

Australian Protection Order Legislation: An Overview

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Protection Orders - Today's aims

- Domestic Violence - many areas, including family & child protection, criminal law
 - main focus is Protection Order law
- Look at *legislation* .: practice, procedural issues for workshops
- Not an exhaustive list, but a highlight of features
- Start of a conversation:
 - Open discussion and debate
 - Point out possibilities for law reform activism
- Key Q: What are the innovations which are likely to make a difference?

Structure

- Recent amendments and reforms
- Focus on innovations -mainly Australia
- Contrasts across jurisdictions
- General protection order issues
- Lead-in to workshops → processes, systems and strategies, consideration of best practice

Protection Orders

- Central Aust. response to domestic violence
- Criminal and civil features
- Local or Magistrates' Court
- Applications by police or private party
- Injunctive, speedy response → strategic value

Recent Law Reform

- Victoria
 - *Family Violence Protection Act 2008*
- Northern Territory
 - *Domestic and Family Violence Amendment Act 2009 (Mandatory Reporting)*
 - *Domestic and Family Violence Act 2007*
- ACT
 - *Domestic Violence & Protection Orders Act 2008(30/03/09)*
 - *Domestic Violence & Protection Orders Act 2001*
- NSW
 - *Crimes (Domestic & Personal Violence) Act 2007*
- Tasmania
 - *Family Violence Act 2004*
- WA
 - *Restraining Orders Act 1997*
 - amended 2004
- Queensland
 - *Domestic and Family Violence Protection Act 1989*
 - amended 2002
- SA??
 - *Domestic Violence Act 1994*
 - Pyke Review awaiting action

Key Features - Victoria

- Principles
 - preamble - human rights and gender power
- Definition (s5) includes
 - Animal abuse
 - Controlling behaviour causing fear
 - Emotional and Ψ (including tormenting) (s7)
 - Sexual
 - Economic (s6)
 - Exposure of children
- Exclusion Orders (s 82) - must be considered
- Tenancy laws (s257 -264) - change of tenancy, locks etc, liabilities
- Privacy - (s166, 167, s68)
- Restrictions where no victim consent (s 75)
- Holding powers (s 12)
- Police Family Violence Safety Notices (s 24)
- Family Law (s 90) -
 - court must suspend, discharge, vary Family Law order if inconsistent (68R FLA) -test: safety of child and victim (s91)
- Cross examination restrictions (s 70-72)
- Variations can be made by police to privately initiated orders (s108).
 - Revocation - Whether applicant has legal rep is factor to consider (s 100)

Key Features - NT and ACT

NT

- Mandatory Reporting (s 124A)
- Police DV Orders Pt 2.6
 - Def. must “show cause” to court
- Economic abuse (s8)
 - (“stand over tactics”)
- Also conduct causing harm, animal abuse(s5)

ACT (08)

- Children - amendments must consider their needs s58 (1) (b)
- Crystallising - endorsement copies s36
- Animal violence offences
- Legal guardian for parties with legal disability (eg children) s19
- Privacy provisions s111
- Short term amendments s60

Key Features - Tasmania

- PFVOs - issued by police s 14
- Mandatory Reporting s 38 - not commenced
- Presumption against bail s 12
- Assessment of risk in relation to decision making eg s 12
- Safety and interests of victim and children paramount s 18
- Definition includes emotional abuse, economic ss 7-9
- Information sharing - s37

Key Features - NSW and Qld and WA

NSW

- Mandatory Children s38(2)
- Fear test and exception s 16
- Proactive policing s 49

WA

- Cooling Off Orders s20
- No consent defence re breaches s62
- Order duration where conviction - lifelong s 63A
- Information sharing s 70A

QLD

- Proactive policing s71
- Police rep for private applicants s60
- Possibility of economic abuse s11

Some Overseas Innovations I

- US - VAWA (1994)
 - Restitution available
 - Pennsylvania - withdrawals of applications must be heard by a judge
- Canada -
 - most provinces include temporary custody order
 - 3rd party applications (eg, First Nations Community Worker) in Saskatchewan
 - Ontario - short term orders crystallise into long term
 - Yukon - bonds and restitution/damages

Some Overseas Innovations II

- NZ - Accessibility - Plain English
 - Translations
 - Without-notice applications
 - Family Law/PO law overlap - same court
- Cyprus, Austria, Denmark, Finland, Sweden mandate \$\$ for support services (Kelly 2005)
- Crim law - DV offences - more serious when in home in Belgium, Cyprus, Spain, Sweden, Switzerland
- Austria - police power - 10 day exclusion order

Availability

- Types of relationships
 - Narrow (Tas, SA) v Broad
 - Carers (NSW, NT, Vic), Relatives and kin (Qld, NT, Vic, NSW), flatmates (NSW s 5(d), NT s 9(d)), intertwining personal relationship (WA s4 (2)), dating couples/stalked victims (ACT s 15 (1) (e); NSW s5; NT s 11; Vic s8(b); WA (s4)
 - 'intimate personal r'ship'
 - reliance on other laws - APVOs, Misconduct ROs, Restraint Orders, Stalking IOs, Workplace orders
 - Associated Orders
 - Associated victims
 - Children (WA s11B; NT s18 (2); NSW s38 (2))
 - Associates (Qld s15(1)), (Vic s76)
 - Family members (WA s 4(2))
 - Associates of the perpetrator (Vic s76)

Tests

- 2 approaches
 1. Perpetrator - Behaviour focussed
 - Behaviour and likelihood of future behaviour (Vic, Tas, Q)
 - ??necessity of past behaviour - Hunter and Stubbs
“triggering event” - counter to preventive function of POs
 - With behaviour focussed tests, definitions become crucial
 2. Victim - effect of behaviour (fear) (NSW, NT)
 - NSW -Likelihood test as exception if no expressed fears s 16 (2) (c) (ii)
 - Objective/subjective test of reasonableness?
 - Ensure safety - ACT, Vic Interim orders
- SA - conduct and fear - s 4 (2) (c)

Definitions

- Tas - comprehensive - s 7
- Also Vic - s 5 - potentially 'bullying' behaviour
- NSW - linked to offences under Crimes Act - narrower (s4,16)
- NT s 17 - counsel or procure someone else to commit act
- Stalking - NSW s16, NT s5, Tas s7
- NT, Tas, Vic - econ abuse but in NT is for broader family relationships and no need to establish intent (s8)

Emotional Abuse

- Tas s8
- NT - mental harm (s101,102)
- Vic s5, s7
- WA - s 6
- Overseas Canada - "Annoys"
- other jurisdictions - intimidation - is this sufficient?
- Need for subjective test?
- Issue of *intent* in definition (ditto stalking)

Conditions I

- Exclusion & Tenancy Orders –
 - Vic (s 82) strongest – court must consider and if appropriate and victim consents, then is included
 - Tenancy – Vic s 262 – change tenancy details, locks s 259
 - Tas s17
 - NT (s23) – replacement tenancy agreement
- Property – in most new laws – eg Vic s 81 – ‘everyday life’, ‘normal running of home’

Detention and Holding Powers

- Tasmania presumption against bail, s12
 - Holding Powers - no stated limit - s11
- NSW exception to presumption in favour (s 9A *Bail Act*)
- Victoria - holding powers Pt 3 - up to 10 hrs

Other Police Powers

- Cooling Off:
 - Vic Family Violence Safety Notices
 - NT, WA Police Orders
- Tas Police Family Violence Orders (PFVOs) s 14
- Obligation to take action - NSW- s 49(q); Q - s 67 (1)(2); WA - s62A,s62C

Protection for Children

- Recognition of post-trauma response for witnessing children - psychological and cognitive safety
 - Tas - 'affected children' - throughout act
 - Vic - definition of fv includes exposure of ch'n
 - Contact - test is children's safety, conditions must maximise safety of both child and parent (s 89-93) - also FVCD
 - WA - s 11A
- Q - paramountcy of child welfare in considering conditions s25 (5) (b)
- Third Party initiated applications - NT s 29
- Child initiated - no age - capacity to understand proceedings - Tas s 15 (2) (c)
- NSW - controversial inclusion s 38(2)
- Evidentiary issues - NSW (s 41 (4), Vic (s 67), Q (s 81A) c.f Tas

Contrasts across jurisdictions: other issues

- Access to Law - Clarity, ease, - Plain English - Qld, Tas, ACT
- Accompanying Resource allocation (US)
- Adjunct Proceedings, cross-vesting, court initiated orders (NSW - ss 39,40; Tas- s 36)
- Breaches - Aiding and Abetting
- Privacy - ACT, Vic, NT c.f "name and shame" - NSW

Protection Orders

- Critiques

- General value of legal intervention eg Smart, Hunter)
- PO law, waters down the criminal law response (eg Scutt)
- Victim choice in a pro-intervention system?

Workshop issues



- What are your thoughts?
 - Exemplars?
- Unintended consequences?
 - Procedural problems apparent with these law reforms?
 - Mandatory reporting?
 - Others??
- Value of law reform without system change?
 - Integrated systems
 - Specialist courts
- Do we need harmonisation?
- Any other issues?