

This clause requires an intervention order to include specific terms designed to ensure that the defendant surrenders any firearms in his or her possession and is prevented from possessing firearms while the order is in force. It allows the Court to allow a defendant to possess firearms but only if the defendant has never been guilty of violent or intimidatory conduct and needs to have a firearm for purposes related to earning a livelihood.

This reflects the current requirement for firearms orders contemplated by section 10 of the *Domestic Violence Act 1994* and section 99D of the *Summary Procedure Act 1921*. The new scheme streamlines the requirement by integrating it with the intervention order.

15—Inconsistent Family Law Act or Children's Protection Act orders

This clause explains that the effect of the Commonwealth *Family Law Act* is that Family Law Act orders referred to in section 68R of that Act prevail over intervention orders but that the Magistrates Court may vary the Family Law Act order in proceedings for an intervention order.

This clause provides that an intervention order is to prevail over a Children's Protection Act order under section 38 of that Act and contemplates that the inconsistency will be resolved by an application made under that Act.

16—Explanation for defendant and protected persons

This clause contains a new requirement for the police and magistrates to explain the terms and effect of intervention orders to defendants and to protected persons. They are also required to explain the effect of clause 15 (if relevant) and that a protected person cannot give permission for contravention of an order.

This is a simplified version of the approach taken in the corresponding Victorian legislation.

Division 2—Police orders

17—Interim intervention order issued by police

This clause contains a new power for the police to issue interim intervention orders on the spot.

The defendant must be before the police officer or in custody. The order must be issued or sanctioned by a police officer of or above the rank of sergeant. This is similar to the situation in respect of the issuing of interim firearms prohibition orders under the *Firearms Act 1977*.

It is contemplated that the police will establish a series of pro forma interim intervention orders to suit the different sorts of situations with which they are most often confronted.

An interim intervention order will require the defendant to appear before the Court at a specified time and place. This must be within 8 days and gives the defendant an opportunity to make submissions and present evidence to the Court. It is contemplated that the form would also include provision for the defendant to consent to the order if the defendant so chooses.

An interim intervention order issued by a police officer must be served personally on the defendant.

The provision draws on the ideas in the corresponding Victorian legislation but avoids the complexity of a different scheme of orders and notices.

This mechanism is designed to ensure that the police can respond effectively on the spot to situations of abuse.

18—Revocation of interim intervention order by Commissioner of Police

The Commissioner of Police is empowered to revoke an order issued by a police officer. Again this is similar to the arrangements in respect of firearms prohibition orders.

Division 3—Court orders

19—Application to Court for intervention order

This clause provides for formal applications to the Court by the police, an abused person or representative, a child exposed to abuse or, if there is a relevant Children's Protection Act order in force, the Minister responsible for the administration of that Act.

Allowing representatives and the Minister to make applications invokes a new approach.

Application to the Court is an alternative avenue for police if they are approached in the absence of the defendant or the circumstances of the particular case involve inconsistent Family Law Act orders or Children's Protection Act orders (a matter only able to be resolved by the Court). An abused person may choose to approach the Court directly.

The clause replaces the provisions for making a complaint in sections 7 and 8 of the *Domestic Violence Act 1994* and sections 99A and 99B of the *Summary Procedure Act 1921*. Details relating to the making of applications by telephone or other electronic means are left to rules of Court.

20—Preliminary hearing and issue of interim intervention order

The Court is required to hear an application as soon as practicable and without summoning the defendant to appear. The Court may dismiss the application including if satisfied that the application is frivolous, vexatious, without substance or has no reasonable prospect of success, but there is a presumption against exercising the discretion to dismiss the application if the applicant alleges that the defendant has committed an offence involving personal violence or an offence of stalking under section 19AA of the *Criminal Law Consolidation Act 1935*. This presumption is similar in effect to section 99CA(2) of the *Summary Procedure Act 1921*.

The process is similar to that of making a restraining order in the absence of the defendant under section 9 of the *Domestic Violence Act 1994* or section 99C of the *Summary Procedure Act 1921*.

As for telephone applications under section 8(1)(d) of the *Domestic Violence Act 1994* and section 99B(1)(d) of the *Summary Procedure Act 1921*, the Court may adjourn the hearing if it wishes to question the applicant in person.

The Court may rely on affidavit evidence at the preliminary hearing but the defendant may require the deponent to appear at the hearing of the application for cross-examination. This is the same approach as in section 9(3) of the *Domestic Violence Act 1994* and section 99C(3) of the *Summary Procedure Act 1921*.

As for interim orders issued by a police officer, an interim intervention order issued by the Court must require the defendant to attend the Court at a specified time and place for the full hearing of the application. It is contemplated that the standard form order would also include provision for the defendant to consent to the order if the defendant so chooses.

An interim intervention order issued by the Court must be served on the defendant personally or in some other manner authorised by the Court. Expressly allowing the Court the flexibility to order some other form of service is new.

The mechanism presented in this clause is designed to provide a quick way of obtaining protection for the victim of abuse, with the defendant given an early opportunity in the full hearing to put the defendant's case.

21—Adjournments

This clause allows for adjournments in the event of difficulties serving an interim intervention order or for other adequate reason. As in the equivalent current provisions, the emphasis is on urgency with adjournments ordinarily being for no more than 8 days (see section 9(5) of the *Domestic Violence Act 1994* and section 99C(5) of the *Summary Procedure Act 1921* although in those cases the period is 7 days).

22—Determination of application for intervention order

This clause contemplates the Court confirming, substituting or revoking an interim intervention order.

It allows for the issuing or confirmation of an order to take place in the absence of the defendant after summons or without taking further submissions or evidence if the defendant consents (and is to the same effect as section 9(1) and section 4(4) of the *Domestic Violence Act 1994* and section 99C(1) and section 99(2b) of the *Summary Procedure Act 1921*).

In the case of substitution of an order, the clause provides for the interim order to continue in force until service of the substituted order. This is similar to the current approach with confirmation of orders in an amended form.

23—Problem gambling order

The Court is empowered to make problem gambling family protection orders under the *Problem Gambling Family Protection Orders Act 2004*.

Section 10A of the *Domestic Violence Act 1994* currently provides for the making of problem gambling family protection orders.

24—Tenancy order

This clause introduces a new power for the Court to assign the defendant's interest as a tenant to the protected person or some other person if the Court is imposing an intervention order (other than an interim intervention order) under which the defendant is excluded from rented premises at which the defendant and protected person previously resided.

Before doing so the Court must be satisfied that the assignee could reasonably be expected to comply with the obligations under the tenancy agreement. This is designed to ensure that it is satisfactory to assume landlord consent to the assignment.

The defendant will continue to be responsible for liabilities accrued before the assignment and any bond paid by the defendant will (subject to any agreement by the parties to the contrary) remain in place as security for the proper performance by the assignee of obligations under the tenancy agreement.

Division 4—Variation or revocation of orders

25—Intervention orders

This clause enables police orders and court orders to be varied or revoked on application to the Court. As in section 12(1a) of the *Domestic Violence Act 1994* and section 99F(1a) of the *Summary Procedure Act 1921* a defendant may only apply for variation or revocation of an order (other than an interim order) if there has been a substantial change in the relevant circumstances since the order was issued or last varied.

26—Problem gambling orders

This clause provides for variation or revocation of problem gambling orders when an intervention order is revoked or on separate application.

If an intervention order is revoked but the problem gambling order is not revoked, then the matter is to become an ordinary matter for the Independent Gambling Authority under the *Problem Gambling Family Protection Orders Act 2004*.

Division 5—Evidentiary matters

27—Burden of proof

The Court is to decide questions of fact on the balance of probabilities. This equates to section 17 of the *Domestic Violence Act 1994* and section 99K of the *Summary Procedure Act 1921*.

28—Special arrangements relating to evidence and cross-examination

This clause is new to the scheme. It contemplates the Court making special arrangements for taking evidence that are similar to the *Evidence Act 1929* arrangements for vulnerable witnesses. It also limits how a defendant may cross-examine victims of and witnesses to abuse in a similar manner to that contemplated for victims of offences in section 13B of the *Evidence Act 1929*.

Part 4—Foreign intervention orders

29—Registration of foreign intervention order

This clause provides for registration of interstate and New Zealand intervention orders. The regulations are to nominate the types of orders or notices that may be registered and given effect here as intervention orders. The Court may require the Principal Registrar to serve the order on the defendant, in which case it will not come into force against the defendant until so served.

See section 14 of the *Domestic Violence Act 1994* and section 99H of the *Summary Procedure Act 1921*.

Part 5—Offences and enforcement

Division 1—Offences

30—Contravention of intervention order

As well as making it an offence to contravene an intervention order (see section 15 of the *Domestic Violence Act 1994* and section 99I of the *Summary Procedure Act 1921*), this clause states that a protected person is not to be guilty of an offence of aiding, abetting, counselling or procuring the commission of such an offence provided no other protected person is affected by the commission of the offence.

If the contravention is constituted of failure to participate in an intervention program or assessment, the offence is expiable. Otherwise the maximum penalty provided is one of imprisonment. It should be noted that the provisions of the *Criminal Law (Sentencing) Act 1988* allow a Court to impose a fine instead in certain circumstances and generally set out the principles to be applied in determining sentence. Intervention programs are also a feature of that Act. It should also be noted that in circumstances where the abuse independently amounts to the commission of an offence other criminal penalties will also apply.

31—Landlord not to allow access to excluded defendant

This clause makes it an offence for the landlord to provide a key or otherwise assist or permit a defendant to gain access to the premises if the landlord has been notified that the defendant is prohibited from being on the rented premises. This is a new provision.

32—Publication of report about proceedings or orders

This is a new provision making it an offence, without the authorisation of the Court, to publish by radio, television, newspaper or in any other way a report about proceedings under the measure, or an order issued or registered under the measure, if the report identifies, or contains information tending to identify any person involved in the proceedings (including a witness but not including a person involved in an official capacity or the defendant), or a person protected by the order or a child of a protected person or of the defendant, without the consent of that person.

Division 2—Special police powers

33—Powers facilitating service of intervention order

This clause enables a police officer to hold on to a defendant for up to 2 hours in order to apply for, serve, or prepare and serve, an intervention order on the defendant. The Court may extend the period but not beyond 8 hours. Compare section 11(3) of the *Domestic Violence Act 1994* and section 99E(3) of the *Summary Procedure Act 1921*.

34—Powers following service of intervention order

This is a new and significant power loosely based on Victorian provisions to enable the police to arrest and detain a defendant for up to 6 hours to prevent abuse or to enable measures to be taken immediately for the protection of a protected person. The Court may extend the period but not beyond 24 hours. It is also contemplated that the rules of Court may authorise an application for extension to be by telephone or other electronic means.

35—Power to arrest and detain for contravention of intervention order

This clause enables a police officer to arrest and detain a person for contravention of an intervention order. It provides the same power as section 15 of the *Domestic Violence Act 1994* and section 99I of the *Summary Procedure Act 1921*.

36—Power to search for weapons and articles required to be surrendered by intervention order

This clause provides express power to search for weapons and articles required to be surrendered by an intervention order. This has been elevated from a matter dealt with in the terms of the order (see section 5(2)(k) of the *Domestic Violence Act 1994*).

Division 3—Disclosure of information

37—Disclosure to police of information relevant to locating defendant

This clause compels public sector agencies and contractors to provide information that may assist in locating a defendant on whom an intervention order is to be served to the police on request.

Part 6—Miscellaneous

38—Delegation by intervention program manager

This clause provides a power of delegation to the Courts Administration Authority's intervention program manager.

39—Dealing with items surrendered under intervention order

This clause provides that surrendered firearms are to be dealt with under the *Firearms Act 1977* and other weapons and articles at the direction of the Court.

40—Evidentiary provision

This clause provides an evidentiary aid relating to contravention of a requirement regulating participation of a defendant in an assessment or intervention program.

41—Regulations

This clause provides general regulation making power.

Schedule 1—Related amendments, repeal and transitional provisions

Part 1—Preliminary

1—Amendment provisions

This clause is formal.

Part 2—Amendment of *Bail Act 1985*

2—Amendment of section 24—Act not to affect provisions relating to intervention and restraining orders

The provision currently provides that nothing in the Act affects the operation of the *Domestic Violence Act 1994* or the provisions of the *Summary Procedure Act 1921* relating to restraining orders. The amendment updates the reference.

Part 3—Amendment of *Criminal Law Consolidation Act 1935*

3—Amendment of section 348—Interpretation

An ancillary order is defined to include a restraining order issued under section 19A of the *Criminal Law (Sentencing) Act 1988*. The Full Court is empowered to make ancillary orders on appeal against acquittal or on an issue antecedent to trial. The reference is updated.

Part 4—Amendment of *Criminal Law (Sentencing) Act 1988*

4—Amendment of section 19A—Intervention orders may be issued on finding of guilt or sentencing

A court is empowered, on finding a person guilty of an offence or on sentencing a person for an offence, to exercise the powers of the Magistrates Court to issue against the defendant a restraining order under the *Summary Procedure Act 1921* or a domestic violence restraining order under the *Domestic Violence Act 1994* as if a complaint had been made under that Act against the defendant in relation to the matters alleged in the proceedings for the offence. The reference is updated.

Part 5—Amendment of *Cross-border Justice Act 2009*

5—Amendment of section 7—Interpretation

This amendment updates the definition of restraining orders for the purposes of the cross-border justice scheme.

6—Insertion of Part 3 Division 2A

This clause enables police to exercise the power to issue an interim intervention order in any part of the cross-border area, including in those parts that are within Western Australia or the Northern Territory.

Part 6—Amendment of *Evidence Act 1929*

7—Amendment of section 13B—Cross-examination of victims of certain offences

Section 13B of the *Evidence Act 1929* contains special provisions for cross-examination of victims of certain offences, including an offence of contravention of a domestic violence restraining order. The reference is updated.

Part 7—Amendment of *Firearms Act 1977*

8—Amendment of section 5—Interpretation

Under section 5(11) a person is not a fit and proper person to possess a firearm if the person is the subject, or has in the past been the subject, of a domestic violence restraining order. The reference is updated.

9—Amendment of section 32—Power to inspect or seize firearms etc

This amendment extends the powers to seize firearms to those possessed in contravention of an intervention order.

Part 8—Amendment of *Problem Gambling Family Protection Orders Act 2004*

10—Amendment of section 4—Grounds for making problem gambling family protection order

Section 4(8) provides for adjournment of proceedings in favour of proceedings under the *Domestic Violence Act 1994*. The reference is updated.

Part 9—Amendment of *Summary Procedure Act 1921*

Note—

The amendments remove provisions relating to personal violence restraining orders, to be dealt with under the new measure. After amendment, Part 4 Division 7 of the Act will deal only with paedophile restraining orders.

11—Non-application of Acts Interpretation Act

This clause provides that the provision for automatic commencement after 2 years does not apply to this Part. This is to enable certain provisions to be suspended indefinitely if necessary to take account of other measures.

12—Amendment of section 4—Interpretation

This clause deletes the definition of *relevant family contact order* because it is unnecessary to the paedophile restraining order provisions. It also makes a necessary adjustment to the definition of *restraining order* to reflect the fact that the Part will only deal with paedophile restraining orders.

13—Repeal of section 99

This clause repeals the section dealing with the making of personal violence restraining orders.

14—Amendment of section 99AA—Paedophile restraining orders

This amendment sets out that a police officer may make a complaint under the section. This is currently set out in section 99A.

15—Repeal of sections 99A and 99B

These sections currently set out who may make a complaint under the Division and establish a scheme for the making of telephone complaints. The latter are not relevant to complaints for paedophile orders.

16—Amendment of section 99C—Issue of restraining order in absence of defendant

This amendment removes a reference to section 99CA which is to be repealed.

17—Repeal of sections 99CA and 99D

This clause repeals the sections on special provisions relating to non-police complaints for section 99 restraining orders and firearms orders for section 99 restraining orders.

18—Amendment of section 99E—Service

This amendment removes reference to firearms orders.

19—Amendment of section 99F—Variation or revocation of restraining order

This amendment removes reference to an application being made by a victim.

20—Amendment of section 99G—Notification of making etc of restraining orders

This amendment removes reference to an application being made by a victim.

21—Amendment of section 99H—Registration of foreign restraining orders

This amendment removes reference to an application being made by a victim.

22—Repeal of section 99J

This clause repeals the section dealing with complaints by children.

23—Repeal of section 99L

This clause repeals the section dealing with the relationship between the *Domestic Violence Act* and this Act.

24—Amendment of section 189—Costs

This clause updates the reference to domestic violence restraining orders so that it will continue to be the case that costs will not be awarded against an applicant unless the Court is satisfied that the applicant has acted in bad faith or unreasonably in bringing the proceedings.

25—Further amendments

References to a member of the police force are updated to police officer throughout the Act.

Part 10—Amendment of *Youth Court Act 1993*

26—Amendment of section 7—Jurisdiction

Section 7 gives the Youth Court the same jurisdiction as the Magistrates Court to make a restraining order under the *Summary Procedure Act 1921* or a domestic violence restraining order under the *Domestic Violence Act 1994* if the person for or against whom protection is sought is a child or youth, and ensures that the Youth Court has power under that Act to vary or revoke such an order previously made by the Court. The references are updated.

Part 11—Repeal

27—Repeal of *Domestic Violence Act 1994*

This clause provides for the repeal of the *Domestic Violence Act 1994*.

Part 12—Transitional provisions

28—Continuance of restraining orders

This clause ensures that existing orders will continue to be effective. If an application is made to vary or revoke an existing order that has an expiry date and a decision is made that the order should continue in some form, the Court is required to turn it into an ongoing order (and so there will be no concept of an extension of an order).

29—Continuance of registered foreign restraining orders

This clause ensures that orders that are currently registered will continue to be effective.