BENCHBOOK

MAGISTRATES COURT OF QUEENSLAND

Domestic and Family Violence Protection Act 2012

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1 INTRODUCTION

1.1 PRELIMINARY

This publication (the Benchbook) outlines the relevant law and suggested procedure for judicial officers (Magistrates; Acting Magistrates; Judicial Registrars; and Acting Judicial Registrars) who deal with applications under the *Domestic and Family Violence Protection Act 2012*; *Domestic and Family Violence Protection Regulation 2023* and the associated *Domestic and Family Violence Protection Rules 2014* [1].

It is a guide only and each judicial officer must form his or her own opinion as to whether jurisdiction to deal with an application exists and the appropriate procedure according to law in each case.

It is *not* a handbook for practitioners or unrepresented litigants appearing before the Court. Useful material available to these persons may be accessed at Courthouses; Police Stations; Legal Aid Queensland offices and many other locations including the following websites:

- Department of Children, Youth Justice, and Multicultural Affairs
- Department of Justice and Attorney-General
- Queensland Courts
- Legal Aid Queensland.

The Benchbook reflects current domestic and family violence jurisprudence in Queensland and follows the provisions of the Act. It is to be read with the National Domestic and Family Violence Benchbook (National Benchbook), developed and maintained by the Australian Institute of Judicial Administration [2]. The National Benchbook contains social science and related literature to promote a greater understanding of the dynamics and behaviours associated with domestic and family violence, in addition to applicable federal and state and territory case law. The Benchbook will reference relevant content addressed in the National Benchbook. Queensland judicial officers utilise both benchbooks when exercising the domestic and family violence jurisdiction.

Frequent reference is made to legislation throughout this Benchbook. The legislation is not repeated verbatim. Instead, the contents of this Benchbook should be read in conjunction with that legislation. Unless stated otherwise, the following abbreviations apply:

- DFVPA or the Act - *Domestic and Family Violence Protection Act 2012* (as amended);
- DV Rules 2014 / the Rules - *Domestic and Family Violence Protection Rules 2014;* and

[1] References to legislation are to Queensland legislation, except where indicated otherwise.
[2] Queensland co-funded the development of the National Benchbook with the Commonwealth and other states and territories and continues to provide financial support for its ongoing revision.

- The Explanatory Notes:
    - Explanatory Notes to the *Domestic and Family Violence Protection Bill 2011;*
    - Explanatory Notes to the *Domestic and Family Violence Protection and Other Legislation Amendment Bill 2016*;
    - Explanatory Notes to the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*; and
    - Explanatory Notes to the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023*

The following Judicial Officers are acknowledged for their contribution to the development of the original Benchbook: His Honour Judge Orazio (Ray) Rinaudo, Chief Magistrate; Magistrates Janelle Brassington; John Costanzo; and Stephanie Tonkin and members of the Magistrates Domestic and Family Violence Committee (Magistrates Annette Hennessy (Chair); Deputy Chief Magistrate Leanne O'Shea; Deputy Chief Magistrate Terry Gardiner; Mark Bucknall; Rod Madsen; Catherine Pirie; Cameron Press; Joseph Pinder); and Judicial Registrar Grace Kahlert. Susan Johnson, Senior Research Consultant and Maryanne May, Acting Magistrate and Principal Legal Officer, Office of the Chief Magistrate are also acknowledged for their contribution.

1.2 OBJECTS AND PRINCIPLES

The main objects for administering the *Domestic and Family Violence Protection Act 2012* (see s3) are to:

- Maximise the safety, protection, and wellbeing of people (including children) who fear, experience or are exposed to domestic violence; and
- Prevent or reduce domestic violence and exposure of children to domestic violence; and
- Ensure that people who commit domestic violence are held accountable for their actions.

The objects are achieved by (s3(2)):

- Allowing a court to make a domestic violence order to provide protection against further domestic violence; and
- Giving police particular powers to respond to domestic violence, including the power to issue a police protection notice; and
- Imposing consequences for contravention.

The **paramount principle** is the safety, protection and wellbeing of people who fear or experience domestic violence, including children (s4(1)).

The following principles also apply (s4(2)):

- People who fear or experience domestic violence should be treated with respect and disruption to their lives minimised;
- The views and wishes of people who fear or experience domestic violence should be sought before a decision affecting them is made, as far as practical;
- Perpetrators should be held accountable for their use of violence and its impact on others but if possible be provided with an opportunity to change;

- Any response to domestic violence should take into account any characteristics that make a person particularly vulnerable (women, children, Aboriginal peoples and Torres Strait Islander peoples, people from a culturally or linguistically diverse background, people with a disability, people who are lesbian, bisexual, transgender or intersex, elderly people);
- Where there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of domestic violence, including for their self-protection, the person who is most in need of protection should be identified,[3] and only one domestic violence order protecting that person should be in force unless, in exceptional circumstances, there is clear evidence that each person is in need of protection from the other;
- A civil response under this Act should operate in conjunction with, not instead of, the criminal law.

Note that in deciding whether to make a protection order under s37, **the court must consider these principles (s37(2))**.

1.3 UNDERSTANDING THE MEANING OF DOMESTIC VIOLENCE

1.3.1 National Benchbook - Understanding domestic violence[4]

Domestic and family violence is complex and diverse. Chapter 3.1 "*Understanding domestic and family violence*" of the National Benchbook outlines some common misconceptions including a focus on domestic violence as a single incident or a series of discrete incidents of physical violence. The National Benchbook explains the concept of domestic violence as a **pattern of behaviour involving a perpetrator's exercise of control over the victim**.

The range of behaviours underpinning domestic and family violence, many of which may be part of a pattern of behaviour, may require a range of judicial responses. These include, actual or threatened (links to National Benchbook references):

- Physical violence and harm
- Sexual and reproductive abuse
- Economic and financial abuse
- Emotional and psychological abuse
- Cultural and spiritual abuse
- Following, harassing and monitoring
- Social abuse
- Exposing children to domestic and family violence
- Damaging property
- Animal abuse

[3] See discussion at 3.7 in relation to cross applications.

[4] Chapter 3.1, *National Domestic and Family Violence Benchbook*.

- Systems abuse
- Forced marriage.

Other relevant chapters of the National Benchbook include Chapter 4, Dynamics of domestic and family violence, in particular:

- Chapter 4.1 Myths and misunderstandings
- Chapter 4.2 Factors affecting risk
- Chapter 4.3 Typological approaches
- Chapter 4.4 Vulnerable groups
- Chapter 5 Fair hearing and safety
- Chapter 5.11 Trauma-informed judicial practice.

1.3.2 Coercive control

Chapter 3.2 of the National Benchbook deals with coercive control as a form of domestic violence. Coercive control has been described as a course of conduct aimed at dominating and controlling another. [5]

In 2021, the Queensland Government established the Women's Safety and Justice Taskforce [6] to examine coercive control, the need for a specific offence of domestic violence, and the experience of women in the criminal justice system. The Taskforce's first report *"Hear her voice – Report one – Addressing coercive control and domestic and family violence in Queensland"* provides a comprehensive examination and analysis of coercive control as a form of domestic and family violence. The report made 89 recommendations for reform, including creating a new offence of coercive control. It made clear that, prior to introducing a new offence, system-wide reform was needed to ensure sufficient services and supports were in place, as well as amendments to existing legislation. Systems needed to respond better to coercive control through a shift from focusing on responding to single incidents of violence to focusing on the pattern of abusive behaviour that occurred over time. [7]

The *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* **Error! Bookmark not defined.** implemented recommendations in Chapter 3.8 of the report. The Taskforce found that the previous definition of domestic violence in s8 sent a confusing message about the nature of coercive control and domestic violence and may have contributed to misidentification of DFV by not properly reflecting coercive control as being the key component of DFV. These reforms include amending the definitions of "domestic violence", "emotional or

[5] See Chapter 3.2 of the National Benchbook.
[6] Information on the work of the Women's Safety and Justice Taskforce can be viewed on the Taskforce's website.
[7] Explanatory Notes to the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022*, pages 1-2.

psychological abuse" and "economic abuse" to include a reference to a "pattern of behaviour". [8]

The Australian Institute of Judicial Administration has developed a suite of resources to facilitate judicial education about coercive control: Recognising and responding to coercive control: Materials on coercive control for judicial officers' continuing professional education.

Chapter 3.2 of the National Benchbook also includes recounts from victims with lived experience of coercive control in addition to relevant coercive control case law.

For Queensland case law considering coercive and controlling behaviour, see:

- *MNT v MEE* [2020] QDC 126 at paragraph 1.3.4.
- *SHW v ABC* [2021] QDC 151 at paragraph 1.3.4
- *DLM v WER & The Commissioner of Police* [2022] QDC 79 at paragraph 1.3.4.
- *Queensland Police Service v KBH* [2023] QDC 26 at paragraph 1.3.4.

1.3.3 Meaning of Domestic Violence in DFVP Act

Domestic violence is defined in s8(1) to include behaviour, or a pattern of behaviour, by the first person towards[9] the second person with whom the first person is in a relevant relationship that is:

- Physically or sexually abusive; or
- Emotionally or psychologically abusive (as defined in s11)[10]; or
- Economically abusive (as defined in s12); or
- Threatening[11]; or
- Coercive (see s8(5) for meaning of coerce[12]); or
- In any other way controls or dominates the second person and causes the second person to fear for his/her safety or wellbeing or for that of someone else[13].

Section 8(2) provides that behaviour, or a pattern of behaviour:

- may occur over a period of time; and
- may be more than one act, or a series of acts, that when considered cumulatively is abusive, threatening, coercive or causes fear (in a way mentioned in s8(1)); and

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[8] Ibid, pages 1 and 5.

[9] For behaviour 'towards' another person see *YY v ZZ* [2013] VSC 743 at [66] per Cavanagh J where it was suggested that behaviour can be 'towards' another person *"if it is focused on, or targeted at, or directed to, that person".* To attempt to obtain a person's address is conduct which focuses on, is targeted at, or is directed to, that person.

[10] See DMK v CAG [2016] QDC 106 at [41] to [49].

[11] Ibid.

[12] Section 8(5) ***Coerce****, a person, means compel or force a person to do, or refrain from doing, something.*

[13] Ibid

- is to be considered in the context of the relationship as a whole.

Section 8(3) expands on the definition by providing a non-exhaustive list of behaviours that constitute domestic violence including:

- Causing or threatening to cause personal injury to someone;
- Coercing a person to engage in sexual activity or attempting to do so;
- Damaging or threatening to damage a person's property[14];
- Depriving a person of their liberty or threatening to do so;
- Threatening a person with the death or injury of the person, a child of the person, or someone else;
- Threatening to commit suicide or self-harm so as to torment, intimidate or frighten the person to whom the behaviour is directed;
- Causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the person to whom the behaviour is directed, so as to control, dominate or coerce the person;
- Unauthorised surveillance of a person (defined in s8(6) including examples)[15]; and
- Unlawfully stalking, intimidating, harassing or abusing a person (as defined in the *Criminal Code Act 1899* ss359B and 359D).

A person who counsels or procures a person to engage in domestic violence is taken to have committed domestic violence (s8(4)).

The Act makes it clear that for behaviour in s8(3) that may constitute a criminal offence, a court may make an order under the Act on the basis the behaviour is domestic violence even if the behaviour is not proved beyond a reasonable doubt (s8(5)).

1.3.4 Emotional or psychological abuse

Emotional or psychological abuse is defined in s11 as behaviour, or a pattern of behaviour, by a person towards another person that torments, intimidates, harasses or is offensive to the other person. Examples include following a person, remaining outside their home or place of work, repeatedly contacting them, repeated derogatory taunts, threatening to disclose a person's sexual orientation without their consent, threatening to withhold a person's medication and preventing a person from having contact with family and friends.

McGill DCJ, in a paper titled *Domestic and Family Violence Protection Act 2012* presented to the Queensland Magistrates Annual State Conference 2012 made a number of

[14] See *R v RBE* [2021] QCA 146 – an appeal against sentence for one count of arson of a dwelling (domestic violence offence). The dwelling was the matrimonial home.

[15] See *OMD v Queensland Police Service & Anor* [2021] QDC 282 where Porter KC DCJ found, at [112], that the appellant's conduct "*in loitering near, watching and approaching [the respondent's] house..*" amounted to domestic violence under s8. And at [118], loitering and the wielding and pointing of a camera amounted to unauthorised surveillance.

comments regarding the definition of domestic violence, especially the definition of emotional or psychological abuse:

> [4] *"Emotional or psychological abuse" is defined in section 11 as behaviour towards another person that torments, intimidates, harasses or is offensive to the other person. This is a somewhat curious definition. The concepts of intimidation and harassment are familiar in this area. It is not entirely clear what is meant by "torments" though my impression is such conduct would be more serious than intimidation or harassment. It is also unclear what is meant by conduct, which is offensive to the other person, but it is at this point that the legislation, potentially at least, becomes subjective. My impression is that generally whether behaviour amounts to domestic violence is something to be assessed objectively. Ordinarily, when a term is defined in a factual way that may be taken to require an objective test for the satisfaction of the various elements of the definition. But whether something is offensive to someone seems to me to require a test which is subjective by reference to that person. The question would have to be whether the behaviour really was offensive to that person, rather than simply whether that person claimed that the behaviour was offensive, perhaps a subtle distinction. It seems that there is no objective or community standard test for what is offensive behaviour, and so long as the behaviour was in fact offensive to the particular aggrieved, it would appear to satisfy the definition in s11 of emotional or psychological abuse. That seems to me to make the definition of domestic violence in part subjective.*
>
> *[5] There is no express statement that the behaviour, in order to be emotionally or psychologically abusive and hence domestic violence for the purposes of s 8, is required to be intentionally offensive to the other person. In these circumstances there is at least a risk that a person who was not intending to be offensive but was in fact offensive unintentionally could end up committing an act of domestic violence. That has potential consequences given the way in which the Act is otherwise structured. There may be an argument that the use of the term abusive may imply a requirement of intention because the term suggests, at least to me, that the conduct is deliberate, in the sense of something which is being deliberately inflicted by someone else.*

As to the meaning of "*intimidation* and *harassment",* see *BBB v RAB* [2006] QDC 080 where McGill SC DCJ held that intimidation is a process where the aggrieved is made fearful or overawed, particularly with a view to influencing the person's conduct or behaviour. [16] There may be a single incident which amounts to intimidation, but something which does not in fact intimidate could not amount to intimidation. Harassment involves repeated or persistent conduct, which is annoying or distressing, rather than something that would cause fear. Harmless fortuitous encounters do not amount to harassment or intimidation even if the aggrieved finds them upsetting.

In *W v D* [2008] QDC 110, Dodds DCJ accepted, at [10], that repeated derogatory statements to the aggrieved (that she was sick, crazy, needed help) in the context of the

[16] This and the following seven paragraphs of text were prepared by Magistrate John Costanzo.

relationship and the parties' characters or personalities, amounted to intimidation. His Honour relied on the Shorter Oxford Dictionary definition: *"…intimidation is the action of intimidating another. To intimidate is to terrify, overawe or cow. To harass is to trouble by repeated attacks, subject to constant molesting or persecution."*

In *DGS v GRS* [2012] QDC 074**Error! Bookmark not defined.** McGill SC DCJ, referring to his previous decisions in *MAN v MAM* [2003] QDC 398 and *D v G* [2004] QDC 477, held at [41]–[44]:

> *(a) Something which did not in fact intimidate could not amount to intimidation.*
> *(b) Nothing could be harassment or intimidation unless the supposed victim of the activity was aware the activity was occurring.*
> *(c) Persistently refusing to discuss matters that the other party wanted to discuss could not be harassment or intimidation.*
> *(d) Mere unwillingness to do what the other party wanted done could not amount to intimidation or harassment.*
> *(e) Production of a recorder to record a conversation (where it only occurred on one occasion) was not intimidation or harassment where it was a defensive, not aggressive, act.*
> *(f) Deliberately standing close to an aggrieved while making a telephone call to prevent the aggrieved from having a private conversation could be harassment.*
> *(g) It was harassment where the respondent deliberately drove in a way annoying and upsetting to an aggrieved, because of concerns about their safety. The conduct could be harassment even if the manner of driving was objectively appropriate.*
> *(h) Hanging around an aggrieved's residence could easily be harassment or intimidation.*
> *(i) Harmless fortuitous encounters are not harassment or intimidation even if a party finds them upsetting.*
> *(j) The legislature did not intend the elements of the definition be applied restrictively. As remedial legislation, it ought to be given the widest construction that the terms can fairly bear. As long as conduct does harass or intimidate, almost anything could in principle amount to harassment or intimidation.*
> *(k) Being wrongly accused of sexual abuse of a child and any other course of conduct involving persistent allegations of significant criminal activity, where the allegations are unjustified and particularly if they are made for a collateral purpose would be harassment or intimidation.*

DGS was cited in *DMK v CAG* [2016] QDC 106 where Morzone KC DCJ upheld the Magistrate's finding that threats made to the children by the appellant to the effect he was going to kill them constituted domestic violence pursuant to s8(1)(d) (see [41] – [49]).

In *MAA v SAG* [2013] QDC 031 at [13], the respondent made numerous groundless complaints of child abuse to police and the Department of Child Safety; entered the aggrieved's garage and took the child's birth certificate; abused the aggrieved in text messages and drove into her estate without good reason. The aggrieved felt harassed and

intimidated by the number and content of the complaints. McGinness DCJ accepted the course of conduct was intimidation and harassment even if only one of the purposes in making the complaints and allegations was to intimidate and harass.

In *Baron v Walsh* [2014] WASCA 124 at [63] and [65], the Court of Appeal (WA) held the respondent's resort to *"legally available procedures"* (complaints to the Australian Health Practitioners Regulation Agency, minor claims proceedings, multiple interlocutory applications in the ROA proceedings and a perjury complaint to police), threats which preceded such conduct and a threat of defamation proceedings, taken as a whole, was intimidation under the *Restraining Orders Act 1997* (WA) .

See also *CPS v CNJ* [2014] QDC 047 where Dearden DCJ found that "*continuous contact and comments",* verbal and by text, made by the appellant were capable of constituting domestic violence.

In *LKF v MRR* [2012] QDC 355, Long SC DCJ referred to the need for an objective enquiry:

> *[29] In particular, much of the appellant's application depended upon proof of intimidation or harassment of her. Whilst those concepts are to be judged by a criterion of the impact of behaviours upon the person to whom they are directed, the essential enquiry is an objective one. Accordingly, there is no requirement of proof of any particular intent or state of mind or other subjective requirement in relation to a respondent's actions[17]. Similarly, and without the fact of intimidation or harassment being objectively established, it will usually not be enough that an applicant subjectively regards particular conduct as intimidation or harassment. Although in some circumstances, particular characteristics of the parties or their relationship may be relevant to a conclusion as to whether domestic violence in the nature of intimidation or harassment has occurred[18].*

DGS and *LKF* were applied in *EVE v ETT* [2021] QDC 161 where the appellant's behaviour of turning up and remaining at the respondent's property in breach of court orders was "*an intentional breach of those orders and amounted to harassing, offensive and tormenting behaviour which constituted emotional or psychological abuse*" (at [75]).

The subjective nature of emotional abuse is also reflected in the decision of Kent KC DCJ in *AMB v TMP & Anor* [2019] QDC 100. At [36]-[38], His Honour discussed the '*more troubling aspect … [of] whether those events did constitute domestic violence in the form of emotional abuse*.' At [37], Kent KC DCJ said:

> *[37] Where the dialogue between the parties involved the trading of insults, it is obviously more difficult to reach a conclusion that mere insults (which is all that is suggested here – there is no finding of any physical contact) do amount to "emotional abuse". In my view, such insults, like many other aspects of*

[17] Although proof of conduct designed or calculated to have such in effect may be particularly relevant.
[18] For example, the position of a particularly vulnerable or sensitive applicant would necessarily be part of the circumstances to be objectively considered, in any given case.

> *human interaction, fall on a continuum of seriousness, from completely trivial to very serious; and at a certain point on the continuum, it becomes clear that emotional abuse is involved. Drawing the line at the point where this is reached may not be a precise science, and in part depends on the impact on the individual recipient, depending on their particular robustness or otherwise.*

In *JSB v Queensland Police Service* [2018] QDC 120, the contravention involved a single act of verbal abuse, resulting in the aggrieved seeking refuge in the bedroom. Fantin DCJ agreed with the Magistrate's characterisation of the offending behaviour as inappropriate, intimidating and controlling.[19]

See also *AVI v SLA* [2019] QDC 192 where Smith DCJA dismissed an appeal against the refusal to make a protection order, finding, inter alia, a single incident in this case did not amount to intimidation and was not an act of domestic violence within the meaning of the Act. In this case, the respondent father had attended his children's school to inquire into their progress (a protection order against the father had expired three months before; family law orders were in place allowing the father contact with the children at a contact centre). Smith DCJA held [at 76 – 77]:

> *[76] In my respectful view the Magistrate was correct in finding at [76] this was not proved to be an act of domestic violence. [77] In my view, the prima facie position is (absent any order to the contrary) a parent is entitled to check on the progress of his children at school. Without more this is not domestic violence. Again, it is not just a matter of the aggrieved finding it upsetting.*

In *MNT v MEE* [2020] QDC 126, Byrne KC DCJ found the Magistrate had erred in finding the forgiveness of a debt by the appellant's son to the appellant amounted to an act of economic abuse against the respondent (aggrieved). There was no evidence the forgiveness of the debt denied the respondent economic or financial autonomy. Nor was there evidence that the forgiveness of the debt amounted to the withholding of support necessary for meeting the respondent's living expenses. However, His Honour found, upon the consideration of the evidence on appeal, that the conduct of the appellant amounted to one aspect [20] of overall controlling behaviour, or emotional or psychological abuse. The timing of the forgiveness of the debt (one month before family law proceedings were instituted by the appellant) suggests that it was a deliberate attempt

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[19] The case also considered s9(2)(a) and (2A) *Penalties and Sentences Act 1992* and whether "violence" in s9(2A) extended to emotional abuse. Fantin DCJ held that s9(3) PSA, when read with s9(2A), supports the construction that "violence" in s9(2A) does not extend to emotional abuse [53]. Accordingly, Fantin DJ proceeded on the basis that s9(2A) does not apply here because the offending involved emotional abuse and not physical harm or personal violence. Therefore, the principles in s9(2)(a) apply and imprisonment should be a last resort.

[20] Other aspects of controlling behaviour which His Honour found amounted to domestic violence (having found the appellant's evidence not credible) within the meaning of s8 included the treatment of the respondent's belongings, the appellant getting into bed with the respondent at a time after they had commenced living apart, the condition of the house and lack of approvals for work done (in circumstances where the appellant was a builder), lack of rectification of works which potentially diminished the value of joint assets, and an altercation on 6 April 2019, the subject of a recording. In His Honour's view, all of these instances of controlling behaviour collectively amounted to emotional or psychological abuse.

to remove the asset (the debt owing) from the property pool. Neither the appellant nor the appellant's son could satisfactorily explain how and why it occurred.

In *AKM v CJM* [2021] QDC 199, Sheridan DCJ held that the conduct of the appellant over the course of a number of years and continuing until recently amounted to intimidation and harassment and constituted domestic violence. The conduct included numerous serious allegations being made against the respondent to police and child safety which were found to be without foundation or support.

See *SHW v ABC* [2021] QDC 151 where passive aggressive acts were found to be controlling and emotionally abusive behaviour amounting to domestic violence. At [37-38]:

> *Even accepting the Magistrate's findings that the respondent was not likely to be violent towards the appellant in the future, his passive aggressive acts such as going to Paluma the day before she was due to arrive, refusing to hand over furniture, and handing over the wrong keys to his solicitors so when the appellant did attend Paulma, she would be unable to enter the cabin,* ***all amount to controlling and emotionally abusive behaviour that has the potential to be repeated during the course of the property settlement. Contact is inevitable during that period.*** [emphasis added] …*In my view the magistrate erred in finding that it was not necessary or desirable to protect the appellant from future domestic violence.*

See *RGB v BKS & Anor* [2021] QDC 234 where a series of text messages from a brother to his sister constituted domestic violence on the grounds of being intimidatory.

See also *OMD v Queensland Police Service & Anor* [2021] QDC 282 in the context of emotional abuse, and stalking and unauthorised surveillance where it was found being fearful is not limited to being fearful of a physical assault. At [126] – [127], Porter KC DCJ held:

> *Stalking behaviour involves the stalker intruding, without consent and without warning, into the daily life of the victim. It can create a grinding, pervasive anxiety, even where there is no real risk of physical violence…*
>
> *Sadly, OMD's submission reflects a lack of understanding of the effect of her behaviour on them. The fact that she does not mean them any harm (which I accept) does not mean that her conduct is not causing them harm.*

See also *DLM v WER & The Commissioner of Police* [2022] QDC 79 where Cash KC DCJ, at [71], found the following behaviour was intended to harass or offend:

- Withholding their child in a manner that was manipulative.
- Rebuffing the first respondent's reasonable requests for contact with their child, and only allowing the first respondent contact if it was supervised by himself in a park.
- Using his knowledge of the first respondent's background to manipulate her.
- Keeping intimate images of the first respondent and threatening to use them in other court proceedings.

His Honour also found other conduct to be controlling behaviour.[21]

In *Queensland Police Service v KBH* [2023] QDC 26, the respondent was charged with four contravention offences which involved approaching the aggrieved, speaking to her on the phone, and remaining at her home despite being asked to leave. Coker DCJ held that the Magistrate erred by misconstruing the actual nature of the domestic violence offending and the nature of control and dominion. The Magistrate erroneously described the breaches as "*minor*" and "*relatively minor*". They were controlling, coercive and "*significant indications of a lack of appreciation or respect by the respondent of the orders previously made, and of the opportunities given to change the direction of his ways*". Coker DCJ stated at [32]:

> *I note particularly the more recent developments in relation to the domestic violence legislation, and of the very real need to accept that domestic violence is something far more than simply the imposition of physical force by one party to an intimate relationship upon another. There are a multitude of means by which there can be control exercised upon another and it is important, in fact, in my view, overwhelmingly so, that penalties imposed reflect the recognition of the importance of ensuring that such behaviours do not continue*.

1.3.5 Economic abuse

Economic abuse is behaviour, or a pattern of behaviour, that is coercive, deceptive, or unreasonably controls another person without that person's consent (s12):

- By denying that person the economic or financial autonomy they would have had but for that behaviour; or
- By withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of that person or a child if that person or child is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

Section 12 includes examples of economic abuse:

- Coercing a person to relinquish control over assets and income.
- Removing or keeping a person's property without their consent or threatening to do so.
- Disposing of property owned by a person or jointly owned against the person's wishes and without lawful excuse.
- Preventing a person from having access to joint financial assets to meet household expenses, without lawful excuse.

[21] That is, an incident where the appellant took the first respondent to a telephone store and refused to leave with the child until the first respondent retrieved identification documentation. His Honour also found conduct plainly sexually abusive when he secretly took photographs of his penis near the first respondent as she slept, at [71].

- Preventing a person from seeking or keeping employment.
- Coercing a person to claim social security payments.
- Coercing a person to sign a power of attorney that would enable the person's finance to be managed by another person.
- Coercing a person to sign a contract for the purchase of goods or services.
- Coercing a person to sign a contract for the provision of finance, a loan or credit.
- Coercing a person to sign a contract of guarantee.
- Coercing a person to sign any legal document for the establishment or operation of a business.

See *MNT v MEE* [2020] QDC 126 where the forgiveness of a debt was found not be economic abuse but rather one aspect of overall controlling behaviour, or emotional or psychological abuse (see paragraph 1.3.1).

1.3.6 Associated domestic violence

Associated domestic violence means domestic violence by a respondent towards a named person other than the aggrieved (s9) – i.e. a child of an aggrieved, a child who usually resides with an aggrieved, a relative of an aggrieved or an associate of an aggrieved (see paragraph 1.4.3).

1.4 AGGRIEVED, RESPONDENT AND NAMED PERSONS

1.4.1 Aggrieved

An aggrieved is a person for whose benefit a domestic violence order, or a police protection notice, is in force or may be made under the DFVPA (s21(1)). Only one person can be named as an aggrieved in an application, domestic violence order or a police protection notice (s21(2)).

1.4.1.1 *Can a child be an aggrieved?*

A child can be named as the aggrieved in an application for a domestic violence order, or in the domestic violence order or in a police protection notice *only if* an intimate personal relationship (i.e., spousal, engagement, or couple relationship) or an informal care relationship exists between the child and the respondent (ss22(1)-(2)).

See *SK (A Child) v Commissioner of Queensland Police & Anor* [2023] QDC 65 for Morzone KC DCJ's discussion of relevant considerations in applications involving juvenile relationships (including what amounts to a "couple relationship") at [58]-[68].

A child cannot be named as an aggrieved where there is a family relationship between the child and the other party. A child is defined in Schedule 1 of the *Acts Interpretation Act 1954* as meaning an individual under 18 years of age, if age rather than descendancy is relevant. An adult child can therefore be named as an aggrieved

where there is a family relationship of child and parent between that person and the respondent (*Explanatory Notes, Domestic and Family Violence Protection Bill 2011*, p39).

Note that a child can be protected from domestic violence in the family home by being named in an order which is made for the benefit of another person as the aggrieved (see paragraph 10.1.2).

Note also the definition of child of an aggrieved and child of a respondent in the Schedule to the Act (means a child who is a biological, adopted or stepchild of the aggrieved/respondent or who is in the care or custody of the aggrieved/respondent). In some other jurisdictions, a child can be named as an aggrieved in their equivalent of a domestic violence order where domestic violence occurs within a family relationship. Section 22(3) recognises that these interstate orders may be recognised interstate orders under Part 6 or New Zealand orders that may be registered under Part 6, Division 4 (see Chapter 19 regarding the national domestic violence order scheme).

1.4.2 Respondent

A respondent is a person against whom a domestic violence order or a police protection notice is in force or may be made under the DFVPA (s21(3)). More than one person may be named as a respondent in an application for, or in a domestic violence order (s21(4)) but only one respondent can be named in a police protection notice (s21(5)).

1.4.2.1 *Can a child be a respondent?*

A child can be named as the respondent in an application for a domestic violence order, or in the domestic violence order or in a police protection notice *only if* an intimate personal relationship (i.e., spousal, engagement, or couple relationship) or an informal care relationship exists between the child and the aggrieved (ss22(1)-(2)).

See *SK (A Child) v Commissioner of Queensland Police & Anor* [2023] QDC 65 for Morzone KC DCJ's discussion of relevant considerations in applications involving juvenile relationships (including what amounts to a "couple relationship") at [58]-[68].

A child cannot be named as a respondent where there is a family relationship between the child and the other party. A child is defined in Schedule 1 of the *Acts Interpretation Act 1954* meaning an individual under 18 years of age, if age rather than descendency is relevant. An adult child can therefore be named as a respondent where there is a family relationship of child and parent between that person and the aggrieved (*Explanatory Notes, Domestic and Family Violence Protection Bill 2011*, 39).

Again, s22(2) does not limit recognised interstate orders under Part 6 or New Zealand orders that may be registered under Part 6, Division 4 (s22(3)).

1.4.3 Named Persons

Persons other that the aggrieved can be protected by being specifically named in a domestic violence order. These persons are:

- Named child: A child of the aggrieved or who usually resides with the aggrieved (that is, a child who spends time at the residence of an aggrieved on a regular or ongoing basis (s24(2)).
- Named relative: A relative of the aggrieved as defined in s19(2) (see paragraph 1.5.2).
- Named associate: An associate of the aggrieved means either of the following persons if it is reasonable to regard the person as an associate –
    - a person whom the aggrieved regards as an associate.
    - a person who regards himself or herself as an associate of the aggrieved (s24(3)).

Examples include a current spouse or partner of the aggrieved; a person who works at the same place as the aggrieved; a person who lives at the same place as the aggrieved; a person who provides support or assistance to the aggrieved such as a friend or neighbour.

See further paragraph 10.1 regarding naming persons in domestic violence orders.

1.5 RELEVANT RELATIONSHIPS

A prerequisite to the making of a domestic violence order is that a relevant relationship exists between the aggrieved and the respondent.

Section 13 - A relevant relationship is:

(a) An intimate personal relationship; or
(b) A family relationship; or
(c) An informal care relationship.

1.5.1 Intimate personal relationship

Section 14 - An intimate personal relationship is:

(a) A spousal relationship; or
(b) An engagement relationship; or
(c) A couple relationship.

1.5.1.1 *Spousal relationship*

Section 15 – A spousal relationship exists between spouses.

A spouse includes:

(a) A former spouse; and
(b) A parent, or former parent, of a child of the person. An example of a former parent of a child - a birth parent who stops being a parent of a child under s39(2)(b) of the *Surrogacy Act 2010 (Qld)* (s15(2)(b)). It is irrelevant whether there is or was any relationship between the parents of the child (s15(3)).

1.5.1.2 *Parent*

Section 16 – A parent of a child means:

(a) The child's mother or father; and
(b) Anyone else having parental responsibility for the child – other than the chief executive (child protection); and
(c) For an Aboriginal or Torres Strait Islander child – a person regarded by tradition or custom as being a parent of a child (ss16(3) & (4)).

Parent does not include (s16(2)):

(a) A person standing in the place of a child on a temporary basis; or
(b) An approved foster carer for the child; or
(c) An approved kinship carer for the child.

1.5.1.3 *Engagement relationship*

Section 17 – An engagement relationship exists between two persons if the persons are or were engaged to be married to each other including a betrothal under cultural or religious tradition.

1.5.1.4 *Couple relationship*

Section 18 – A couple relationship exists between two people if the person has or have had a relationship as a couple.

Factors the Court may have regard to in deciding whether a couple relationship exists (ss18(2) & (3)):

(a) The circumstances of the relationship e.g., degree of trust between the persons; and the level of each person's dependence on, and commitment to, the other person;
(b) The length of time of the relationship.
(c) The frequency of contact between the persons.
(d) The degree of intimacy.
(e) Whether the trust, dependence or commitment is/was of the same level.
(f) Whether one of the persons is/was financially dependent on the other.
(g) Whether persons jointly own/ed any property.
(h) Whether persons have/had joint bank accounts.
(i) Whether relationship involves/involved a sexual relationship; and
(j) Whether the relationship is/was exclusive.

A couple relationship may exist even if the court makes a negative finding in relation to any or all of the factors (e)–(j) above (s18(4)).

A couple relationship may exist between same sex persons (s18(5)).

Dating on one or a number of occasions does not automatically mean a couple relationship exists (s18(6)).

The *Explanatory Notes, Domestic and Family Violence Protection Bill 2011*, pages 36-37, may assist in providing some clarity:

> *The new definition of couple relationship aims to overcome some of the reported problems associated with* [the former] *section 12A, in particular the requirement that the lives of the parties to the relationship were 'enmeshed'….*
>
> *Clause 18 requires a court to consider the objective factors that underpin or evidence the existence of a couple relationship and does not rely on how the parties to the relationship themselves view, define, or describe the relationship….*
>
> *The new definition of couple relationship is intended to capture a broader range of relationships than those envisaged in clause 12A. Examples of the types of relationships the definition of couple relationship has been framed to cover include:*
>
> - *Two elderly people who form a relationship based on companionship or an interest in travelling could be in a couple relationship. The two people may not reside together and may not be financially dependent on each other, but still be in a relationship that involves trust, emotional dependence and commitment, and frequent contact such that is can be characterised as a couple relationship.*
>
> - *Two young people who form a relationship while they are still each residing with their parents could be in a couple relationship. The relationship could be largely comprised of contact through a social networking website and may not be a relationship of a sexual nature, but the relationship could involve frequent contact between the parties and declaration of their trust and commitment towards one another.*

A further example is provided in the *Explanatory Notes, Domestic and Family Violence Protection Bill 2011*, 37-38:

> *… [A] woman forms what she believes is a committed and monogamous relationship with a man. She can prove through email correspondence and the evidence of common friends they have had regular contact over a period of time, the relationship is sexual and that they both initiated contact with each other. They both called and emailed the other, and he returns her calls and emails. The woman ends the relationship, and the man becomes violent and beings to harass her. When interviewed by police, the male partner denies they were in a relationship, although admits to them having casual sex*

on a few occasions. The man is in a de facto relationship with another woman. Despite the man's statements about the nature of the relationship and involvement with another woman, the court can look objectively at evidence that can be presented about the frequency of contact and that it is initiated by both parties, the degree of intimacy between them and the existence of a sexual relationship and conclude that the two people had a relationship as a couple.

In *MDE v MLG & Queensland Police Service* [2015] QDC 151, Morzone KC DCJ considered the meaning of a 'couple relationship':

[56] I first deal with the appellant's appeal ground 3, that the Magistrate erred in deciding that the parties were in a 'couple relationship'.

[57] The respondent's evidence included a statement filed 5 January 2015, which was prepared in a submission-like format peppered with commentary, opinion, and factual matters. These matters go to weight. The appellant elaborated on his perception of the matters referred to in s18(3), particularly the absence of mutual trust dependence or commitment, financial commitment, joint bank accounts or property, and exclusivity.

[58] The Magistrate made the following findings in concluding that the appellant and first respondent were in a couple relationship:

> *"In this case, the [appellant] submits that I couldn't be satisfied that there is or was a couple relationship. I have regard to the material – all the material relied on by the parties. The [first respondent] says that she and the [appellant] had a boyfriend/girlfriend relationship for about eight months, and they broke up in about August 2014. The [appellant] says that they met on a date website. They broke up in about August 2014. The [appellant] says that they met on a dating website. They dated on 10 – 15 occasions over a seven-month period, and they had sexual intercourse on each or nearly each of those occasions."*

[59] Later in the decision (at page 3 lines 5 to 10), the Magistrate added:

> *"I also reject [the appellant's] evidence in relation to the relationship ... where it is inconsistent with the evidence of [the first respondent], however, even if I had accepted the respondent's evidence in relation to the circumstances of the relationship, I would still be satisfied under the Act that a couple relationship existed between the parties. That's having regard to the number of occasions – the frequency of contact and the sexual relationship in particular."*

[60] Section 37 required the court to be satisfied that a "relevant relationship" existed between the appellant and the first respondent. Section 13 defines relevant relationship as an "intimate personal relationship." Section 14 further defines an intimate personal relationship as a "couple relationship". The appellant argued that the relationship did not go beyond a relationship

that existed merely because the parties dated each other on a number of occasions within the meaning of s18(6) of the Act.

[61] The terms "date" or "dating" are not defined in the Act. The term is ordinarily used colloquially when two people meet socially in public, usually involving some romantic interest beyond mere friendship, or with the aim of each assessing the other's suitability for an intimate relationship. It is a precursor to the establishment of a couple relationship.

[62] The Magistrate referred to the threat of legislative provisions, and referred to matters listed in s18(2) including the circumstances of the relationship, the length of the relationship, the frequency of contact and the degree of intimacy. The findings made were open on the evidence and in my view, involved significant elements in ss18(2)-(3) of the Act to support the conclusion of a couple relationship between the appellant and the first respondent. It was not necessary for all the elements to be present.

[63] It is clear that the evidence demonstrated that the relationship went beyond one of 'dating', and appeal ground 3 will fail.

In *SK (A Child) v Commissioner of Queensland Police & Anor* [2023] QDC 65, Morzone KC DCJ discussed the relevant considerations in applications involving juvenile relationships. His Honour stated at [67], that the meaning of "couple relationship" under s18 of the DFVPA "*reflect a relationship that is well-established beyond mere dating; it entails mutual respect, trust, communication, shared experiences, a deep understanding of one another, spending time together, mutual support and commitment, emotional intimacy and mature physical intimacy, mature emotional intimacy and commitment to a future together*".

1.5.2 Family relationship and relative

Section 19(1) - A family relationship exists between two persons if one of them is or was a relative of the other.

Section 19(2) - A relative of a person is someone who is ordinarily understood to be or to have been connected to the person by blood or marriage.

Examples of an individual's relatives:

- Spouse
- Child or stepchild
- Parent or stepparent
- Sibling or half sibling
- Grandparent
- Aunt, aunt in law, uncle, uncle in law, nephew, niece
- Cousin

Examples of former relatives:

- A person's former mother-in-law (where the person is no longer in a spousal relationship with son or daughter whose mother it is).

- A person's former stepparent (where their parent is no longer in a spousal relationship with the stepparent).

See *DL v MD & Queensland Police Service* [2022] QDC 228 where Loury KC DCJ upheld an appeal against a decision of a Magistrate that there was no family relationship between the appellant and respondent to the application (the appellant's sister had previously been in a relationship with the respondent although they had not married).

1.5.3 Informal care relationship

An informal care relationship requires one person to be or have been dependent on another person, a carer for help in an activity of daily living such as dressing or personal grooming, preparing, or assisting a person with eating meals, shopping for a person's groceries, or telephoning to make medical appointments for a person (s20(1)).

This category can include a carer who is receiving a pension or allowance for providing the care, or who is reimbursed for out-of-pocket expenses, despite the exclusion of carers operating under a commercial arrangement (see below) (s20(4)(b)).

Does not include:

- An informal care relationship between a child and a parent of a child (s20(2)).
- Where a person is engaged to help another under a commercial arrangement (s20(3)). An example is the relationship between a person and a nurse who visits the person each day to help with bathing and physiotherapy under a commercial arrangement between the person and the nurse's employer. Note that a commercial arrangement can exist even if no fee is being paid for the help provided (s20(4)). For example, the provision of help by a voluntary organisation for which a person does not pay a fee may still be under a commercial arrangement.

Note that if the person being cared for pays a fee because they are being threatened, coerced, or intimidated into making the payment by the carer, this would not be regarded as a commercial arrangement and therefore would not be excluded from the definition of informal care arrangement (s20(4)(c)) and the person would be entitled to apply for a domestic violence order.

1.5.4 Relationships to which the DFVPA does NOT apply

- Child (person under 18 years of age) as an aggrieved and a family member as a respondent, see s22 – the rationale is that the child protection system applies to children under 18 years where the child is at unacceptable risk of harm.
- Child as respondent where there is a family relationship with the aggrieved.

1.6 WHAT IS A DOMESTIC VIOLENCE ORDER?

A domestic violence order means (ss23(2)-(3)):

(a) A protection order (see chapter seven); or
(b) A temporary protection order (an order made in the period before the court decides whether to make a protection order) (see chapter six).

A court can make a domestic violence order against a respondent for the benefit of an aggrieved (s23(1)).

Named persons can also be protected by being specifically named in the domestic violence order (see ss52-53 and earlier paragraph 1.4.3).

Note s54 which sets out the circumstances when the **court *must* consider** whether the child should be named in the order (see also paragraph 10.1.2.2).

2 JURISDICTION TO HEAR AND DECIDE APPLICATIONS

A court[22] has jurisdiction to hear and decide any application made to the court under the Act and to perform any function or exercise any power given to the court under the Act (s136 (1)).

2.1 JUDICIAL REGISTRARS CAN DEAL WITH SOME APPLICATIONS

The jurisdiction of Judicial Registrars is set out in ss53I and 53J of the *Magistrates Act 1991**Error! Bookmark not defined.*** and *Practice Direction No.22 of 2012* (amended). A Judicial Registrar can hear and decide the following applications under the Act:

- For an adjournment of an application for an order.
- For a temporary protection order (see Chapter Six regarding temporary protection orders).
- Domestic violence order by consent or not opposed by the parties (see Chapter Eight).
- Variation of a domestic violence order by consent or not opposed by the parties.

Judicial Registrars also have jurisdiction to issue subpoenas, list an application for trial, and make directions orders.

2.2 MAGISTRATES COURT UPON DV APPLICATION BY A PERSON IN S25

A Magistrates Court exercising jurisdiction under the Act must be constituted by a Magistrate, except for those matters set out in paragraph 2.4 (s137).

A Magistrates Court in any district may hear and decide a proceeding that has been started in a Magistrates Court in another district (s136(2)).

The power to make the order and the test to be applied by the court are set out in s37 – see Chapter Eight.

The court can make a temporary protection order if (s27):

- The court adjourns–
    - A hearing of an application for a protection order.
    - A hearing of an application for variation of a domestic violence order.
    - An offence proceeding mentioned in s42; or
    - A Childrens Court proceeding mentioned in s43; or

[22] Note that Court is defined in s6 to mean–

- If an application is made to a Magistrates Court – the Magistrates Court;
- If an application is made to a Magistrate – the Magistrate;
- If a court convicts a person of an offence involving domestic violence – the court that convicts the person;
- If the Childrens Court is hearing a child protection proceeding – the Childrens Court.

- The applicant for a protection order has asked the clerk of the court under s36 for the application to be heard-
    - Before the respondent is served; or
    - Before the respondent is served and without the applicant giving the court a verification declaration;[23] or
- The applicant for a variation of a protection order has asked the clerk of the court under s90 for the application to be heard-
    - Before the respondent is served; or
    - Before the respondent is served and without the applicant giving the court a verification declaration; or
- A police officer applies for a temporary protection order under Part 4, Division 4 (urgent temporary protection orders).

The power to make the temporary protection order and the test to be applied by the court are set out in s44 – see Chapter Seven.

2.2.1 Dealing with application when criminal charges have been laid

A court may deal with an application under the DFVPA even if a person concerned in the application has been charged with an offence arising out of the conduct on which the application is based (s138(1)).

2.3 MAGISTRATES COURT IN CRIMINAL PROCEEDINGS FOR AN OFFENCE INVOLVING DOMESTIC VIOLENCE[24]: s138, s26 AND s42

2.3.1 When can the court make the order?

A court that convicts a person of an offence involving domestic violence can make a protection order naming the person as a respondent (s26 and s42).

The court can make the order on its own initiative if the court is satisfied that a protection order could be made against the offender under s37 (s42(2))[25]. (See Chapter Eight regarding when a protection order can be made.)

In deciding whether to make a protection order under s42(2), the court **may** consider the offender's criminal history and domestic violence history (s42(3)).[26]

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[23] Sections 27 and 36 were amended by the *Justice and Other Legislation Amendment Act 2021*, the purpose of which was to give permanency to regulations made in response to the COVID pandemic, increasing the accessibility of the court for private applicants in urgent situations by allowing applications to be verified between an applicant and a Magistrate.

[24] See paragraph 16.7 for the admissibility of evidence relating to a domestic violence application in criminal proceedings.

[25] See *KEM v GYB* [2020] QDC 262 at [80] and [81].

[26] This subsection provides that this is despite s37(2)(a)(iii), which requires a court to consider the respondent's criminal and domestic violence histories when deciding whether to make a protection order.

The order can be made before the offender is discharged by the court or otherwise leaves the court or the court may adjourn the matter to a later date[27] and make a temporary protection order in the meantime (s42(6)).

2.3.2 What is an offence involving domestic violence?

An offence involving domestic violence is any criminal offence that involves behaviours which constitute domestic violence as defined in s8 (see paragraph 1.3 for the meaning of domestic violence).

The definition specifically includes an offence against s177 (contravention of a domestic violence order), s178 (contravention of a PPN) and s179 (contravention of release conditions) (see Schedule Dictionary). The *Explanatory Notes, Domestic and Family Violence Protection Bill 2011* p46 explains that these are specified because contraventions of these might not amount to domestic violence as defined in s8:

> *For example, a respondent to a domestic violence order can be convicted of an offence of contravening a condition of the order that the respondent not have any contact with the aggrieved person on the basis of making a single telephone call. The telephone call, by itself, may not amount to domestic violence and so, without the definition in the dictionary, the court would not be able to consider varying the domestic violence order under clause 42.*

2.3.3 What if a domestic violence order is already in force?

If a domestic violence order is already in force against the offender, the court **must** consider the order and whether it needs to be varied (for example, by varying the date the order ends) and can make a variation order of its own volition (s42(4)). (See Chapter 14 regarding variation of domestic violence orders.)

2.3.4 Before making or varying an order?

Before the protection order is made or the domestic violence order is varied:

- The court **must be satisfied** that the requirements of s37 are met.
- The court **may** consider the offender's criminal and domestic violence histories (s42(3)).
- The court **must give the offender, prosecutor and, if practicable, the aggrieved, a reasonable opportunity** to be heard about the making or variation of the order (s42(5)) – this may require an adjournment.

[27] See paragraph 13.8 for giving notice of the adjournment to the respondent if they were not present when the matter was adjourned.

The power to vary a temporary protection order under s42 does not give the court the power to vary the temporary protection order into a five-year final order. See *Jones v DBA* [2019] QDC 149**Error! Bookmark not defined.**.

2.3.5 Adjournments

If the court adjourns the matter under s42(6)(b)[28], the court **must** inform the offender that if they do not appear at the time and date to which it has been adjourned, the court may (s42(7)(a)):

- Make a protection order or vary a domestic violence order in their absence; and
- Issue a warrant for them to be taken into custody if the court believes that it is necessary for the respondent to be heard. (Note that s156 says that a court must not issue a warrant as a matter of course but only where, in the circumstances of the case, the court believes it appropriate that the offender be heard.)

If the court adjourns the matter, the court may issue any direction that it considers necessary (s42(7)(b)).

If the court adjourns the hearing of the application at the first mention for the proceeding, the court must consider whether to make a temporary protection order (s47B) where the application was filed after 23 September 2024 (s238).

If the offender fails to appear at the time and date to which it was adjourned, the court may (s42(8))–

- **Make** a protection order or vary a domestic violence order in the offender's absence; or
- **Adjourn** the matter further and may, in the meantime, make a temporary protection order under Division 2; or
- Subject to s156(1), order the **issue of a warrant** to take the offender into custody and bring them before the court. (Note that s156 says that a court must not issue a warrant as a matter of course but only where, in the circumstances of the case, the court believes it appropriate that the offender be heard).

2.3.6 Other provisions to note

A proceeding to make or vary a protection order under s42 **must be held in open court** (despite s158) unless the court orders the court to be closed (s42(9)).

[28] See above note.

Section 145 of the DFVPA applies to a proceeding to make or vary a protection order under s42 (s42(11)) – i.e., the court is not bound by the rules of evidence, may inform itself as it thinks fit and need only be satisfied of a matter on the balance of probabilities.

The power of the court to make any other order against the offender is not limited by s42 (s42(10)) – for example, an order under the *Penalties and Sentences Act 1992* or under s359F of the *Criminal Code Act 1899* (a restraining order against a person charged with unlawful stalking, intimidation, harassment or abuse).

See Chapter 13 regarding service and notification of orders made.

2.4 JUSTICES CONSTITUTING MAGISTRATES COURT

A Magistrates Court constituted by two or more justices may (despite the provisions of the *Justices of the Peace and Commissioner for Declarations Act 1991*) deal only with:

- An application to make or vary a temporary protection order if a Magistrate is not readily available (s137(2)(a)).
- An application to adjourn a proceeding taken with a view to the making of a domestic violence order against a respondent (s137(2)(b)).

Where two or more justices are constituting a Magistrates Court and exercising criminal jurisdiction under s552C(3) of the *Criminal Code Act 1899*, it may deal with an application for a domestic violence order or make a domestic violence order on its own initiative relating to the offence for which the offender is the respondent (s137(5)).

2.5 CHILDRENS COURT – CHILD PROTECTION PROCEEDINGS

A Childrens Court hearing a child protection proceeding may make or vary:

- A protection order (s26 and s43).
- A temporary protection order (s27 and s44)

against a parent of a child for whom an order is sought in the child protection proceedings.

The court can do so:

- On its own initiative (s43(4)); or
- On the application of a party to the child protection proceeding (s43(4)). A party means a child for whom the order is sought, a separate legal representative for the child or an applicant or respondent in the proceeding (s43(11)). Note that an applicant is obliged to inform the court about any family law order of which they are aware (s77).

2.5.1 When can the court make an order in child protection proceedings?

The court can make a protection order **if satisfied that**:

- A protection order could be made against a person under s37 (see Chapter Eight); and
- The person to be named as the aggrieved is also a parent of the child for whom the order is sought in the child protection proceedings (s43(2)).

If a domestic violence order is already in force against the parent, the court must consider the order and whether it needs to be varied (for example, to vary the date that it ends or to make it consistent with the proposed child protection order) (s43(3)) (See Chapter 14 regarding variation of domestic violence orders.)

Before the order is made or varied the court must give each party to the child protection proceeding a reasonable opportunity to be heard about the making or variation of the order (s43(5)) – this may require an adjournment (see below).

The Childrens Court can make the protection order or vary the domestic violence order during the hearing of the child protection proceeding or the court may adjourn the matter[29] to a later date and make a temporary protection order under Division 2 in the meantime (s43(7)). Section 43 does not limit the power of the court to make any order under the *Child Protection Act 1999* (s43(10)).

See paragraph 10.11 regarding the relationship of domestic violence orders with orders under the *Family Law Act 1975* (Cth).

See Chapter Four regarding service and notification of orders made.

2.5.2 Adjournments

If the court adjourns the matter[30], the court must inform the parent that if they do not appear at the time and date to which it has been adjourned, the court may (s43(8)(a)):

- Make a protection order or vary a domestic violence order in their absence; and
- Issue a warrant for them to be taken into custody if the court believes that it is necessary for the parent to be heard.

If the court adjourns the matter, the court may issue any direction that it considers necessary (s43(8)(b)). If the parent fails to appear at the time and date to which it was adjourned, the court may (s43(9)):

- Make a protection order or vary a domestic violence order in the offender's absence; or
- Adjourn the matter further and may, in the meantime, make a temporary protection order under Division 2; or

[29] See paragraph 13.8 for giving notice of the adjournment to the respondent if they were not present when the matter was adjourned.
[30] See paragraph 13.8 for giving notice of the adjournment to the respondent if they were not present when the matter was adjourned.

- Subject to s156(1) order, the issue of a warrant to take the offender into custody and bring them before the court. (Note that s156 says that a court must not issue a warrant as a matter of course but only where, in the circumstances of the case, the court believes it appropriate that the offender be heard.)

3 WHO CAN APPLY FOR AN ORDER?

An application for a protection order can only be made by (s25):

- An aggrieved (see paragraph 3.6 for more information about private applications).
- An authorised person for an aggrieved - i.e. an adult authorised in writing by the aggrieved or an adult whom the court believes is authorised by the aggrieved, even though it is not in writing (e.g. where a physically disabled man who cannot sign an authority orally authorises another to apply on his behalf and the court believes the person is authorised after hearing evidence about the authorisation) (see paragraph 3.6);
- A police officer acting under s100(2)(a) (see paragraph 3.2 for more information); and
- A person acting for the aggrieved under another Act such as a guardian under the *Guardianship and Administration Act 2000* or an attorney under the *Powers of Attorney Act 1998* – see paragraph 15.12 for persons with impaired capacity.

A person who may make an application for a domestic violence order may make other applications or bring other proceedings under the Act in relation to an order made because of the application – e.g., an application for variation of the domestic violence order (s25(3)).

3.1 POLICE APPLICATIONS

There are various ways in which the police can initiate an application for a domestic violence order, or variation of an order:

- Application for a protection order under Part 3, Division 1 (see paragraph 3.2).
- Urgent temporary protection order pending decision on application under Part 4, Division 4 (s129) (see paragraph 3.3).
- Police Protection Notice under Part 4, Division 2 (s101) (see paragraph 3.4); and
- Take the person into custody and apply for a protection order under Part 4, Division 3 (s118).

Note that an applicant for a domestic violence order or a variation of such **is obliged to inform the court about any family law order** of which they are aware and, if possible, give a copy of the order to the court (s77). Note that failure to comply with this requirement does not invalidate an application.

3.2 POLICE APPLICATION FOR PROTECTION ORDER OR VARIATION UNDER PART 3, DIVISION 1

3.2.1 When can a police officer apply for a protection order?

If a police officer reasonably suspects that domestic violence has been committed, the police officer must investigate or cause to be investigated the complaint, report, or circumstance on which the officer's reasonable suspicion is based (s100(1)).

See *OMD v Queensland Police Service & Anor* [2021] QDC 282 where Porter KC DCJ discusses s100(1) in the context of investigations being inconsistent with Queensland Police

Service OPMs, concluding it is not a fatal flaw to the lawfulness of a protection order. At [45]:

> *This is not to say that officers investigating domestic violence allegations should not strive to comply with the directions in the OPM. They should. The DV Act confers very significant powers and discretions on police officers.*

And at [46] – [47]:

> *The exercise of the powers in s100(3) has the potential significantly to impact on the person identified as the respondent. Further, it is inevitable that the party, which the investigating officer concludes is the aggrieved party (or perhaps most aggrieved: see s4(e) DV Act), will in practice likely be at an advantage in any proceedings for a protection order.*
>
> *Investigating officers should therefore apply their best endeavours to investigate complaints fairly and with an open mind, with a view to exercising the discretion to bring DV Act proceedings justly and in proper cases. However, that does not mean that failure to do so of itself impacts on the lawfulness of a protection order made after a trial.*

A police officer who, after investigation, reasonably believes domestic violence has been committed may apply to a court for a protection order or a variation of one under Part 3, Division 1 of the DFVPA (s100(2)).

An application for a protection order may be made to the Magistrates Court by a police officer acting under s100(2)(a).

The application must (s32(2)):

- Be in the approved form – see DV Form 1; and
- State the grounds on which it is made; and
- State the nature of the order sought; and
- Be filed in the court – it may be filed in a registry of the court in any district for the court or region (*Domestic and Family Violence Protection Rules 2014* (r8)). Rule 9 and 9A outline how documents may be filed generally, including by electronic or computer-based means.
    - For police officers, r9(4) provides that a police officer can file a document electronically or by computer-based means if the document is sent electronically or by computer-based means to the registry and the police officer receives an electronic message from the registry that the document was received.
    - For parties other than a police officer, r9A provides that a party may file a document electronically if the principal registrar approves the filing of the document or class of documents as well as the electronic file format for the document or class of document. The document filed electronically is taken to be filed when the party receives an electronic message from the registry confirming the document was received (r9A(2)). The note under r9A(1) refers to the *Oaths Act 1867* for how an affidavit or statutory declaration may be

signed electronically and made in counterparts. Rule 9B provides for the approval process of the principal registrar.

As soon as practicable after the application is prepared, the applicant police officer **must** prepare a copy of the application stating the date, time, and place of hearing (s33(1)) and:

- Personally serve it on the respondent (s34(1)).[31] An application by a police officer may be served on the respondent before it is filed in the court (s34(3)).
- Give a copy to the aggrieved, if the applicant for the protection order is not the aggrieved (s35(1)). Note that failure to do so does not invalidate or otherwise affect an application (s35(2)).

3.3 POLICE APPLICATION FOR URGENT TEMPORARY PROTECTION ORDER, UNDER PART 4, DIVISION 4

3.3.1 When can a police officer apply for an urgent TPO?

A police officer:

- May apply for an urgent temporary protection order:
  - if an application for a protection order has been prepared; and
  - the officer reasonably believes that the application will not be decided sufficiently quickly by a court to protect the aggrieved from domestic violence; and
  - the officer reasonably believes that a protection order is necessary or desirable to protect the aggrieved from domestic violence (s129(1)).

- **Must** apply for an urgent temporary protection order against a person if:
  - the person has been released on conditions under s125 (see paragraph 22.4 for release on conditions); and
  - the date for the hearing of the application for a protection order is more than five business days after the person is released (s129(2)).

The application for a temporary protection order must be made to a Magistrate (s130(1)) and may be made by telephone, email, radio, fax, or other similar facilities.

Further details about these applications and when a Magistrate may make an urgent temporary protection order are at paragraph 7.3.

3.4 POLICE APPLICATION VIA POLICE PROTECTION NOTICE UNDER PART 4, DIVISION 2

Extensive changes were made to the police protection notice (PPN) regime in the 2016 amendments to require police to consider the provision of immediate protection and expand the operation of PPNs. The amendments to PPNs were a recommendation of the Special Taskforce on Domestic and

[31] See note under s34(1) - an applicant may ask the court for a hearing before the application is served on the respondent under s36.

Family Violence in Queensland (the Taskforce) in its report, *"Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland"*. The Taskforce noted that the limited protection offered by PPNs and restrictions on their use discourages police officers from using them.

The *Domestic and Family Violence Protection and Other Legislation Amendment Bill 2016 Explanatory Notes* provide the rationale for the changes (p4):-

> *PPNs were one of the reforms introduced by the Act to enable police officers to provide quick and effective responses for victims of domestic and family violence. Under Part 4, Division 2 of the Act, PPNs:*
>
> - *Can be issued where a police officer is at the same location as the respondent and reasonably believes a notice is necessary or desirable to protect the aggrieved from domestic violence.*
> - *Can protect the aggrieved person, but not their children relatives or associates.*
> - *Must contain the standard conditions that the respondent be of good behaviour towards the aggrieved person.*
> - *May include a 24 hour cool down condition that excludes the respondent from the family home or prevents them contacting the aggrieved person.*
> - *Are also an application for a court issued PO, with a court hearing occurring within five business days in most courts and within 28 days in some courts in rural and remote areas.*

The 2016 amendments: -

- Require police to consider what action should be taken following an investigation (amended s100(2)).
- Simplifies the range of police responses by expanding the role of PPNs and giving police more flexibility to issue and serve PPNs by requiring a releasing police to issue a PPN if the respondent has been taken into custody under Part 4, Division 3; not been brought before a court to have a protection order application heard while still in lawful custody; and not had a temporary protection order made against them (note: previously, a respondent was issued with release conditions upon being released from custody) (new 101A);
- Expand the protections police are able to provide by enabling PPNs to protect a victim's children, relatives, and associates (new s101B).
- Give police power to include additional conditions in PPNs (s106A), including cool-down conditions (s107), no contact conditions (s107A), ouster conditions (s107B) and return conditions (s107C).
- Removes the requirement that an officer be in the same location as the respondent to issue a PPN and allows police to issue a notice where, for example, the respondent has fled the scene before police arrive. However, police will be required to make reasonable efforts to speak to the respondent before issuing a PPN (amended s101).
- Amends the *Weapons Act 1990* to provide that any weapons licence held by a respondent named in a PPN is suspended for the duration of the notice, in the same way that licences are suspended when courts issue temporary protection orders.

- Preserves safeguards and court oversight of PPNs - senior officers will continue to approve the issuing of PPNs and/or the conditions in them (s102), and notices will continue to commence a court application for a DVO (s112).
- Clarifies the relationship between PPNs and family law orders (s107D) (see paragraph 3.4.6 below); and
- Police will continue to be prevented from issuing cross-notices or issuing a PPN where a notice has already been issued or DVO has been made involving the same parties (s103).

A police protection notice (PPN) is an application for a protection order made by a police officer (s112).

Where a PPN is before a court, it must first be determined whether:

- The respondent was not in custody at the time the PPN was issued (s101); or
- The PPN was issued against the respondent when the respondent was released from custody (s101A).

The treatment and consideration of the PPN by the court is different, depending on whether the PPN was issued under s101 (not in custody) or s101A (upon release from custody) (see below).

3.4.1 If the respondent was NOT in custody when the PPN was issued under s101

If the PPN states:

- The nature of the protection order sought; and
- The grounds on which the order is sought according to s112(1)

the PPN is taken to be an Application for a Protection Order by a police officer. If the court is satisfied that the PPN has been personally served on the respondent, it can make a final Protection Order in the respondent's absence.

If the PPN does *not* state the grounds on which the Protection Order is sought, the court may also receive a Statement of Grounds with the PPN.

The court needs to be satisfied that:

- The PPN has been personally served on the respondent (s109) and
- The Statement of Grounds has also been served before making a final Protection Order in the respondent's absence (see s111).

3.4.2 If the PPN issued is against respondent when released from custody under s101A

A PPN issued against the respondent when released from custody under s101A is *not* taken to be an application for a Protection Order (see s112(2)). The court will need to be satisfied that a PPN and a DV1 Application have both been personally served on the respondent before making a final order in the absence of the respondent where the PPN was issued under s101A.

3.4.3 Naming person in PPN (s101B)

The name of a child may be included if a police officer issuing a PPN reasonably believes-

- Naming a child of the aggrieved or
- A child who usually lives with the aggrieved

is necessary and desirable to protect the child from:

- Associated domestic violence, or
- Being exposed to domestic violence committed by the respondent.

The name of a relative or associate of the aggrieved may be included if a police officer issuing a PPN reasonably believes it is necessary or desirable to protect the relative or associate from associated domestic violence (s101B).

3.4.4 Form of PPN

Under section 105, the PPN must:

- Be in an approved form and signed by the police officer.
- State the police officer's name, rank, registered number, if any, and station.
- State the respondents name and address for service if any.
- State the name of the aggrieved and any named person.
- State the type of relevant relationship between the respondent and aggrieved.
- State the police officer is satisfied the grounds for issuing a notice under s101 or s101A have been met.
- State the standard conditions in s106.
- State any conditions imposed under s106A including for a cool down or ouster condition (s106A (2));
- Advise the respondent that under s112 the notice is taken to be an application for a protection order.
- State the time and date for hearing at the local Magistrates Court for the respondent.
- State the consequences for failing to appear (DVO may be made; matter adjourned, and temporary protection order made; or warrant issued for respondent to be taken into custody and brought before the court).

3.4.5 Conditions in PPNs

Standard condition (s106)

A PPN must include the standard condition that the respondent must be of good behaviour toward the aggrieved and must not commit domestic violence against the aggrieved including any domestic violence or associated domestic violence against a named person.

If the PPN names a child, the standard condition must also include the condition that the respondent must be of good behaviour towards the child, must not commit associated domestic violence against the child and must not expose the child to domestic violence.

Cool-down condition (s107)

Prohibits a respondent for a maximum period of 24 hours (s107(3)) from:

- Entering, attempting to enter, or remaining at stated premises or within a stated distance from them.
- Approaching or attempting to approach within a stated distance an aggrieved or named person.
- Contacting or attempting to contact an aggrieved or named person.

No Contact Condition (s107A)

Prohibits a respondent:

- Approaching or attempting to approach within a stated distance an aggrieved or named person.
- Contacting, attempting to contact, or asking someone else to contact an aggrieved or named person.
- Locating or attempting to locate or asking someone else to locate the aggrieved or a named person if their whereabouts are not known to the respondent.
- But it does not prohibit the respondent from asking a lawyer (representing him/her) or a victim advocate to contact the aggrieved or a named person for a purpose authorised under the DFVPA (s107A(2)–(3)). See s107A(4) for definition of victim advocate (a person engaged by an approved provider to provide advocacy for, and support of, an aggrieved or named person).

Ouster Condition (s107B)

Prohibits the respondent from:

- Entering, attempting to enter, or remaining at the premises.
- Approaching within a stated distance of the premises.

Return Condition (s107C)

Allows the respondent under the supervision of a police officer to:

- Return to premises to recover property (s107C(1)(b)(i)); or
- Remain at premises to recover property (s107C(1)(b)(ii))
- But not property required to meet the daily needs of any person who continues to live at the premises (s107C(2)).

3.4.6 Relationship between PPN and Family Law Order (s107D)

Before imposing a condition that would limit contact between the respondent and child the police officer must:

- Ask the respondent and aggrieved whether there is a family law order allowing contact (s107D(1)(a)) and seek details of the terms related to contact (s107D(1)(b)).
- If a condition being considered is inconsistent with the family law order, not impose the condition and consider whether to apply to a Magistrate under Part 4, Division 4 for a temporary protection order.
- If a condition included in a PPN is inconsistent with a family law order, the condition is of no effect to the extent of the inconsistency (s107D(3)(a)). The inconsistency does not otherwise invalidate the PPN (s107D(3)(b)).

3.4.7 Time of hearing (s105)

A PPN must state the date and time for the hearing of the application at the local Magistrates Court (defined in the schedule) for the respondent (s105(j)). The date must be within five business days of the issuing of the notice if the local Magistrates Court sits at least once a week. Otherwise, it must be the next sitting date of the local Magistrates Court (s105(2)). If that is more than 28 days from the date of the notice, the clerk of the court is to make arrangements for the matter to come before another Magistrates Court and notify the respondent of the details (s105(l)).

The PPN must be personally served on the respondent (s109) and a copy given to the aggrieved and named person (s109A) and a copy filed in the local Magistrates Court for the respondent (s111(1)).

3.4.8 Contravention of PPN (s178)

A contravention of a PPN is an offence under s178 (see paragraph 21.2).

The penalty for a contravention of a PPN is 120 penalty units or three years imprisonment (s178(2)).

3.4.9 How long does a PPN remain in force? (s113)

A PPN takes effect when (s113(1)):

- It is personally served on the respondent or in a way stated in a substituted service order; or
- A police officer tells the respondent about the existence of the notice and conditions which can be by telephone, email, SMS, social networking site or other electronic means (s113(1)(2)).

Note, if an application is adjourned and no order made, the PPN ceases (see s113(3)(c)).

A PPN remains in force until (s113(3)):

- On an application for a temporary protection order under s129(2) a Magistrate makes a temporary protection order, and that order is served or otherwise becomes enforceable under s177.
- The court makes an order, and it is served or otherwise becomes enforceable under s177;
- The court adjourns the application for a protection order without making a domestic violence order or an order to extend the PPN under sub section (4); or
- The application for a protection order is dismissed.
- In exceptional circumstances, a court may adjourn the application for a PPN and make an order to extend the PPN for not more than five business days or, if the court if not sitting in the next five business days, until the next anticipated sitting date for the court (s113(4)).
- Exceptional circumstances means unforeseen circumstances that cause the operation of the court to be significantly reduced (e.g. natural disaster, severe weather event or major public health event) (s113(11)).

An order to extend the PPN under this section may be made without appearances by the parties to the application for the protection order (s113(5)). The court must take reasonable steps to notify the police commissioner and the parties to the application of any extension to the PPN (s113(7)).

A PPN may only be extended once under this section (s113 (6)).This provision applies to a PPN, whether the notice is issued before or after 23 September 2024 (s239) when the amendments to s113 by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* commenced.

A police officer, before issuing a PPN, must have a reasonable belief that no domestic violence order or recognised interstate order has been made or PPN already issued that names the respondent and aggrieved (s101(c)). However, if a PPN is issued and there is an existing domestic violence order in place, the respondent must comply with both. If it is not possible to comply with both, the domestic violence order prevails (s114).

3.5 POLICE APPLICATION FOLLOWING DETENTION IN CUSTODY - URGENT APPLICATION TO EXTEND DETENTION PERIOD

Under s116, a police officer may take a person into custody if while investigating domestic violence the officer reasonably suspects that the person has committed domestic violence and that:

- another person is in danger of personal injury by the person; or
- property is in danger of being damaged by the person.

The person must be taken to a holding cell or watch-house as soon as reasonably practicable (s117), and the police officer must prepare an application for a protection order (s118(1)) and arrange for the person to be brought before the court for the hearing of the application (s118(2)). If it is not

practicable to bring the person before the court, the application must state the date and times that the respondent is required to appear (s118(3)).

Section 119 sets out the factors relevant to determining how long a person can be held in custody (see paragraph 22.2). If a police officer is authorised under s119(3)(b) to detain a person for four hours, the police officer can apply to a Magistrate for an extension (s121) before the detention period for the person ends (s121(2)(b)).

3.5.1 What is required in the application for extension (s121)

The application **must** be made:

- To a Magistrate.
- Before the detention period ends (s 121(2)(b)).

Section 121 sets out how the application is to be made including:

- What **must** be said/given to the person by the police officer before the application is made (s121(4)):
    - tell the person or their lawyer about the application.
    - given them a copy.
    - ask the person or their lawyer if they agree to the application or oppose it and ask if they wish to make a submission to the Magistrate.

- What the application **must** state (s121(5)):
    - the police officer's name, rank, registered number if any and station.
    - the person's name, age, and address.
    - whether the person is a child.
    - whether the person is an Aboriginal or Torres Strait Islander person.
    - whether the person is a person with impaired capacity.
    - if the person is a child, whether a parent of the child has been told of the detention.
    - why further detention of the person is necessary; and

- What the police officer **must** tell the Magistrate (s121(6)):
    - whether the person or their lawyer want to make a submission or say anything to the Magistrate; and
    - whether there is any factor that may affect the person's ability to communicate with the Magistrate (such as intoxication).

Note that the person or their lawyer may make submissions to the Magistrate but not submissions that unduly delay the consideration of the application (s121(10)).

An application for extension may be made by phone, fax, radio, email, or similar facility if it is outside normal business hours or there are other special circumstances such as remote location (s121(7)). An application made in this way is taken to be made only when it is

brought to the attention of the Magistrate (s121(8)). For example, if a police officer faxes an application to a Magistrate, the application is only made when the Magistrate reads the fax, or the police officer speaks to the Magistrate by telephone to tell the Magistrate the fax has been sent.

The Magistrate **must** make a record in writing of the application (s121(9)).

3.5.2 Of what must the Magistrate be satisfied? (s122)

A Magistrate may extend the detention period if satisfied:

- The nature and seriousness of the domestic violence require the extension; and
- Further detention is necessary to make arrangements for the safety of an aggrieved or child; or to allow a police officer to reasonably believe that the respondent no longer presents a continuing danger; and
- The person or their lawyer have been given a reasonable opportunity to make submissions on the application (s122).

3.5.3 Duration of extension

An order extending the detention may authorise an extension for a reasonable period stated in the order up to four hours (s122(2)) or eight hours from the time the person is taken into custody if a further extension is granted (s123(c)).

See discussion of police powers including detention powers etc. at paragraph 22.1.

3.6 PRIVATE APPLICATIONS

A private application for a protection order may be made by:

- An aggrieved (s32(1)(a)).
- An authorised person for an aggrieved (s32(1)(b)) – that is, a person authorised in writing by the aggrieved (s25(2)(a)) or a person whom the court believes is authorised, even though that authority is not in writing (s25(2)(b)). An example of the latter is where an aggrieved's physical disability is such that they are unable to sign an authority, so the court may hear evidence of the authorisation being given orally by the aggrieved to the authorised person.
- A person acting under another Act for an aggrieved (s32(1)(d)) – examples of persons acting under another Act include (s25(1)(d)) a guardian for a personal matter of the aggrieved under the *Guardianship and Administration Act 2000* and an attorney for a personal matter of the aggrieved under an enduring power of attorney under the *Powers of Attorney Act 1998*.

Note that an applicant for a domestic violence order or a variation of such **is obliged to inform the court about any family law order** of which they are aware and, if possible, give a copy of the order to the court (s77). Note that failure to comply with this requirement does not invalidate an application (s77(3)).

Note that a person who may make an application for a protection order under s25 may make other applications or bring other proceedings under the DFVPA in relation to a domestic violence order made because of the application (s25(3)).

Note also that a party to a child protection proceeding may apply to the Children's Court for a protection order against a parent of a child for whom an order is sought in the child protection proceeding. A party to a child protection proceeding means (s43(10)):

- A child for whom an order is sought in the proceeding; or
- A separate legal representative for the child (that is, a lawyer appointed under s110); or
- An applicant or respondent in the proceeding.

These applications are part of the child protection proceedings and are discussed further in paragraph 2.5.

3.6.1 Form of the application

A private application must (s32(2)):

- Be in the approved form – Form 1.
- State the grounds on which it is made.
- State the nature of the order sought.
- If the applicant is not a police officer, be verified by the applicant by a statutory declaration (a verification declaration); and
- Be filed in the court.

Not also s32(3), inserted by the *Justice and Other Legislation Amendment Act 2021*, a verification declaration under s32(2)(d) is not required if the clerk of the court agrees to grant the applicant's request for a hearing before the respondent is served or without giving verification declaration.[32]

The application is to be filed in accordance with r9 and/or r9A of the *Domestic and Family Violence Protection Rules 2014* ***Error! Bookmark not defined.***.

3.6.2 Confidentiality of aggrieved's details

[32] The purpose of the amendments to the DFVP Act in the *Justice and Other Legislation Amendment Act 2021* is to give permanency to the modified arrangements introduced during the COVID-19 pandemic to reduce contact between persons to support social distancing and requirements under the Queensland Chief Health Officer's public health directives. As per the Explanatory Notes to the Bill, the amendments "*increase the accessibility of the court for applicants in urgent situations by providing the option for private applications for protection orders and variations of DVOs to be verified between an applicant and a Magistrate, as an alternative to verifying the application by statutory declaration, for the purpose of the court making a temporary protection order before the respondent is served the application…".*

Form 1 allows the aggrieved to provide an address other than their home address (for example, a post office box or solicitor's address). Alternatively, the aggrieved can complete a **Form DV01C – DV Aggrieved Confidential Address Form**.

3.7 CROSS APPLICATIONS

One of the original principles for administering the DFVPA is in circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, **the person who is most in need of protection should be identified (s4(e)).** The *Domestic and Family Violence Protection Bill 2011 Explanatory Notes* (p 2-3) states:

> *This is particularly important where cross-applications are made, which is where each party to a relationship alleges domestic violence against the other and which often result in cross-orders.*
>
> *During consultation, stakeholders reported a disproportionate number of cross-applications and cross-orders and expressed concern that in many instances domestic violence orders are made against both people involved.*
>
> *This is inconsistent with the notion that domestic violence is characterised by one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them. Both people in a relationship cannot be a victim and perpetrator of this type of violence at the same time.*
>
> *A cross-application may be used by a respondent to continue victimising the aggrieved person, to exact revenge or to gain a tactical advantage in other court proceedings.*
>
> *Also, violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken.*

In 2015, the *"Not Now, Not Ever"* report recommended changes to the DFVPA to require courts to "*consider concurrent cross applications at the same time and a later application and related cross application or order*"[33] (s41 at the time gave the court a discretion to hear the cross applications together, with no requirement to consider hearing them together). In response, the *Domestic and Family Violence Protection and Another Act Amendment Act 2015* inserted a new Division 1A "Cross applications", replacing s41 and inserting new ss41A to 41F. According to the *Explanatory Notes to the 2015 Bill* [at page 8]:

> *The intention is where the court is aware of cross applications involving the same individuals it will be required to hear the applications together, unless hearing the cross applications separately is necessary for the safety, protection, or wellbeing of an aggrieved person.*

[33] Amendment 99.

In 2021, the Women's Safety and Justice Taskforce heard that cross applications were being used by perpetrators as a means of continuing to control and intimidate victims, resulting in domestic violence orders being made against victims. In response to the Taskforce's recommendations, the *Domestic and Family Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* made amendments requiring applications and cross applications to be heard together, the court to identify the person most in need of protection in the context of the relationship as a whole, and only one DFV order to be made unless there are exceptional circumstances and clear evidence that both persons are in need of protection from the other.[34] New s22A provides guidance for determining who is the "person most in need of protection" and mandatory considerations in making that determination.

Note that, in the context of PPNs, cross-notices are not permitted under the DFVPA. If a police officer issues a PPN naming a person as a respondent and another as an aggrieved, the officer cannot issue another PPN naming that aggrieved as the respondent and that respondent as the aggrieved (s103).

3.7.1 Person most in need of protection

One of the principles for administering the DFVPA under s4(2)(e) is that in circumstances where there are conflicting allegations of domestic violence or indications that both persons are committing acts of violence, including for their self-protection:

- the person who is most in need of protection in the relationship should be identified; and
- only one domestic violence order protecting that person should be in force, unless, in exceptional circumstances, there is clear evidence that each person is in need of protection from the other.

3.7.2 Determining the "person most in need of protection" (S22A)

A person, who is in a relevant relationship with another person, is the **"person most in need of protection"** in the relationship if, when the behaviour of each person is considered in the context of their relationship as a whole (s22A(1)):

- the behaviour towards the first person is more likely than not to be (i) abusive, threatening, or coercive; or (ii) controlling or dominating and causing them to fear for their safety or wellbeing (or that of another person or an animal); or
- the first person's behaviour towards the other person is, more likely than not (i) for their self-protection or that of a child, another person or animal, or (ii) in retaliation to the other's person's behaviours towards them (or a child, another person or animal), or (iii) attributable to the cumulative effect of the other person's domestic violence towards them.

[34] Explanatory Notes to Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022, page 6.

In deciding the person most in need of protection, the **court must consider** (s22A(2)):

- the history of the relationship and domestic violence between the parties; and
- the nature and severity of the harm caused to each other; and
- the level of fear experienced by each person because of the other's behaviour; and
- which person has the capacity to (i) seriously harm the other; or (ii) to control or dominate the other and cause them to fear their safety or wellbeing (or that of their child, another person, or an animal); and
- whether the parties have characteristics that may make them particularly vulnerable to domestic violence.
    - Examples: women; children; Aboriginal peoples and Torres Strait Islander peoples; peoples from a culturally or linguistically diverse background; people with disability; people who are lesbian, gay, bisexual, transgender or intersex; and elderly people.

In *WJ v AT* [2016] QDC 211[35], Smith DCJA considered the correct approach to considering the evidence in domestic violence cross applications. His Honour noted, [at 166], the *Explanatory Notes* to the *Domestic and Family Violence Protection Bill 2011*:

> *Both people in a relationship cannot be a victim and perpetrator of this type of violence at the same time.*
>
> *A cross-application may be used by a respondent to continue victimising the aggrieved person, to exact revenge or to gain a tactical advantage in other court proceedings. Also, violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken*.

Smith DCJA however found, like the judicial registrar, there was no "physical abuse" by the first respondent so the appeal against the decision not to make an order (the cross application) was dismissed.

See *ATD v TBC* [2020] QDC 236 where McGinness DCJ was satisfied the respondent had committed one act of verbal abuse which may have constituted emotional or psychological abuse under s8(1)(b). Her Honour, however found this to be out of character and that there was no credible or reliable evidence that prior to or since that date the respondent behaved in any way which could satisfy a court that it was necessary or desirable to make a protection order against him, at [76].

3.7.3 Hearing of cross applications

Applications before the same court (s41C)

[35] Note that this case was decided prior to the amendments made by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (including the requirement that cross applications be heard together).

If an original application for a protection order or the application for variation and cross application is before a court and a cross application is made and is **before the same court**, the court must:

- Hear both applications together (s41C(2)(a)); and
- In hearing the applications, consider:
    - The principle in s4(2)(e) - who is most in need of protection (s41C(2)(b)(i));
    - Whether it is necessary to make arrangements for the safety, protection, or wellbeing of the person most in need of protection in the relationship (e.g., the court can make orders under ss150 and 151 in relation to a person giving evidence or being cross-examined as a protected witness) (s41C(2)(b)(ii));
- If adjourning the matter, consider whether to make a temporary protection order (s41C(3)).

To make it clear that the court must identify the person most in need of protection when deciding a cross application, s37 (when court may make protection order) applies subject to s41G (deciding cross applications) (s37(6)).

Applications before different courts (s41D)

If the court is aware that:

- The original application and the cross application are before different courts; or
- The variation application and the cross application are before different courts;

the court must:

- Consider whether to hear both applications together (s41D(2)(a)); or
- Consider whether to order the application before the court be dealt with by the other court (s41D(2)(b));
- If hearing the applications:
    - consider the principle in s4(2)(e) (s41D(3)(a)); and
    - whether it is necessary to make arrangements for the safety, protection, or wellbeing of the person most in need of protection in the relationship (e.g., the court can make orders under ss150 and 151 in relation to a person giving evidence or being cross-examined as a protected witness) (s41D(3)(b)).
- If adjourning, consider whether to make a temporary protection order (s41C(4)).

See *AJC v Constable Kellie-Ann Gijsberten & Ors* [2019] QDC 195[36] [37] where cross applications were heard one after the other. The issue on appeal (one of) was whether hearing both applications on the same day, albeit after a decision is made in relation to one application before then hearing and determining the other, satisfies the requirement of s41C(2) of hearing the matters "together"? In Lynham DCJ's view, the answer is no [at 34]. The Magistrate had not been referred to s41C. To be heard "together" means, in his view, both applications being heard and determined at the same time as part of the same proceeding. This is also consistent with the purpose for which s41C was introduced. Reference was made to the *Explanatory Notes* for the introduction of the section, as per 2015 amendments to the DFVPA, and the policy objectives underpinning the DFVPA, which are aggrieved focused, emphasising the paramountcy of the safety, protection and wellbeing of people who fear or experience domestic violence, see [39].

See *RIS v DOL & Anor* [2021] QDC 154[38] where cross applications were considered and the evidence briefly discussed at a review mention before one applicant was found the person most in need of protection and granted a protection order. On appeal, Dearden DCJ found the absence of a hearing and the failure to follow the process in s151 amounted to a failure of procedural fairness.

3.7.3.1 *Can an order be made in favour of both cross applicants?*

The *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* amended the principle in s4(2)(e) for administering the DFVPA in circumstances where there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection. In addition to the principle that the "person who most in need of protection" should be identified in these circumstances, the amending Act provides that only one order protecting that person should be in force unless, in exceptional circumstances, there is clear evidence that each of the persons in the relationship is in need of protection from the other (s4(2)(e)(ii)).

As at the issue of this edition of the Benchbook, there are no decisions discussing s4(2)(e)(ii). See discussion at 3.7.5 on "exceptional circumstances" in deciding cross applications under s41G.

The following case was decided prior to the amendments to s4(2)(e)(ii).

[36] Note that this case was decided prior to the amendments made by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*.

[37] The grounds of appeal in relation to the conduct of the hearing were allowed (the appellant had not been given adequate opportunity to conduct his case and had been prohibited from cross-examining the aggrieved.)

[38] Note that this case was decided prior to the amendments made by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*.

The case of *GRP v ABQ* [2020] QDC 272[39] (see discussion at paragraph 7.1.2) concerned an appeal against a decision not to make a cross temporary protection order McGinness DCJ allowed the appeal and on the rehearing, made a temporary protection order naming the appellant as the aggrieved. Her Honour noted the principle in s4 of identifying the person most in need of protection however, at [39], noted "*…it does not follow that the appellant is not also entitled to protection in the circumstances of this case. Cross-orders are not uncommon in situations where both parties have committed acts of domestic violence*."

If the cross application has not been served within a ***reasonable period,*** the court may:

- Hear the cross application before or at the same time as the original application only if the aggrieved named in the original application consents (s41E(2)) or in the case of a variation application, if the aggrieved named in the cross-application consents (s41E(9)).
- ***Reasonable period*** means at least one business day before the hearing (s41E(11)(a)) or within a longer period before the day of the hearing the court considers is reasonable in the circumstances (s41E(11)(b)).

If consent is not given the court must:

- Adjourn the hearing of the cross application or variation application (s41E(7)(a)) and
- Set a date by which the application must be served (s41E(7)(b)).

3.7.4 Hearing of application – existing protection order

If a protection order has been made and an application for another protection order is made:

- Each party to the proceeding must inform the court about the existing order (s41F(2)), and
- The court must take into account the court records relating to the making of the protection order (s41F(3)).

See also paragraph 16.5 regarding the use of evidence in other proceedings.

3.7.5 Deciding cross applications (s41G)

When hearing a cross application under ss41C, 41D or 41E, the court must decide (s41G(2)):

- Who is the person most in need of protection in the relevant relationship; and

[39] Note that this case was decided prior to the amendments made by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (including the addition of s4(2)(e)(ii)).

- The application that makes, or varies, the protection order that is necessary or desirable to protect the person most in need of protection from domestic violence; and
- If the other application is an application for a protection order – to dismiss the other application; and
- If the other application is an application for the variation of a protection order – to vary the order by reducing its duration so that the order ends.

Despite s41G(2), the court may make, or vary, a protection order under both applications if satisfied that, in exceptional circumstances, there is clear evidence that each party to the relevant relationship is in need of protection from the other party; and it is not possible to decide whether one party's need for protection is greater than the other (s41G(3)).

Meaning of "exceptional circumstances"

The *Explanatory Notes* to the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 states that it is intended that '*exceptional circumstances*' is defined in accordance with its ordinary meaning. It may "*describe a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or* uncommon*. It need not be '*unique, or unprecedented, or very encountered'. *Whether exceptional circumstances are shown to exist will depend on the facts and circumstances of a particular case*."[40]

"Relevant relationship" (s41G(4))

The relevant relationship in ss41G(2) and (3) is the relevant relationship between the parties to:

- The original application and cross application in s41A(1); or
- The first protection order and second protection order in s41A(2); or
- the original protection order and cross application in s41A(3).

Transitional provisions (s235)

Sections 41C, 41D and 41G of the DFVPA apply to existing cross applications made, but not decided before the commencement of these provisions on 1 August 2023.

3.7.6 Disclosure of cross applications

The following parties must disclose cross applications:

- A party to the original application who is aware of the cross application; (s41B(1)(a))

[40] Explanatory Notes to Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022, page 31.

- A person who is a party to a proceeding for the cross application and is aware of the original application (s41B(1)(b)).

The following parties must disclose the variation application or cross application:

- A party to the variation application who is aware of the cross application; (s41B(2)(a))
- A person who is a party to the cross application and is aware of the variation application (s41B(2)(b)).

4 SERVICE OF APPLICATIONS

4.1 SERVICE OF THE APPLICATION

Once filed in the court, the clerk of the court writes the date, time, and place of hearing on a copy of the application and gives a copy to the applicant, if the applicant is not a police officer, and to the officer in charge of the police station nearest the place where the respondent lives (s33(2)). If the applicant is a police officer, the police officer must prepare a copy of the application that states the date, time, and place of the hearing (s33(1)).

A police officer **must:**

- Personally serve the copy of the application on the respondent (s34(1));
- If the applicant is not the aggrieved, give a copy to the aggrieved (s35(1)). Note that failure to do so does not invalidate or otherwise affect an application (s35(2)).

4.2 HOW PERSONAL SERVICE IS TO BE EFFECTED

Rule 14 of the *Domestic and Family Violence Rules 2014* applies to a police officer who must personally serve an application and requires the officer to file a *statement of police service* within the registry of the DFVP court hearing the proceeding (unless the court orders or the rules provide otherwise).

The statement of police service must (r14(4) and (5)):

- Be made and signed by the officer who served the application; and
- Include the officer's name and rank; the time, day, and date of service; the place of service; the name of the person served and how they were identified; if required, how the document was explained to the person; and
- Include a statement that either the contents of the statement are true; or the contents are true to the best of the officer's knowledge; and
- Include a statement that the officer understands that a police officer who provides a false matter in the statement may commit an offence; and
- Have the application referred to in a way sufficient to identify it or have the statement of service written on the application.

Note: This rule does not apply if the police officer files an affidavit of personal service or a statement of substituted police service (r14(2)).

4.3 AFFIDAVIT OF ATTEMPTED PERSONAL SERVICE (R14AA)

If an application for a substituted service order is made under s184A in relation to personal service of a document on a respondent, a police officer who has attempted to personally serve the document on the respondent must file an affidavit of attempted personal service with the registry, unless the court orders otherwise (r14AA(2)):

The affidavit must be filed (r14AA(3)):

- If the application is made under s184A(4)(b) – as soon as practicable after a copy of the application is given to the police commissioner under r19A;[41] or
- If the application is made under s184A(4)(c) – when the application is filed.

The affidavit must (r14AA(4)):

- Be in the approved form; and
- Be made by a police officer who has attempted to serve the document; and
- Include the following details for each attempt to serve the document:
    - the name and rank of the officer who attempted service;
    - the time, day, and date of attempted service;
    - the place at which service was attempted;
    - the name of the person attempted to be served;
    - the reason service was not effected; and
- Either:
    - have the document that was attempted to be served filed with it as an exhibit; or
    - if the document that was attempted to be served has been filed – mention the document in a way sufficient to enable the document to be identified.

If more than one police officer has attempted to personally serve the document, each officer is taken to have complied with r14AA(2) if an affidavit is filed by any one of the officers (r14AA(5)).

If the court orders, a police officer mentioned in an affidavit of attempted personal service must give evidence orally about the attempted service (rr14AA(6)).

4.3.1 Statement of substituted police service (r14AB):

If a police officer serves a document on a respondent under a substituted service order, the officer must file a ***statement of substituted police service*** with the registry, unless the court orders otherwise (r14AB(2)).

The statement must (r14AB(3) and (4)):

- Be made and signed by the police officer who served the document; and
- Include each of the following details –
    - the officer's name and rank;
    - the time, day, and date of service;
    - the way, stated in the substituted service order, in which the document was served;
    - the name of the person served; and
- If the officer complied with s184A(5)(a) and (b) –

[41] Rule 19A provides that if an application for a substituted service order is made under s184A(4)(b), the clerk of the court must, as soon as reasonably practicable after the application is filed, give a copy of the application to the police commissioner.

    - state that the provisions were complied with; and
    - include details of how the document, and the nature and effect of the document, were explained to the respondent; and
- If the officer did not comply with s184A(5)(a) and (b) – state the basis on which it was not reasonable in the circumstances to comply with the provisions; and
- Include a statement that the contents of the statement are true; or the contents are true to the best of the officer's knowledge; and
- Include a statement that the officer understands that a police officer who provides a false matter in the statement may commit an offence; and
- Have the substituted service order filed with the statement as an exhibit; and
- Either: have the document that was served filed with the statement as an exhibit; or if the document has been filed – mention the document in a way sufficient to enable the document to be identified.

4.4 WHAT IF THE RESPONDENT IS OUTSIDE THE STATE?

An application may be served (r17):

- Outside the State but within Australia; or
- Outside Australia.

The court may issue a direction about how a document is to be served outside the State, otherwise it is to be served in compliance with Part 3, Division 2 of the Rules (r17(2)).

Nothing in rule 17 or in any direction issued by a DFVP court made under the Rules authorises or requires the doing of anything in the country in which service is to be effected that is contrary to the law of the country (r17(6)).

In deciding whether to issue a direction about service, the court may consider (r17(3)) –

- For service outside Australia – whether a convention requires service to be performed in a particular was (for example, the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, the Hague, 15 November 1965 (entered into force 10 February 1969); and
- How the party required to serve the document is to pay the costs of service; and
- If the document must be served personally and the DFVP court considers it impracticable for service to be proved by an affidavit of personal service or statement of police service – whether service is to be proved in another way.

The *Service and Execution of Process Act 1992 (Cth)*

If a document is to be served outside the State but within Australia and it can be served in accordance with the *Service and Execution of Process Act 1992* (Cth) then it must be served in accordance with that Act (r17(4)).

The *Trans-Tasman Proceedings Act 2010 (Cth)*

If the document is to be served in New Zealand, and it may be served in accordance with the *Trans-Tasman Proceedings Act 2010* (Cth), the document must be served in accordance with that Act (r17(5)).

4.5 WHEN NEED THE APPLICATION NOT BE SERVED ON THE RESPONDENT?

The applicant (police officer, aggrieved or authorised person) may ask the clerk of the court to arrange for the application to be heard by the court before the application is served on the respondent for the purpose of making a temporary protection order under Division 2 (s36)[42].

If the court hears an application for a protection order before it is served, the court may adjourn the application whether or not it makes a temporary protection order (s40).

If the respondent has not been served with a copy of the application and is not present in court, **the court may make a temporary protection order only if the court is satisfied that**:

- The making of a temporary protection order despite the respondent having not been served is necessary or desirable to protect the aggrieved, or another person named in the application, from domestic violence (s47(2)); and
- The relevant relationship exists, and the respondent has committed domestic violence (s45).

The *Domestic and Family Violence Protection Bill 2011* (p 49) suggest a number of reasons why the respondent may not be served:

- The respondent has not been located by the police;
- The applicant is concerned that putting the respondent on notice of the application before a temporary protection order is made will put the aggrieved at increased risk of domestic violence – for example, the service of the application may prompt a violent response in circumstances where the respondent would not (at that point) be bound by the conditions of an order.

See further regarding Temporary Protection Orders at Chapter 7.

4.6 SERVICE ON A NAMED PERSON

If a person is to be specifically named in a domestic violence order when it is made (or at a later date if it is varied), the DFVP court, if it considers it necessary and appropriate, may order that a copy of the application be served on the person (r18(2)).

If the person to be named is a child, the court **must** consider the following before ordering service of the application (r18(3)):

- The age of the child;

[42] The applicant may also ask the clerk of the court to arrange for the application to be heard by the court before the application is served on the respondent and without the applicant giving the court a verification declaration (s36(2)(b).

- The ability of the child to understand the application;
- Whether the court has dispensed with the requirement to give a copy of the application to a parent of the child under s188(3) (see below);
- Whether service of the copy of the application is in the best interests of the child; and
- Whether the child is already aware of the proceeding or the circumstances giving rise to the proceeding.

4.7 SERVICE ON A CHILD

If the DFVPA authorises or requires a document to be given to, or served on, a child[43], the person giving or serving it (s188(2)):

- Must also give a copy to a parent of the child (s188(2)(a) (unless the court has dispensed with this requirement – see below). Note that parent is defined in this section to include the chief executive (child protection) if they have custody or guardianship of the child (s188(7)); and
- Must not give or serve it on the child at or near the child's school (unless there is no other reasonable way that the document can be given or served) (s188(2)(b)).

The **court can dispense with the requirement** to give a copy to the parent if the court is satisfied (s188(3)):

- The person cannot locate the parent after making reasonable enquiries;
- There are other special circumstances - for example, the child is estranged from their parents; or
- There would be an unacceptable risk of harm to the child if the parent was given a copy.

4.8 NOTIFICATION OF POLICE COMMISSIONER

The police commissioner must be notified by the clerk of the court within 1 business day after the day the application is made, or order is granted (s162(2)).

The police commissioner must be notified by the clerk of the court within 1 business day of any of the following applications (s162):

- An application for a protection order;
- An application for variation of a domestic violence order;
- An application for variation of a recognised interstate order, registration of a New Zealand order, variation of a New Zealand order as it is registered in Queensland or revocation of the registration of a New Zealand order;
- An order made on the court's initiative under s42 (in criminal proceedings) or by the Childrens Court under s43 (in child protection proceedings).

[43] The age is to be determined on the day the document is to be given to the person (s188(4)).

5 PROVISION OF CRIMINAL AND DOMESTIC VIOLENCE HISTORIES

In 2021, the Women's Safety and Justice Taskforce recommended amendments to the DFVPA to ensure the court is provided with a respondent's criminal and domestic violence histories to help determine the risk to the aggrieved and whether to make a protection order; and to assist in best tailoring the conditions of the order to keep the victim safe.[44] In response, the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* requires QPS to provide the respondent's criminal and domestic violence histories to the court, and provides for the court considering the histories, and their access and disclosure.

5.1 COURT MUST BE GIVEN RESPONDENT'S CRIMINAL AND DOMESTIC VIOLENCE HISTORIES (S36A)

If:

- a police officer makes an application for a protection order; or
- the clerk of the court gives an application for a protection order to the officer in charge of a police station under s33(2)(b); or
- a police protection notice is filed in court to be heard as an application;

the police commissioner must ensure that a copy of the respondent's criminal history and domestic violence history is:

- filed in court with a police application or a police protection notice, or before the hearing of the application; or
- given to the court when the application is first heard.

If the respondent does not have a criminal or domestic violence history, the police commissioner must ensure the court is informed of that fact (s36A(3)).

- Note: the section is silent on how this may occur, but the Explanatory Notes state that it could be orally or in writing.[45]

Schedule (Dictionary) to the DFVPA provides:

- ***"criminal history"***, of a person, means a document that states each conviction or, or charge made against, the person for an offence in Queensland, or elsewhere, regardless of when the conviction or charge, or acts or omissions constituting the offence or alleged offence, happened.
- ***"domestic violence history"***, of a person, means a document that states each of the following orders made, or notices issued, against the person, regardless of when the order was made or noticed issued – a domestic violence order; a police protection notice; a domestic violence order under the repealed DFVPA 1989; an interstate order; an order that corresponds to an interstate order made under a repealed law of another State; a New Zealand order.

[44] Explanatory Notes to *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022*, page 7.
[45] Ibid, page 8.

[See s90A and 14.6 in relation to the provision of the respondent's criminal and domestic violence histories in an application for a variation of a domestic violence order].

The police commissioner's obligation under ss36A and 90A to file or give the court the respondent's criminal and domestic violence histories only applies to information in the police commissioner's possession; or that, under a law, the police commissioner is permitted to access and give to the court to be used in a proceeding under the DFVPA (s189B(1) and (2)).

- This means that domestic violence history will only include interstate or New Zealand orders when this information is already recorded on QPRIME or in the police commissioner's possession. Options to allow QPS to provide interstate orders that are able to be accessed and printed from the National Police Reference System are being explored.[46]

If the domestic violence history includes an order made or varied by consent, a copy of the history filed or given to a court must state that fact (s189B(3)).

Note: the DFVPA applies in relation to a person despite the *Criminal Law (Rehabilitation of Offenders Act) 1986* (s189A).

5.2 DISCLOSURE OF CRIMINAL AND DOMESTIC VIOLENCE HISTORIES

If the police commissioner is required under s36A or 90A to ensure a copy of a respondent's criminal and domestic violence history is filed in or given to a court in relation to a DFVP application, the police commissioner must ensure an identical copy of the respondent's criminal and domestic violence histories is given to the respondent before the first hearing date in the application, unless it is not reasonable in the circumstances (r19B).

5.3 COURT MAY ISSUE DIRECTIONS IN RELATION TO CRIMINAL AND DOMESTIC VIOLENCE HISTORY (R22):

Rule 22 provides for various matters for which a court may issue a direction about, including that the police commissioner give the court a copy of a respondent's criminal and domestic violence history for a proceeding under ss42 or 43 (r22(1)(q)).

If, in a DFVP application, the court considers it necessary to have a respondent's current criminal and domestic violence history because of the time that has passed since a copy of the history was filed in or given to the court under ss36A or 90A, the court may direct that the police commissioner give the court the respondent's current criminal and domestic violence histories (r22(2) and (3)).

If the court issues a direction under r22(1)(q) or r22(3):

[46] Explanatory Notes to *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022*, page 8.

- The direction applies only to information – in the police commissioner's possession; or that the police commissioner is permitted to access and give to the court; and
- If the respondent's domestic violence history includes a domestic violence order made or varied by consent under s51, the history given to the court must state that fact (r22(4)).

5.4 COURT MAY MAKE ORDER ABOUT DISCLOSURE OR ACCESS TO RESPONDENT'S CRIMINAL OR DOMESTIC VIOLENCE HISTORIES (S160A)

If the respondent's criminal or domestic violence history has been filed to given to a court hearing an application, the court may:

- Order that a person (not the respondent)[47] must not disclose information in the respondent's criminal or domestic violence history to another person (s160A(2));
- If satisfied that all or part of the respondent's criminal or domestic violence history is not relevant to deciding the application, decide the application without taking into account or hearing submissions about all or part of the histories (s160A(4)).[48]
    - If the court decides the application under s160A(4), the court may order:
        - The aggrieved or applicant (excluding the respondent and police) not be given a copy of or told about all or part of the histories (s160A(5)(a)); and
        - Any copies of the histories given to the aggrieved or applicant (excluding the respondent and police) be returned to the court (s160(5)(b)).
- Make an order under this section with or without conditions (s160A(6));
- Make an order under this section on its own initiative (s160A(7)).

5.4.1 Non-compliance

If a person does not comply with a court order under s160A, the person may be found in contempt of court under s50 of the *Magistrates Court Act 1921,* unless the person had a lawful excuse (e.g., disclosing information about a respondent's criminal or domestic violence history to a counsellor or legal representative.[49]

5.5 TRANSITIONAL PROVISIONS (S234)

The following transitional arrangements apply to applications made but not decided before the commencement, for a protection order or a variation of a domestic violence order. The provisions apply whether or not the proceedings had started before commencement on 1 August 2023 (s234(1)).

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[47] s160A(3) *Domestic and Family Violence Protection Act 2012*.

[48] For example – the criminal history consists of a conviction for a minor stealing offence committed over 20 years earlier; or part of the criminal history consists of offences that did not involve violence committed as a child.

[49] Explanatory Notes to *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022**Error! Bookmark not defined.*,* page 9.

If, in the court's opinion, the respondent's criminal and domestic violence history is relevant to deciding the application, the court may ask for the history; and consider the history in deciding the application (s234(2)). If the applicant is not a police officer, the clerk of the court may ask the police commissioner for the history (s234(3)).

- If a request is made, the police commissioner must ensure a copy of the respondent's criminal and domestic violence history is filed in court before the next hearing date; or is given to the court when the hearing of the application resumes (s234(4)).
- If the respondent does not have a criminal or domestic violence history, the police commissioner must ensure the court is informed of that fact (s234(5)).

This section applies despite ss36A, 37, 90A and 91 (s234(6)).

6 HEARING OF APPLICATION FOR PROTECTION ORDER

6.1 APPLICATION SERVED AND RESPONDENT APPEARS

If the respondent appears before the court that is to hear and decide the application for a protection order, the court may (s38):

- Hear and decide the application; or
- Adjourn the application, whether or not it makes a temporary protection order under Division 2 (see Chapter 6); or
- Dismiss the application under s38(3) if the applicant has not appeared (see paragraph 6.2).

6.1.1 What if a respondent has impaired capacity?

If in deciding whether to hear and decide an application, adjourn the application, or order the issue of a warrant for the respondent, the court is aware that the respondent is a person with impaired capacity, the court may consider whether to appoint a litigation guardian or to continue to hear the proceeding before a litigation guardian is appointed (r31).

See paragraph 15.13.2 regarding the appointment of a litigation guardian for respondent with impaired capacity.

6.2 RESPONDENT APPEARS AND APPLICANT FAILS TO APPEAR

If the respondent appears before the court that is to hear and decide the application and the applicant has not appeared and no police officer or QPS legal officer has sought an adjournment **and** no other person eligible to apply for a protection order has appeared, the court may dismiss the application without deciding it (s38(3)). See *NBE v PRT & Anor* [2018] QDC 29 and *XNR v AMF* [2022] QDC 197.

See *KJW v PQV & Anor* [2022] QDC 200 where the decision at a review mention to make a protection order for five years in the absence of the respondent was held to be procedurally unfair. Sheridan DCJ took into account the circumstances of the case including the fact the respondent was in police custody on an unrelated matter at the time of the review mention and had been fully engaged up until that point. Her Honour held, at [64], s39 did not apply as the matter was before the court for review mention and not for the purpose of "*hearing and deciding an application for a protection order*", pursuant to s39(1).

The dismissal of an application does not affect the right of the applicant to make a further application (s38(4)).

6.3 APPLICATION SERVED AND RESPONDENT FAILS TO APPEAR

If a respondent fails to appear before the court that is to hear and decide the application for a protection order and the court is satisfied that the respondent has been served, the court may (s39):

- Hear and determine the application in the absence of the respondent;

- Adjourn the application, whether or not it makes a temporary protection order under Division 2;
- Subject to s156(1), order the issue of a warrant. Section 156(1) provides the court must not issue a warrant as a matter of course, but only where, in the circumstances of the case, it believes it appropriate that the respondent be heard.

See paragraph 6.1.1 above regarding a respondent with impaired capacity.

The case of *RCK v MK* [2018] QDC 181 was an appeal against the making of an order in the absence of the respondent and that there was insufficient evidence that an act of domestic violence had been committed or that an order was necessary or desirable. Morzone KC DCJ considered whether the respondent in the circumstances was denied the opportunity to be heard by the application proceeding in circumstances where it had previously been set for mention only. In allowing the appeal, His Honour found that the Magistrate did not take into account material considerations in exercising the discretion as to whether to hear the matter or grant an adjournment. His Honour, at [40], set out six features which ought to have been taken into account by the Magistrate:

1. The proceeding was subject to active management by the court;
2. Other related criminal proceedings and subsequent appeal;
3. Common knowledge at earlier mentions that cognate proceedings need to be finalised before the final hearing being set in this proceeding;
4. No attempt by the aggrieved's representative to contact the respondent's solicitor when the matter was stood down at 9:00am before the return to court at 12:41;
5. All the parties knew the matter was only set for mention and was unlikely to be finally determined until the resolution of the cognate proceedings;
6. Evidence supporting the grounds for protection and related matters were the subject of express dispute.

In *STO v Queensland Police Service & Another* [2020] QDC 139, the respondent's explanation as to why he failed to appear was one factor taken into account in Her Honour McGinness DCJ's finding that a miscarriage of justice had occurred. In the respondent's absence, a five-year protection order was made in circumstances where the respondent had previously appeared by telephone, in the presence of the aggrieved, but was not specifically informed by the Magistrate of the adjourned date and no Notice of Adjournment was sent. At this previous mention, the Magistrate had endorsed the file with a notation that both parties were given leave to appear by telephone at the hearing on 4 February 2020. At the hearing on 4 February 2020, neither the aggrieved nor respondent appeared, and no attempt was made to call either party, despite the notation on the court file.

In upholding the appeal, at [29], Her Honour was satisfied that there had been a miscarriage of justice where a five-year protection order was made against the appellant in circumstances where the appellant's failure to appear was adequately explained. Her Honour had regard to:-

- The court history of the matter.
- The clear notation on the court file that the parties had been given leave to appear by phone.
- The failure of the court to call the appellant on 4 February 2020.
- The appellant's explanation for his failure to appear on 4 February 2020; and

- The evidence that both parties opposed the making of the order.

Her Honour was satisfied that the appellant had provided an adequate explanation as to why he did not appear at the hearing on 4 February 2020, noting his failure to appear was due to an honest mistake on his part as to the correct hearing date, but not due to a failure of the court to notify him of the hearing date. Her Honour noted that ordinarily busy courts cannot be expected to adjourn cases where parties have been served or are present in court when the matter adjourned (as was the case here) but this is an example where the prosecutor should have been aware the court needed to contact the appellant [at 39].

See *AMA v PGM* [2021] QDC 26 where a protection order was made in the absence of the respondent in circumstances where the respondent had not been issued with a notice of adjournment bringing forward the hearing date. Cash KC DCJ found it was inappropriate for the Magistrate to hear and decide the application without satisfying himself that the appellant had notice of the hearing, at [14].

See *BUI v SNL & Anor* [2021] QDC 285 where a five year protection order was made in the absence of the respondent in circumstances where the respondent had provided his solicitor with an incorrect date. Byrne KC DCJ held there was no legitimate complaint of a denial of procedural fairness. The Appellant had been given notice of every hearing date and the onus was on him to ensure he or his legal representative was at the hearing. However, Byrne KC DCJ found the reasons given for the making of the order were inadequate (consisting of two words, "five years" at [20]) and thus the Appellant had been denied procedural fairness.

See *AEN v Queensland Police Service & Anor* [2022] QDC 27 where leave to appeal the making of a protection order and a varied order was refused. The appellant did not appear at the hearing of the protection order application and the order was made in his absence. McDonnell DCJ, at [37], was satisfied the appellant had satisfactorily explained his absence at the hearing, however there was no evidence that satisfied Her Honour that the Magistrate had made an error in making the order. At the hearing of the application for variation (to limit the duration of the order) which was opposed by the QPS, the appellant appeared and consented to the order being varied to include a written exception.

6.4 WITHDRAWAL OF APPLICATION

There is no specific provision relating to withdrawal of an application in the DFVPA. Pursuant to s142 of the DFVPA, the *Domestic and Family Violence Protection Rules 2014* apply for a proceeding under the Act.

Rule 50 makes provision for withdrawal of a DFVP application. The Rule applies to:

- An application for a protection order; and
- An application to vary a protection order; and
- A police protection application.

6.4.1 How is an application withdrawn?

An applicant can withdraw the application before the court has decided it orally during the proceeding (r50(1)(a)).

Otherwise, the applicant is to make a written application to withdraw (Form DV 27) to the clerk of the court (r50(1)(b)).

In *KAV v Magistrate Bentley & Anor* [2016] QSC 46, Henry J considered a costs application where the Magistrate had not permitted the applicant to withdraw her application before hearing. His Honour noted at [50] "...*Rule 50 does not require an applicant to seek leave to withdraw."* He said at [56] that *"…rule 50 did not confer an unfettered discretion upon the presiding Magistrate to permit or prevent the applicant to withdraw her application*."

In *Grace v Peter* [2024] QSC 69, Henry J found that a Magistrate had erred in refusing to allow an application for a domestic violence order to be orally withdrawn. A lack of power to award costs if an application is withdrawn, rather than heard and dismissed, could not of itself provide a possible basis for rejecting or refusing to hear an oral withdrawal. The timing of the withdrawal application on the day of the hearing did not necessarily mean that it was an abuse of process.

The application to withdraw must state (r50(2)):

- The name of the person withdrawing;
- The role of the person in the proceeding to be withdrawn, including whether that person is, represents, or is acting on behalf of, a party to the proceeding;
- The proceeding in which the application is to be withdrawn, including the name of the parties and the file number; and
- The date of the next court appearance for the proceeding if the person knows the date.

A copy of the application must be sent to the nearby police officer for personal service on the other parties to the proceeding (r50(3) and (4)).

A court may decide an application to withdraw without the parties appearing unless the court orders otherwise (r50(5)).

Note that if the application to be withdrawn is an application to vary a domestic violence order, and a court has made a temporary protection order under s48, see s48(5)(c) for the effect of the withdrawal and r19. Refer to paragraphs 7.2.2 and 14.7.

6.4.2 Police applications

Note that QPS OPM 9.6.1 states that:

> *Officers are reminded when police initiate an application, the Service maintains the right to appear and make representations at variations which would shorten the period of the order or to ensure applications are not withdrawn by the*

aggrieved due to threats and/or intimidation by the respondent or any other reason unless special circumstances exist.

QPS OPM 9.8.9 clearly states that applications should not be withdrawn merely because the aggrieved wishes that the matter be withdrawn.

6.4.3 Can court make an order if the aggrieved does not want to proceed?

The Magistrate in *Armour v FAC* [2012] QMC 22 made a protection order in favour of an aggrieved who clearly indicated that she did not want to proceed with the police application. His Honour considered the meaning of the phrase *'necessary or desirable to protect the aggrieved'* and said:

[14] The first thing to observe is that the test is stated in the alternative.

…….

[16] A court may find it necessary to make an order without finding it to be desirable. One example may be where a court finds it necessary despite the wishes of the aggrieved who stands opposed to the making of the order.

The decision was set aside on appeal when Kingham DCJ in *FCA v Commissioner of the Queensland Police Service* [2014] QDC 46 found that on the facts the making of the order was not necessary or desirable:

[48] The uncontested facts, assessed in the context of the evidence as a whole, count against a finding that it was necessary to make a protection order. FCA and LJK were no longer in a relationship. The hearing was 6 months after the alleged act of domestic violence. There was no evidence of any contact between them except as it related to these proceedings. There was no allegation of any further act of domestic violence against LJK. LJK had made repeated attempts to terminate the proceedings. She gave evidence that she was not in fear of FCA and did not require protection. That was consistent with her attempts to withdraw the complaint.

[49] In those circumstances, I do not consider that a finding that it was necessary or desirable to make a protection order was open on the evidence before the court.

However, Her Honour did state that there was *"no contest with His Honour's analysis of the approach he should take in considering whether a protection order was necessary or desirable"* (at [35]).

6.5 PERMANENT STAY OF PROCEEDINGS FOR AN ABUSE OF PROCESS

In *SGLB v PAB* [2015] QMC 8, the Magistrate ordered a permanent stay of proceedings on the basis the application for a protection order was an abuse of process. However, Muir DCJ, in *HDI v HJQ* [2020] QDC 83, found *SGLB* was wrongly decided, finding the Magistrate did not have power to grant a permanent stay of an application made under the DFVPA.

Her Honour considered the cases referred to in *SGLB* and whether the Magistrates Court has an implied power to stay a decision. Her Honour found that the Magistrate in *SGLB,* in finding that the authorities seem to suggest that it is accepted in Queensland that a Magistrates Court as a court of inferior jurisdiction does have such a power, had overlooked three important matters:

1. the decision relied on (Williams JA in *Doonan v McKay* [2002] QCA 514) was confined to the facts of that case.
2. both *Doonan* and the other authorities cited concerned a magistrate's power in the criminal jurisdiction.
3. the Court of Appeal in the 2005 decision of *Higgins v Comans* (2005) 153 A Crim 565 determined in a unanimous judgment that a Magistrate in Queensland has no implied power to stay committal proceedings (the Magistrate in *SGLB* was not referred to it).

At [66], Her Honour said:

> [66]…*I am not satisfied that SGLB supports a finding that a Magistrate in Queensland has the power to grant a permanent stay of an application made under the DFVP Act*.

Her Honour then considered whether the power to order a permanent stay under the DFVPA can be found by other means, referring to the objects and principles of the Act in ss3 and 4, the powers of the court in s38 on an application for a protection order and on an application for a variation of a DVO in s93 and the circumstances in which a court can vary an order in s94. Her Honour said:

> *[75]…these provisions reveal that the Magistrates Court has power to summarily dismiss an application under the DFVP Act in certain circumstances.*

Her Honour then cites s157 - costs - the court can award costs against a party who makes an application that the court hears and decides to dismiss on the grounds that the application is malicious, deliberately false, frivolous, or vexatious.

At [77]:

> *It follows that by expressly contemplating that applications that can be categorised as malicious, deliberately false, frivolous, or vexatious the DFVP Act provides either expressly or by implication for applications that are an abuse of its process to be dismissed. But there is no express reference to a power to stay such a proceeding on these bases.*

The *Domestic and Family Violence Rules 2014* is cited, namely r5, 6, 22 and 48. The Rules make express provision for the summary dismissal of applications but no reference to the power to stay a proceeding.

At [85]:

> *…there is nothing on the face of either the DFVP Act or its accompanying Rules to suggest that Parliament contemplated that applications made under that legislation would be finalised by way of a grant of a permanent stay, or indeed, even temporarily stayed.*

Her Honour then considers the power of Magistrates Courts in other civil matters to stay proceedings and other legislative sources. Under the *UCPR,* the Magistrates Court has the power to stay proceedings under r16(g). However, under s142(3) of the DFVPA, the *UCPR* does not apply to a proceeding under the DFVPA (except appeals). Under the *Magistrates Court Act 1921,* there is a power to stay proceedings, but this is confined to employment claims. This is to be contrasted with the express provision in the *District Court of Queensland Act 1967,* s69, to include the power to stay proceedings. The *Civil Proceedings Act 2011* applies to the Supreme, District and Magistrates Courts (and is not expressly excluded by the DFVPA). Section 7(6) when read with s7(4), in Muir DCJ's view does not create an express power to order a stay of an application under the DFVPA.

Is there a power to stay by implication, in the absence of an explicit statutory power?

Her Honour considers the power to grant a permanent stay in committals in *Higgins v Comans* (2005) 153 A Crim 565; [2005] QCA 235 and the High Court decision of *Grassby v The* Queen [1989] HCA 45 and whether the power should be inferred, which she said could be applied in the context of civil cases as well. That is, in the absence of an express power, should the power be conferred on the Magistrates Court as a matter of *necessary implication*? Caution must be exercised when considering a power to order a stay, particularly when it can only be granted in exceptional circumstances.
At [94]:

> *…I am not satisfied that an implied power to stay proceedings is required for the effective exercise of a jurisdiction which is expressly conferred under the DFVP Act – namely the jurisdiction to summarily dismiss applications that are frivolous, vexatious or (either expressly or by implication), an abuse of the court process*." And at [95], "*…I am not satisfied that such a power ought to be conferred upon the Magistrates Court as a matter of necessary implication under the relevant provisions of the DFPV Act.*

The order staying the application to vary ought to be set aside as a nullity.[50]

The decision of *OSE v HAN* [2020] QDC 309 also considered the power to summarily dismiss, upon a "no case to answer" submission. In this case, Byrne KC DCJ held although there is no express power to find no case to answer or a power to summarily dismiss in the legislation, upon an examination of the relevant authorities, it was possible to imply such a power.

At [41]:

> *"In these proceedings the Court was specifically empowered to "hear and decide the application" for the Protection Order. The Act neither prescribes nor proscribes the methods by which the Court can "hear and decide the application". The absence of conferral of an expressed power to determine a proceeding by a no case submissions*

[50] Her Honour then considered whether the application to vary should be allowed, dismissed, or referred back to the Magistrates Court for a further hearing. In Her Honour's view there was no utility in sending the matter back to the Magistrates Court. Her Honour determined the matter, found no basis to allow the applicant's application to vary in full. Two minor variations were made to the order (substituting "order" for "condition" in respect of the ouster and inserting a "family law exception" to allow contact with the children without contravening the order.)

does not necessarily mean that the use of that procedure is unavailable. Although the use of the procedure may be inappropriate for other reasons."

At [44]:

"A power will be implied only if it is "necessary" for the effective exercise of the jurisdiction which is expressly conferred and is confined to that which is actually necessary. The term "necessary" does not mean essential, but rather is to be subjected to the "touchstone of reasonableness".

And at [46]:

"In my view, a Court hearing an application for a Protection Order under the DFVP Act has an implied power to summarily dismiss or otherwise terminate the proceedings determining the application on the basis of a lack of evidence capable of supporting the making of the order sought, where that is appropriate."

At [59], His Honour set out four principles for determining an application for summary dismissal of an application for a Protection Order, which is only to be granted after exercising exceptional caution and only when the need is clearly demonstrated and to give effect to the principles for administering the DFVPA:-

Given the nature of an application for summary dismissal and the fact it is brought before a judicial officer who is both the tribunal of fact and the tribunal of law, any factors which may tend to make consideration of the application inappropriate for any reason must be given full weight, and should usually result in the judicial officer declining to consider the application until all evidence is adduced in the hearing. It is only in the very clearest of cases that the application should be entertained before the respondent has been put to his or her election.

If the application is entertained prior to the respondent being put to their election, the application must be determined only on the evidence adduced in the applicant's case. This will include any material tendered by the applicant which benefits the respondent but will not include any material tendered by the respondent during the applicant's case unless it is made admissible through cross-examination (or in this case where the rules of evidence do not apply, is properly received as a result of cross-examination). If there is any evidence in the applicant's case which, taken at its highest, is capable of supporting the application, no matter how tenuous or inherently weak or vague, the application for summary dismissal must be dismissed.

Where the respondent is put to his or her election and declines to give or call any (possibly further) evidence, the application for summary dismissal must be determined in the manner outlined in the sub-paragraph immediately above, but any inferences that arise in the particular circumstances from the election to not adduce any evidence55 can also be taken into account. Where the respondent is put to his or her election and elects to give or call evidence, the application for summary dismissal must be determined on all of the evidence.

7 MAKING A TEMPORARY PROTECTION ORDER

7.1 TPO UNDER SECTION 44

7.1.1 When can the court make a temporary protection order? (s44)

A court may make a temporary protection order if (s44):

- The court adjourns a proceeding – the hearing of an application for a protection order or a variation, or a criminal proceeding for an offence involving domestic violence (s42) or a Childrens Court child protection proceeding (s43); or
- The applicant for a protection order or a variation has asked the clerk of the court for the application to be heard before the respondent is served or before the respondent is served and without the applicant giving the court a verification declaration (see s36 and paragraph 4.5 and s90 and paragraph 14.5); or
- An application for an urgent temporary protection order is made by a police officer under Part 4, Division 4 (see paragraph 7.3).

If the application is a police protection notice under s112, it does not matter whether or not the nature of the protection order and the grounds on which it is sought are stated (s44(2)):

- In the police protection notice; or
- In a statement mentioned in s111(3) that has been filed; or
- Have otherwise been made known to the court.

7.1.2 Of what must the court be satisfied before making the TPO? (s45)

A court may make a temporary protection order **only if satisfied that** (s45):

- A relevant relationship exists; and
- The respondent has committed domestic violence [51] against the aggrieved. BUT if the application was adjourned under s41E (hearing of cross application), in addition to the requirements in s45, it must be satisfied that the order is necessary or desirable to protect the aggrieved or another person pending a decision on the application (s49(3)).

In deciding whether to make a temporary protection order, the court **may** consider the respondent's criminal and domestic violence histories if, in the court's opinion, it is relevant to do so (s45(3)).

See *LBU v QPS & Anor* [2020] QDC 279 where a temporary protection order was found to have been properly made in the absence of the respondent, where the only material before the Magistrate was the PPN (properly issued) and submissions from police prosecutions.

[51] Defined at paragraph 1.3.

See *GRP v ABQ* [2020] QDC 272**Error! Bookmark not defined.**, the rehearing of a temporary protection order application and the considerations of s45. The allegation of physical abuse occurred during an incident involving an allegation of choking by the appellant who was subsequently charged. The appellant made a cross application for a protection order against the respondent alleging she had scratched him with her nails. On the re-hearing, McGinness DCJ, applying s45, which required a relevant relationship and the respondent having committed domestic violence, made a temporary protection order naming the appellant as the aggrieved. Her Honour noted the principle in s4 of identifying the person most in need of protection however, at [39], noted "…*it does not follow that the appellant is not also entitled to protection in the circumstances of this case. Cross-orders are not uncommon in situations where both parties have committed acts of domestic violence*." Her Honour found the evidence of alleged physical violence was sufficient to be satisfied the respondent had committed domestic violence against the appellant. Her Honour noted that the respondent would have an opportunity to give evidence before a Magistrate at a hearing before determining whether a protection order should be made. A costs order was made against the respondent.

If the court is making a temporary protection order under s44(1)(b) on the adjournment of an application for a variation of an existing domestic violence order, the provisions of s48 apply (see paragraph 7.2).

7.1.3 Evidence (s46)

The temporary protection order need only be supported by the evidence that the court considers sufficient and appropriate having regard to the temporary nature of the order (s46).

7.1.4 Form of the order (s50)

The court may make a temporary protection order in the same terms as a protection order (s50). This means it can include named persons (see paragraph 10.1) and the same conditions that can be included in a protection order (see paragraph 10.3).

7.1.5 Temporary Protection Order when respondent not served (s47)

If the respondent has not been served with a copy of the application and is not present in court, the court may make a temporary protection order **only if the court is satisfied that** (s47):

- The making of a temporary protection order despite the respondent having not been served is necessary or desirable to protect the aggrieved, or another person named in the application, from domestic violence; and
- The relevant relationship exists, and the respondent has committed domestic violence (s45).

In deciding whether to make a temporary protection order, the court may consider the respondent's criminal history and domestic violence history if it is relevant to do so (s45(3), s47(3)).

See *KBE v Queensland Police Service* [2017] QDC 326 where costs (appellant's filing fee) were awarded where a hearing had been conducted on the basis the appellant has been served with the application for a temporary protection order, when he had in fact not been served. The Magistrate conducted the hearing pursuant to s45 instead of s47 and the order was set aside.

7.1.6 Temporary Protection Order when applicant unable to give declaration (s47A)

If the applicant for a protection order or a variation of a protection order has not given a court a verification declaration (see s32(2)(d) for meaning of verification declaration), the court may make a temporary protection order against the respondent only if the applicant verifies, on oath or affirmation, that the application is true and correct. This section applies in addition to s45 (matters court must be satisfied of, s47A(3)).

Note that under s142A, a Magistrates Court may enable a person to take an oath or make an affirmation by audio visual link or audio link (see s47A(1) note).

7.1.7 Temporary Protection Order when application adjourned (s47B)

If the court adjourns the hearing of the application at the first mention for the proceeding, the court must consider whether to make a temporary protection order.

This provision also applies to a PPN (see s112).

This provision only applies to applications filed, or PPNs issued, after 23 September 2024 (s238)

7.2 TEMPORARY PROTECTION ORDER IN RELATION TO APPLICATION FOR VARIATION (s48)

If the court adjourns the hearing of an application for a variation of a domestic violence order (see paragraph 14.8) (*the first domestic violence order*), the court may make a temporary protection order against the respondent **only if the court is satisfied** it is necessary or desirable to protect the aggrieved, another person named in the first domestic violence order, or another person named in the application for variation from domestic violence, pending a decision on the application for variation (s48(2)).

7.2.1 Suspension of first DVO (s48(3) and (4))

If the court makes a temporary protection order under this section, the first domestic violence order is suspended from when the respondent is served with the order or when the order would otherwise become enforceable under s177.

7.2.2 End of suspension (s48(5))

Section 48(5) of the DFVPA states the suspension ends, and the first domestic violence order is revived when –

(a) The court varies the first domestic violence order, and it takes effect under s99 (see paragraph 11.3); or
(b) The court refuses to vary the first order and the respondent is told about the refusal; or
(c) The application for variation is withdrawn and the respondent is told about the withdrawal.

The respondent may be told about the refusal or withdrawal by the court if present in court, or by a police officer (s48(6)). (Note that r19 requires the clerk of the DFVP court to notify the police commissioner of the refusal or withdrawal). A police officer can tell the respondent in any way including by telephone, email, SMS, a social networking site or by other electronic means (s48(7)).

7.3 URGENT TEMPORARY PROTECTION ORDER (SS129-133)

See paragraph 3.3 regarding the circumstances in which a police officer may apply for an urgent temporary protection order.

7.3.1 What is required in the application? (s130)

Regarding the application:

- It must be made to a Magistrate (s130(1));
- It may be made by telephone, email, radio, fax, or other similar facility (s130(2));
- The police officer must inform the Magistrate of the particulars of the application mentioned in s129(1);
- The Magistrate must make a record in writing of the application (s130(5)).

7.3.2 Of what must the Magistrate be satisfied to make an urgent TPO? (s131)

A Magistrate **may only make the order if satisfied** that (s131):

(a) An order could be made under Part 3, Division 2 (see paragraph 7.1). That is:
  (i) A relevant relationship exists, **and** the respondent has committed domestic violence against the aggrieved (see s45); **and**
  (ii) If the respondent has not been served, that the making of a temporary protection order despite the respondent not being served is necessary or desirable to protect the aggrieved, or another person named in the application, from domestic violence (see s47); **AND**
(b) The application for a protection order referred to in s129(1) will not be decided sufficiently quickly by a court to protect the aggrieved from domestic violence; **OR**

(c) The date for the hearing of a protection order referred to in s129(2) is more than five business days after the person is released.

Note that the urgent application can only be made after the police officer has prepared an application for a protection order (s129(1)(a)). The Magistrate is entitled to assume that the person making the urgent temporary protection order application is a police officer and that the application for a protection order has been prepared (s130(4)).

7.3.3 What are the Magistrate's duties?

The Magistrate **must:**

- Make a record in writing of the application (s130(5));
- If the Magistrate makes the temporary protection order:
    - make a record in writing of the terms of the order and the grounds that caused the Magistrate to be satisfied of the matters mentioned in s131(1); (s131(2)(a)) and
    - inform the applicant by way of telephone, fax, radio, email, or other similar facility, of the terms of the order (s131(2)(b)); and
    - as soon as practicable, give the written record of the application and the terms of the order to the clerk of the Magistrates Court that will hear the application for the protection order that relates to the temporary protection order (s131(2)(c)).
- <u>If the Magistrate refuses to make the temporary protection order:</u>
    - make a record in writing of the reasons for the refusal (s131(3)(a)); and
    - inform the applicant by way of telephone, fax, radio, email, or other similar facility, of the refusal (s131(3)(b)); and
    - as soon as practicable, give the written record of the application and the written reasons for the refusal to the clerk of the Magistrates Court that will hear the application for the protection order that relates to the temporary protection order (s131(3)(c)).

7.3.4 What must the police officer do if an order is made? (s132)

A police officer who obtains an urgent temporary protection order under s131 **must** prepare a copy of the order in the approved form and file the copy in the court (s132(1)).

The copy of the order must include –

- The name of the Magistrate who made the order;
- The date and time the order was made; and
- The date, time, and place at which the matter is to come before a court for a hearing of the application for the protection order (s132(2)). The hearing date must be no more than 28 days after the temporary protection order is made or, if there is no suitable hearing date within 28 days, the next available hearing date (s132(3)).

7.4 TEMPORARY PROTECTION ORDER IN RELATION TO CROSS APPLICATIONS

If an original application for a domestic violence order is before a court and a cross application is made and was not served on the original aggrieved within a reasonable period before the day of hearing the original application (s49) –

- The court must adjourn the hearing of the cross application and set a date by which the cross application is to be served on the aggrieved, unless that aggrieved consents to the court hearing the cross application before or at the same time as hearing the original application (s41E).
- If the original aggrieved does not consent as above, the court may make a temporary protection order if satisfied that the temporary protection order is necessary or desirable to protect the aggrieved or another person named in the cross application, pending a decision in the cross application (s49(3)).

The court is to be satisfied of the matters set out in s45 (see paragraph 7.1.2) (s49(4)).

The following **transitional provisions** apply:

s217 – Application to make or vary domestic violence order

(1) The amended DFVPA applies to a proceeding for an application to make or vary a domestic violence order whether the proceeding was started before or after the commencement.
(2) Without limiting subsection (1), if an intervention order has previously been made against the respondent, the respondent's compliance with the order must not be the only reason the court decides –
    (a) for an application to make a protection order – to refuse to make a protection order; or
    (b) for an application to vary a domestic violence – to vary a protection order.

s219 – Duration of existing protection order

(1) This section applies to a protection order made before the commencement if the protection order:
    (a) was in force immediately before the commencement; and
    (b) did not state a day on which it ends.
(2) Section 97, as in force immediately before the commencement, continues to apply to the protection order unless the protection order is varied to change its duration.
(3) Section 97, as amended by the amendment Act, applies in relation to an application to vary the duration of the protection order.

8 MAKING A PROTECTION ORDER

8.1 WHEN CAN THE COURT MAKE A PROTECTION ORDER?

A court can make a protection order when:

- An application is made to it by any of the persons in s25 (see Chapter Three);
- The court convicts a person of an offence involving domestic violence – see s42 and paragraph 2.3;
- The court is a Childrens Court hearing a child protection proceeding – see s43 and paragraph 2.5.

8.2 TEST TO BE APPLIED (S37)

A court may make a protection order against the respondent for the benefit of the aggrieved **if the court is satisfied that** (s37(1)):

(a) A relevant relationship exists between the aggrieved and the respondent (see paragraph 1.5), and
(b) The respondent has committed domestic violence (as defined in paragraph 1.3); and
(c) The protection order is necessary or desirable to protect the aggrieved from domestic violence.

The first two tests are the same as they were under the previous DFVPA. However, the test in s37(1)(c) is new – the 'necessary or desirable' test (see paragraph 8.3).

Note Porter KC DCJ in *OMD v Queensland Police Service & Anor* [2021] QDC 282, when considering the principles in *House v The King* (1936) 55 CLR 499 at 504-505 regarding discretionary judgments, at [28]:

> *…the making of a protection order should not be treated as a discretionary judgment in all respects. While it can be accepted that s37(1) DV Act confers a discretion on the Court as to whether to make a protection order or not, that does not mean that the threshold conditions for that discretion to arise should be treated as discretionary as well.*

See *ATJ v SLK* [2018] QDC 191 where the appellant appealed against a Magistrate's decision to grant the respondent (aggrieved) a protection order for five years under the DFVPA:

Ground of appeal: whether the Magistrate erred in the exercise of his discretion in finding that the conduct of the appellant constituted 'domestic violence' under the DFVPA.

The original hearing proceeded in the absence of the appellant (the respondent to the application for a protection order). The only material before the Magistrate was the application for the current order in which the respondent aggrieved stated the appellant was sending increasingly harassing and intimidating Facebook messages and texts (including threats to kidnap the respondent aggrieved's daughter). The Magistrate made the current order on the basis of the uncontested allegations in the application, being satisfied that the requirements for making a domestic violence order under s37 of the DFVPA had been met.

Farr SC DCJ, at [14], noted that a court may inform itself in any way deemed appropriate in a domestic violence application hearing and it would seem appropriate to act on the information before him, that being the above submissions regarding the contacts between the parties. There was no factual dispute regarding the contacts or the contents of them.

His Honour said, at [15], that while the respondent said she found those messages intimidating, the objective observer would find nothing said in them that is likely to fall within the very wide definition of 'domestic violence' under the DFVPA. Further, the messages were not consistent with the allegations made in the application for the current order – that ATJ continued to harass and intimidate the respondent and had threatened to kidnap the child.

At [16] and [17], Farr SC DCJ said that, as the Magistrate was not advised of the above information nor the contents of the contacts, he would have presumed that behaviour similar to what was particularised in the application was continuing to the present time. Accordingly, the Magistrate had been '*positively misled when he turned his mind to whether the relevant test had been met' and had 'acted upon a false factual basis…'*. Farr SC DCJ was satisfied that a significant factual error had occurred in the Magistrate's exercise of discretion in the sense articulated in *House v The King [1936] 55 CLR 499*.

The appeal was allowed, and the Magistrate's decision was set aside and remitted back to the Magistrate's Court.

In *AMB v TMP & Anor* [2019] QDC 100, the appellant appealed against the making of a domestic violence order on the basis the learned Magistrate had erred in finding (i) that the appellant had committed domestic violence and that (ii) an order was necessary or desirable. In relation to the first ground, the Magistrate was satisfied, on the balance of probabilities, that the appellant had committed two incidents of emotional abuse amounting to domestic violence. These comprised a derogatory and abusive message sent to the aggrieved on 29 October 2017 and, secondly, derogatory name calling in multiple Facebook messages between October and December 2017. Printouts of these messages evidenced the insulting nature of the contents. Although there were concerns regarding the aggrieved respondent's credit, these were not central to the case. See Kent KC DCJ's discussion about emotional abuse and at what points the trading of insults amounts to emotional abuse (at [36]-[38]).

As for whether the protection order was necessary or desirable to protect the aggrieved from domestic violence, Kent KC DCJ noted Morzone KC DCJ's three stage assessment for determining if a protection order is necessary or desirable set out in *MDE v MLG & Queensland Police Service* [2015] QDC 151 (see s783 and paragraph 8.4).

Note that 'be satisfied' imports the civil standard of proof, the balance of probabilities (s145(3)).

Note also:

- When court must ask questions about weapons before making an order (paragraph 9.5);
- When court must consider naming child in an order (see also paragraph 10.1.2.2).

In *RJCS v Queensland Police Service* [2023] QDC 18, Loury KC DCJ noted at [50] that the making of a protection order was not a form of extra-curial punishment and stated that "*The making of a Protection Order was all but inevitable consequence of the appellant committing serious acts of domestic violence*".

8.3 'NECESSARY OR DESIRABLE' TEST (S37(1)(C))

In deciding whether a protection order is necessary or desirable, the court **must consider:**

- The principles in s4 (see paragraph 1.2);
- If an intervention order has previously been made against the respondent, any failure to comply with the order (37(2)(a)(ii));
    - If there was a previous intervention order and the respondent has complied with the order, the court may consider the respondent's compliance (s37(2)(b)), however the court must not refuse to make a protection order merely because the respondent has complied with a previous intervention order (s37(3));
- The respondent's criminal history and domestic violence history filed in or given to the court under s36A (s37(2)(a)(iii)).

If the application for a protection order names more than one respondent, an order can be made against one or more respondents (s37(4)).

Note: Section 37 of the DFVPA applies subject to s41G in relation to deciding cross applications (s37(6)).

In an appeal against the making of a protection order on the grounds that the order was not necessary or desirable, Kent KC DCJ in *RC v MM* [2018] QDC 276 found that the Magistrate failed to explicitly consider whether an order was necessary or desirable as required by s37(1)(c) as there was no analysis in the Magistrate's reasons of the question whether a protection order was necessary or desirable at all. (See also paragraph 8.4).

See *ARTE v Nugent & Anor* [2020] QDC 268**Error! Bookmark not defined.** where Williamson KC DCJ held, at [27], the requirement in s37(2) to consider the principles in s4, when considering whether an order is necessary or desirable under s37(1)(c), required the Magistrate to have regard to the wishes and views of the people who fear or experience domestic violence to the extent appropriate and practicable (as per s4(2)(b)). In this case, His Honour found the Magistrate's failure to disclose in the reasons whether the considerations mandated by s37(2) were taken into account amounted to an error of law and the order should be set aside.

8.3.1 Meaning of 'necessary or desirable'

Magistrate Costanzo considered the meaning of necessary or desirable in *WJM v NRH* [2013] QMC 12, referring to his earlier decision in *Armour v FAC* [2012] QMC 22[52]. His Honour made a number of points about the concept [17]:

- The test is stated in the alternative so "a court may find it desirable to make an order without finding it necessary - for example, where a perpetrator of domestic violence needs to be held accountable.[53] A court may find it necessary to make an order without finding it desirable. One example may be where a court finds it necessary despite the wishes of an aggrieved who stands opposed to the making of an order."
- Giving these terms their plain English meaning, the online Oxford English Dictionary defines:
    - "Necessary" as "That is needed"; "Needed to be done, achieved, or present; essential"; "Indispensable, vital, essential; requisite. Also, with *to* or *for* (a person or thing); "Of an action: that needs to be done; that is done in order to achieve the desired result or effect: if necessary; if required by the circumstances"; and "That which is indispensable; a necessary thing: an essential or requisite;
    - "Desirable" as "Worthy to be desired; to be wished for"; and "That which is desirable; a desirable property or thing".
- Whether the court finds it necessary or finds it desirable, the finding must be made in the context that it is either necessary or desirable that the order be made in order to protect the aggrieved with the terms of an order.
- The need for protection must be a real one, not some mere speculation or fanciful conjecture.
- Need often arises from risk. The court needs to assess the risk to the aggrieved and assess whether management of the risk is called for.
- The risk of further domestic violence and the need for protection must actually exist. There is not stated necessity that the need or the risk be significant or substantial. The need for protection must be sufficient to make it necessary or desirable to make the order in all the circumstances.

In *MDE v MLG & Queensland Police Service* [2015] QDC 151 the District Court considered the meaning of 'necessary or desirable' and the process for determining whether it was

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[52] The decision to make a protection order in this case was set aside on appeal in *FCA v Commissioner of the Queensland Police Service* [2014] QDC 46. However, Kingham DCJ said at para 35 that there was no contest with His Honour's analysis of the approach he should take in considering whether a protection order was necessary or desirable.

[53] See McGill SC DCJ in *GKE v EUT* [2014] QDC 248 who appears to disagree with this example although His Honour refers to it as an example of an order being 'necessary' when the Magistrate used it as an example of it being 'desirable'. McGill SC DCJ said at para 30 that "the focus should be on the prospect of future domestic violence otherwise occurring, rather than holding the respondent accountable for domestic violence. That seems to be tying the justification for the order to prior conduct. There are other mechanisms in the Act for giving effect to the purpose of holding perpetrators accountable."

necessary or desirable to make the order (see also paragraph 8.4 and Morzone KC DCJ's three stage process). Morzone KC DCJ said -

> *[50] The third element in s 37(1)(c) is that "the protection order is necessary or desirable to protect the aggrieved from domestic violence".*
>
> *[51] The focus of this element is the paramount need for the protection [of] an aggrieved from domestic violence, and whether imposing a protection order is necessary or desirable to meet that need.*
>
> *[52] The use of the phrase "necessary or desirable" invokes a very wide and general power and should be construed in a similarly liberal manner to enable a court to properly respond, and, if appropriate, tailor an order to protect a person from domestic violence. The phrase is not unusual in that appears in both state and federal legislation, including analogous anti-domestic violence legislation.*

In *GKE v EUT* [2014] QDC 248 McGill SC DCJ considered the requirement and said at [32] to [33]:

> *[32] In my opinion the focus must be on the issue of protecting the aggrieved from future domestic violence, the extent to which on the evidence there is a prospect of such a thing in the future, and of what nature, and whether it can properly be said in the light of that evidence that is necessary or desirable to make an order in order to protect the aggrieved from that. The Magistrate spoke about this in terms of an assessment of the risk to the aggrieved, and that I think was an appropriate basis for analysis. I agree with the Magistrate that it is necessary to assess the risk of domestic violence in the future towards the aggrieved if no order is made, and then consider whether in view of that the making of an order is necessary or desirable to protect the aggrieved.*
>
> *[33] I also agree that there must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future. Broadly speaking I agree with what the Magistrate said in the passage beginning "fourthly" of his reasons, though I would express the last sentence as "the risk of future domestic violence against an aggrieved must be sufficiently significant to make it necessary or desirable to make an order in all the circumstances." In assessing such a risk, it is relevant to consider the fact that there is going to have to be some ongoing relationship because of the position of the children, and, if as the appellant alleges the respondent has been difficult and uncooperative in the past in relation to the arrangements for him to have the opportunity to spend time with the children, there is a risk that there will be situations arising of a kind which have in the past produced domestic violence.*

[54] This is consistent with the *Domestic and Family Violence Protection Bill 2011 Explanatory Notes* [at p5-6]*:*

> *The Bill replaces the 'likelihood' element with a requirement that a court be satisfied that an order is necessary or desirable to protect an aggrieved from*

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

Harrison DCJ followed Morzone KC DCJ in *MDE v MLG* in *AJS v KLB & Anor* [2016] QDC 103.

In *DMK v CAG* [2016] QDC 106, Morzone KC DCJ again considered whether an order was "necessary or desirable":

> *[68] The use of the phrase "necessary or desirable" invokes a very wide and general power and should be construed in a similarly liberal manner to enable a court to properly respond, and, if appropriate, tailor an order to protect a person from domestic violence".*
>
> *[72] The Magistrate did not need to be satisfied that future domestic violence was 'likely' (required by the former Act). His reasoning, although economical, well demonstrated his satisfaction on the evidence of the prospect of domestic violence beyond some mere possibility or speculation.*

In *SHW v ABC* [2021] QDC 151 it was found an order was necessary or desirable given future contact was inevitable due to the ongoing contentious property settlement.

GKE v EUT and *DMK v CAG* were cited by Rinaudo J in *TAF v AHN* [2021] QDC 204, where His Honour upheld the Magistrate's decision that an order was necessary or desirable in circumstances where the appellant (respondent) resided in the USA. The Magistrate considered the ongoing need for contact in respect of the child. In concluding that a protection order was necessary and desirable, the Magistrate said:

> *"It is desirable most definitely to keep the peace between these two warring parties, because without it I am fearful. I believe that there would be threats continuing. I believe there would continue to be harassment and intimidation in particular. I'm not quite so sure about the denigration because of the reduced communication now between the parties, but there is sufficient there for a court to find it is desirable that there be an order."*

See *RBG v BKS & Anor* [2021] QDC 234 where Sheridan DCJ held the Magistrate was correct to consider there to be sufficient evidence to draw an inference that domestic violence may occur again in the future between two siblings. In dismissing the appeal, Sheridan DCJ

referred to several factors including the familial relationship and the likely need for ongoing contact between the appellant and the first respondent due to the fact the respondent is the executrix of the mother's estate, which includes the house where the appellant lives.

In *OMD v Queensland Police Service & Anor* [2021] QDC 282, Porter KC DCJ held, at [134], the Magistrate was correct to find an order was necessary or desirable in circumstances where there was a high risk of commission of future domestic violence if an order is not made given the appellant's continued "*lack of insight into the suffering her conduct caused, or into the fact that her* (now adult) *children were determined to reject her advances, despite her protestations of love for them.*"

In *TJB v CRC* [2022] QDC 67, Smith DCJA dismissed an appeal against the making of a protection order, finding an order was necessary or desirable (applying *GKE v EUT* and *MDE v MLG*). His Honour found a number of features demonstrated the order was necessary, at [94]:-

> *(a) The appellant committed acts of domestic violence against the respondent;*
> *(b) The appellant did not accept responsibility for his behaviour;*
> *(c) He was not deterred from committing acts of domestic violence in breach of the temporary protection orders;*
> *(d) The respondent lived alone at times on an isolated rural property and was especially vulnerable;*
> *(e) The most serious episode of domestic violence involved the appellant threatening to use a firearm to kill himself. The imposition of domestic violence order will prevent him from holding or obtaining a weapons licence for the duration of the order;*
> *(f) There was every reason to be concerned about the appellant's mental health. He had not sought any treatment for his mental health issues and seemed to have little or no insight into the extent of them.*

At [95], His Honour found further features demonstrated an order was desirable:-

> *(a) The appellant needed to be accountable for his behaviour;*
> *(b) The appellant needed to understand that his behaviour was unacceptable and would not be tolerated by the courts. This was particularly important considering he did not accept he had engaged in domestic violence, and he tried to minimise and justify his behaviour on 2 January 2021;*
> *(c) The appellant needed to understand that further acts of domestic violence or breaches of orders of the court would result in immediate action by the police;*
> *(d) The respondent needs to be protected by the court.*

In *DLM v WER & The Commissioner of Police* [2022] QDC 79, Cash KC DCJ found, at [72], it *"…an inevitable conclusion that a protection order was necessary or desirable*", once it had been established domestic violence had occurred. The appellant had *"…by his conduct demonstrated a pattern of domestic violence. There was the real prospect of future*

domestic violence, especially where the parties shared a child, and it was likely they would have to maintain some contact."

The fact an aggrieved and respondent lived far apart and had no children or joint property does not preclude an order being necessary or desirable. See Cash KC DCJ in *PAD v GA* [2022] QDC 125, at [9]:

> *There are further findings relevant to whether it was necessary or desirable to make a protection order. These included that the appellant did not accept that he had done anything wrong and appeared to continue to blame the first respondent. And, also, what I would describe as findings of an absence of insight on the part of the appellant. On these findings, there could be no fault in the conclusion of the Magistrate that acts of domestic violence had occurred, and that a protection order was necessary or desirable. That is so even if the appellant and the first respondent were living, at the time, far apart.*

8.4 PROCESS APPLIED IN DETERMINING WHETHER AN ORDER IS NECESSARY OR DESIRABLE

Morzone KC DCJ in *MDE v MLG & Queensland Police Service* [2015] QDC 151[54] expressed the view that the element of whether "*the protection order is necessary or desirable to protect the aggrieved from domestic violence*" requires a three stage process supported by a proper evidentiary basis (adduced pursuant to s145 of the DFVPA):

> *[55]…**1. Firstly, the court must assess the risk of future domestic violence between the parties in the absence of any order.***
>
> *There must evidence to make factual findings or draw inferences of the nature of, and prospect that domestic violence may occur in the future. This will depend upon the particular circumstances of the case. Relevant considerations may include evidence of past domestic violence and conduct, genuine remorse, rehabilitation, medical treatment, physiological counselling, compliance with any voluntary temporary orders [s37(2)(b)], and changes of circumstances.*
>
> *Unlike, its predecessor provision under the now superseded legislation, the court does not need to be satisfied that future domestic violence is 'likely'. However, there must be more than a mere possibility or speculation of the prospect of domestic violence.*
>
> ***2. Secondly, the court must assess the need to protect the aggrieved from that domestic violence in the absence of any order.***
>
> *Relevant considerations may include evidence of the parties' future personal and familial relationships, their places or residence and work, the size of the community in which they reside and the opportunities for direct and indirect contact and future communication, for example, in relation to children.*

[54] Note that this case was decided prior to the amendments introduced by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*.

3. Thirdly, the court must then consider whether imposing a protection order is "necessary or desirable" to protect the aggrieved from the domestic violence.

In this regard, pursuant to [s37(2)(a)], the court must consider the principles in s 4(1) that:

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

4. Finally, if the court is satisfied of the other pre-conditions of a relevant relationship and domestic violence are established, the court may exercise its discretion to make a protection order imposing appropriate prohibitions or restrictions on the behaviour of a respondent necessary or desirable to protect the aggrieved from the domestic violence.

The three-stage process of Morzone KC DCJ was considered by Horneman-Wren SC DCJ in *ACP v McAulliffe* [2017] QDC 294. This was a decision as to whether a protection order was necessary or desirable to protect the respondent (to the appeal) from domestic violence. His Honour states [67-69]:

> *[67] Having identified three steps considered by Morzone QC DCJ in MDE as being required to be taken, the learned Magistrate gave no express, direct consideration to either of the first two steps. Her Honour did not, expressly, assess the risk of future domestic violence between the parties. Nor did her Honour, directly, assess the need to protect the aggrieved from that domestic violence in the absence of an order.*
>
> *[68] In my respectful opinion, whilst Morzone QC DCJ identified a three-stage process which his Honour considered satisfaction under s 37(1)(c) required, his Honour's decision should not be understood to mandate those particular stages or steps. As his Honour observed at para [52]:*
>
> > *"The use of the phrase 'necessary or desirable' invokes a very wide and general power and should be construed in a similarly liberal manner to enable a court to properly respond, and, if appropriate, tailor an order to protect a person from domestic violence."*

> *[69] The requirement under s 37(1)(c) that the court be satisfied that the protection order is necessary or desirable itself confers a discretion. It is a discretionary determination to be made in the exercise of a further discretionary decision: whether to make a protection order.*

ACP v McAulliffe was applied in *ARTE v Nugent & Anor* [2020] QDC 268 where it was noted Horneman-Wren SC DCJ observed the phrase '*necessary or desirable to protect the aggrieved*' in s37(1)(c) invokes a very wide and general power that should be construed liberally, having regard to s37(2) and the s4 principles of the DFVPA. This required the Magistrate to have regard to the wishes and views of the people who fear or experience domestic violence to the extent appropriate and practicable (s4(2)(b)) [at 27].

The three stage process of Morzone KC DCJ was again considered by Kent KC DCJ in *RC v MM* [2018] QDC 276, in finding that it was not necessary or desirable to make a protection order in the context of there being no children together, no shared bank accounts, evidence from both parties that they had no desire to contact each other in the future and no basis to doubt this evidence (see paragraph 8.7).

Kent KC DCJ, in finding that no error had been demonstrated in any steps of the process, addressed each stage as follows, in *AMB v TMP & Anor* [2019] QDC 100,:-

- *Based on evidence and all the circumstances of this case, there was a risk, more than mere possibility or speculation, of future domestic violence given the parties are in ongoing contact about a child.*
- *There was a need to protect the aggrieved from that risk of domestic violence; and*
- *The protection order was necessary or desirable, particularly having regard to the principles in section 4(1).*

See *FAJ v FJH* [2024] QDC 23 which provides a useful consideration of the need to ensure that the statutory test for the making of a protection order is applied with a reminder that the test requires an explicit finding as to the assessment of the risk of future acts of domestic violence albeit that a strict application of the three (or four) stage test in *MDE* may not necessarily be required.

8.5 WHERE MAGISTRATE ACTED UPON A WRONG PRINCIPLE - WHETHER ORDER NECESSARY OR DESIRABLE

In *MDE v MLG & Queensland Police Service* [2015] QDC 151, Morzone KC DCJ considered the appellant's first appeal ground - that the Magistrate failed to be bound, as required, by the decision in *GKE v EUT* [2014] QDC 248 such that a future 'risk' of violence must be considered and, if absent, a protection order should not issue:

> *[65] At the commencement of the decision, the Magistrate generally referred to the requirements of s37, including the need to have regard to the principles set out in s4 of the Act. The Magistrate summarised the offensive conduct from page 2, line 23, to page 3, line 15, of the transcript as follows:*

"In regard to whether a domestic violence order is necessary or desirable, the [appellant] submits that it is neither as, in effect, he had no intention to intimidate or harass the [first respondent] when he contacted her. He says that he went to her unit on 16 October 2014 to speak to her. She didn't want to speak to him. He called her a fucking slut. He then sat on her doormat as he says there was nowhere else for him to sit. He could have left, or he could have told her immediately what he wanted to say. It's unclear, on his account, why he didn't do so. He says that he went there because he wished to advise her that he had in 2013 been diagnosed with Human Papillomavirus and he thought that it may have returned. He says that he thought he should ... provide this information to her.

On his own addition (sic), ... or on his own material, the [appellant] visited the [first respondent's] residence twice uninvited. He swore at her and said that he knew that [the first respondent] did not welcome his visits on those occasions, and he says that he telephoned her mobile 10 times. The police statements reveal that on the 17th of October, two officers went with [the first respondent] to her unit. She told them she was scared to return there alone. It seems her fears were well founded because even though the respondent knew that she had been at the police station because he had called her mobile phone while she was there and a police officer answered her phone, he was at her unit when the police took her home. He was then very reluctant to leave her front door. When he did so at the direction of the police, he went to the front gate or the front entrance of her unit. He refused to leave there when told buy the police. They issued a 'move on' direction. He still refused to leave and ultimately the police officers were forced to arrest him and take him into custody. Such was his determination to remain at her residence.

In relation to why he wanted to speak to her and his reasons for attending at her unit and telephoning [the first respondent] on at least 10 occasions, I find that the [appellant's] account is wholly improbable. I reject it where it is inconsistent with the evidence of the [first respondent] and the police officers. .... Further, given the [appellant's] actions towards the aggrieved, in particular his obstinacy in attending at her unit, ….the fact that he would not leave her residence until he was arrested by the police.

I am satisfied that it is desirable to make a protection order."

[66] The Magistrate's reasons confuse and conflate the considerations relevant to s37(1)(a) and s37(1)(c) of whether the appellant committed domestic violence against the first respondent and whether a protection order is necessary or desirable to protect the first respondent from domestic violence.

[67] Further, the reasons are insufficient to discern whether the Magistrate had regard to some material considerations required in s37(1)(c) or the evidential basis or process of reasoning supporting the conclusion that it was desirable to make a protection order. In particular, it seems to me that that the Magistrate failed to assess the nature and risk of future domestic violence, the nature of such risk, the protective needs of the aggrieved (if any), and, if a need was found, how imposing a protection order was "necessary or desirable" to meet those needs.

[68] In my respectful view, the trial Magistrate erred in exercising the discretion by acting upon a wrong principle in determining whether the order was "necessary or desirable" and allowed erroneous or irrelevant matters to guide or affect her.

In *CPD v Ivamy & Anor* [2018] QDC 244, Muir DCJ found the Magistrate considered extraneous or irrelevant matters in reaching her decision (conduct of the appellant's counsel in cross-examination and the tone of emails between the aggrieved and the appellant's mother being further acts of domestic violence). Further, the Magistrate failed to take into account relevant matter in determining whether an order was necessary or desirable (a seven-month delay between the conclusion of the hearing and the Magistrate's decision, and two years since the parties ceased co-habitation).

See *QKL v Queensland Police Service* [2021] QDC 195 where the Magistrate's finding that an order was necessary or desirable amounted to a breach of natural justice as the parties were not given an opportunity to give evidence or address the issue.

See *TMG v Commissioner of Police* [2021] QDC 286 where Porter KC DCJ found there was insufficient evidence that could sustain the conclusion that an order was necessary and desirable. His Honour in particular noted that there had been no incidents or breaches of the temporary protection order for two years, there was no evidence indicating that the relationship was continuing and there was no necessary basis for either party to continue to interact (no common property, no children or family law orders).

8.6 WHETHER BAIL CONDITIONS MEAN AN ORDER IS NEITHER NECESSARY NOR DESIRABLE

As to whether bail conditions prohibiting contact between the respondent and the aggrieved and her daughter constitute adequate protection such that a protection order is neither necessary nor desirable, see *TJA v TJF* [2014] QDC 244**Error! Bookmark not defined.** where Farr SC DCJ said:

[64] Had it been the legislature's intention that a protection order is not desirable or necessary when a bail undertaking with no contact conditions exists, it could easily have said so. In fact, s4(2)(e) of the Act says the exact opposite to that proposition and one can well understand why.

[65] A bail undertaking is not specifically designed, no matter the nature of the associated charge, with issues of domestic violence in mind. That position is to be contrasted with the very specific nature of a protection order. That degree of specificity, in my view, carries with it, the added benefit of it being more likely to focus the mind of the subject of the order on the specific behaviours that can constitute domestic violence. Furthermore, domestic violence can include behaviour that would not necessarily constitute a breach of a no contact condition in a bail undertaking. Such behaviour can include for instance, the damage of another person's property; threatening the child of a person when there is no prohibition against contact with that child; unauthorised surveillance of a person and unlawfully stalking a person.

[66] For these reasons, the Magistrate was quite correct to reject that argument.

See s22.1 and the rebuttable presumption against bail.

8.7 WHERE ORDERS FOUND NOT TO BE NECESSARY OR DESIRABLE

In *CPS v CNJ* [2014] QDC 47, Dearden DCJ found that the learned Magistrate's conclusion that a protection order was necessary or desirable was not supported by the evidence. His Honour concluded that the learned Magistrate was appropriately satisfied that a relevant relationship existed and that the appellant had committed domestic violence[55] and His Honour then considered whether the protection order was necessary or desirable to protect [the respondent] from domestic violence:

> *[22] In that respect, the learned Magistrate clearly indicated that it was only the fact that the appellant had taken steps to seek out the respondent's former partner and strike up a relationship with that former partner, which satisfied the learned Magistrate that it was "necessary or desirable in the circumstance to make an order". The appellant's decision* to *take up with the respondent's ex-partner, G, is curious, and his explanation for initiating that connection is less than convincing.*
>
> *[23] However, I am not persuaded, on balance, that the actions of the appellant in seeking out and striking up a relationship with the respondent's ex-partner, was sufficient to have persuaded the learned Magistrate that a protection order was "necessary or desirable to protect [the respondent] from domestic violence" in the future. Such a conclusion, in my view, was entirely speculative, and was not supported on the evidence.*

Kingham DCJ in *FCA v Commissioner of the Queensland Police Service* [2014] QDC 46 found that on the facts the making of the order was not necessary or desirable:

> *[48] The uncontested facts, assessed in the context of the evidence as a whole, count against a finding that it was necessary to make a protection order. FCA and LJK were no longer in a relationship. The hearing was 6 months after the alleged act of domestic violence. There was no evidence of any contact between them except as it related to these proceedings. There was no allegation of any further act of domestic violence against LJK. LJK had made repeated attempts to terminate the proceedings. She gave evidence that she was not in fear of FCA and did not require protection. That was consistent with her attempts to withdraw the complaint.*
>
> *[49] In those circumstances, I do not consider that a finding that it was necessary or desirable to make a protection order was open on the evidence before the court.*

In *BJH v CJH* [2016] QDC 27, a protection order was made against the appellant requiring him to be of good behaviour against the aggrieved and her son. There has been no domestic violence prior to the night in question. Rackemann DCJ found, at [47], that the appellant's act in seizing the aggrieved's phone and in reacting to her attempts to retrieve it by throwing it on the floor were domestic violence. However, his Honour found that the Magistrate had made a material error in the nature and extent of the violence. Given the limited scope of the violence and the fact that the aggrieved's

[55] See paragraphs [17] where continuous contact and comments was held capable of constituting domestic violence in the circumstances by amounting to harassment.

evidence was that she was not in fear of the appellant the order was set aside on the basis that it was not "necessary or desirable."

Long SC DCJ, in *AZ v BY* [2017] QDC 67**Error! Bookmark not defined.**, considered a Magistrate's refusal to grant a stay in circumstances where the Magistrate had refused to make an order as it was not "necessary or desirable." The Applicant and respondent were correctional officers. Their workplace had made arrangements so that they would not work together. The Magistrate found that she was not satisfied that domestic violence had occurred but if she was wrong in that finding said that the order was not "*necessary or desirable*" due to the workplace arrangements.

On appeal, Long SC DCJ said:

> [16] *The extent in which an exercise of discretion may be involved, it may be seen to be in respect of the determination of the necessity or desirability of making a protection order, which is an order of an evaluative kind, rather than the preconditions which must be established as matters of fact pursuant to s37(1)(a) and (b). And such a determination also demands regard to the conditions which would be included in an order pursuant to S56 and which may be included pursuant to the succeeding provisions of Division 5 of Part 3 of the DFVPA and therefore it may be noted that the requirement of s37(2)(a) to have regard to the principles set out in s4, may also be particularly relevant to that wider context of consideration of appropriate conditions.*

See also Muir DCJ in *LDC v TYL & STP* [2017] QDC 197 where Her Honour allowed the appeal against the decision to make a protection order finding, at [77], the evidence did not support a conclusion that it is necessary to make a protection order in order to protect the first respondent and the other aggrieved from domestic violence and, having regard to the principles in s4 of the DFVPA, Her Honour did not consider it desirable to make such an order to protect them from domestic violence.

In *ATD v TBC* [2020] QDC 236, McGinness DCJ found it not necessary or desirable to make an order in circumstances where the only act which could have amounted to domestic violence was one occasion of verbal abuse, which Her Honour found was out of character. There was no credible or reliable evidence that prior to or since the alleged incident, the respondent had behaved in any way which could satisfy a court a protection order was necessary or desirable [76].

In *JSA v MPR* [2022] QDC 111**Error! Bookmark not defined.**, Cash KC DCJ dismissed an appeal against a decision not to make a protection order. His Honour agreed with the Magistrate's findings that the appellant was motivated to seek revenge upon the respondent and that the appellant was not genuinely in fear of the respondent. The appellant was found to have embellished much of her evidence, motivated by malice and a desire for revenge [22]. His Honour concluded the findings of the Magistrate were sufficient to justify an award of costs against the appellant.

In *SK (A Child) v Commissioner of Queensland Police & Anor* [2023] QDC 65, Morzone KC DCJ considered an appeal against the making of a protection order in relation to two 12-year-old children in a "relationship". It was held that whilst protection of the aggrieved was necessary and desirable, a protection order under the DFVPA was not necessary nor desirable as there were available orders under the *Youth Justice Act 1992*, the scope of restraining orders, efficacy of enforcement and prospect of criminal sanction for non-compliance were inconsistent with the Youth Justice principles; and it was not desirable that the child be subject to orders beyond his comprehension and capacity to control his emotions and reactions.

In *ZTP v BBY* [2023] QDC 59, Muir DCJ considered an appeal against the making of a protection order. Whilst her Honour was satisfied that there was one act of domestic violence involving emotional and psychological abuse, she was not satisfied of previous acts of domestic violence and ultimately was not satisfied that a protection order was necessary or desirable.

8.8 NON-FATAL STRANGULATION AS A FACTOR AFFECTING RISK

There is growing recognition of the risk of non-fatal strangulation as a lethality factor in literature, medical science, and the law. The offence under s 315A of the *Criminal Code* (choking, suffocation or strangulation in a domestic setting) was introduced as a result of the recommendation made in the "*Not Now, Not Ever: Putting an End to Domestic Violence in Queensland*" report of the Special Taskforce on Domestic and Family Violence in Queensland. The Explanatory Notes to the *Criminal Law (Domestic Violence) Amendment Bill (No 2)* 2015 provide:

> *"The new strangulation offence and the significant penalty attached, reflect that this behaviour is not only inherently dangerous, but is a predictive indicator of escalation in domestic violence offending, including homicide. The Taskforce noted the importance of identifying this conduct to assist in assessing risk to victims and increasing protections for them."*

See also references to non-fatal strangulation as a risk factor in the National Domestic and Family Violence Benchbook:

> *US research[56] indicates that women who had experienced non-fatal strangulation by the perpetrator in the last year were twice as likely to be killed as women who had not[57]. Other key studies in the US found that women who had experienced non-fatal strangulation were seven times more likely to be killed by their abusive partner[58]. These women were also six times more likely to be a victim of attempted murder by their abusive partner[59]. Strangulation is sometimes referred to as garrotting or choking. A recent Western Australian study highlights the strong association between non-fatal strangulation and intimate partner sexual assault[60].*

In its 2017-18 Annual Report, the Queensland Domestic and Family Violence Death Review and Advisory Board reports that choking and strangulation were prevalent in 29.5% of the intimate partner homicides reviewed by the Board[61]. See Chapter 23 for the *Non—inquest findings into the death of Rinabel Tiglao Blackmore* where Coroner Nerida Wilson explained the link between non-lethal strangulation and homicide:

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[56] US Training Institute on Strangulation Prevention website

[57] Block, Carolyn, 'Reducing Intimate Partner Homicide Rates: What are the Risk Factors for Death when a Woman is being Abused?' in Australian Institute of Criminology, *Domestic-related Homicide: Keynote Papers from the 2008 International Conference on Homicide* (Report No 104, Research and Public Policy Series, 2009) 62.

[58] Douglas, Heather and Robin Fitzgerald, '*Strangulation, Domestic Violence and the Legal Response*' (2014) 36 *Sydney Law Review* 231.

[59] Glass, Nancy, et al, '*Non-fatal Strangulation is an Important Risk Factor for Homicide of Women*' (2008) 35(3) *Journal of Emergency Medicine* 329.

[60] Zilkins, R.R., Phillips, M.A., Kelly, M.C., Mukhtar, S.A., Semmens, J.B., & Smith, D.A., '*Non-fatal strangulation in sexual assault: A study of clinical and assault characteristics highlighting the role of intimate partner violence*' (2016) 43 *Journal of Forensic and Legal Medicine* 1.

[61] *Domestic and Family Violence Death Review and Advisory Board Annual Report 2017-18* .

> *"According to World Health Organisation statistics, strangulation is a relatively common cause of homicide death, particularly for women. Prior attempted, non-lethal strangulation is one of the best predictors for the subsequent homicide of victims with research suggesting that the odds of becoming an attempted homicide victim increase by 700 per cent, and the odds of becoming a homicide victim increase by 800 per cent for women who had previously been strangled by their partner."*

In May 2019, the Queensland Sentencing Advisory Council published a Sentencing Spotlight on choking, suffocation or strangulation in a domestic setting. The report found that between 1 July 2016 and 30 June 2018, 287 offenders committed a total of 482 strangulation offences over the two years analysed. More than 76% of offenders were jailed; the longest sentence imposed was four years.

Two decisions of the Court of Appeal in September and October 2018 indicate that higher sentences than previously imposed will be imposed for this new offence.

In *R v MCW* [2018] QCA 241, the applicant pleaded guilty and was sentenced to (i) two and half years imprisonment for two counts of assault occasioning bodily harm (domestic violence offence), (ii) three and a half years imprisonment for one count of choking, suffocation or strangulation in a domestic setting, and (iii) three months imprisonment for one summary charge of contravention of domestic violence order (aggravated offence). All sentences were concurrent. The sentencing judge declined to fix a date for eligibility for parole.

The applicant appealed the sentence as manifestly inadequate and that by not providing an opportunity to be heard on the decision not to fix a parole eligibility date, there was a failure to accord the applicant procedural fairness.

The application was refused on the basis that no procedural fairness arose, and the sentence was not manifestly excessive. Mullins J found that it was open to the sentencing judge to reflect the plea of guilty by reducing the sentence from four years to three and a half years imprisonment. "*The sentencing judge was not bound to seek a submission on not imposing a date for eligibility for parole, as that aspect of the sentence could not be characterised as resulting in a sentence which was unusual or incorporating an additional penalty that was unusual: R v Robertson* [2017] QCA 164 *at [56]"* [27].

In finding that the sentence was not manifestly excessive, Mullins noted at [39] the Explanatory Notes to the Bill introducing s315A and the conduct as a predictive factor to escalating violence including homicide. Mullins held that it was not useful to compare sentences for an offence of assault occasioning bodily harm in a domestic setting as comparable for a s315A offence [at 40].

MCW was considered in *R v MDB* [2018] QCA 283 which concerned an application to appeal against a sentence on the grounds the sentence was manifestly excessive. The applicant pleaded guilty, was convicted, and sentenced to the following concurrent terms of imprisonment on the indictable offences [4]:

1. Common assault – six months imprisonment;
2. Threatening violence – two years imprisonment;
3. Assault occasioning bodily harm – two years imprisonment;
4. Choking in a domestic setting – four years imprisonment; and
5. Wilful damage – 12 months imprisonment.

In considering whether the sentence of four years for the choking offence in a domestic setting was manifestly excessive, Bowskill J held at [37]:

> *Where it is contended a sentence is manifestly excessive, the test is whether, having regard to all the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle. A sentence is not established to be manifestly excessive merely if the sentence is markedly different from other sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle or that the sentence is "unreasonable or plainly unjust".*

Bowskill J referred to *MCW*, cited the above paragraph references regarding the introduction of s315A and the intention of the Legislature. The usefulness of comparable sentences was also discussed [at 46]:

> *As Mullins J said, at [43] of R v MCW, the test of whether the sentence imposed on the applicant was manifestly excessive is not determined by comparing the sentence selected by the sentencing judge with the submissions made by the parties as to the appropriate sentence. Such a submission is merely a statement of opinion. It is a matter for the sentencing judge, in the exercise of their discretion, to impose what they regard as the appropriate sentence, taking into account and balancing all the relevant factors that bear upon the sentence.*

The matter of *Rose*, a sentencing decision of Clare SC DCJ made on 19 September 2017 was considered in which a sentence of three years imprisonment was imposed for a choking offence. Also, the sentencing decision of Applegarth J given on 10 November 2017 in a matter of *Bennett* was considered, regarding a sentence imposed of three and a half years imprisonment for a choking offence. Noting the serious implications of the offending conduct involving non-fatal strangulation, Bowskill J held, at [50]:

> *In the course of the sentencing remarks, and reflective of the observations made in R v MCW, Applegarth J said this:*
>
> *"… One reason why acts of strangulation are treated so seriously is that someone in your victim's position could have been dead within seconds. Any act of strangulation is inherently dangerous, and your act of strangulation was not momentary. Your victim saw white dots in her eyes and persistence in this abuse of power over an effectively defenceless woman, could easily have caused permanent serious injury or death.*
>
> *Any strangulation is serious. Strangulation perpetrated in a domestic setting is even more serious. Given the epidemic of domestic violence in our community and the number of*

fatalities caused to victims of domestic violence every year, you deserve to be severely punished for the act of strangulation which you committed…".

The application was refused on the grounds the sentences was not manifestly excessive.

MCW and *MDB**Error! Bookmark not defined.*** were considered in *R v AJB* [2019] QDC 169. In this application for a directed verdict under s590AA of the *Criminal Code*, Coker DCJ considered the meaning "choke", "strangle" and "suffocate" and whether the offence requires the victim to have stopped breathing. His Honour was "enormously assisted" by the decision of Her Honour Justice Loukas-Karlsson of the Supreme Court of the Australian Capital Territory in *R v Green (No. 3)* [2019] ACTSC 96. In *Green*, Her Honour considered the principles of statutory construction and considered "choke", "strangle" and "suffocate" offences across Australia, and an examination of the dictionary meaning of "choke". His Coker DCJ noted the consistent theme involving a stopping of breath, which in his assessment was the specific intent of the legislation.

The Queensland Court of Appeal distinguished *Green* in *R v HBZ* [2020] QCA 73. Her Honour Mullins JJA delivered the lead judgement (McMurdo JJA and Bodice J agreed). The question on appeal was **whether the trial judge had correctly directed the jury as to the meaning of "choke" (to stop or hinder the breathing of a person**). Dismissing the appeal, Her Honour concluded that the direction to the jury as to the meaning of "choke" was appropriate.

Her Honour examined the background of s315A of the *Criminal Code* and the consideration of s315, which also includes the words "choke, suffocate, or strangle", in previous cases (*R v Osborne* [1987] 1 Qd R 96 and *R v Lansbury* [1988] 2 Qd R 180) where the issue centred on whether the person was incapable of resistance (an element of the offence in s315). Her Honour notes that in those cases, it was not necessary for the court to dwell on the extent of restriction on the breathing as the s315 offence focuses on the consequences of the choking action for the victim in resisting the offender. This is not the case for the offence in s315A.

At [34], Her Honour then considers the purpose of s315A to resolve the dispute over the construction of the word "choke", noting it is permissible to have regard to the relevant extrinsic material (ss14A & B AIA). Reference is made to the Explanatory Notes for the Bill inserting s315A and recommendation 20 of the report of the Special Taskforce of Domestic and Family Violence in Queensland, "*Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*". Recommendation 20 was that the Queensland Government consider the creation of a specific offence of strangulation. The new offence was intended to reflect the seriousness of the behaviour and its inherent danger and predictive indicator of escalation in domestic violence offending including homicide. It was argued by the appellant that s315A should be construed narrowly as it was a penal provision. This was not accepted by Her Honour, finding the purposive approach to interpretation is applicable to a penal provision (s14A AIA).

Her Honour references a similar provision to s315A in the ACT, s38(2)(a) *Crimes Act 1900* (ACT), and the decision in *R v Green (No 3)* [2019] ACTSC 96. Loukas-Karlsson J ruled on the meaning of "choke" for the purpose of s38(2)(a), holding the relevant element of "choke" is constituted by "the stopping of the breath". The appellant submitted that this approach should be adopted.

Her Honour distinguishes the context of the introduction and the purpose of the ACT provision – to provide for a specific offence that did not require the extreme outcome of unconsciousness from the choking - with the introduction and purpose of s315A – to deter conduct committed within the domestic setting that is a predictive indicator of an escalation of domestic violence, including homicide.

In finding the trial's judge direction to the jury to apply the meaning of choke as "to hinder or stop the breathing of a person" was correct, Her Honour held [at 56 and 57]:

> *[56] The gravamen of the offending conduct which the offence seeks to deter is the action of one domestic partner towards the other that is described as either choking, strangling, or suffocating the victim and not the consequence of the act. The rationale for the offence is that even though one incident in the domestic context of choking, strangling, or suffocating may not result in any serious injury, the conduct must be deterred, because it is inherently dangerous and experience shows that if it is repeated, death or serious injury may eventually result.*
>
> *[57] With the benefit of the approach of the majority judges in A2, the interpretation of "chokes" in s 315A in context and in light of the extrinsic material does not result in any ambiguity. In order to achieve the purpose of the introduction of this offence, "chokes" must be construed as the act of the perpetrator that hinders or restricts the breathing of the victim and does not require proof that breathing was completely stopped, although the hindering or restriction of the breathing would encompass the stopping of the breathing. The act of choking will not be proved, unless there is some detrimental effect on the breathing of the victim, because otherwise it would not constitute the act of choking. Even if the restriction of the breathing, as a result of the action of choking the victim, is of short duration, without any lasting injury and does not result in a complete stoppage of the breath of the victim, that will be sufficient, as the offence is directed at deterring that type of conduct from occurring at all.*

Application for leave to appeal against the sentence was allowed, on an examination of the comparable authorities (*R v MCW* [2018] QCA 241 and *R v MDB* [2018] QCA 28) which involved more serious offending. The appellant was younger and without the relevant prior criminal history, as compared to the authorities. At [72], Her Honour held:

> *[72] As emphasised in both MCW and MDB, s 315A* of *the Code was enacted to deter a type of offending that was viewed as a precursor to offending with much greater consequences for the victims, including death. That the offending may be committed over a very short period of time will frequently be a characteristic of this offence. The deterrent aspect of sentencing for this offence is not just directed at the offender being sentenced, but more generally, in an attempt to eliminate the dangerous conduct of one domestic partner choking, suffocating, or strangling the other that can easily result in fatal or lasting consequences.*

Her Honour found that even allowing for the importance of the general deterrence, and that the offender was being sentenced after trial, the sentence was manifestly excessive as it did not recognise the difference between his offending and the offending in *MCW* and *MDB*. Her Honour found the appropriate sentence to be two years imprisonment. A parole release date was fixed at the halfway point of the sentence, 5 June 2020.

R v HBW was cited in *R v RT (No 2)* QDC 158, where the defendant was charged on indictment that he unlawfully choked the complainant without her consent whilst they were in a domestic relationship. Cash KC DCJ, applying *R v HBW*, held:

> *[6] "...to choke someone means to do an act that hinders or restricts the breathing of the complainant. It is not necessary for the prosecution to prove that the complainant's breathing was completely stopped. It is sufficient to prove that there was a restriction of breathing, even if for only a short time and without any lasting injury."*

However, in this case, His Honour was not satisfied the prosecution had proved all the elements of the alleged offence beyond a reasonable doubt and the defendant was found not guilty.

See also *R v BDK* [2020] QCA 48, an appeal against conviction for strangulation in a domestic setting and sentence. Her Honour Philippides JJA in the lead judgment (agreed by Sofronoff P and McMurdo JJA) dismissed the appeal and observed, at [22], that the absence of marks on the complainant's neck is not inconsistent with the assault having occurred, as the forensic medicine specialist had explained in her evidence.

R v MCW was cited in *R v Luxford* [2020] QCA 272.

R v BDK and *R v MCW* were distinguished in the case of *Attorney-General for the State of Queensland v Samuels* [2021] QCA 107 where the Attorney-General's appeal of a sentence of two years imprisonment with immediate parole for an offence of strangulation in a domestic setting and common assault was dismissed. In *Samuels*, the Attorney-General did not submit the sentence of two years was manifestly inadequate but that the order for immediate parole rendered the sentence manifestly inadequate. The circumstances of the strangulation charge involved the offender grabbing the complainant's throat with his right hand, lifting her off the ground with his left, and holding her by her throat for about 30 seconds, causing her to be very fearful and thinking she was going to die.

In the lead judgment, with Sofronoff P and Bond JA agreeing, Davis J noted the offender was 20 years old at the time of the offending, had demonstrated genuine remorse, entered early pleas of guilty and had made positive rehabilitative efforts. The offenders in the authorities were significantly older, with lengthy criminal histories and/or without the benefit of early pleas of guilty. In dismissing the appeal, Davis J stated those decisions do not establish any principle that actual custody is the inevitable consequence of conviction for a domestic violence offence. The sentence imposed was within the acceptable range of a sound exercise of discretion.

R v MCW and *R v HBZ* were also cited in another appeal by the Attorney-General in *R v Gibbs; Ex parte Attorney-General (Qld)* [2021] QCA 191 on the grounds the sentence was manifestly inadequate. The respondent was found guilty after a trial of two counts of choking and strangulation in a domestic setting. The respondent was sentenced for each count to imprisonment for three years with an immediate parole release date. In considering whether the sentence was manifestly inadequate, in a joint decision (Sofronoff P, Mullins JA and Crow J) at [39]:

> *"The seriousness of* the *offences committed by the respondent is unquestionable. As explained in authorities such as MCW at [3] and [35] and HBZ at [72], s 315A of the Code was enacted to deal with a particular sort of offending that was not uncommon in*

domestic relationships and was objectively dangerous conduct, as the choking, suffocating, or strangling of another could easily result in fatal or lasting consequences. That is why deterrence, both general and specific, is usually prominent in sentencing for this type of offending."

The respondent's circumstances were exceptional. He suffered from PTSD, having served as a sniper in the SAS for 22 years during which he sustained serious injuries. Since the offending, the respondent had undertaken lengthy and significant rehabilitation and treatment, which was said would be impeded by a term of imprisonment. The Court accepted a sentence to imprisonment with an immediate parole release date was remarkable, however this was the result of *"…a sound exercise of the sentencing discretion, as the sentencing judge's careful analysis of the relevant factors, including the exceptional circumstances of the respondent, showed*."

R v MCW and *R v MDB* were distinguished in *The Queen v DBW* [2021] QCA 234 where Davis J, in the lead judgment, found errors in the sentencing approach. This decision concerned an application for leave to appeal against sentence for domestic violence offences including suffocation and strangulation offences and a contravention of a domestic violence order.

The applicant pleaded guilty to eight counts on an indictment and one summary charge including burglary, threatening to use violence, unlawful assault, assault occasioning bodily harm, strangulation, suffocation, and deprivation of liberty.

The applicant was sentenced to a head sentence of five years on the choking and suffocation counts and lesser sentences on the other offences, to be served concurrently, with a parole eligibility after two years.

Davis J found the sentencing judge had made errors in the sentencing approach applied. The sentencing judge determined the "true maximum penalty" was the penalty attached to the offence the judge considered factually was the most serious (suffocation and choking – seven years). This was an incorrect approach. "*The objective is to properly reflect the total offending and, where necessary, that might require the imposition of cumulative sentences*".

Citing *MCW* and *MDB* which attracted three and a half years and four years respectively, the physical violence in the present case was not as serious however neither case involved a home invasion or abduction (both aggravating factors here). "*A five-year head sentence with eligibility for parole after two years as a global sentence to reflect the totality of the Applicant's offending is well within the range of a sound exercise of the sentencing discretion*"

9 CONSENT ORDERS

9.1 WHEN CAN THE COURT MAKE OR VARY A CONSENT ORDER (S51)

The court may make or vary a domestic violence order by consent if:

- The party's consent or do not oppose the making of the order (s51(1)) –
    - if an authorised person is the applicant, the court must be satisfied that the aggrieved person consents;
    - if a police officer is the applicant, the court must be satisfied that the aggrieved person consents unless the aggrieved is not present and cannot be contacted and the police officer reasonably believes that the order promotes the safety, protection, and wellbeing of the aggrieved, any named person and any child affected by the order (s51(3) and (4)); and
- The court is satisfied that a relevant relationship[62] exists between the aggrieved and the respondent (s51(1)(a)).

Note that, unless the respondent is a child, the court does not need to be satisfied of s37(1)(b) or (c) before making a protection order by consent i.e., that the respondent has committed domestic violence against the aggrieved and that it is necessary or desirable to make an order (s51(1)(b)(i)).

Similarly, the court can make a temporary protection order by consent without the need to be satisfied of the matters in s45(1)(b) – i.e., that the respondent has committed domestic violence against the aggrieved (s51(1)(b)(ii)).

The court may make the consent order whether or not the respondent admits to all or any of the particulars of the application (s51(1)(c)).

9.2 RESPONDENT CHILD (S51(2))

If the respondent is a child, **the court may make a consent order only if it is satisfied of the matters in s37** (see paragraph 8.2) **or s45** (see paragraph 7.1.2) (s51(2)).

9.3 BEFORE MAKING THE ORDER (S51(5))

Before deciding whether to make or vary an order, the court may:

- Conduct a hearing in relation to the particulars of the application if it is in the interests of justice to do so; and
- Consider the respondent's criminal history and domestic violence history if it is relevant to do so (see ss36 and 90A).

[62] See para 1.5.

9.4 SHOULD A CHILD BE NAMED IN THE ORDER?

If the application or other information before the court discloses the existence of a child of the aggrieved or who usually lives with the aggrieved, **the court must consider whether the child should be named** under s53 in the order (s51(6) and s54) - see paragraph 10.1.2.

9.5 QUESTIONS ABOUT WEAPONS?

If the respondent is present or a police officer is the applicant or otherwise appears before the court, **the court must ask about weapons** as required under s80 (see paragraph 10.10.7) before making a domestic violence order.

9.6 THE CONSENT ORDER

Any consent **order made must contain the standard conditions** set out in s56 (s51(7)). The **court must ensure that the aggrieved and respondent understand the domestic violence order** as required by s84 (see chapter 12) (s51(7)).

9.6.1 Consent order process and requirement to explain orders before they are made

In *JC v KP* [2017] QDC 175 , the appellant and respondent (aggrieved) were brothers. They had consented to an order "without admissions."

The grounds of the appeal were:

1. That the Magistrate erred in making the order by consent;
2. That in making the order, the Magistrate has acted on a premise that is wrong in law.
    a) The Magistrate was aware that the defendant was unrepresented.
    b) **The Magistrate should have been aware that the appellant did not fully understand the effect of the order at the time of giving apparent consent.**
    c) The appellant's consent to the order was induced by the Magistrate representing that the appellant would not lose his shooters licence or his right to possess his firearms as a result of the order.
    d) The statement was made in direct response to a question raised by the appellant about the effect of the order upon his shooters licence and his right to own firearms.
    e) The Magistrate knew or ought to have known that but for the said representation as to the effect of the order, the appellant would not have consented to the making of the order but would have persisted in his previous course of seeking the matter be set for a contested hearing.
3. The statement as to the effect of the proposed order made by the Magistrate was wrong in law.
4. The appellant has relied upon that statement to his detriment in circumstances where it was reasonable for the appellant to rely upon the statement made by the Magistrate as to the effect of the order.
5. The appellant has not therefore, given informed consent to the order being made.
6. The order could not therefore, be properly made in all the circumstances.

At page 4, reference was made to the appellant asking the Magistrate "*Does it, by me consenting to that, does that mean I lose my shooters licence and my guns and all*

that sort of stuff?" The response was indistinct, however, the appellant has replied "*thank you*." The appellant submitted that the response from the Magistrate had been in the negative and Long SC DJC noted "*there is much to indicate that the appellant was left with the impression, at least, that he had a negative answer to that question*."

The respondent submitted the appellant "*should have been aware of the law and, in effect, should have had an understanding of what his obligations were in respect of his shooters licence and that in any event, it is clear that he consented to the order being made*." In making the protection order, the Magistrate asked the appellant if he would consent to being of good behaviour towards the aggrieved and not commit any act of domestic violence, for a period of 12 months, to which he responded that he would. The order was made for five years although the appellant (respondent) was not specifically appraised of the consequences of an order of that length.

Long SC DCJ referred to the requirements in s84(2) for the court to ensure that the respondent and aggrieved understand the domestic violence order before it is made [7]. The requirement for the provision of written information being provided to the respondent and aggrieved in s85 is separate arising after the order to ensure that the requirements are properly understood.

As the order had been made on the false understanding of the appellant that there would be no effect on his gun licence the order was set aside, and the matter reemitted for rehearing. His Honour also cautioned against the use of mediation in the hearing to adduce agreement particularly where litigants are self-represented notwithstanding the pressure on Magistrates in busy lists.

JC v KP was referred to in the decision of Dick SC DCJ in *Bailey (a pseudonym) v Bailey (a pseudonym)* [2021] QDC 99. This case concerns an appeal against a decision to make a protection order by consent (s51) and to what extent the requirement in s84, that the court ensure the respondent understands the order and conditions, applies in circumstances where the appellant was present in court and represented by counsel. Her Honour applied the reasoning in the decision of *R v Smith* [2004] QCA 417 in coming to the view that the appellant was, as in *Smith*, "*competently legally represented and there can be no question that he now well understands the effect of the sentence imposed".* His Honour made the following points, [at 41]:

- *The Act does not require that the Magistrate engage personally with the respondent.*
- *Sub-section 84(4) of the Act provides that a court can use services or help from other persons to assist the court in discharging its obligations under s 84. Some examples are provided and for the most part, if not all, the person giving the explanation is not a legally qualified person.*
- *The appellant is a qualified solicitor.*
- *The appellant was represented in court by competent counsel.*
- *The appellant was in court at the time the order was made.*

- *There was a discussion between the bench and the two barristers concerning the order.*
- *The order was made by consent or without objection.*
- *Section 85 of the Act provides the court must include with a copy of the orders served on the respondent, a written explanation containing the relevant material that is referred to in s85.*

In *PR v KJ* [2022] QDC 29**Error! Bookmark not defined.**, a consent order was made for five years including an ouster. The appellant (respondent to the protection order) was represented by a duty lawyer in the original proceedings. On appeal, the appellant sought to set aside the order on the grounds he was denied procedural fairness as he did not understand the proceedings and the Magistrate failed to comply with statutory requirements (s51(5)). The appellant sought an extension of time to file the appeal, being some 12 months out of time. Cash KC DCJ refused to extend the time for filing the appeal as the appeal did not have any prospect of succeeding. His Honour found at [19], the complaint that the Magistrate did not conduct a hearing in contravention of s51(5) was without foundation. Section 51(5) is in permissive terms and does not impose a requirement to decide if the making of a protection order is in the interests of justice.

Cash KC DCJ found at [21], the Magistrate was entitled to act upon the statements made by the duty lawyer on behalf of the Appellant and there was no requirement for the Magistrate to confirm with the Appellant directly that he consented. In relation to whether the Magistrate ensured the appellant understood the order, His Honour observed that there was discussion in some detail of the terms of the order. At [26], the conduct of the hearing is a clear indication that the appellant was able to communicate sufficiently to understand the hearing and the making of the protection order. The application for extension was dismissed and the appeal dismissed.

9.7 REFUSAL TO MAKE CONSENT ORDER

The court **may refuse** to make or vary a domestic violence order even if the party's consent or do not oppose it, **if the court believes the making of the order or variation may pose a risk to the safety of an aggrieved person, a named person, or a child** (s51(6)). For example, the court may form this opinion because the court considers the conditions of the order proposed by the parties are not sufficient for the protection of the aggrieved or a named person, given the nature of the violence alleged in the application (*Domestic and Family Violence Protection Bill 2011 Explanatory Notes* p 51).

10 NAMED PERSONS AND CONDITIONS OF DOMESTIC VIOLENCE ORDERS

10.1 NAMING PERSONS IN A DOMESTIC VIOLENCE ORDER

10.1.1 Naming a relative or associate of the aggrieved

If the court is satisfied that naming a relative or associate of the aggrieved is necessary or desirable to protect the relative from associated domestic violence the court may name them in the order (s52).

Note that in this section, *relative* of an aggrieved does not include a child mentioned in s53.

Note also that a named person or a person acting for them can apply for a variation of an order naming them or of a condition relating to them (see paragraph 14.2).

10.1.2 Naming a child

10.1.2.1 *When court may name a child (s53)*

The court may name a child of the aggrieved or who usually resides with the aggrieved (that is, a child who spends time at the residence of an aggrieved on a regular or on-going basis (s24(2)) in a domestic violence order if the court is satisfied that naming the child is necessary or desirable to protect the child from:

- Associated domestic violence (defined in paragraph 1.3.6)
- Being exposed to domestic violence by the respondent (defined in s10).

In *CED v HL* [2016] QDC 345**Error! Bookmark not defined.** Kent KC DCJ at [38] took the following matters into account in deciding to remove a child from a temporary protection order:

- Insufficient reasons had been given for including the child in the temporary protection order with no reference to ss48(2) and 49 of the DFVPA.
- There was insufficient evidence that an order was necessary or desirable in terms of ss48 or 57;
- The child's presence at the incident of DV was incidental and not prolonged, dangerous, or wilfully brought about or persisted with by the appellant (respondent to the order);
- It was unlikely to be repeated.

The application of the exercise of the discretion in s53 was dealt with in *BM v CM & Anor* [2020] QDC 30. The case concerned an appeal against the naming of persons in a protection order. The central issue was whether the Magistrate erred in naming the child MM in the protection order. The Magistrate's reasoning for naming MM were sparse. Rackemann DCJ explained what is needed for the exercise of discretion that is necessary or desirable to name a child pursuant to s53, at [16]:

> *That would necessarily involve an assessment of the risk of those matters in the absence of any order. The magnitude of the risk which would be sufficient to justify a conclusion that it is necessary or desirable to protect the child by naming the child in the order will depend on the circumstances, but the risk would need to be more than a bare possibility or a matter of mere speculation. The applicant's fear of such a risk would not be sufficient. There would need to be a proper evidentiary basis for concluding that there was such a risk.*

Also, at [33]:

> *Where it is proposed to name a child in the order, the Court also has to be satisfied that it is necessary or desirable to protect the child from the matters stated in section 53(a) or (b) (from associated domestic violence or exposure to domestic violence in the future). His Honour's reasons do not state that he was so satisfied, far less give reasons for that satisfaction. Indeed, there was no mention of section 53.*

The part of the order naming MM was set aside, and the matter remitted back to the Magistrates Court to a different Magistrate to decide whether MM should be named in the Order.

10.1.2.2 *When court must consider naming a child (s54)*

The **court must consider** whether a child should be named in the order, regardless of whether it is sought in the application, if the court:

- Is hearing an application for a domestic violence order or variation and the application or other information discloses the existence of a child of the aggrieved or who usually resides with the aggrieved; or
- Is deciding to make a domestic violence order in criminal proceedings (s42) or child protection proceedings (s43) and the information discloses the existence of a child of the aggrieved or who usually resides with the aggrieved.

10.1.2.3 *Power to obtain information about child (s55)*

If the court is considering whether to name a child in an order and -

- The respondent contests the naming of the child or the imposition of any conditions concerning the child; and
- The court considers the chief executive (child protection) may have information relating to the child, the aggrieved or the respondent that may assist in the decision whether to name the child or impose conditions.

The court may ask the chief executive to provide such information to the court and **the chief executive must comply** (to the extent that the information is in their possession or accessible by them) as quickly as possible (s55(2)-(4)).

The court must provide the information to each party, unless it would place the aggrieved or a child at increased risk, and **the parties must be given a reasonable opportunity to make submissions** (s55(5)(a) & (6)).

A copy of the domestic violence order or varied order must be given to the chief executive if they provided information under this s(s55(5)(b)).

10.2 THE STANDARD CONDITION (S56)

All domestic violence orders **must include** the standard condition that the respondent be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved (s56(1)(a)).

If the order includes a named person, then it **must include** that the respondent be of good behaviour and not commit associated DV against the named person (s56 (1)(b)).

If the named person is a child, it **must also include** a condition that the respondent not expose the child to domestic violence (s56(1)(c)).

Note that if the court does not impose the standard conditions, it is taken to have done so (s 56(2)).

10.3 OTHER CONDITIONS (s57)

A court making or varying a domestic violence order must consider whether to impose conditions necessary or desirable to protect:

- The aggrieved from domestic violence;
- A named person from domestic violence;
- A named person who is a child from being exposed to domestic violence (s57(1))

And whether to impose an ouster order (s57(2)). See *PRH v LPL & Anor* [2021] QDC 17 in paragraph **9.7.2** as to whether an ouster condition is necessary or desirable.

The principle of paramount importance must be the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount (s57(3)).

When considering which conditions to impose, the court should also consider whether any exceptions to the conditions should be specified in the order. For example, a condition enabling contact for the purposes of contact with a child or children (refer also to paragraph 10.6 below).

In *CED v HL**Error! Bookmark not defined.*** [2016] QDC 345, Kent KC DCJ at [37] considered whether a child named on an order should be removed. His Honour noted that orders and conditions have serious consequences and are not to be made lightly. He referred to *RMR v Sinclair* [2012] QDC 204 at [13]

The making of an order is a serious matter. Orders should not be made lightly. Breaches involve as the learned Magistrate said, community as well as personal concerns.

More information can be located in the National Bench Book, Chapter 7.4 Conditions

10.4 BEHAVIOUR (s58)

The court may impose a condition on the respondent that prohibits:

- Stated behaviour that would constitute DV or is likely to lead to DV against the aggrieved or associated DV against a named person;
- The respondent from approaching or attempting to approach the aggrieved or a named person, including within a stated distance;
- The respondent from contacting, attempting to do so or asking someone else to contact the aggrieved or a named person, including if the aggrieved is in a refuge. Note that this does not prohibit a respondent's lawyer contacting them, or another person for a purpose authorised under an Act (s60) nor does it prohibit a victim advocate (engaged by an approved provider) from contacting the aggrieved or named person in circumstances specified in s61;
- The respondent from locating or attempting to do so or asking someone else to locate the aggrieved or a named person if their whereabouts is unknown to the respondent. Note that this does not prohibit a respondent's lawyer locating them, or another person for a purpose authorised under an Act (s60) nor does it prohibit a victim advocate (engaged by an approved provider) from locating the aggrieved or named person in circumstances specified in s61;
- Stated behaviour towards a child of the aggrieved or a child who usually resides with the aggrieved, including prohibiting the respondent's presence at or in a place associated with the child.

10.5 RECOVERY OF PERSONAL PROPERTY (s59)

The court may impose a condition on the respondent that requires the respondent to (s59(1)):

- Return stated personal property to the aggrieved;
- Allow the aggrieved access to stated personal property;
- Allow the aggrieved to recover stated personal property;
- Allow the aggrieved to enter premises for the above purposes; and
- Do any act necessary or desirable to facilitate action listed above.

If the court imposes any of the above conditions, the court **must consider**:

- Whether supervision by a police officer is required to fulfil the condition; and
- Whether it should impose a condition that the respondent must not, during a stated period, approach within a stated distance of stated premises to facilitate the action (s59(2)).

10.6 LIMITING CONTACT WITH A CHILD OF THE RESPONDENT [CROSS REFERENCE WITH RELATIONSHIP WITH FAMILY LAW ORDERS]

A condition preventing or limiting a respondent's contact with their child **must only** limit contact between them to the extent necessary for the child's safety, protection, and wellbeing (s62(2)). The paramount consideration is the principle that the safety, protection, and wellbeing of people who fear or experience domestic violence including children are paramount (s57(3)).

This applies where the aggrieved or an applicant on their behalf has asked for the condition or where the court of its own initiative is considering imposing the condition (s62(1)).

Note that an applicant for a domestic violence order or variation is obliged to inform the court about any family law order of which they are aware (s77(2)).

10.6.1 Where family law order allows contact

Consider whether to create an exception to the prohibition on contact to facilitate contact under the order or whether to vary, rescind, discharge or suspend the order under s68R *Family Law Act 1975* (Cth) – see s78 and below.

10.6.2 Exceptions

An example of an exception to the condition prohibiting contact is:

- This condition does not apply when having contact with a child or children as set out in writing between the parties or in compliance with an order of the court, or when having contact authorised by a representative of the Department of Child Safety, Youth and Women.

10.6.3 Vary etc. the family law order – s68R FLA

Where a family law order allows contact between a respondent and a child that may be restricted under a proposed order or variation, the court **must have regard to any family law order** of which the court has been informed and consider whether to exercise its power to revive, vary, discharge or suspend the family law order under s68R of the *Family Law Act 1975* (Cth) (s78(1)). The requirement to consider an existing family law order was included in the *Domestic and Family Violence Protection and Other Legislation Amendment Act 2016* (commenced on 30 May 2017).

The court **must** not diminish the standard of protection given by a domestic violence order for the purpose of facilitating consistency with a family law order (s78(2)).

If the court is considering using its power under s68R, it must give the parties a reasonable opportunity to be heard on the issue, unless the court is deciding whether to make a temporary protection order under s47 (ss78(3) and (4)).

See further details about the relationship between domestic violence orders and family law orders at paragraph 10.11. For a discussion in the National Bench Book, Chapter 10.1.3 Intersection of legal systems.

10.7 OUSTER AND RETURN (SS63, 64 & 65)

An ouster condition can prohibit the respondent from (s63(1)):

- Remaining at stated premises;
- Entering or attempting to enter stated premises;
- Approaching within a stated distance of stated premises.

The stated premises may include (s63(2)):

- Premises in which the respondent has a legal or equitable interest;
- Premises where the aggrieved and respondent live together or previously lived together;
- Premises where the aggrieved or a named person lives, works, or frequents.

10.7.1 What court should consider before making ouster condition re premises other than the aggrieved's usual place of residence

When considering making an ouster condition in these terms, the court need only take account of the matters in s57 (see paragraph 10.3).

10.7.2 What court must consider before making ouster condition relating to the aggrieved's usual place of residence

The court must consider (s64):

- Matters in s57;
- Whether any child living with the aggrieved can live safely in the residence if the ouster condition is not made;
- Any views expressed by the aggrieved;
- The desirability of preventing or minimising disruption to the aggrieved;
- Importance of aggrieved and child's social connections;
- Continuity in childcare arrangements, education, training, and employment;
- Accommodation needs of aggrieved;
- Accommodation needs of respondent.

See *PRH v LPL & Anor* [2021] QDC 17 where a seven-year ouster condition was reduced on appeal to six months. RS Jones DCJ noted very scant reasons were given for the need for an ouster order, let alone an ouster for such an extended period in a property in which the appellant was a registered proprietor. His Honour referred to the Magistrates Court decision in *Armour v FAC* [2012] QMC 22 where [at 23]:

> *…a number of observations were made including that any order should go no further than is necessary for the purpose of protecting the aggrieved and that the Act is intended to be protective legislation, but it is not intended to be punitive upon the Respondent unless, of course, conduct warranted*.

Further, at [24]:

> *In my view the imposition of a seven-year ouster condition is not only not necessary to ensure the protection of the first Respondent but it was also punitive and, indeed, having regard to the reasons of judgment, one suspects intended to be a punitive imposition on the appellant*.

The failure of the aggrieved to express a view or wish about the conditions does not give rise to an inference that the aggrieved does not have a view or wish about the condition being imposed (s64(2)).

However, note *ARTE v Nugent & Anor* [2020] QDC 268 where Williamson KC DCJ found an error of law occurred where the Magistrate exercised discretion to impose an ouster condition in circumstances where it was not sought by the (police) applicant and the views and wishes of the aggrieved had not been sought. In this case, His Honour did not accept the Magistrate had correctly assessed the risk of future violence occurring and the need for an ouster condition because:

1. The Magistrate's earlier finding in relation to a significant power imbalance, in the absence of evidence (an irrelevant consideration); and
2. The second respondent was not afforded the opportunity to express her wishes by way of sworn evidence (a mandatory consideration).

The court must give reasons for making or not making the ouster condition (s64(3)).

Note that if the court is imposing an ouster condition, the courts must consider:

- Imposing a return condition (s65, see paragraph 10.7.4); and
- The need for police supervisions (s66, see paragraph 10.7.5).

See paragraph 10.12 for further information relating to ouster conditions where respondent is a tenant.

10.7.3 Court must give reasons

The court **must** give reasons for:

- Imposing an ouster condition; or
- Not imposing an ouster condition;

relating to the aggrieved's usual place of residence (s64(3)).

10.7.4 Return Condition (s65)

If the court imposes an ouster condition on a respondent, the **court must consider** imposing a return condition allowing the respondent:

- To return to the stated premises to recover stated personal property; or
- To remain at the stated premises to remove stated personal property (s65(1)).

The return condition **may not allow** a respondent to remove or recover personal property that is required to meet the daily needs of any person who continues to live in the premises (for example, household furniture or kitchen appliances) (s65(2)).

10.7.5 Police supervision of ouster of return condition

Before imposing a return condition, **the court must consider** the extent to which a matter relating to the return condition must be supervised by a police officer. If police supervision is required for an ouster condition or return condition, **the court must consider** the need to impose a condition that the respondent must not approach within a stated distance of stated premises (s66).

10.7.6 Return condition without police supervision

If the court imposes a return condition without ordering police supervision, the **court must state in the domestic violence order** (s65(3)):

- If the respondent is in court (s65(3)(a)):
  - the time at which the respondent may return to the premises and must then leave the premises without contravening the order; or
  - for how long the respondent may remain at the premises without contravening the order; or

- If the respondent is not in court (s65(3)(b)):
  - the time at which the respondent may return to the premises and must leave the premises, based on the time of service of the order on the respondent - for example, the respondent may return to the premises at noon on the day after the date the order is served on the respondent and must leave the premises no later than 2p.m. that same day; or
  - for how long the respondent may remain at the premises based on the time of service of the order on the respondent.

In deciding the time to state in the order, the **court must have regard to** any expressed wishes of the aggrieved (s65(4)).

10.8 PROTECTING AN UNBORN CHILD (S67)

If the aggrieved is pregnant when a domestic violence order is made, the court may impose a condition that takes effect when the child is born and requires the respondent to be of good behaviour towards the child, not commit associated domestic violence against the child and not expose the child to domestic violence (s67(2)).

The court may impose the condition whether or not the respondent is the father (s67(4)).

The condition takes effect when the child is born (s67(2)(a)).

10.8.1 Of what must the court be satisfied?

The court may impose the condition if satisfied that (s67(4)):

- The aggrieved is pregnant; and
- The order is necessary or desirable to protect the child from associated domestic violence or being exposed to domestic violence once the child is born. (See s10 for definition of exposed to domestic violence).

10.9 INTERVENTION ORDERS (ss68-75)

An intervention order requires the respondent to attend an approved intervention program provided by an approved provider and/or counselling provided by an approved provider (s69). Counselling means counselling of a kind that may, in the court's opinion, be beneficial in helping a respondent to overcome harmful behaviour related to domestic violence (s68).

For example, it need not be intended specifically to address domestic violence issues and can relate to other harmful behaviour which is related to domestic violence such as counselling for substance abuse issues which are related to a person's domestic violence behaviours (*Domestic and Family Violence Protection Bill 2011 Explanatory Notes*, page 56*).*

In 2016, Division 6 was amended to refer to Intervention Orders (IO) rather than Voluntary Intervention Orders (VIO). The *Domestic and Family Violence Protection and Other Legislation Amendment Bill 2016 Explanatory Notes* notes to the 2016 amendments explained:

> *This change will help clarify that once a respondent has agreed to an intervention order being made, they should comply with it in the same way as they should comply with other court orders* [7].

10.9.1 When can a court make an Intervention Order?

If a court makes or varies a domestic violence order, the court may make or amend an intervention order **only if**:

- The **court is satisfied that an approved provider is available** to provide the intervention program or counselling at a location reasonable convenient to the respondent, having regards to where the respondent lives or works (s69(2)); and
- The **court has explained** or caused to be explained **to the respondent the purpose and effect of the order, the consequences of contravening the order** and that it may be varied or revoked on the application of the respondent or a police officer (s70); and
- The **respondent is present in court and agrees to the order** being made or amended and agrees to comply with the order (s71).

10.9.2 What must the order require? (s69)

The intervention order **must** require the respondent to:

- Report to a stated approved provider at a stated place, and within a stated time to allow the approved provider to assess the respondent's suitability to participate in the program or counselling (s69(3)(a)); and
- If the approved provider gives a notice under s72(3) confirming the respondent's suitability, attend the approved intervention or counselling (s69(3)(b)); and
- Comply with every reasonable direction given to the respondent by the approved provider
(s69(3)(c)).

10.9.3 Copy of Intervention Order to be given to the aggrieved (s186)

If a court makes an intervention order, the court must give a copy of the order to the aggrieved (s186(2)), unless the clerk of the court cannot locate the aggrieved or identify an address for their residence or business after making all reasonable enquiries (s186(4)).

If the aggrieved is in court when the order is made, the clerk of the court may give them the order before they leave the court (s186(3)).

The requirement to give a copy of the intervention order, to the aggrieved is subject to s188 if the aggrieved is a child (see paragraph 4.7). However, failure to comply with the section does not invalidate the order (s186(5)).

10.9.4 Approved provider list (s75)

To satisfy itself that an approved provider is available, the court can go to the list of approved providers and approved intervention programs see Chapter 23. Section 75 provides that the chief executive must prepare and keep a list of approved providers and approved programs and give a copy of the list to the Chief Magistrate and the police commissioner.

10.9.5 Completion of Intervention Order (s74)

Upon completion of an intervention order, the approved provider must give the court (and the respondent and police commissioner) a notice in writing within 14 days stating that the respondent completed the program or counselling and the date of completion (s74).

10.9.6 Contravention of an Intervention Order (s73)

If the approved provider becomes aware that the respondent has contravened intervention order, they must give the court and the police commissioner a notice in the approved form within 14 days, stating:

- That the respondent has contravened the intervention order; and
- That nature of the contravention; and
- The date of the contravention.

Unless the approved provider considers the contravention is minor and the respondent has taken steps to remedy it or has otherwise substantially complied with the intervention order (s73(3)).

For further discussion on Perpetrator Interventions in the National Bench Book see [here]

10.10 WEAPONS

The *Domestic and Family Violence Protection and Other Legislation Amendment Act 2016* amended the *Weapons Act 1990* to suspend a weapons licence when a PPN or release conditions are made. The *Domestic and Family Violence Protection and Other Legislation Amendment Bill 2016 Explanatory Notes 2016* (p 13) notes that this was a departure from the usual rule about the effect of legislation on individual rights and liberties under s4(2) of the *Legislative Standards Act 1992* because if may adversely affect the respondent's employment based on a decision made by a police officer rather than a court order.

Weapons Act 1990 ss27A, 28A 29B and 34AA provide for the impact of an order on a person's weapon's licence.

If a temporary protection order is made the licence is suspended:

- From the time of the order if the licensee is present in court; or
- When the order is served on the respondent (s27A).

10.10.1 Suspension of licence

If a person:

- Is a licensee and is named as the respondent in a temporary protection order, PPN or release conditions, the licence is suspended while the order, notice or conditions are in force (s27A).
- If a person is a body's representative and is named as the respondent in a temporary protection order, PPN or release conditions.

any authority the respondent has to possess a weapon because the respondent is the body's representative is ineffective while the order, notice or conditions are in force; and the body's licence is suspended seven days after the licensee (s27A(2)).

10.10.2 End of suspension

A suspension ends when the order, notice or conditions are no longer in force (s28A).

10.10.3 Arrangements for surrender of suspended or revoked licences and weapons

A person whose licence is suspended under s27A or revoked under s28A because they are named as a respondent to an order, PPN or release conditions **must** immediately do the following:

Give the licence:

- To a police officer if it is in their possession (s29B(3)(a));
- Or as soon as practical but within a day after the order or notice if the licence is not in the respondent's possession (s29B(3)(b)); or
- If the police officer personally serves the order or notice at the respondent's place of residence, immediately (s29B(4)),

Surrender the weapon:

- To a police officer if it is in their possession; or
- Within a day after the order or notice if it is not in their possession (s29B(3)(c)).

10.10.4 Fit and Proper Person

In determining a fit and proper person issue, for the renewal, suspension or revocation of a licence *Weapons Act 1990* s10B(1)(b) requires consideration of whether a domestic violence order has been made, PPN issued or release conditions imposed against the person.

A person is not a fit and proper person if a domestic violence order has been made against them *Weapons Act 1990* s10B(2)(b).

A weapons licence is suspended when a temporary protection order, order, notice or conditions are in force *Weapons Act 1990* (s27A).

10.10.5 Excluded Person

A person who, in the five year period immediately before the day the person signs the approved form under this section, has been subject to a domestic violence order, other than a temporary protection order, is an **excluded person** and cannot use a weapon at an approved range, *Weapons Act 1990* (s53(7)(c)).

10.10.6 A person possesses a weapon if they have:

- Custody;
- Control; or
- Can obtain custody at will *Domestic and Family Violence Protection Act 2012*, s79.

10.10.7 Questions the court must ask about weapons

If the respondent, a police officer applicant, or another police officer is present in court (s80(1)), **the court must ask** the following questions about weapons ***before*** making a domestic violence order (s80(2)):

- Does the respondent have a weapons licence?
- Does the respondent possess a weapon?
- Does the respondent have access to a weapon as part of their employment (note that employment includes a respondent who is a partner in a partnership (s80(5))? If so, what is the employer's name and address and what are the employment or other arrangements relating to the respondent having access to a weapon?
- Does the respondent have access to a weapon because they are a person mentioned in s2 of the *Weapons Act 1990* and thus exempt from the application of that Act (e.g. members of the armed forces, federal police etc.)? If so, what is the employer's name and address and what are the employment or other arrangements relating to the respondent having access to a weapon?

10.10.8 Information about weapons that the court may include in the order

After asking the questions required, the court may include one or more of the following in the domestic violence order, to the extent the court considers reasonable (s80(3)):

- Information about any weapons licence of the respondent;
- Information about any weapon the respondent possesses;
- Information about any weapon to which the respondent has access because of their employment;
- Information about any weapon to which the respondent has access because they are a person referred to in s2 of the *Weapons Act 1990*;
- A statement that when the domestic violence order is served on the respondent, the *Weapons Act 1990* applies to the respondent under s83 of the DFVPA, despite s2 of the *Weapons Act 1990*.

10.10.9 Conditions relating to things used as weapons

If the court is satisfied that a respondent:

- Has used or threatened to use a thing in committing domestic violence against the aggrieved, or associated domestic violence against a named person;
- Is likely to use the thing again or carry out the threat;

the court may impose a condition prohibiting the respondent from possessing a thing (or a thing of the same type) for the duration of the order (ss81(1)&(2)).

Examples of things include: an animal (including a pet); an antique firearm, crossbow, or spear; a cricket or baseball bat.

If the court makes such an order, the thing is taken to be a weapon and may be dealt with under the DFVPA and the *Weapons Act 1990* as a weapon for which the respondent does not have a licence (s81(3)).

10.10.10 Court's obligation to provide details

A court making a domestic violence order **must** state as much information as it can about the weapons that the respondent possesses, including anything the subject of prohibition under s81(2) (s82(2)). This is to ensure that a police officer has as much information available as is possible when the police officer exercises a power under an Act to obtain or seize a weapon (s82(1)).

10.11 RELATIONSHIP WITH FAMILY LAW ORDERS

The *Family Law Act 1975* (Cth) (FLA) Division 11 of Part VII governs the interaction between domestic violence orders and family law orders (including parenting orders, recovery orders and other orders or injunctions under the *Family Law Act 1975* (Cth)). The general rule is that orders under the FLA prevail over inconsistent orders under family violence legislation (s68P and s68Q).

However, State courts have jurisdiction to revive, vary, suspend, or discharge certain family law orders when making family violence orders (s68R). The court may do this on its own initiative or on application of a party. This assists courts to establish consistency between domestic violence orders and orders under the *Family Law Act 1975* (Cth). It also allows the court to take account of violence that occurs after a court makes a family law order.

The FLA defines "family violence orders" as orders under a prescribed law of a State or Territory to protect a person from family violence (s4). The *Domestic and Family Violence Protection Act 2012* is a "prescribed law" under the *Family Law Act 1975* (Cth) (*Family Law Regulations 1984 (Cth)* , regulation 12BB and Schedule 8).

An applicant for a domestic violence order or a variation of such **is obliged to inform the court about any family law order** of which they are aware and, if possible, give a copy of the order to the court (s77). Note that failure to comply with this requirement does not invalidate an application[63].

10.11.1 What court may consider (s78)

The court **must have regard to** any family law order of which it has been informed, before deciding whether to make or vary a domestic violence order (s78(1)(a)). If the family law order allows contact between a respondent and a child that may be restricted under a

[63] See *DLM v WER & The Commissioner of Police* [2022] QDC 79 where Cash KC DCJ stated, at [47], regarding s78, "…*it may also be taken as an expression that a failure to have regard to a family law order is unlikely to amount to appellable error*".

proposed order or variation, the court must consider whether to exercise its power to revive, vary, discharge or suspend the family law order under s68R of the *Family Law Act 1975* (Cth) (or s176 of the *Family Court Act 1997* (WA)).

Note that the court must not diminish the standard of protection given by a domestic violence order for the purpose of facilitating consistency with a family law order (s78(2)).

If the court is considering using its power under s68R, it must give the parties a reasonable opportunity to be heard on the issue and make submissions about the exercise of power, unless the court is deciding whether to make a temporary protection order under s47 (ss78(3) & (4)).

10.11.2 Conditions on exercising s68R power

Note these conditions for the exercise of this power:

- The court must make or vary a family violence order in the proceeding (where it is exercising a power a s68R power) (s68R(3)); and
- If the court proposes to revive, vary, discharge or suspend a relevant *Family Law Act 1975* (Cth) order, the court must have material that was not before the court that made the order or injunction (s68R(3)); and
- The court must have regard to the purposes of the Division (stated in s68N) and to whether contact with both parents is in the best interests of the child (ss68R(5)(a)&(b));
- If the court proposes to vary, discharge or suspend a relevant *Family Law Act 1975* (Cth) order the court must be satisfied that it is appropriate to do so because the earlier order exposes or is likely to expose a person (including a child or an adult) to family violence (s68R(5)(c)).

10.12 *RESIDENTIAL TENANCIES AND ROOMING ACCOMMODATION ACT 2008* ORDERS (s139 - 141)

If an ouster condition is imposed on a respondent who is a tenant, the aggrieved may be able to apply under the *Residential Tenancies and Rooming Accommodation Act 2008*:

- s245 for an order to be recognised as the tenant instead of the respondent; or
- s321 for an order terminating the tenancy (and a s323 interim order pending the determination of the termination request).

While these applications normally lie to QCAT, the person may, if they are also making an application for a protection order or a variation of a domestic violence order:

- Make the tenancy application to the Magistrates Court (s139); or
- Where there are already tenancy proceedings on foot, if the court considers it appropriate, remove such an application from QCAT to the Magistrates Court (s140).

10.12.1 Magistrates Court jurisdiction for tenancy applications

Section 141 of the DFVPA confers jurisdiction on the Magistrates Court to hear and decide those tenancy applications and perform any other function or exercise any other power conferred on QCAT for a tenancy application.

An order of the Magistrates Court about the tenancy application is taken to have been made under the *Queensland Civil and Administrative Tribunal Act 2009* for the *Residential Tenancies and Rooming Accommodation Act 2008* (s141(6)).

10.12.2 Procedures applicable

- Procedures applicable are those under the *Queensland Civil and Administrative Tribunal Act 2009*, subject to the Magistrates Court giving directions before, or at any time during the hearing of the tenancy application about the way in which the court may exercise the powers of QCAT or the service of documents for a tenancy application (ss141(2) and (4));
- The court must not be open to the public unless the court orders otherwise (s141(3));
- Written notice of the tenancy application, an application to remove it to the Magistrates Court or any adjournment of the application must be given to the lessor by the aggrieved or respondent making the tenancy application (s141(5)).

11 DURATION OF DOMESTIC VIOLENCE ORDERS

11.1 APPROPRIATE DURATION OF DOMESTIC VIOLENCE ORDERS

Section 37(5) provides that if the court decides to make a protection order against the respondent, the court must consider the appropriate period for which the order is to continue in force.

This provision applies to applications for protection orders made after 18 March 2024 (see s237).

See s97 for matters to be considered when deciding the period for which a protection order is to continue in force. The principle of paramount importance to the court must be the principle that the safety, protection, and wellbeing of people who fear or experience domestic violence, including children, are paramount.

11.2 COMMENCEMENT OF DOMESTIC VIOLENCE ORDERS

Section 96 of the DFVPA provides that a DVO takes effect:

(a) On the day it is made; or
(b) If it is made while another DVO is in force between the respondent and the aggrieved, the day that order ends, or another day decided by the court.

11.3 COMMENCEMENT OF VARIATION OF DOMESTIC VIOLENCE ORDER

Section 99(1) of the DFVPA provides that a variation of a domestic violence order takes effect:

(a) If the respondent is in court when the court varies the order – when the court varies the order; or
(b) If the respondent is not in court when the court varies the order, the earliest of the following:
    (i) When the respondent is served with a copy of the varied order
    (ii) When the varied order otherwise becomes enforceable under s177.[64]

Note that the original domestic violence order remains in force until the varied order takes effect (s99(2)).

11.4 END OF TEMPORARY PROTECTION ORDER

Section 98 of the DFVPA provides that a temporary protection order continues in force until:

(a) If the respondent is in court when the Court makes a final protection order – when the protection order is made.

[64] Section 177 sets out how a respondent is to be told about, or made aware of, an order before he or she can be convicted of a breach of the order (see para 21.1).

(b) If the respondent is *not* in court when the Court makes a final protection order, the earliest of the following:
    (i) When the respondent is served with a copy of the protection order; or
    (ii) When the protection order becomes enforceable under s177;[65] or
    (iii) When the protection order ends.
(c) If the Court refuses to make a protection order – when the court refuses.
(d) If an application for a protection order related to the temporary protection order is withdrawn – when the application is withdrawn.
(e) Otherwise – when any protection order related to the temporary protection order ends.

11.5 END OF PROTECTION ORDER

Section 97 of the DFVPA provides that a protection order continues in force until the earliest of the following:

(a) The day stated by the court in the protection order.
(b) The day that is five years after the day it is made.

> The *Explanatory Memorandum to the Domestic and Family Violence Protection Bill 2016 Explanatory Notes* [11] said:
>
> *The change is necessary to ensure that people who fear or experience domestic and family violence are protected for as long as needed and that perpetrators are held accountable for their actions. The changes will reduce the need for victims to seek extensions of their POs or new orders after the expiry of their order. It also increases court's ability to protect victims where there are factors that lead to ongoing risks of further violence, for example where parents have contact with their children. Existing limitations and safeguards will continue to apply for POs and courts will continue to have discretion to determine the length of POs on the facts of each case*.

11.6 CALCULATION OF TIME

For calculation of time, see s38 of the *Acts Interpretation Act 1954* and *Director-General, Department of Child Safety v G -H & Ors* [2007] QChC 6.

In considering the calculation of time for a child protection order and the construction of s62 *Child Protection Act 1999,* Samios DCJ found that time began on the day the order was made (24 May 2004) and ran for not more than two years after the day it was made being midnight on 24 May 2006.

11.7 TRANSITIONAL PROVISIONS

Where a protection order was made before the commencement of the amended DFVPA (30 May 2017) and does not state the date it ends, s97 applies (s219).

[65] See note above.

11.8 REASONS REQUIRED FOR ORDERS LESS THAN FIVE YEARS DURATION

The court may order that a protection order continues in force for a period of less than five years only if the court is satisfied there are reasons for doing so (s97(2)(b)) and reasons must be given for making the order less than five years (s97(4)).

12 EXPLANATION OF ORDERS (SS84-85)

Note that failure to comply with this section does not invalidate or otherwise affect a domestic violence order (s84(5)).

12.1 EXPLANATION OF PROPOSED ORDER TO THE RESPONDENT

If a court is about to make a domestic violence order and the respondent is present in court, the **court must ensure** the respondent understands (s84(2)):

- The purpose, terms, and effect of the order;
- The type of behaviour that constitutes domestic violence;
- What may follow if the respondent contravenes the order; and
- That the respondent may apply for a variation of the order.

In terms of the purpose, terms and effect of the order, the respondent should understand, for example, that:

- The order may be enforceable in other States and New Zealand without further notice to the respondent;
- If the respondent has a weapons licence or is a body's representative under the *Weapons Act 1990,* the implications of s27A or s28A of the *Weapons Act 1990* on the licence or endorsement as the body's representative;
- A person against whom a protection order is made cannot apply for a weapons licence for five years (s10B of the *Weapons Act 1990* and is not exempt from the *Weapons Act 1990* despite s2 of that Act;
- The type of behaviour that constitutes a domestic violence order;
- The consequences of a domestic violence order, as explained above, can only be avoided by successfully appealing the order.

Note that a written explanation of this information is to be included in the copy of the order served on the respondent (s85(2)).

12.2 EXPLANATION OF PROPOSED ORDER TO THE AGGRIEVED

If a court is about to make a domestic violence order and the aggrieved is present in court, the **court must ensure** the aggrieved understands (s84(3)):

- The purpose, terms, and effect of the proposed order, including, for example, that it may be enforceable in other States and New Zealand; and
- What that aggrieved may do and what may follow if the respondent contravenes the order; and
- That the aggrieved may apply for a variation of the order; and
- The type of behaviour that constitutes a domestic violence order.

See *JC v KP* [2017] QDC 175 for the distinction between the requirements in ss84 and 85 of the DFVPA.

Note that a written explanation of this information is to be included in the copy of the order given to the aggrieved (s85(3)).

See also paragraph 8.6.1 and the decision of *Bailey (a pseudonym) v Bailey (a pseudonym)* [2021] QDC 99. The case considered to what extent the requirement in s84, that the court ensure the respondent understands the order and conditions, applies in circumstances where the appellant was present in court and represented by counsel.

12.3 COURT MAY ENLIST ASSISTANCE IN EXPLAINING THE PROPOSED ORDER

The court may use the services of others to assist in complying with s84 to the extent the court considers appropriate (s84(4)). Examples include:

- Arranging for the clerk of the court or a public service employee to explain the order;
- Using a professional interpreter or the telephone interpreter service;
- Giving out explanatory notes prepared for aggrieved or respondents, including in languages other than English;
- Arranging for an Indigenous council, community justice group or group of elders to explain the order;
- Arranging for a non-government service provider's disability case worker to explain the order to an aggrieved or respondent who has a disability.

However, note the requirement in *JC v KP* [2017] QDC 175 that this occur ***before*** the order is made.

13 SERVICE AND NOTIFICATION OF ORDERS

13.1 SERVICE OF ORDER ON RESPONDENT (S184)

If a court makes or varies a domestic violence order or makes an intervention order, a police officer **must** personally serve[66] a copy of the order on the respondent (s184(2)), **unless** the respondent was in court when the order was made or varied and has been given a copy of the order (s184(4)), or police have told the respondent about the order or variation and the order has been served on the respondent other than by personal service (including in a way stated in a substituted service order) (s184(5)).

(Note that the clerk of the court must give a copy to the officer in charge of the police station nearest where the respondent lives (s184(3)) if the respondent was not present in court when the order was made).

The copy of the order served on or given to the respondent, or their nominee must contain a written explanation of the order (s85) and the information required to be explained to the respondent under s84.

13.2 SUBSTITUTED SERVICE (S184A)

The DFVPA previously required applications and orders to be served personally by police. In 2021, the Women's Safety and Justice Taskforce recommended amendments to enable a court, in limited circumstances, to order substituted service for these documents. The Taskforce emphasised that personal service by police provides an important opportunity to convey the seriousness of an order to a perpetrator, and to potentially disrupt or de-escalate a domestic violence situation. Requiring personal service and an explanation for the document is more than just process serving – it is an important intervention point which reinforces that DFV will not be tolerated. The Taskforce found that personal service by police should continue unless a substituted method of service would provide increased protection to the victim.[67]

Section 184A of the DFVPA enables the court to make a substituted service order if it is satisfied that:

- Reasonable attempts have been made to personally serve the respondent;
- Serving the document in another way is necessary or desirable to protect the aggrieved; and
- Serving the document in another way is reasonably likely to bring the document to the respondent's attention.

The substituted service order must state the circumstances in which the document is taken to have been served on the respondent – for example: when a document served by post or electronic communication is taken to have been served; or that the circumstances are on the happening of a stated event or at the end of a stated time (s184(3)). The Explanatory Notes[68] state that this is

[66] A police officer can serve a document under this Act on any day including Good Friday or Christmas Day (s183).
[67] *Explanatory Notes to the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022* ***Error! Bookmark not defined.***, page 8.
[68] Ibid, page 9.

particularly relevant to substituted service of protection orders, as the respondent is required to have been served to be convicted of a breach of the order.

An order may be made by the court on its own initiative; or on the application of a party or police officer (s184(4)).

The police officer serving a document under a substituted service order must (unless it is not reasonable in the circumstances) give a copy of the document to the respondent and explain what the document is and its nature and effect (s184(5)).

- An example given in the Explanatory Notes[69] is that if the alternate method is by email, the email should attach a copy of the document and include a statement explaining the document.

13.2.1 Transitional provision:

Section 236 of the DFVPA provide that a substituted order may be made for a document under s184A regardless of whether the document was made before or after the commencement on 1 August 2023.

13.3 REOPENING PROCEEDINGS SERVED UNDER A SUBSTITUTED SERVICE ORDER (DIV 3A)

Division 3A (ss157A-157C) of the DFVPA provides for limited circumstances in which a proceeding may be reopened. The *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* introduced this new division which outlines limited circumstances in which a proceeding may be reopened. It is intended to provide a respondent with procedural fairness in circumstances where the respondent genuinely has not been able to access the application, despite it being served in an approved manner under a substituted service order; and has not had an opportunity to make submissions to the court. For example, where an application is served via email and the email address is incorrect due to human error.[70]

13.3.1 Reopening proceedings decided in the respondent's absence (s157A)

A respondent may make an application to reopen the proceeding if (s157A(1)):

- The application was served on the respondent under a substituted service order, and
- The application was not, and could not reasonably have been, brought to the respondent's attention, despite being served in a way stated in the substituted service order; and
- The respondent was not present in court when the application was heard and decided.

The application must be made within 28 days after the day on which the respondent became aware that the protection order had been made or varied (s157A(2)).

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[69] Ibid.
[70] Ibid, page 10.

The court may reopen the proceedings if satisfied that the grounds in s157A(1) are established.

If the respondent fails to appear at the reopening, another application under this section may only be made with the court's leave (s157A(4)).

13.3.2 Effect of decision to reopen proceeding and rehearing (ss157B and 157C)

Reopening a proceeding does not affect the operation of the decision in the proceeding, or a domestic violence order made or varied in the proceeding or prevent the taking of action to implement the decision or order (s157B(1)).

However, the court may (on its own initiative or a party's application) stay the operation of the decision, domestic violence order, or varied order until the reopened proceeding is decided (s157B(2) and (3)).

The court may decide a reopened proceeding in any way it considers appropriate – including, for example, hearing the proceeding afresh, in whole or part (s157C(1)).

The time for starting an appeal against a decision subject of the reopened proceeding, starts on the day of the court's decision under the reopening (s157C(2)).

The division does not otherwise affect a right of appeal (s157C(3)).

13.4 OTHER PERSONS TO WHOM ORDER MUST BE GIVEN (S185)

If a court makes or varies a domestic violence order, a copy of the order must be given by the clerk of the court as soon as is reasonably practicable to (s185(1)):

- The aggrieved; and
- An applicant who is not an aggrieved or a police officer; and
- Each named person; and
- The police commissioner.

If the person is present in court, the person may be given the copy before they leave the court (s185(2)).

The clerk of the court is not required to comply with the requirement:

- If the person cannot be located, after reasonable inquiries (s185(3)); or
- The clerk of the court reasonably believes the named person is a child and a copy has been given to a parent because the parent is an aggrieved or a named person (s185(4)).

See Rule 18 of the *Domestic and Family Violence Protection Rules 2014* for the giving of notice of proceedings to a named person.

13.5 GIVING OR SERVING A DOCUMENT ON A CHILD (S188)

If the DFVPA authorises or requires a document to be given to, or served on, a child,[71] the person giving or serving it (s188(2)):

- **Must** also give a copy to a parent of the child (unless the court has dispensed with this requirement – see below). Note that parent is defined in this section to include the chief executive (child protection) if they have custody or guardianship of the child (s188(7)); and
- **Must not** give or serve it on the child at or near the child's school (unless there is no other reasonable way that the document can be given or served) (s188(2)(b)).

13.5.1 Court can dispense with requirement to give parent copy to parent if satisfied (s188(3))

- The person cannot locate the parent after making reasonable enquiries; or
- There are other special circumstances - for example, the child is estranged from their parents; or there would be an unacceptable risk of harm to the child if the parent was given a copy.

See Rule 18 of the *Domestic and Family Violence Protection Rules 2014* for the giving of notice of proceedings to a named person who is a child.

13.6 NOTIFICATION OF POLICE COMMISSIONER

The police commissioner must be notified by the clerk of the court within one business day of any of the following **applications made or orders granted** (s162):

- A protection order, a temporary protection order, an order for variation of a domestic violence order;
- An order for a variation of a recognised interstate order, registration of a New Zealand order, variation of a New Zealand order as it is registered in Queensland or the period for which the order has effect in Queensland, or the revocation of the registration of a New Zealand order;
- An order made on the court's own initiative in criminal proceedings under s42;
- An order made by the Childrens Court in child protection proceedings under s43.

13.7 NOTICE TO PUBLIC GUARDIAN WHERE ADULT WITH IMPAIRED CAPACITY INVOLVED (S163)

If the court:

- Makes a domestic violence order; and
- The court considers there was domestic violence or associated domestic violence involving an adult with impaired capacity; and

[71] The age is to be determined on the day the document is to be given to the person (s188(4)).

- Considers that because of the circumstances involving, or the nature of the violence, the public guardian should be informed about it;

the court may inform the public guardian in writing about it (s163).

13.8 GIVING NOTICE OF ADJOURNMENT TO ABSENT RESPONDENT (S187)

If the court adjourns the hearing of an application to make or vary a domestic violence order, or a criminal proceeding under s42 or child protection hearing s43 and the respondent is not present in court when the adjournment is made (s187(1)):

- If the respondent was served with the application – the clerk of the court must give the respondent written notice of the date, time and place to which it is adjourned and written advice that if they do not appear, a domestic violence order may be made in their absence or a warrant issued (s187(2)), unless the clerk of the court cannot reasonably locate the respondent (s187(5));
- If the respondent has not been served with the application – the clerk of the court must write the date, time, and place to which the matter has been adjourned on a copy of the application and give it to the police at the station nearest where the respondent lives (s187(3)). A police officer must then personally serve the application on the respondent (s187(4)).

See paragraph 6.3 and *STO v Queensland Police Service & Another* [2020] QDC 139 where a respondent appeared by telephone and no notice of adjournment was subsequently sent. McGinness DCJ found, even though there was no requirement to send a notice of adjournment, a miscarriage of justice occurred where a five-year protection order was made against the appellant in circumstances where his failure to appear was adequately explained.

14 VARIATION OF A DOMESTIC VIOLENCE ORDER

14.1 WHEN CAN A COURT VARY A DOMESTIC VIOLENCE ORDER? (S91)

- On its own initiative if a court convicts a person of an offence involving domestic violence (s42 – see paragraph 2.3);
- On its own initiative if the Childrens Court is hearing a child protection proceeding (s43 – see paragraph 2.5);
- On an application in writing (s91(1)).

(See paragraphs 14.10 and 14.11 below for the test to be applied).

14.2 WHO CAN APPLY FOR A VARIATION? (S86(1))

An application to vary any aspect of a domestic violence order including a condition of, the duration or, or the persons named in the order can be made to a court by (s86(1)) -

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

A named person or person acting under another Act for the named person can apply for a variation only in relation to their naming in the order or a condition of the order relating to them (s86(4)).

Note that an applicant for a variation of a domestic violence order **is obliged to inform the court about any family law order** of which they are aware and, if possible, give a copy of the order to the court (s77). Note that failure to comply with this requirement does not invalidate an application.

14.3 REQUIREMENTS OF THE APPLICATION FOR VARIATION (S86(2)-(6))

The application must (s86(2)):

- Be in the approved form – DV04 (Note that this form includes the advice to the respondent required under s88(2) that if they do not appear in court the court may hear and decide the application in their absence or issue a warrant for the respondent to be taken into custody if the court believes it is necessary for the respondent to be heard); and
- State the grounds on which it is made; and
- State the nature of the variation sought; and
- If the applicant is not a police officer, be verified by the applicant by a statutory declaration (a variation declaration); and
- Be filed in the court.

Note the application does not need to be verified if the clerk of the court agrees to grant the applicant's request under s90(2)(b) for the application to be heard before the application is served on the respondent and without the applicant giving the court a variation declaration (s86(3)).

Note that the application to vary an order **must be in writing**. There is no longer any provision for the court to hear an oral application to vary an order even if all parties are present, have been served and consent to the variation. (This change has occurred since the substitution of s142 of the DFVPA in 2013. The earlier provision incorporated r32 of the *Uniform Civil Procedure Rules 1999* which permitted the making of oral applications).

The variation can relate to (s86(4)):

- Condition on the order s86(4)(a);
- Duration of the order s86(4)(b);
- Persons named in the order s86(4)(c).

The application for variation of a domestic violence order may only be made while the domestic violence order is still in force (s86(6)).

14.4 SERVICE OF APPLICATION FOR VARIATION AND GIVING OF COPIES (SS88 & 89)

The applicant police officer is to put the date, time, and place of hearing on a copy of the application (s87(1)) and serve it on the respondent (s88(1))[72]. It may be served before it is filed in the court (s88(4)). A copy is to be given to the aggrieved, any named person who is affected by the application and any authorised person for the aggrieved who was the original applicant for the order (s89(1)).

For all other applications, the clerk of the court inserts the date, time and place of hearing and gives a copy to the applicant and to the police (s87(2)). The police must serve a copy on the respondent unless the respondent is the applicant, in which case the police are to personally serve the aggrieved and any named person who is affected by the variation application (s88(3)).

If the applicant is not the aggrieved or the respondent, they must give a copy to the aggrieved, any affected named person and any authorised person who applied for the original order on behalf of the aggrieved (s89(1)). Failure to comply does not invalidate the application (s89(2)).

14.5 ARRANGING FOR HEARING BEFORE SERVICE OF THE APPLICATION OR WITHOUT VARIATION DECLARATION (S90)

Applicants (other than the respondent) can ask the clerk of the court to arrange for the application to be heard before it is served on the respondent or before it is served on the respondent and without the applicant giving the court a variation declaration, for the purpose of the court making a temporary protection order under Division 2 (s90).

[72] Note an applicant may ask the court for a hearing before the application is served, under s90 (see note under s88(1).

If the respondent applies for a variation, the court must be satisfied that the aggrieved has been served before it can hear the application.

14.6 RESPONDENT'S CRIMINAL AND DOMESTIC VIOLENCE HISTORIES TO BE GIVEN TO COURT (S90A)

The *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* introduced changes requiring QPS to provide the respondent's criminal and domestic violence histories to the court in applications for and variation of protection orders.
[See also Chapter 5 re provision of criminal and domestic violence histories in applications for protection orders under s36A].

Where police are making an application to vary a domestic violence order, or the clerk of the court gives a variation application to the officer in charge of a police station under s87(2)(b):

- The police commissioner must ensure the respondent's criminal and domestic violence histories are filed in the court (with the application or before the first hearing); or is given to the court at the first hearing (s90A(1) and (2)).
- If the respondent does not have a criminal or domestic violence history, the police commissioner must ensure the court is informed of that fact (s90A(3)).

See 5.1 for definitions of "*criminal history*" and "*domestic violence history*".

Where a police commissioner is required to ensure that the respondent's criminal and domestic violence histories are filed in or given to a court under ss36A or 90A, the obligation applies only to information: in the police commissioner's possession; or that the police commissioner is permitted to access and give to the court to be used in a proceeding under this Act (s189(1) and (2)).

If a respondent's domestic violence history includes a domestic violence order made or varied by consent, the history filed or given to a court must state that fact (s189(1) and (2)).

Note: the DFVPA applies in relation to a person despite the *Criminal Law (Rehabilitation of Offenders Act) 1986* (s189A).

14.6.1 Respondent to be given a copy of the criminal and domestic violence history (r19B)

If the police commissioner is required under s36A or 90A to ensure a copy of a respondent's criminal and domestic violence history is filed in or given to a court, the police commissioner must ensure an identical copy of the histories is given to the respondent before the first hearing date in the application, unless it is not reasonable in the circumstances.

14.6.2 Court may issue directions in relation to criminal and domestic violence history (r22)

Rule 22 provides for various matters for which a court may issue a direction about, including that the police commissioner give the court a copy of a respondent's criminal and domestic violence history for a proceeding under s42 or 43 (r22(1)(q)).

If, in a DFVP application, the court considers it necessary to have a respondent's current criminal and domestic violence history because of the time that has passed since a copy of the history was filed in or given to the court under ss36A or 90A, the court may direct that the police commissioner give the court the respondent's current criminal and domestic violence histories (r22(3)).

If the court issues a direction under r22(1)(q) or r22(3)

- the direction applies only to information – in the police commissioner's possession; or that the police commissioner is permitted to access and give to the court; and
- if the respondent's domestic violence history includes a domestic violence order made or varied by consent under s51, the history given to the court must state that fact.

14.6.3 Court may make order about disclosure or access to respondent's criminal or domestic violence histories (s160A)

If the respondent's criminal or domestic violence history has been filed to given to a court hearing an application, the court may:

- Order that a person (not the respondent)[73] must not disclose information in the respondent's criminal or domestic violence history to another person (s160A(2));
- If satisfied that all or part of the respondent's criminal or domestic violence history is not relevant to deciding the application, decide the application without taking into account or hearing submissions about all or part of the histories (s160A(4)).[74]
    - If the court decides the application under s160A(4), the court may order:
        - The aggrieved or applicant (excluding the respondent and police) not be given a copy of or told about all or part of the histories (s160A(5)(a)); and
        - Any copies of the histories given to the aggrieved or applicant (excluding the respondent and police) be returned to the court (s160(5)(b)).

[73] s160A(3) *Domestic and Family Violence Protection Act 2012*.

[74] For example – the criminal history consists of a conviction for a minor stealing offence committed over 20 years earlier; or part of the criminal history consists of offences that did not involve violence committed as a child.

- Make an order under this section with or without conditions (s160A(6));
- Make an order under this section on its own initiative (s160A(7)).

14.6.4 Non-compliance

If a person does not comply with a court order under s160A, the person may be found in contempt of court under s50 *Magistrates Court Act 1921*, unless the person had a lawful excuse (e.g. disclosing information about a respondent's criminal or domestic violence history to a counsellor or legal representative.[75]

14.6.5 Transitional provisions (s234)

The following transitional arrangements apply to applications made but not decided before the commencement, for a protection order or a variation of a domestic violence order. The provisions apply whether or not the proceedings had started before commencement on 1 August 2023 (s234(1)).

If, in the court's opinion, the respondent's criminal and domestic violence history is relevant to deciding the application, the court may ask for the history; and consider the history in deciding the application (s234(2)). If the applicant is not a police officer, the clerk of the court may ask the police commissioner for the history (s234(3)).

- If a request is made, the police commissioner must ensure a copy of the respondent's criminal and domestic violence history is filed in court before the next hearing date; or is given to the court when the hearing of the application resumes (s234(4)).
- If the respondent does not have a criminal or domestic violence history, the police commissioner must ensure the court is informed of that fact (s234(5)).

(This section applies despite ss36A, 37, 90A and 91 (s234(6)).

14.7 WITHDRAWAL OF APPLICATION FOR VARIATION (RULE 50)

See paragraph 6.4 for how to withdraw an application for variation (see r50).

Note that where the application to be withdrawn is an application to vary a domestic violence order, and a court has made a temporary protection order under s48, see s48(5)(c) for the effect of the withdrawal and r19 at paragraph 7.2.2. In essence, the withdrawal of the variation application ends the suspension, and the first domestic violence order is revived.

[75] Explanatory Notes to *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022*, page 9.

14.8 HEARING OF APPLICATION FOR VARIATION (SS93 & 94)

The court may:

- Hear and decide the application if the respondent appears (s93(2));
- Hear and decide the application if the respondent does not appear but the court is satisfied that the respondent has been served (s94(2));
- Adjourn the application, whether or not it makes a temporary protection order, regardless of whether the respondent appears as long as the court is satisfied that the respondent was served (ss93(2)(b) and 94(2)(b));
- Issue a warrant if the respondent has not appeared but has been served (s94(2)(c));
- Dismiss the application without deciding it if the applicant has not appeared (ss93(3) and 94(2)(d)). Where the applicant is not the respondent, the court can only dismiss the application if no other police officer or service legal officer has appeared for a police applicant or no other person eligible to apply for the application has appeared (s93(3)(c) & (d)). The dismissal of an application does not affect the right of the applicant (other than the respondent) to make a further application (s93(4)).

14.9 TPO PENDING HEARING OF APPLICATION FOR VARIATION

When the court adjourns an application for variation of a domestic violence order, it may make a temporary protection order under s48 pending the hearing of the application.

These are discussed at paragraph 7.2.

14.10 WHAT THE COURT MUST CONSIDER BEFORE VARYING AN ORDER (S91(2))

Before it varies a domestic violence order, the court must consider:

- The grounds set out in the application for the protection order (s91(2)(a)); and
- The findings of the court that made the domestic violence order (s91(2)(b)); and
- If an intervention order has previously been made and the respondent has not complied with the order, the court **must consider** the respondent's failure to comply with the order (s91(3)(a)); and
- If an intervention order has previously been made and the respondent has complied with the order, the court **may consider** the respondent's compliance with the order (s91(3)(b)); but the court must not vary an order merely because the respondent has complied with an intervention order (s91(4)).
- The Court **may** consider the respondent's criminal history and domestic violence history if it is relevant to do so (s91(3)(c)). (The police commissioner is required to ensure the respondent's criminal history and domestic violence history is filed in or given to the court – see s90A).
- **The court must not vary an order** if the police commissioner has not been given a copy of the application for variation (s95).

Section 91(2)(a) of the DFVPA mandates that the court must consider the grounds set out in the application for the protection order. This was reinforced by Horneman-Wren SC DCJ in *ECW v ECW* [2018] QDC 166, who allowed an appeal against the decision to dismiss an application to vary a protection order by removing children from the order as named persons. His Honour found that the Acting Magistrate, in dismissing the application to remove children from the order on the basis that it was a matter for the Family Court, failed to properly consider the grounds of the original application for a protection order and the findings of the court that made the protection order: -

> *[33] With respect, that passage demonstrates that her Honour did not deal with the matter which was before her. It was, with respect, not a matter for the Family Court: it was a matter before her Honour, as an application to vary an order of the Magistrates Court. Section 91(1) of the Domestic & Family Violence Protection Act 2012 provides that a Court may vary a domestic violence order, on an application to vary it. By s 91(2) it is provided that:*
>
> > *Before a Court varies a domestic violence order, the Court must consider (a) the grounds set out in the application for the protection order, and (b) the findings of the Court that made the domestic violence order.*
>
> *[34] Her Honour published no separate decision in respect of the matter, or any reasons other than those which are articulated in the course of the hearing. A reading of that transcript demonstrates, to me, that the requirement mandated by section 91(2)(a) of the Domestic & Family Violence Protection Act 2012, that the Court consider the grounds set out in the application for the protection order before it varies the domestic violence order, was, simply, not observed by her Honour*.
>
> *[35] The circumstances of this case demonstrate why such a statutory requirement, prescribed in mandatory terms, is to be observed. The sexual abuse of the children was raised as a ground set out in the application for the protection order. Those matters were addressed by each party in the material filed in support of their positions, in respect of the application for variation. One could understand why the Act requires a consideration of those grounds, originally raised for the protection order to be made, in circumstances where a Court is considering varying the protection order.*

The Court must give adequate reasons of its considerations of s91(2) before making the variation. *ABF v DZT* [2020] QDC 136 was an appeal against a decision to vary the duration of a protection order for a further three years. McGinness DCJ in upholding a (third) ground of appeal[76], that the Magistrate failed to consider whether a variation of the protection order was necessary or desirable, found that given the Magistrate's brief reasons, she could not be satisfied that the Magistrate had regard to the relevant factors in ss91 and 37.

Her Honour conducted a re-hearing of the variation hearing and was satisfied there was evidence before the Magistrate at the variation hearing which warranted an extension of the protection order for a further three years. Her Honour was also satisfied the appellant continued to fail to

[76] The first and second grounds of appeal were found to be misconceived and without merit respectfully (that there had been no change in the respondent's circumstances (s29) and the appellant's affidavit and witness statutory declarations had not been properly considered).

comply with the conditions of the original protection order. In dismissing the appeal against the variation of the protection order, and finding it necessary and desirable to extend the current order for a further three years, Her Honour had regard to a number of factors pursuant to ss91 and 37, including (at [46]):-

- The grounds of the initial application for a protection order including allegations of physical, psychological, and emotional domestic violence.
- The appellant consented without admission to the original protection order for a period of two years.
- The appellant continued to breach the first condition of the protection order, that the appellant be of good behaviour towards the respondent, by continuing to send sarcastic, abusive, and intimidating messages to the respondent.
- The original order was not a five-year order as the appellant offered to attend an intervention order program (which he was subsequently found to be unsuitable for). The appellant presented no evidence at the variation hearing relating to his non-completion of the domestic violence courses.
- The appellant was found guilty of two breaches of the protection order.
- During the appeal hearing the appellant in his oral submissions continually blamed the respondent for inciting him to send her the relevant messages and for denying him access to their daughter and for mentally harming their daughter. Her Honour, at [47], "*I am satisfied he displayed almost no insight into how his ongoing written communications with the respondent would amount to emotionally or psychologically abusive behaviour*".

ABF v DZT was applied in *GRP v ABQ* [2020] QDC 272 where McGinness DCJ found the failure to provide adequate reasons as to whether one (of five) alleged incidents amounted to domestic violence amounted an error of law. Her Honour set aside the decision and conducted a rehearing on the affidavit evidence in the proceeding before the Magistrate.

14.11 PROPOSED VARIATION MAY ADVERSELY AFFECT SAFETY, PROTECTION OR WELLBEING (S92)

If the court considers that a variation may adversely affect the safety, protection, or wellbeing of the aggrieved or any named person the **court must also have regard to** (s92):

- Any expressed wishes of the aggrieved or named person (s92(2)(a)); and
- Any current contact between the aggrieved or named person and the respondent (s92(2)(b)); and
- Whether any pressure has been applied, or threat has been made, to the aggrieved or named person by the respondent or someone else for the respondent; and
- the safety, protection or wellbeing of people who fear or experience DV including children are paramount (s92(2)(d));
- Any other relevant matter.

The court may vary the order **only if the court considers** that the safety, protection, or wellbeing of the aggrieved or named person will not be adversely affected (s92(3)(a)) and if the variation is to reduce the duration of the order - there are reasons for doing so (s92(3)(b)).

(Examples of variations that may adversely affect the safety, protection and wellbeing of a person include removing a condition or removing a named person from the order.)

14.12 WHAT THE COURT MUST STATE IN A COPY OF VARIED ORDER (SS91(5) & (6))

If the court orders a variation, the **court must make a copy of the domestic violence order** that states (the ***varied order***):

- The details of the domestic violence order after the variation (s91(5)(a)); and
- The conditions of the domestic violence order after the variation (s91(5)(b)).

14.13 SERVICE AND NOTIFICATION OF VARIED ORDER

See Chapter 12 for service and notification of orders.

15 PRACTICE AND PROCEDURE FOR COURT PROCEEDINGS

15.1 APPLICABLE RULES

A proceeding in a court under the DFVPA is governed by the *Domestic and Family Violence Protection Rules 2014* (not the *Uniform Civil Procedure Rules 1999* or the *Childrens Court Rules 2016*[77]) (ss142(1) and (3))[78].

15.2 USE OF AUDIO-VISUAL LINKS OR AUDIO LINKS[79]

Section 142A of the DFVPA was inserted by the *Justice and Other Legislation Amendment Act 2021.* As part of the suite of reforms introduced to give permanency to the COVID-19 reforms allowing alternative arrangements in particular circumstances. The new s142A clarifies the accessibility to DFV proceedings by giving Magistrates discretion to conduct all or part of proceedings by AV link or audio link (s142A(2)).

In a proceeding under the DFVPA, a person is able to do any of the following by AV link or audio link (s142A(3)):

- Appear before the Magistrates Court;
- Give evidence or make a submission to the Magistrates Court;
- Take an oath or make an affirmation.

If all or part of a proceeding is conducted by AV links or audio links, a person who appears before the Magistrates Court for the proceeding is taken to be present before the Magistrates Court (s142A(4)).

15.3 APPLICABLE LAWS

The provisions of the *Justices Act 1886* apply to a proceeding under the DFVPA before a Magistrates Court or a Magistrate, unless such application is inconsistent with the DFVPA s143(a)).

For a proceeding under the DFVPA in the Childrens Court (s143(b)):

- The provisions of the *Justices Act 1886* apply unless they are inconsistent with the DFVPA or the *Childrens Court Act 1992*; and
- The provisions of the *Childrens Court Act 1992* apply unless they are inconsistent with the DFVPA.

The court is not bound by the rules of evidence (s145(1)(a)) and may inform itself in any way it considers appropriate (s145(1)(b)). This includes written submissions from the bar table (see *ATJ v SLK* [2018] QDC 191, Farr SC DCJ at [14].

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[77] The reference in the Act to the ***Childrens Court Rules 1997*** is incorrect.
[78] Note that the UCPR apply to an appeal under the Act (s142(2)).
[79] Note transitional provision s230 – proceedings commenced but not finalised before the commencement of the *Justice and Other Legislation Amendment Act 2021* may continue under new s142A.

Note, the *Evidence Act 1977* Part 2 Subdivision 2A creates a category of records defined as "protected counselling communications" (s14A) (see 15.6.5).

15.4 ISSUING DIRECTIONS

The court may issue directions in relation to a particular proceeding before the court to the extent that the matter is not provided for by the applicable rules or laws (s144).

Division 2 of the *Domestic and Family Violence Protection Rules 2014* explains the orders and directions that may be made or issued in a domestic violence proceeding.

Rule 22 sets out matters about which directions may be issued in a proceeding:

- That an application be amended, and how the application is to be amended;
- That an applicant gives further particulars about his or her application;
- That evidence be given by a person by affidavit[80];
- How and when an affidavit is to be filed and served on the other parties in the proceeding;
- That a person gives further details of a matter in the affidavit, and how the further details are to be given;
- That a person who has given an affidavit attend, or not attend, a proceeding;
- How a respondent may cross-examine an aggrieved or a named person[81];
- How a respondent's lawyers may cross-examine an aggrieved, named person or a child [82];
- That scandalous or oppressive matter be removed from an affidavit;
- That a scandalous or oppressive document be removed from the file;
- That a party to the proceeding may appear and make submissions by telephone, video link or another form of communication, including conditions about the appearance and submissions;
- That evidence may be received by telephone, video link or another form of communication, including conditions about how the evidence may be received;
- That a document, particular documents, or a class of documents be disclosed to a party in the proceeding, and how disclosure is to happen[83];
- If a person is to be specifically named in a domestic violence order and the application is to be served in a way other than r18[84] – the way the person is to be notified;
- That a named person give evidence in a proceeding; and
- How and when a subpoena is to be served.

Note that the court's order or direction prevails if it is inconsistent with another provision of the rules (r24).

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[80] See also paragraph 15.5 regarding affidavits.
[81] See also paragraph 15.12 regarding special provisions for protected witnesses.
[82] See also paragraph 15.11 regarding special provisions for child witnesses.
[83] See also paragraph 15.7 regarding court power to make and inspect and copy order in relation to documents produced in response to a subpoena.
[84] See paragraph 4.6 regardingpara service on a named person under r18.

A court can vary or revoke an order made or direction issued under these rules (r25).

15.4.1 Matters relevant to making orders or issuing directions

The interests of justice are paramount in deciding whether to make an order or issue a direction (r23(1)).

The DVFP court may also have regard to the following when deciding whether to make an order or issue a direction of the type in r22:

- The protection of the person for whose benefit an application for a protection order or variation of an order or a police protection application is made;

- That each party is entitled to a fair hearing[85] [86] [87] [88] [89] [90] [91] [92] [93] [94] [95] [96] [97] [98];
- The time allowed for taking a step in the proceeding or for the hearing must be reasonable;

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[85] See *AJC v Constable Kellie-Ann Gijsberten & Ors* [2019] QDC 195 where Lynham DCJ found the self-represented appellant had been denied procedural fairness by a prohibition on cross-examination of the aggrieved. His Honour considered the jurisprudence of the Family Court of Australia and guidelines applicable for trial judges in considering whether the self-represented appellant was provided adequate opportunity to present his case and whether the hearing was conducted according to proper procedure. At [71], determining the application "on the papers" was an error in procedure depriving the appellant of a fair hearing, and "*the failure of the Magistrate to explain to the appellant in terms he understood, the procedure by which the application would be determined, including how he could challenge evidence and how he could adduce evidence as part of his case also deprived the appellant of a fair hearing*." Appeal allowed on this ground.

[86] See *YTL v Commissioner of Police* [2019] QDC 173 where an appeal against a conviction for contravening a protection order was upheld as the appellant was denied a fair hearing by the Magistrate's management of the trial (the appellant was unrepresented, time limits were placed on giving evidence and cross-examination, and appellant was denied the opportunity to call an eye witness in his own case).

[87] See *JKL v DBA* [2020] QDC 159 where Byrne KC DCJ noted, in relation to the provision of written submissions to the respondent minutes before the hearing, at [49]: "*Where a self-represented opponent does not have the benefit of English as a primary language, and often where they do, it is far preferable that submissions be delivered at a time which will afford the party the opportunity to consume and understand the document. To do otherwise will raise a risk of a relevant unfairness, such as is asserted here."* See also *DGE v REU* [2023] QDC 35 in relation to a contested application involving non-English speaking parties (one being unrepresented), translations of documents, and cultural considerations.

[88] See Dearden DCJ in *EKL v Commissioner of Police & PEL* [2020] QDC 194, applying *AJC v AJC v Constable Kellie-Ann Gijsberten & Ors*, found a failure to comply with s151(4) was a fundamental error resulting in the appellant being denied a fair hearing. Dearden DCJ also found the discussions between the Magistrate and the Prosecutor in the absence of the appellant or his representative, at [18], "*…canvased various matters of substance in the application itself as well as matters personal to the appellant and was clearly a breach of natural justice. A judicial officer has an unwavering obligation to treat all parties in any litigation with procedural fairness and must avoid any apprehension of bias.*" See also *TAF v AHN* [2021] QDC 204 where Rinaudo AM DCJ found discussions between the Bench and respondent's solicitor in the absence of the appellant should not have occurred however they were of a procedural nature and not material to the decision the magistrate had to make (grounds of appeal of bias and magistrate misconduct were rejected).

[89] In *ARTE v Nugent & Anor* [2020] QDC 268**Error! Bookmark not defined.**, an exchange between the solicitor for the first respondent and the Magistrate regarding a domestic violence stakeholder group meeting, and other irregularities, is indicative of a reasonable apprehension of bias on the part of the Magistrate.

[90] See Chief Judge O'Brien's decision in *SMF v PDF & Anor* [2020] QDC 174, at [27] as to the requirements of procedural fairness and the duty of the court.

[91] In *PRH v LPL* & Anor [2021] QDC 17, the failure to allow the appellant to place significant proportions of evidence before the court amounted to a denial of natural justice.

[92] See *RIS v DOL & Anor* [2021] QDC 154 where Dearden DCJ stated the failure of the Magistrate when dealing with cross applications to follow the process in s.151 and to determine the applications, at a review mention, on the material filed without providing either party an opportunity for hearing or cross-examination amounted to a lack of procedural fairness for both parties.

[93] See *QKL v Queensland Police Service* [2021] QDC 195 where Burnett AM DCJ found natural justice was denied where the final decision was made upon the papers and the appellant was not afforded an opportunity to give evidence or to address issues of whether the order was necessary.

[94] See *DJS v A Police Officer & Anor* [2021] QDC 148 where Reid DCJ found the Magistrate's misunderstanding of the importance of motive for seeking a protection order led to an improper consideration of the issues of credit of the second respondent.

[95] See *FLC v MRT* [2021] QDC 264 where Porter KC DCJ found the Magistrate's reasons, contained in 35 lines of transcript, were inadequate to deal with conflicting versions of fact, whether an order was necessary or desirable and associated legal issues. Porter KC DCJ provides analysis and guidance on what "reasons" must cover. See also *BUI v SNL & Anor* [2021] QDC 285, *GJL v JW* [2023] QDC 36 and *ZTP v BBY* [2023] QDC 59**Error! Bookmark not defined.** in relation to inadequate reasons.

[96] See *TMG v Commissioner of Police* [2021] QDC 286 where refusal to grant leave to file affidavit evidence was found not to be procedurally unfair, applying Rule 5 *DFVP Rules*. The hearing had already been delayed 12 months to allow the aggrieved time to file material.

[97] See *LAF v AP* [2022] QDC 66 regarding the duty to ensure a trial is fair and the particular duty to ensure self-represented litigants are given due assistance.

- The complexity or simplicity of the case;
- The importance of the issues and the case as a whole;
- The volume and character of the evidence to be led;
- The time expected to be taken by the hearing;
- The number of witnesses to be called by the parties;
- That each party must be given a reasonable opportunity to lead evidence and cross-examine witnesses;
- The state of the court lists;
- Another relevant matter.

15.4.2 Failure to comply with court directions

A failure to comply is an irregularity and does not render a proceeding, a document or step taken in a proceeding a nullity (r26).

15.5 AFFIDAVITS

As noted in paragraph 15.4, the court may issue directions including that evidence of a person be given by affidavit, how and when the affidavit is to be filed and served, that further details of matters in an affidavit be provided and that scandalous or oppressive material be removed from an affidavit.

There are specific rules relating to affidavits:

- Rule 35 sets out the requirements for affidavits;
- Rule 36 outlines the requirement to swear or affirm an affidavit; and
- Rule 37 states that an affidavit can only be used in a proceeding if it has been filed unless the court orders otherwise.

15.5.1 Requirements for affidavits (r35)

An affidavit must:

- State the name of the person making the affidavit;
- State the name of the party on whose behalf it is filed;
- Include only matters relevant to the proceedings;
- Be divided into paragraphs numbered consecutively;
- Include page numbers;
- Include a statement that either the contents are true or, if the contents are based on information and belief (see below), a statement that those contents are true to the best of the knowledge of the person making the statement and that the person

[98] See *SK (A Child) v Commissioner of Queensland Police & Anor* [2023] QDC 65 where Morzone KC DCJ held that the child respondent was not afforded procedural fairness in terms of representation and opportunity to be heard. His Honour discussed procedural fairness in the context of a child respondent at [38]-[41].

understands that a person providing a false statement in the affidavit may commit an offence;
- Attach the documents referred to in the affidavit after the last page of the affidavit as exhibits to the affidavit;
- Comply with the *Oaths Act 1867.*

An affidavit may contain statements based on information and belief if the person making the statement states the sources of the information and the grounds for the belief (r35(6)).

15.6 SUBPOENAS (S154)

A court hearing an application may issue a subpoena requiring:

- The attendance of a person before the court to produce documents (subpoena for production);
- The attendance of a person to give evidence (subpoena to give evidence); or
- The attendance of a person to do both (subpoena for production and to give evidence) (s154).

The court may require the person to take an oath or affirmation (s154(2)).

Part 5 Division 4 of the *Domestic and Family Violence Protection Rules 2014* explains how a court may issue a subpoena.

15.6.1 Request for subpoena (r39)

Rule 39 sets out the process of request a subpoena and Form DV22A is the Request for Subpoena Form.

The request, in the approved form, must state the name of the person to whom the subpoena is directed (unless the court orders otherwise), must attach the subpoena that is to be issued by the court and must be filed (r39).

Note there is no time restriction legislated for requesting a subpoena. Rule 22 of the *Domestic and Family Violence Protection Rules 2014* empowers a domestic violence court to issue a direction about a number of matters including how and when a subpoena is to be issued (r22(p)). See *SMF v PDF & Anor* [2020] QDC 174 where Chief Judge O'Brien allowed an appeal against a decision not to issue a subpoena for being filed out of time. His Honour noted that unlike r145 of the *Uniform Civil Procedure Rules*, the DFVP Rules impose no time restraint or requirement with respect to either the filing or service of a subpoena.

15.6.2 Form of subpoena (r40)

Rule 40(1) sets out the formal requirements of a subpoena.

There is one approved form of Subpoena – Form DV22 – Subpoena – which covers the following three forms of subpoena available under s154 DFVPA:

- Subpoena for production;[99]
- Subpoena to give evidence;
- Subpoena for production and to give evidence.

A person to whom a subpoena is directed, must comply with it (r40(5)).

15.6.3 Service of subpoena (r22(p))

Rule 22(p) provides for the court to issue a direction about how and when a subpoena is to be served.

15.6.4 Setting aside a subpoena (r41)

A court may set aside all or part of a subpoena, including on any of the following grounds (r41):

- Want of relevance100;
- Privilege;
- Oppressiveness, including oppressiveness because substantial expenses may not be reimbursed;101
- Noncompliance with the Rules;
- Compliance with the subpoena would breach an obligation under an Act;
- Protected counselling communication (see 15.6.5).

15.6.5 Sexual Assault Counselling Privilege

The *Evidence Act 1977* was amended by the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* to establish a sexual assault counselling privilege. New Part 2 Subdivision 2A of the *Evidence Act 1977*, which commenced on 1 July 2017, protects counselling communications of a ***counselled person***.

Section 14B defines ***counselled person*** as a person who (a) is being, or has at any time been, counselled by a counsellor and (b) is, or has at any time been, a victim or alleged victim of a sexual assault offence.

A ***protected counselling communication*** is a confidential communication between a counsellor and counselled person (ss14A, 14B). Please note, a ***protected counselling communication*** does not extend to a communication made to or by a health practitioner

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[99] Note that r42 sets out how a person is to comply with a subpoena for production. Rule 43 gives more explicit advice about compliance with a subpoena to produce a media exhibit.

[100] See *DLM v WER & The Commissioner of Police* [2022] QDC 79 where the Magistrate's decision to refuse requests for the issue of multiple subpoenas for want of relevance was upheld. Cash KC DCJ noted however, at [51], the material may have contained matters relevant to the assessment of credit of the parties, however in this case the Appellant, appearing as a litigant in person, appeared to be on a 'fishing expedition", having already filed 171 pages in the proceedings. It was for the appellant to demonstrate the relevance of the witnesses or material sought by the subpoenas which he had not done. His argument was not assisted by pursuing "clearly non-sensical claims" such as the attempt to subpoena the first respondent's solicitor.

[101] See r44 at paragraph 15.6.8 for circumstances where court can order non-party costs of compliance.

about a physical examination of the counselled person conducted in the course of an investigation into an alleged sexual assault offence (s14A(2)).

A party cannot compel, whether by subpoena or otherwise, without leave of the court, a person to produce protected counselling communications (ss14D & 14F).

Application for leave to issue a subpoena for counselling records (s14G)

A qualified privilege operates in domestic violence proceedings. Notice of intent and leave is required prior to compelling a person to produce privileged counselling communications to a court. Leave of the court is required for privileged counselling communications to be inspected, copied, or adduced (s14G).

A party intending to issue a subpoena for the protected counselling communications must provide at least 14 days written notice to each party and the counsellor prior to applying for leave (s14G(5)).

The notice must include (s14G):

- A statement that the party intends to issue a subpoena for the person's counselling records;
- Describe the nature of the records and particularise the protected counselling communications sought; and
- Confirm that the counsellor or counselled person has standing to appear in the proceedings.

Where counselling communications are privileged, the counsellor and counselled person have standing to attend court to set out their reasons for objecting to the granting of leave for the privileged counselling communications to be produced to the court, inspected, copied, or adduced in court (s14L).

Upon receiving an application for leave to issue a subpoena, inspect, or copy subpoenaed records or to adduce evidence, that is a privileged counselling communication, the court must satisfy itself that the counselled person is aware of the relevant provisions and has had an opportunity to seek legal advice (s14K).

Deciding whether to grant leave (s14H)

Prior to granting leave for privileged counselling communications to be produced, inspected, copied, or adduced the court must be satisfied that:

- There is substantive probative value in producing or adducing this evidence;
- Similar evidence, that is not privileged, is not available to be produced and achieve the same purpose; and

- The public interest in producing the privileged counselling communications substantially outweighs the public interest in preserving the confidentiality of the communications and protecting the counselled person from harm (s14H(1)).

For deciding the application, the court may do any of the following (s14H(2A):

- Order a person to produce the protected counselling communication to the court;
- Consider the protected counselling communication;
- Make any other order it considers appropriate to facilitate its consideration of the protected counselling communication.

If the protected counselling communication is produced to the court under s14H(2A), then the court must not disclose it, or make it available to a party to the proceeding, before deciding the application (s14H(2B).

In *MH v HJ* [2023] QSC 176, the applicant (who was the complainant in a sexual offence criminal proceeding) sought orders in the nature of certiorari to set aside a pre-trial direction which had been made in the District Court enabling counsel for the first respondent (the defendant in the criminal proceeding) and the prosecution to access protected counselling communications concerning the applicant to ascertain whether they could be used in the criminal proceedings. Cooper J held that, in making this direction, the learned District Court judge had fallen into jurisdictional error, misapprehended the limited of the courts power to permit inspection of the protected counselling communication material and misconstrued the statutory provisions. Consequently, the court lacked authority to make the impugned direction. The direction was quashed, and the matter remitted to the District Court for further consideration.

Public Interest Test

The Court must have regard to the following (s14H(2)):

- The need to encourage victims of sexual assault offences to seek counselling;
- The public interest in ensuring victims of sexual assault offences receive counselling;
- Effective counselling is likely to rely on the counsellor maintaining the confidentiality of the counselled person;
- Disclosure of protected counselling communications may potentially damage the therapeutic relationship between the counsellor and victim of sexual assault;
- Whether disclosure of the communication is sought on the basis of a discriminatory belief or bias;
- That the disclosure of the communication is likely to infringe a reasonable expectation of privacy;
- The extent to which the evidence is necessary to enable an accused person to make a full defence; and
- Any other matter the court considers relevant.

When deciding an application for leave, the Court may consider a written or oral statement made by the counselled person outlining the harm the person is likely to suffer if the application is granted. Harm includes physical, emotional, or psychological harm, financial loss, stress or shock, and damage to reputation (s14H(3)-(8)).

Deciding whether document or evidence is protected counselling communication (s14M)

The court may consider a document or record to decide whether it is a privileged counselling communication. When considering a document or record, the court must exclude anyone who is not an essential person and any essential person that the counselled person asks to be excluded. The court may make any other order to facilitate its consideration of a document or record (s14M).

Every subpoena may include records that are privileged counselling communications. Each subpoena should state that the privileged counselling communications are excluded from the material sought unless leave has been given for the privileged counselling communications to be included.

R v JML [2019] QDCPR 23 was the first reported decision to consider the new sexual assault counselling privilege, where the application for a subpoena for the production of the protected counselling communication was dismissed. The defendant was charged with sexual offences (all domestic violence offences) against his stepdaughter, M, when she was 10 to 13 years old. For several months during that time, M received professional counselling. The defendant sought leave to subpoena the counselling records for use at trial.

Fantin DCJ provided a detailed analysis of the relevant legislative scheme, particularly the requirements of s14H of the *Evidence Act 1977* that must be met before an application for production of a 'protected counselling communication' can be granted.

Fantin DCJ turned to the three limbs of s14H, all of which must be satisfied before granting an application for a subpoena for production of the communication.

First limb of s14H – Substantial probative value of protected counselling communication

Her Honour noted, at [50], that **the court must be satisfied that the communication will have substantive probative value**. The cases suggest that evidence has probative force if it increases or diminishes the probability of the existence of a fact in issue – it must render the fact in issue more probable than it would be without the evidence. Fantin DCJ said, at [54]-[55], that 'substantive probative value' is more exacting than 'legitimate forensic purpose' that normally applies to subpoena applications and 'substantial' requires something that is very important, ample, or considerable.

Fantin DCJ noted, at [51], that the communication must be considered, not in isolation, but having regard to other documents or evidence, with a focus on the use which the party seeking them may wish to put the communication.

At [57], Her Honour said that if the communication cannot render a fact in issue more probable than it would be without the evidence, it will not have substantial probative value.

In this case, the principal fact in issue was whether M was sexually assaulted by her stepfather. Only M and the defendant were present at the alleged assault. Thus, the question was whether M was a truthful and reliable witness. The defence argued that the counselling records could have substantial probative value regarding M's credibility. However, Her Honour dealt and dismissed each of the points raised in turn:

(a) the defence argued that M had not complained about the offending to the counsellor although some of it occurred during the counselling period. Her Honour made various observations, including that it is wrong to make assumptions about how sexual assault complainants should behave and it cannot be assumed that delay in complaining is always a sign that the allegation is false. There may be good reason why, particularly a child, might not complain. In the context of this case, M lived with the defendant, she had no other family close by, the counselling was for other issues, she was 'scared' to tell her mother in case the defendant found out, and that the defendant said her mother would be upset if she knew about their interactions. In these circumstances, if the communication evidenced a lack of complaint being made, this did not have substantial probative value regarding M's credibility.

(b) that M had mentioned her relationship with the defendant in a positive way is not necessarily inconsistent with the alleged offences having occurred. The positive descriptions might merely indicate M being unable to properly rationalise the inappropriateness of the relationship. Such evidence could not have substantial probative value regarding M's credibility.

(c) if there was evidence in the records giving rise to a possible motive for a false complaint, that could have substantial probative value. However, there was other evidence, apart from the records, that could possibly reveal possible motives for falsely complaining.

Fantin DCJ considered the defendant's submissions and what the counselling communication actually contained. At [83]-[84], Her Honour said she was not satisfied that the communication would, in isolation or having regard to other documents or evidence, have substantial probative value regarding a fact in issue, namely, M's credibility.

As the first limb of s14H was not satisfied, the application to subpoena the records failed. However, for completeness, Her Honour considered the other two limbs of the test.

<u>Second limb of s14H – no other evidence available</u>

Section 14H(1)(b) requires that **there are no other documents or evidence concerning the matters to which the protected counselling communication relates**. This requirement is

intended to prevent access to protected communications if relevant material can be obtained from other sources, such as police statements.

Fantin DCJ, at [91], said that the matters raised by the defence were ones about which other evidence might well be available (neither party identifying any such evidence). Other witnesses, such as the mother, could give evidence about the relationship between M and the defendant and possible motives for a false complaint. Thus, the second limb of the test also failed.

Third limb of s14H – weighing competing public interests

Section 14H(1)(c) requires that **the public interest in admitting the communication into evidence 'substantially outweighs' the public interest in (a) preserving its confidentiality, and (b) protecting the counselled person from harm**. The requirement imposes an additional and significant constraint. It necessitates that access is conditional on the public interest in protection of confidence be 'substantially outweighed' by the interest in admitting the communication into evidence to enable the defendant to test M's credibility.

At [99], Her Honour found, on the basis of the evidence, submissions, mandatory matters under s14H(2) and M's statement to the court:

- if the application were granted, M was likely to suffer psychological or emotional harm.
- M participated in counselling believing it was confidential and provided a safe space
- disclosure of the records (protected counselling communication) –
    - would be likely to damage the relationship between M and the counsellor and may damage relations with other family members.
    - would be likely to infringe a reasonable expectation held by M that the records would be private.
    - would inhibit M from engaging in counselling again for present reasons or any future reason; and
    - is not necessary to enable the defendant to make a full defence.

At [100], Fantin DCJ concluded that she was not satisfied that the public interest in admitting the communication substantially outweighed the public interest in preserving the confidentiality of the communication and protecting M from harm.

Conclusion

Fantin DCJ was not satisfied that any of the limbs of s14H were satisfied, let alone all of them. Accordingly, the application for a subpoena for the production of the protected counselling communication was dismissed.

JML has been followed in *R v HJE & HRB* [2019] QDCPR 23 and *R v Do* [2019] QDCPR 49. In *HJE & HRB*, Dick SC DCJ adopted Fantin DCJ's meaning of "substantive probative value" in finding the protected counselling communication did not have substantial probative value

whether by itself or having regard to other documents or evidence. In *DO*, Smith DCJA again considered the legislative framework and Fantin DCJ's decision in *JML* as to "substantive probative value" and the public interest limb of s14H(1)(c).[102]

15.6.6 Refusal to comply (s155)

If the person attends court in response to a subpoena and without reasonable excuse (s155) –

- Refuses to be sworn or to affirm; or
- Refuses to answer a question put to them; or
- Fails to give an answer to the court's satisfaction;

the court may treat it as a contempt of court. (See s50 of the *Magistrates Courts Act 1921* for the power of the court to punish a person for contempt and the penalties that apply).

15.6.7 Compliance with subpoena for production (rr42 & 43)

Note r42 explains how to comply with a subpoena for production and provides that an agent of the person named in the subpoena may produce the document or thing to the court (r42(6)).

Rule 43 contains explicit requirement re compliance with a subpoena to produce a media exhibit[103], requiring that it be produced in a format capable of being played or viewed.

15.6.8 Non-party costs of compliance (r44)

If a court is satisfied that a non-party to the proceeding has or will incur substantial loss or expense in complying with the subpoena, the court may order the party on whose part the subpoena was issued to pay all or part of the losses/expenses, including legal costs, incurred by the non-party in responding (r44).

This costs order must be made before any order is made finally deciding the proceeding at first instance (r44(4)).

The court may fix the amount payable or order the amount to be fixed by assessment (r44(3)).

Note that if a party who is ordered to pay losses and expenses under r44(2) obtains an order for costs of the proceeding under s157 of the DFVPA, the court may make another order it considers appropriate (r44(5)).

15.7 COURT POWER TO ORDER INSPECTION AND COPY OF SUBPOENAED DOCUMENTS (R45)

[102] See also *R v Kay* [2021] QDCPR 10; *R v LFC* [2021] QDCPR 60; *TRKJ v Director of Public Prosecutions (Qld) & Ors; KAY v Director of Public Prosecutions (Qld) & Ors* [2021] QSC 297

[103] Defined in the Rules (Schedule 2) as a plan, photograph, video or audio recording or model. See paragraph 16.6 for special rules regarding the tendering of media exhibits.

Where a document has been subpoenaed and given to the clerk of the court it cannot be inspected or copied by any person, including the parties, without an 'inspect and copy order' issued by the court (r45(2)).

An 'inspect and copy order' means an order made by the court that authorises the person named in the order, to inspect, or inspect and copy, the document (r45(7)). Note that the court must specifically order that the person may copy it in the registry (r45(6)).

15.7.1 When can the court make an "inspect and copy" order? (r45(4))

The court can make an "inspect and copy" order upon application by a person, only if:

- The court has given all the parties to the proceeding a reasonable opportunity to present evidence and make submissions about the application, including objecting to the making of the order; and
- The court has considered the submissions; and
- The court considers it appropriate in the circumstances to make the order (r45(4)).

The "inspect and copy" order authorises the person to inspect the document in the registry and, if the court specifically orders it, to make a copy in the registry (r45(6)).

15.7.2 Court can refuse to make an inspect and copy order (r45(5))

Rule 45(5) provides that the court may, even if the other parties to the proceeding have not been given notice of the application:

- Hear and refuse the application; or
- Dismiss the application without deciding it.

15.8 CLOSED COURT (S158)

A court hearing an application under the DFVPA is not to be open to the public (s158(1))[104].

The court may open the proceeding or part of the proceeding to the public or to specific persons (s158(2)). Examples of where the court may open the proceedings are (s158):

- Where the court is hearing another proceeding that concerns the same events upon which the domestic violence proceeding is based, and the other proceeding is required to be held in open court;
- Where the court considers that it is in the public interest to hear the proceeding in open court because the aggrieved and respondent are well known to the public and a closed court may result in an inaccurate representation of the proceeding.

[104] Note that a proceeding where a court is making or varying a domestic violence order on its own initiative after convicting a person of an offence involving domestic violence **must** be held in open court, unless the court orders otherwise (s42(8)) (see paragraph 2.3.6)

Note that an aggrieved is entitled to have an adult support person with them throughout the proceeding (s158(3)).

15.9 EXPLANATIONS TO PARTIES ON FIRST APPEARANCE (S84)

If a court is hearing an application for a domestic violence order; and

- The aggrieved or the respondent is personally before the court for the first time in relation to the application;

the **court must ensure** that the aggrieved or respondent understands the nature, purpose, and any legal implications of the proceeding and of any order or ruling made by the court (s84(1)).

15.9.1 Court may enlist assistance in explaining the proposed order

The court may use the services of others to assist in complying with s84 to the extent the court considers appropriate (s84(4)). Examples include:

- Arranging for the clerk of the court or a public service employee to explain the order;
- Using a professional interpreter or the telephone interpreter service;
- Giving out explanatory notes prepared for aggrieved or respondents, including in languages other than English;
- Arranging for an Indigenous council, community justice group or group of elders to explain the order; and
- Arranging for a non-government service provider's disability case worker to explain the order to an aggrieved or respondent who has a disability.

Note, this must occur before the order is made, see *JC v KP* [2017] QDC 175 (see paragraph 8.6).

15.10 RIGHTS OF APPEARANCE AND REPRESENTATION (SS146 & 147)

- A party (including an aggrieved) to a proceeding may appear in person or be represented by a lawyer (s146(1))[105];
- A police officer or service legal officer may appear in any proceeding under the DFVPA (s146(2));
- A police officer, service legal officer or authorised person for an aggrieved person may appear and act on behalf of an aggrieved in a proceeding for any application under the DFVPA (s147(1)).

If the authorised person for the aggrieved who has made the application is not able to help the court, the application is taken to have been made by the aggrieved (s147(2)).

[105] See *JKL v DBA (No. 2)* [2022] QDC 142 where it was held no procedural fairness arose from the appellant's lack of legal representation at the trial of an application to vary the protection order given the appellant's competence to adequately represent himself at trial and appeal.

Note the Queensland Police Service *Operational Procedures Manual* (OPM) was amended (effective 15 December 2023) with respect to the provision of information in private applications for a domestic violence order. The effect of this change is that in private applications, prosecutors can now provide the court with information that is relevant to the proceedings (for example, relevant entries on criminal histories, any prior domestic and family violence occurrences etc) when it is requested by a Court. It also outlines when it would be appropriate for Queensland Police Prosecutions to assist an aggrieved, under s147. See OPM, section 9.11

15.10.1 Unrepresented child (s149)

A court may adjourn a proceeding if a child who is:

- Named in an application for a protection order as an aggrieved; or
- Named in an application for a protection order as a respondent; or
- Is involved in proceeding under s42 (conviction for an offence involving domestic violence); or
- Is involved in a proceeding under s43 (a child protection proceeding);

has not had a reasonable opportunity to obtain representation by a lawyer (s149).

15.11 HJSPECIAL PROVISIONS FOR CHILDREN[106] (S148)

15.11.1 Giving evidence etc.

A child (other than one who is an aggrieved or a respondent) may only be called to give evidence with the leave of the court (s148(2)). The **court may only grant leave if**:

- The child is at least 12 years of age; and
- Is represented by a lawyer; and
- Agrees to give evidence (s148(3)).

The **court must have regard to** the following in deciding whether to grant leave (s148(4)):

- The desirability of protecting children from unnecessary exposure to the court system; and
- The harm that could occur to the child and to family relationships if the child gives evidence.

Because a child is also a protected witness (see below), **the court must make at least one of the orders i**n s150(2)(a) to (d):

(a) That the child give evidence outside the courtroom and the evidence be transmitted to the courtroom by audio visual link; and/or
(b) That the child give evidence outside the courtroom and an audio-visual record of the evidence by made and replayed in the courtroom; and/or

[106] Note that these provisions do not affect the *Evidence Act 1977*, s21A (evidence of special witnesses).

(c) While the child is giving evidence, that a screen or one-way glass or other thing be placed so the child cannot see the respondent; and/or
(d) While the child is giving evidence that the respondent be held in a room apart from the courtroom and the evidence be transmitted to that room by audio visual link.

Leave of the court is required for a person to do any of the following in respect of a child (s148(5)):

- Call the child as a witness in the proceeding.
- Ask the child to remain in court during the proceeding.
- Ask the child to swear an affidavit for the proceeding.
- Ask the child to produce a stated document or thing for a proceeding.

15.11.2 Cross-examination

Leave of the court is required to cross-examine a child who has been granted leave to give evidence (s148(6)).

Note that a child is also a protected witness and therefore **the court must make an order** that the respondent may not cross-examine the child witness in person (s151(3)) (see below).

Where a court makes an order prohibiting a respondent from cross-examining a child witness in person, **the court must**:

- Inform the respondent that they cannot cross-examine in person; and
- Require the respondent to advise the court by a stated date or time whether the respondent has arranged for a lawyer to act for the respondent or to cross-examine the child witness or has decided not to cross-examine the child witness (s151(4)).

See also court's power to issue directions re cross-examination of a child (paragraph 15.4).

15.12 SPECIAL PROVISIONS FOR PROTECTED WITNESSES [107] (S150 & S151)

A protected witness includes any of the following persons who is to give or is giving evidence in a proceeding under the DFVPA (s150(1)):

- The aggrieved.
- A child.
- A relative or associate of the aggrieved who is named in the application that relates to the proceeding.

[107] Note that these provisions do not affect the *Evidence Act 1977**Error! Bookmark not defined.***, s21A (evidence of special witnesses).

Note: These provisions apply to civil proceedings under DFVPA only. For proceedings for an offence against the DFVPA and summary proceedings under the *Justices Act 1886* for a domestic violence offence, Part 2, Division 6 of the *Evidence Act 1977* applies to the cross-examination of protected witnesses – see paragraph 21.5 regarding cross-examination of protected Witnesses in offence proceedings.

15.12.1 Giving evidence

The court **must** consider whether to make any of the following orders (s150(2)):

(a) That the protected witness give evidence outside the courtroom with transmission to the courtroom via audio visual link;
(b) That the protected witness give evidence outside the courtroom and an audio-visual recording be played in the courtroom;
(c) That the protected witness give evidence behind a screen or one-way glass so as not to see the respondent;
(d) That the respondent be moved to another room where they can view the protected witnesses' evidence by audio visual link;
(e) That the protected witness be accompanied by a support person approved by the court;
(f) If the protected witness has a physical or mental disability, that they give evidence in a way specified by the court that will minimise their distress;
(g) Any other alternative arrangement the court considers appropriate.

As noted above in the section on child witnesses, if the protected witness is a child, the court must make at least one of the orders in (a) to (d) (s150(3)).

15.12.2 Restrictions on cross-examination in person of a protected witness

Cross-examination of a protected witness by the respondent in person where the respondent is not represented by a lawyer is restricted under s151. On its own initiative or on the application of a party to the proceedings, the court **may** order that the respondent may not cross-examine the protected witness in person if the court is satisfied that the cross-examination is likely to cause the protected witness to:

- Suffer emotional harm or distress; or
- Be so intimidated as to be disadvantaged as a witness (s151(2)).

If the witness is a child, the court **must** make an order that the respondent may not cross-examine the child witness (s151(3)).

Where a court makes an order prohibiting a respondent from cross-examining a protected witness in person, the court must:

- Inform the respondent that they cannot cross-examine in person; and

- Require the respondent to advise the court by a stated date or time whether the respondent has arranged for a lawyer to act for the respondent or to cross-examine the protected witness or has decided not to cross-examine the protected witness (s151(4)).

Rule 22 provides that the court may issue a direction about:

- How a respondent may cross-examine an aggrieved, or a named person; and
- How a respondent's lawyer may cross-examine an aggrieved, named person or a child.

For further discussion in the National Bench Book see Chapter 10.3.2 Cross-examination.

In *AJC v Constable Kellie-Ann Gijsberten & Ors* [2019] QDC 195, Lynham DCJ considered, inter alia, whether a prohibition on allowing the appellant to cross-examine the aggrieved deprived the appellant of a fair hearing. The Magistrate made his decision on this point without hearing submissions under s151. Section 151 confers a discretion on the court not to allow cross-examination of an aggrieved. Sections 151(2) contains the considerations relevant to the discretion, that is, if the court is satisfied that the aggrieved is likely to suffer emotional harm or distress or be so intimated as to be disadvantaged as a witness, if they are cross-examined by a respondent in person. Section 151(4) sets out what the Magistrate is required to do, if it makes an order prohibiting cross-examination under s151(2).

His Honour found that the appellant had been denied procedural fairness as the decision was made without hearing submissions from the police prosecutor as to the aggrieved being likely to suffer emotional harm or distress etc under s151(2)(a) and (b). Section 151(4) was not complied with as the Magistrate did not require the appellant to inform the court of various matters (that he had arranged a lawyer etc). At [79], failing to comply with the requirements of s151 was a fundamental error which denied the appellant a fair hearing. The appeal was allowed on this ground.

See also *YTL v Commissioner of Police* [2019] QDC 173, an appeal to the District Court from a decision of the Richlands Magistrates Court to convict for a contravention of a protection order. The appeal was upheld on the basis of a failure of procedural fairness and natural justice, including the imposition of time limits on evidence and cross-examination.[108]

AJC v Constable Kellie-Ann Gijsberten & Ors was applied in *EKL v Commissioner of Police & PEL* [2020] QDC 194. In this case, the Magistrate made an order under s151(2) restricting cross-examination by the respondent however failed to comply with the mandatory provisions of s151(4). At [35], finding Lynham DCJ's conclusion in *AJC v*

[108] See *YTL v The Attorney-General for the State of Queensland* [2020] QDC 44**Error! Bookmark not defined.**, for the appeal against conviction for contempt for not answering a question from the Magistrate.

Constable Kellie-Ann Gijsberten & Ors directly applicable, Dearden DCJ found the learned Magistrate's non-compliance with the mandated provisions of s151(4) was a fundamental error which resulted in the appellant being denied a fair hearing.

See *RIS v DOL & Anor* [2021] QDC 154 where the Magistrate *failed* to follow the process in s151(4). Dearden DCJ found neither party was afforded procedural fairness.

See also *TAF v AHN* [2021] QDC 204which also concerned an *appeal* against a decision not to allow cross-examination. Sub-sections 151(1) and (2) were cited in the decision (but not sub-section 151(4)).

See also *LAF v AP* [2022] QDC 66 where Smith DCJA *found* the Magistrate failed to give the Appellant a fair hearing by ignoring clear evidence before the court that the Appellant suffered from post-traumatic stress disorder. The Magistrate ignored this evidence and failed to take it into account in determining the application under s151.

15.13 SPECIAL PROVISIONS FOR PERSONS WITH IMPAIRED CAPACITY

15.13.1 What if the aggrieved has impaired capacity?

A person may be a litigation guardian for an aggrieved with *impaired* capacity if the person (r27):

- Is an adult; and
- Is not a person with impaired capacity; and
- Has no interest in the proceedings adverse to the interest of the aggrieved; and
- Consents.

If an aggrieved with impaired capacity does not have an authorised person appearing on their behalf (under s25) and a guardian has not been appointed for the person for a legal matter pursuant to the *Guardianship and Administration Act 2000*:

- A person can become a litigation guardian by filing in the registry the person's written consent to be litigation guardian of the aggrieved (see Form DV 29); or
- A DVFP court may appoint a litigation guardian. The court may also remove a litigation guardian for the aggrieved or substitute another person as litigation guardian (r28).

A person with impaired capacity may start proceedings by the person's litigation guardian. The litigation guardian can do anything that may be done by a party in a proceeding (r30).

Note: s163 requirement to notify the public guardian in certain cases where a court makes a domestic violence order involving an adult with impaired capacity (see paragraph 13.7).

15.13.2 What if a respondent has impaired capacity?

If in deciding whether to hear and decide an application, adjourn the application, or order the issue of a warrant for the respondent, the court is aware that the respondent is a person with impaired capacity, the court may consider whether to appoint a litigation guardian or to continue to hear the proceeding before a litigation guardian is appointed (r31).

A person may be a litigation guardian for a respondent with impaired capacity if the person (r27):

- Is an adult; and
- Is not a person with impaired capacity; and
- Has no interest in the proceedings adverse to the interest of the aggrieved; and
- Consents.

If a respondent has impaired capacity and does not have a guardian appointed for a legal matter pursuant to the *Guardianship and Administration Act 2000*:

- A person can become litigation guardian by filing their written consent in the registry (see Form DV 29);
- A DVFP court may appoint a litigation guardian. The court can also remove or substitute another litigation guardian (r28).

A person with impaired capacity may be a respondent for a proceeding by the person's litigation guardian. The litigation guardian can do anything that may be done by a party in a proceeding (r30).

15.13.3 Named person with impaired capacity

A person may be a litigation guardian for a named person with impaired capacity if the person is an adult, is not impaired, has no interest in the proceeding adverse to the named person and consents (r27). If a named person has impaired capacity and does not have a guardian appointed for a legal matter pursuant to the *Guardianship and Administration Act 2000*:

- A person can become litigation guardian by filing their written consent in the registry.

A DVFP court may appoint a litigation guardian. The court can also remove or substitute another litigation guardian (r28).

15.13.4 Notice to the Public Guardian where adult with impaired capacity involved (s163)

If the court:

- Makes a domestic violence order; and
- Court considers there was domestic violence or associated domestic violence involving an adult with impaired capacity; and

- Considers that because of the circumstances involving, or the nature of the violence, the public guardian should be informed about it;

the court may inform the public guardian in writing about it (s163).

15.14 PROHIBITION ON PUBLICATION (S159)

There is a prohibition on the publication of:

- Information given in evidence in a proceeding under the DFVPA in a court; or
- Information that identifies or is likely to identify a person as a party to the proceeding, or a witness (other than a police officer) or a child concerned in a proceeding (s159(1)).

However, the court can expressly authorise the information to be published (s159(2)(a)).

Other exceptions to the prohibition include: with the consent of the persons to whom the information relates; the display of a notice in the courthouse; the publication in law reports or on judgments website if the information does not identify the parties, witnesses or children; for approved research as long as it is non-identifying; if permitted under this or another Act or a regulation (s159(2)(b)-(g)).[109]

Note that the definition of *publish* is more limited than the definition in the 1989 DFVPA and refers to publishing *to the public*. This limitation is designed to ensure that necessary communication of information related to proceedings is not hampered (See *Domestic and Family Violence Protection Bill 2011 Explanatory Notes* at 83-84 for examples).

15.15 PROHIBITION ON OBTAINING COPIES OF DOCUMENTS FOR PROCEEDING (S160)

As a general rule, a person is not entitled to a copy of:

- Any part of the record of a proceeding under the DFVPA; or
- Any document used or tendered in proceedings under the DFVPA (s160(1)).

Exceptions to the general prohibition apply to (s160(2))[110]:

- A party to the proceeding; or
- A person named in an order made in the proceeding; or
- A person expressly authorised by the court or the chief executive (Magistrates court) to obtain the copy; or
- A qualified person authorised by the chief executive (Magistrates court) to use the document for approved research under s161; or
- An Australian court – a court of the Commonwealth or a State or Territory; or

[109] For publication permitted under a regulation under s159(2)(g), see s2 of the *Domestic and Family Violence Protection Regulation 2023*.

[110] Those entitled to access documents under s160 can make a request in accordance with Rule 47.

- A police officer if the court considers an offence may have been committed and the copy of record is relevant for an investigation into whether an offence has been committed or a copy of the record is relevant to investigation or prosecution of an offence; or

The Director of Public Prosecutions or a police prosecutor if the record is relevant to the prosecution of an offence or another proceeding related to an offence.

15.16 PERMANENT STAY OF PROCEEDINGS FOR AN ABUSE OF PROCESS

See paragraph 6.5 regarding permanent stay of proceedings for an abuse of process.

16 EVIDENCE

16.1 COURT NOT BOUND BY THE RULES OF EVIDENCE & MAY INFORM ITSELF IN ANY WAY

Section 145(1) of the DFVPA provides that in a proceeding under that Act, the court is not bound by the rules of evidence, or any practices or procedures applying to courts of record and may inform itself in any way it thinks appropriate.

ADH v ALH & Commissioner of Police [2017] QDC 103 Morzone KC DCJ described the DFVPA as "*remedial legislation [it] ought to have been given the widest construction that the terms can fairly bear* [44]."

His Honour [46] examined s145 and said:

> *The premise of the section is clear – the court ought have all pertinent information to fulfil the purpose of the proceeding reflected in the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.*[111] *Nevertheless, although not bound by the rules of evidence, it is well settled that the court's decision must derive from relevant, reliable and rationally probative evidence that tends to show the existence of the facts in issue*[112]*. It is not enough to suspect or speculate that something might have occurred.*[113]

His Honour also considered s145 in *RCK v MK* [2018] QDC 181 and said:

> *Although not bound by the rules of evidence, it is well settled that the court's decision must arrive from relevant, reliable, and rationally probative evidence that tends logically to show the existence or non-existence of the facts in issue. It is not enough to suspect or speculate that something might have occurred. Further, the seriousness of the allegations and the gravity of the consequences of the proceedings in a protection order being imposed also warrants the considerations drawn from Briginshaw v Briginshaw (1938) 60 CLR at 362. That is, the seriousness of the allegations in the case and the gravity of their consequences warrant that a higher degree of certainty be satisfied on the balance of probabilities.*

Note that this provision does not mean that the rules of evidence are to be ignored. As Justice Evatt of the High Court said in *R v War Pensions Entitlement Appeals Tribunal; ex parte Bott* (1933) 50 CLR 228, 256[114] when considering a similar provision that the tribunal was not bound by the rules of evidence:

> *But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, throughout many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In*

[111] ss4 and 57
[112] *Sudath v Health Care Complaints Commission* [2012] NSWCA 171
[113] *Minister for Immigration and Ethnic Affairs v Pochi* [1980] FCA 85
[114] As cited in Forbes, JRS Evidence Law in Queensland, 6th ed, 2006 at p 2.

other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice.

In the context of domestic and family violence legislation, McGill DCJ in *DMO v RPD* [2009] QDC 92[115] considered the equivalent provision to s145 in the 1989 DFVPA and said:

> [9] *Provisions of this nature are familiar, and they do not exclude an obligation to accord procedural fairness. Nor do they have the effect that an order can be made without any proper basis; the position is simply that the formal rules of evidence do not apply, so that it would be open, for example, in an appropriate case to receive material which would ordinarily be excluded as hearsay, or to receive evidence in written form. But there must still be evidence, in the sense of there being some material put before the court which provides a rational basis for arriving at the state of satisfaction contemplated by s20, and it must be put before a court in a way which gives the opposite party the opportunity to challenge that evidence, and to put the opposite party's case in relation to the matter.*
>
> *[10] Ordinarily, therefore, one would expect that the hearing of an application under the Act, where the respondent appeared and contested the matter, would proceed in much the same way as a civil trial; the applicant would give or call evidence, and the applicant's witnesses would be cross-examined by the respondent, and the respondent would then give or call evidence and be subject to cross-examination.*

In *LDC v TYL and STP* [2017] QDC 197, Muir DCJ, noting Morzone KC DCJ in *ADH v AHL* and the Briginshaw principle said:

> *[47] The relevant principle is that depending on the nature and gravity of the allegation against a party, the strength of the evidence required to meet the standard of proof may vary. What this means is that for more serious allegations, the court ought to more closely examine the evidence to ensure that it is strong enough to prove the allegations on the balance of probabilities. However, it is important to recall that the Briginshaw principle does not create another standard of proof.*

In *NBE v PRT & Anor* [2018] QDC 29, Long SC DCJ considered an appeal form a decision of a Magistrate to dismiss an application for a protection order in circumstances where the applicant did not attend court but a third party sought to appear on her behalf. Before the hearing, she had provided a statutory declaration to the Court advising that she did not wish to attend if the respondent did so and asked the court to make the order in her absence. The Magistrate arranged for an email to be sent to her before the hearing saying that her presence was required. She did not attend. The Magistrate rejected her evidence and accepted the evidence of the respondent. An order for costs was made against the applicant.

Long SC DCJ considered *LKL v BSL* [2015] QDC 337**Error! Bookmark not defined.**. His Honour said it should not be discerned that the statutory intent was to preclude a hearing in the absence of the applicant. He considered s38(3) which provides that an application can only be dismissed in certain circumstances; when the applicant or a police officer or third person has not appeared for them.

[115] Cited in *LJC v KGC and Commissioner of Police* [2012] QDC 67

The case contains a discussion about the award of costs to the respondent ex parte and the fact this was not an appropriate case for the exercise of that jurisdiction.

For further discussion of evidence issues, see National Bench Book Chapter 9.2.3 Vulnerable or special witnesses.

DMO v RPD and *LKL v BSL* were both cited in *RIS v DOL & Anor* [2021] QDC 154 which concerned an appeal against the dismissal of an application for a protection order, a cross application. Dearden DCJ found the failure of the Magistrate when dealing with cross applications to follow the process in s151 and to determine the applications, at a review mention, on the material filed without providing either party an opportunity for hearing or cross-examination amounted to a lack of procedural fairness for both parties. Citing the earlier authorities, Dearden DCJ stated at [29] "*…the learned magistrate had failed to provide not only a fair hearing, but any hearing*."

DMO v RPD, *LKL v BSL* and *RIS v DOL & Anor* were all cited in *TG v CK & Anor* [2021] QDC 258 where an unrepresented respondent was found to have been denied procedural fairness by not being invited to make submissions about any of the findings the learned Magistrate was required to make, or to address the evidence contained in the aggrieved's affidavit. The appellant was not given a fair opportunity to advance his case and was in fact deterred from advancing his case by being told that by not giving evidence that would be looked upon favourably. Examining s145(4) and finding the appellant was denied procedural fairness, Loury KC DCJ found, at [32], the Magistrate was "*required to conduct a fair hearing which required him to listen fairly to both sides. The learned Magistrate acted on what the police prosecutor told him which was that neither party wanted to give evidence. He also acted upon whatever it was that the police prosecutor told him of the matter in the absence of the appellant. The appellant wasn't asked if he wanted to give evidence*."

LKL v BSL was also applied in *LAF v AP* [2022] QDC 66 where Smith DCJA found the Magistrate failed to have regard to s145(4) and had erred in finding there was no evidence on the appellant's application because the appellant did make herself available for cross examination.

In *RQM v PAK & Anor* [2023] QDC 53, Kent KC DCJ set aside a protection order and remitted the application for rehearing before a different Magistrate where the self-represented respondent was denied procedural fairness by the Magistrate's effective refusal to hear the matter. The Magistrate erroneously refused to allow the appellant to contest the application in any way (i.e., cross-examine another witness, give, or call evidence, and make submissions). This decision also provided guidance for Magistrates in dealing with applications involving self-represented litigants, and reiterated the importance of procedural fairness in these types of matters **(Link to case note).** See also *DWB v Protheroe* [2022] QDC 113 where Smith DCJA observed, at [89], …"*Even though section 145 (1) of the DVA provides that the court is not bound by the rules of evidence, a court hearing a DV matter should as close as possible observe the rules such as the rule in Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298 at p 308*."[116] [117]

[116] Re inferences drawn from a failure to call evidence.

[117] Smith DCJA in *DWB v Protheroe* [2022] QDC 113 also examines the requirement to give adequate reasons at [55] to [67], including relevant cases.

16.1.1 Court can have regard to alleged domestic violence in New Zealand

See *WAJ v CRA* [2021] QDC 85 where Cash KC DCJ found the Magistrate was entitled to have regard to alleged domestic violence in New Zealand and noted the following:-

(i) The objects of the DFVPA in s3, and the principles in s4 are broad and not limiting, emphasising the civil nature of the proceedings, in contrast to criminal proceedings.
(ii) The definition of 'domestic violence' in s8 contains no words suggesting it is limited to acts occurring in Queensland.
(iii) Section 136 gives a Queensland Court jurisdiction to hear and decide any application made under the DFVPA.
(iv) The language of s37 does not imply it is limited to domestic violence that happened in Queensland.
(v) Part 6 of the DFVPA is concerned with national, and international, recognition of domestic violence orders. Part 6 Division 4 of the DFVPA evidences a parliamentary intention that the scheme should work as seamlessly as possible throughout Australia and New Zealand.
(vi) Section 145 – relieves the Court from the rules of evidence and other practices and procedures suggesting the legislation is intended to be implemented without undue deference to formal process.

For these reasons, at [42], His Honour concluded the DFVPA does not prohibit reliance upon domestic violence that occurs outside of Queensland.

16.2 DIRECTIONS

In accordance with modern case management techniques, it is common for Judicial Officers to make directions prior to trial to define the issues in dispute. Affidavits are used to avoid or reduce the need for oral evidence. Directions may be used to limit the matters to be determined at trial.

Court has a wide discretion to control the hearing process

ZXA v Commissioner of Police [2016] QDC 248

The Magistrate made Directions that in the absence of consent no affidavit evidence would be admitted as evidence unless the witness was made available for cross-examination. One of the appellant's witnesses was not available to give evidence in person and the Magistrate refused leave for the witness to appear by telephone on the basis that where credit was in issue telephone evidence was inappropriate.

Kent KC DCJ found that the Magistrate was not in error in refusing telephone evidence which was clearly within the discretion of the Magistrate. Pursuant to s39R of the *Evidence Act 1977,* a court has a broad discretion to control procedure and given that the evidence was contested credit and reliability were in issue.

In *R v Sutton* [2015] QSC 110 at [19], Burns J said in considering whether to exercise discretion to allow evidence by audio link the court should consider:

- The nature and scope of the evidence the witness is to give, including whether that evidence is likely to be in contest;
- Whether the credit or reliability of the witness will be in issue, and if so, whether the use of an audio-visual link will be likely to affect the jury's ability to assess those matters,
- The quality of the available technology;
- Any submission to the court about the way in which the person should give evidence.

This list may also be of assistance in determining whether to allow telephone evidence.

16.3 STANDARD OF PROOF (S145(3))

Wherever a court is to be satisfied of a matter, it need only be satisfied on the balance of probabilities (s145(3)).

McGill DCJ held in *SCJ v ELT* [2011] QDC 100 at [12] that *"... the onus is on the person seeking an order to prove that the requirements have been made out...."*.

16.4 PERSONAL EVIDENCE OF AGGRIEVED NOT REQUIRED (S145(4))

Section 145 of the DFVPA also explicitly states that the court need not have the personal evidence of the aggrieved before making a domestic violence order (s145(4)).

Failure by aggrieved to file affidavit does not render application a nullity

LKL v BSL [2015] QDC 337

LKL filed an application for a protection order signed and witnessed as a statutory declaration. Directions were made for filing affidavits or statements by the parties and the matter was listed for hearing. Five days before the hearing, LKL sought an adjournment, and the application was refused. She did not file an affidavit of evidence in support of the application and the Magistrate dismissed the application.

On hearing an appeal from the Magistrate's decision to dismiss the application, the appellant argued that the direction was not an imperative but only required her to file affidavits if she called witnesses. The respondent could file affidavit material in response to her application.

Dick SC DCJ found that the Magistrate's ruling that there was no material before the court was incorrect as the aggrieved's evidence was contained in the application. The directions did not exclude the sworn application as evidence. The Magistrate's failure to consider the application meant that the application had not been heard and determined.

16.5 USE OF EVIDENCE FROM OTHER PROCEEDINGS (R33)

The court can give permission for evidence, or an affidavit used in an earlier proceeding, an earlier stage of the same proceeding or a cross application to be relied on if it is relevant to the proceeding (r33).

The earlier proceeding includes an earlier criminal or child protection proceeding.

16.6 TENDERING MEDIA EXHIBIT AT HEARING (R34)

Special rules apply if a party intends to tender a media exhibit[118] at a hearing.

At least seven days before the hearing starts:

- The party must file the media exhibit (r34(2)); and
- The party must give all other parties notice that it has been filed and that they may inspect the exhibit at the registry and may agree to its admission without proof (r34(3)) **unless the court orders that it be placed in a sealed container.**

The court may, on the application of a party without notice to the other parties, order that the media exhibit be placed in a sealed container (such as an envelope) (r34(4)) and the container may be opened only if the court orders it to be opened (r34(5)).

16.7 ADMISSIBILITY OF EVIDENCE RE DV APPLICATION IN CRIMINAL PROCEEDINGS (S138)

In a trial for a person charged with an offence arising out of conduct on which an application under the DFVPA is based, a reference to any of the following is only admissible with the leave of the court (s138(2)):

- The existence of the application;
- The existence of any proceeding relating to the application;
- The making of, or refusal to make, any order relating to the application;
- The making of, or refusal to make, any variation of any order relating to the application;
- The fact that evidence of a particular nature or content was given in any proceeding relating to the application.

16.8 USE OF SIMILAR FACT EVIDENCE

In *CR v CM* [2015] QDC 146, Smith DCJA considered a complex matter where there were accusations of computer hacking, deleting social media and emails and threats to kill made by the aggrieved and a former partner of the respondent. His Honour considered whether the evidence given by both women which had similarities regarding the conduct of the respondent could be relied upon in determining the matter.

His Honour considered the admission and use of similar fact evidence may be relied on in domestic violence proceedings and said:

> *[81] Relevant to a finding on the balance of probabilities is the evidence of Ms AS. It seems to me the evidence of Ms AS can be regarded as similar fact evidence. Whilst the rules of evidence do not apply it seems to me one should have regard to the principles applicable to such evidence. In Jacara Pty Ltd v Perpetual Trustees WA Ltd* [2000] FCA 1886 *it was noted at [70] that the admissibility of similar fact evidence in civil cases as*

[118] Defined in the Rules (Schedule 2) as a plan, photograph, video or audio recording or model.

developed by analogy with the general law, however in Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] Ch 119 Lord Denning MR noted that in civil cases courts will admit evidence of similar facts if it is logically probative in determining the matter in issue provided it is not oppressive or unfair to the other side and the other side has fair notice of it and is able to deal with it. In other words, the admissibility of similar fact evidence in civil cases depends on its relevance to the facts in issue.

*[82] More recently in the UK it has been said that the only test of admissibility is relevance. Northrop J in Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23**Error! Bookmark not defined.**, contrary to Lord Denning, considered oppression and unfairness to be irrelevant considerations.*

[83] To my mind the touchstone of admissibility is always the question of relevance, and a fact or facts are relevant if they are logically probative as to the issues in dispute.

[84] Whichever approach is to be taken the evidence was admissible under s145, but it also seems to me that there were a number of similarities between the evidence of Ms AS and CM.

[85] Once admitted then it may make more probable the fact in dispute. The evidence of Ms AS strengthens the conclusion that on the balance of probabilities the appellant created this email. Ms AS gave clear evidence of the adeptness of the appellant with access to internet accounts, resetting passwords and the like. He certainly would be capable of creating a routing trail which would put people off the scent.

[86] Ms AS also gave clear evidence that CR was capable of sending vitriolic emails as the disputed ones are.

[87] Having regard to this evidence, and the impression I gained from both witnesses in the witness box I prefer the evidence of CM and reject that of CR.

16.9 EVIDENTIARY AIDS (S189)

16.9.1 Evidence of orders

A document purporting to be a copy of a protection order, a temporary protection order, a varied order, voluntary intervention order is evidence of the making of the order and the matters contained therein (s189(2)).

16.9.2 Police commissioner certificates

A certificate signed by the police commissioner and stating any of the following is evidence of what it states (s189(3)):

- On a stated day and stated time a stated police officer issued a stated PPN;
- On a stated day and stated time a stated police officer was a supervising police officer for s102;
- On a stated day and at a stated time a stated supervising police officer approved the issuing of a stated PPN;
- On a stated day and at a stated time a stated police officer was a releasing police officer under s125;

- On a stated day and at a stated time a stated releasing police officer released a stated person from custody on stated release conditions.

If in a criminal proceeding, the prosecution intends to rely on one of these certificates, it must give a copy to the defendant or their lawyer at least 20 business days before the hearing day (s189(4)).

16.9.2.1 *Challenging the certificate*

If the defendant intends to challenge the certificate, they must give the prosecution notice in the approved form of the matter to be challenged at least 15 business days before the hearing day (s189(5)).

If the defendant challenges the certificate, the certificate stops being evidence of the matter to be challenged (s189(6)).

17 COSTS (S157)

17.1 EACH PARTY TO BEAR OWN COSTS

Section 157 of the DFVPA provides that each party must bear their own costs in a proceeding for an application under that Act (s157(1)).

17.1.1 Court's discretion to award costs (s157(2))

The court may award costs against a party[119] who made the application if the court hears the application and decides to:

- Dismiss the application and, in doing so, also decides that the party, in making the application, intentionally engaged in behaviour, or continued a pattern of behaviour, towards the respondent that is domestic violence; or
- The note to s157(2)(a) provides that this behaviour is known as systems abuse or legal abuse. It is behaviour in which a person intentionally misuses the legal system (e.g., by starting proceedings based on false allegations to exert control or dominance over the other person or to torment, intimidate or harass them.
- Dismiss the application on the grounds that it is malicious, deliberately false, frivolous, or vexatious.

The court may award costs on the basis that the application is malicious, deliberately false, frivolous, or vexatious (s157(2)) provided three criteria are met:

- The court must hear the application;
- The court must dismiss the application, and
- The ground for dismissal must be that the application is malicious, deliberately false, frivolous, or vexatious.

In *KAV v Magistrate Bentley & Anor* [2016] QSC 46, Henry J said:

> *[8] If any of those elements are not met, then the court has no power to award costs at all. Thus, an application to award costs will not be enlivened simply because an application is malicious, deliberately false, frivolous, or vexatious. If an application is withdrawn without hearing, then each party must bear their own costs.*

17.1.2 Meaning of malicious, frivolous, or vexatious

As to the meaning of *malicious, frivolous or vexatious*, see *LKF v MRR* [2012] QDC 355 where the Magistrate at first instance determined that an application was frivolous and malicious. Long SC DCJ described the Magistrate's decision in context:

> *[52] In the context of the lengthy outline and findings made by the Magistrate as to the conduct of the proceedings, up to and including 15*

[119] A "party" includes an aggrieved (s157(3)).

April 2011, the Magistrate made findings that the appellant had been dilatory in her conduct of her case, had "consistently sought to adjourn matters for her own purposes", with adjournments being granted and costs thrown away when medical certificates were produced (with evidence subsequently emerging of her attending her daughter's birthday party at Aussie World in one period covered by such a certificate and also in respect of claims of hospitalisation being proffered on the basis of attendance at hospital emergency departments, with complaint of pain).

[53] Further, it was noted that the appellant had failed to establish any acts of domestic violence by the respondent and had failed to comply with directions, particularly in producing "voluminous amounts of material", with the observation:

> *"She consistently files repetitive and voluminous affidavits which are confusing and lack any order, or in some cases, substance going to the allegations. No doubt this has caused enormous expense to the respondent in relation to defending this matter."*

[54] However, the Magistrate expressly recognised that she had "to decide whether the application can be considered malicious, deliberately false, frivolous or vexatious". The Magistrate then proceeded to make findings that:

> *(a) There was "an intricate link" between the bringing of this application and an attempt to enhance the appellant's position in the Federal Magistrates Court.*
> *(b) "Some of the claims by [LKF] could be described as nothing other than frivolous"; and*
> *(c) "She concedes that she previously brought applications against the respondent, who is then forced to incur legal fees to defend them, and then withdrew them is, of course, indicative of that. That, of course, is not my concern in relation to this matter, but it is reflective of [LKF]'s inability to show any concern for her behaviour and action. 'Malicious' refers to any course of conduct taken with malice. The conduct of [LKF]'s submissions continue to show the malice with which she reviews and treats [MRR]. Her allegations, which are baseless and bordering on paranoia, can only be grounded in malice according to the respondent for the purposes of the Federal Magistrate proceedings.*

[55] Accordingly the Magistrate found… *"the application should be dismissed on the basis that it was frivolous and malicious and thus a costs order may well be appropriate."*

His Honour then went on to consider the meaning of the terms 'frivolous', 'vexatious' and 'malicious'.

[*73] In Mudie v Gainriver Pty Ltd & Anor* [2002] QCA 546 *the Court of Appeal considered the meaning of a pre-condition to making a costs order in an otherwise no-costs jurisdiction, expressed in s7.61(1A)(a) of the Local Government (Planning and Environment) Act 1990**Error! Bookmark not defined.***, as follows:

> *"The Court may.... order such costs... as it considers appropriate in the following cases—*
>
> > *(a) where it considers the appeal or other proceedings to have been frivolous or vexatious;"*

[74] In the joint judgment of McMurdo P and Atkinson J, it is observed:

> *"[35] The words "frivolous or vexatious" are not defined in the Act and should be given their ordinary meaning, unfettered by their meaning in the very different context of striking out or staying proceedings for an abuse of process. By the time an application for costs is made, the court knows the issues which have been litigated whilst a interlocutory applications, the court must to some extent speculate and must necessarily be cautious to ensure a deserving claimant is not unjustly deprived of the opportunity of a trial of the action. The Macquarie Dictionary defines 'frivolous' as 'of little or no weight, worth or importance; not worthy of serious notice: a frivolous objection. 2. characterised by lack of seriousness or sense: frivolous conduct ...' and 'vexatious' as '1. causing vexation; vexing; annoying ...'.*
>
> *[36] Unquestionably, something much more than lack of success needs to be shown before a party's proceedings are frivolous or vexatious. Although in a different context, some assistance can be gained from the discussion of the meaning of these words in Oceanic Sun Line Special Shipping Company Inc v Fay where Deane J states that 'oppressive' means seriously and unfairly burdensome, prejudicial, or damaging and 'vexatious' means productive of serious and unjustified trouble and harassment, meanings apparently approved by Mason CJ. Deane, Dawson and Gaudron JJ in Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55*; (1990) 171 CLR 538. Those meanings are apposite here.*
>
> *[37] Whether proceedings are vexatious or oppressive will turn on the circumstances of the case and will include public policy considerations and the interests of justice." (Citations omitted)*

[75] *In a separate judgment Williams JA wrote:*

> *"[59] For the appellant to succeed the court must be satisfied that the appeal to the Planning and Environment Court was 'frivolous or vexatious' within the meaning of those words in the section of the legislation empowering the court to make an order for costs. Each word is used in everyday language and there is little doubt as to the ordinary meaning of each. The Shorter Oxford English Dictionary defines 'frivolous' as follows:*
>
> > *'1. Of little or no value or importance, paltry; (of a claim, charge, etc.) having no reasonable grounds.*
> > *2. Lacking seriousness or sense; silly.'*
>
> *That work defines 'vexatious' as follows:*
>
> > *'1. Causing or tending to cause vexation, annoyance, or distress; annoying, troublesome.*
> > *2. In law. Of an action; instituted without sufficient grounds for winning purely to cause trouble or annoyance to the defendant.'*
>
> *[60] So far as the law is concerned the terms have been incorporated into rules of court as a ground upon which a claim may be struck out summarily. If a proceeding discloses no viable cause of action it can be struck out as being frivolous or vexatious. In consequence something of a gloss has been superimposed upon the ordinary meaning of each word when used in that context. But when the terms are not used in the context of striking out a claim which is groundless that gloss is no longer relevant and one must revert to the ordinary meaning of each word. But that is not to say that cases dealing with the striking out of an action on the ground that it was frivolous and vexatious are entirely irrelevant. Dixon J in Dey v Victorian Railways Commissioners (1949) 78 CLR 62* at 91 said:
>
> *'The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims'."*

[76] Similarly an ordinary meaning of the word "malicious" is to be adopted. The Macquarie Dictionary (5th Edition) provides the following definitions:

> *"**malicious**... 1. full of, characterised by, or showing malice; malevolent. 2. law motivated by vicious, wanton, or mischievous purposes, as in malicious arrest, malicious injuries to persons or property, malicious prosecution, etc."; and*

> *"**malic**e... 1. desire to inflict injury or suffering on another."*
>
> *[77] It is obviously of some relevance to the issue of costs, to note that, on 3 September and 17 December 2010, the appellant expressed a desire to withdraw her application, on the conditions stipulated by her. That situation was obviously complicated by the understandable concern of the respondent as to the considerable costs which had already been incurred and his desire to seek recompense for that. However and notwithstanding what may have been a misapprehension on the part of the defendant as to the extent to which he could recover those costs, it was the appellant who chose to proceed and thereby ensured that further costs would be incurred by the respondent and that she may become liable to pay costs, if s 61 of the DFVPA was satisfied, as the Magistrate subsequently found it was.*
>
> *[78] On a review of this aspect, I would also find that precondition satisfied. Although I do not necessarily share the Magistrates conclusion that the circumstances warranted a finding that the application was malicious, the Magistrate correctly found that the application was, in part, frivolous and otherwise, having due regard to the underlying lack of merit in the application and the way it was pursued (including on and after 17 December 2011, when the applicant had apparently an option of withdrawing the* application) and *the conduct of the appellant in not pursuing her application on 15 April 2011, I would find that the application should have been dismissed as vexatious.*
>
> *[79] It can be added that such a conclusion flows from the identified considerations and as a feature of the appellant's conduct of this case, which extends beyond what might be expected as to the usual difficulties encountered by a litigant in person in dealing with the demands of conducting litigation.*

In *RWT v BZX* [2016] QDC 246, Deveraux SC DCJ considered an appeal from a costs order and affirmed the Magistrate's decision to make a costs order in circumstances where the Magistrate found the application was made to "vex the respondent" [66].

In *NBE v PRT & Anor* [2018] QDC 29, Long SC DCJ considered an appeal by an applicant for a domestic violence order whose application was dismissed by the Magistrate and an order made that she pay the respondent's costs in circumstances where the applicant was not present but sought to have a person appear for her. The judge observed that the applicant was entitled to be represented by a representative. The applicant had said that as the respondent was attending, she did not wish to attend and wanted orders made in her absence. Prior to the hearing the Magistrate had a clerk contact her to advise her presence was required.

His Honour considered the effect of the decision in *LKL v BSL* [2015] QDC 337 in circumstances where the applicant was before the court but had not taken the opportunity to file additional material noting the provisions of s145(1)(b) and (3).

However, he said, at [10] and [11]:

(i) Court must receive material which is a proper basis for satisfaction of the matters required by the Act and only after a hearing that complies with requirements for procedural fairness;
(ii) Formal rules of evidence do not apply but there must still be evidence which provides a rational basis for determination, and it must be put to the court in a way that gives the other party the chance to challenge the evidence and put the other party's case in relation to the matter.

The Magistrate relied on unchallenged evidence of the respondent. When invoking s157(2) and deciding that the application was malicious or vexatious or deliberately untrue, *Briginshaw v Briginshaw* (1938) 60 CLR 336 principles apply. There is nothing in the reasons of Magistrate to show that this was considered.

The Magistrate did not properly consider the request by the applicant to be represented by a third person. The respondent sought to take advantage of the absence of an application to seek order for costs on an ex parte basis. There was a lack of proper foundation for a costs order pursuant to s157(2).

The appeal was allowed, and the costs order discharged.

In *JSA v MPR* [2022] QDC 111**Error! Bookmark not defined.**, Cash KC DCJ found the significant findings of the Magistrate (including that the appellant had no grounds for bringing the application and that she had misled the court in her evidence) were a powerful factor in favour of awarding costs. At [30]:-

> *In my view, the findings of the Magistrate about the appellant's motivation were sufficient to justify an award of costs to the respondent so that he might be indemnified for the expense of defending a malicious and vexatious proceeding.*

NBE v PRT & Anor was followed in *XNR v AMF* [2022] QDC 197 where Allen KC DCJ, at [24], adopted the comments of Long SC DCJ in *NBE v PRT & Anor*:

> *[32]… a cautious approach should be taken to any determination that the power provided in s 157(2) should be applied and particularly, where such determination is sought in the absence of the party against whom the order is sought and when there is no contradictor. A party seeking the exercise of such power should expect to have to justify the conclusion as a clear one and from an objective point of view, rather than as a subjective and potentially contentious point of view.*

17.1.3 Appeal costs

See *S v T* [2018] QDC 49**Error! Bookmark not defined.** for an application for costs after an appeal against the making of a domestic violence order. As UCPR applies to appeals (s142(2)), r 681 UCPR states that costs follow the event unless the court orders otherwise.

This issue was also dealt with in *AVI v SLA (No.2)* [2019] QDC 2017, following the dismissal of an appeal against a refusal to make a protection order. Section 157 of the DFVPA and the DFVP Rules do not apply to appeals (r3) His Honour discussed the authorities including *BAK v Gallagher & Anor (No.2)* [2018] QDC 132 at [24] where Muir DCJ noted "*that the starting point is that the cost of the appeal would follow the event unless ordered otherwise*." In *HZA v SHA* [2018] QDC 125 at [10] Devereaux SC DCJ noted that "*relevant matters to the exercise of discretion…might include the public interest nature of the proceeding…*" drawing upon the main protective objects and principles of the DFVPA.

His Honour found, in all the circumstances that costs should follow the event, given that the respondent was wholly successful and was put to the expense of responding to an appeal. The appellant's evidence was not accepted with respect to a number of allegations of domestic violence. The appeal was conducted appropriately by both parties. The appellant was ordered to pay the respondent's costs fixed in the sum of $5,000.

His Honour dismissed the application for an indemnity certificate, finding s15(2) of the *Appeal Costs Fund Act 1973* not engaged. Even if it was, he would have exercised his discretion against granting the certificate as the appellant's evidence was not accepted concerning alleged acts of violence prior to 2018.

Byrne KC DCJ in *MNT v MEE (No 2)* [2020] QDC 100 reached a consistent conclusion with the decision of Smith DCJA in *ACI v SLA (No 2)* and other decisions mentioned therein, adopting the considerations summarised by Smith DCJA at [12]-[15]. His Honour ordered costs be awarded to the respondent on the standard basis.

Note also the earlier decision of Muir DCJ in *KBE v Queensland Police Service* [2017] QDC 326 where costs (appeal filing fee) were awarded against the respondent where, through no fault of the Magistrate at first instance, the application was decided on the basis that the appellant had been served. The appellant had not in fact been served. Her Honour found no misconduct on the part of the respondent however regarded there was a public interest in ensuring that careful and accurate submissions are made before a Magistrate when applications of this kind are made. Her Honour was not prepared to determine that on appeals of this nature costs will ordinarily follow the event however in the unusual circumstances of the present case, Her Honour exercised her discretion to award costs.

The above cases were not referred to Fraser JA in *LAP v HBY & Anor* [2021] QCA 123, a decision on costs following an order striking out an appeal on the ground the Court of Appeal lacked jurisdiction to hear it. Fraser JA found there is discretion to assess costs on an indemnity basis however declined to exercise the discretion in this case and ordered the appellant to pay the first respondent's costs.

BAK v Gallagher & Anor (No. 2) and *KBE v Queensland Police Service* were both cited in *RIS v DOL & Anor (no. 2)* [2021] QDC 157. Having dealt with the appeal[120], Dearden DCJ was satisfied the error was on the part of the Magistrate and was not contributed to in any way by the appellant or the first respondent. An order was made for the first respondent to pay the appellant's costs on an indemnity basis, subject to an associated grant of an indemnity certificate to the first respondent, ensuring the first respondent was not out of pocket.

See *Pavelescu v Pisa* [2021] QCA 167 where the appellant was ordered to pay the respondents' costs on an indemnity basis in circumstances where the appeal involved claims with no basis and should never have been made, and they attempted to advance points in wilful disregard of known facts or established law.

See *RBG v BKS & Anor* [2021] QDC 234 where a fixed costs order was made. Sheridan DCJ referred to *Goodwin v O'Driscoll & Anor* [2008] QCA 43 at [12]: "*fixing of costs is intended as a summary determination of what is fair and reasonable for costs in the circumstances. It is not intended to mimic an assessment of costs*." At [100], Sheridan DCJ also referred to Tamberlin J in *Nine Films & Television Pty Limited v Ninox Television Limited* (2006) FCA 1046 at [8], referencing the need for the approach to be "*logical, fair and reasonable and should only be exercised when the Court considers that it can do so fairly as between the parties*."

See also *PR v KJ (No.2)* [2022] QDC 78, where the respondent sought costs on an indemnity basis, submitting correspondence inviting the appellant to discontinue the appeal with each party bearing their own costs (a *Calderbank* offer). Cash KC DCJ found refusal of an offer does not give rise to a presumption in favour of indemnity costs, but it is a relevant matter. At [6], factors relevant to the question of whether the refusal was unreasonable will include: -

> *(a) the stage of the proceeding at which the offer was received;*
>
> *(b) the time allowed to the offeree to consider the offer;*
>
> *(c) the extent of the compromise offered;*
>
> *(d) the offeree's prospects of success, assessed as at the date of the offer;*
>
> *(e) the clarity with which the terms of the offer were expressed; and*
>
> *(f) whether the offer foreshadowed an application for indemnity costs in the event of the offeree rejecting it.*

See also *LAF v AP (No 2)* [2022] QDC 104 where Smith DCJA observed, at [13], *"there is no doubt that the appellant should be awarded her costs"* and noted, at [14], that the criteria for consideration of an order for indemnity costs are not closed but *"…there must be some special or unusual feature to justify a departure from the usual practice",* citing *Colgate Palmolive Co v Cussons Pty Ltd* [1993] FCA 801. In this case, the judicial errors were not of

[120] See *RIS v DOL & Anor* [2021] QDC 154 at 3.7.1, 14.3.2, 14.11.2 and 15.1.

the making of the respondent and standard costs were awarded against the respondent. Smith DCJA suggested, at [20], the appellant perhaps should consider making an application to the State of Queensland for those costs she has been unable to recover.

In *SLC v Queensland Police Service and SLC* [2023] QDC 78**Error! Bookmark not defined.**, a costs application was made following a successful appeal against a protection order. The appeal had succeeded on the interpretation of s8 of the DFVPA by a District Court judge. Costs were refused in circumstances where the commission of domestic violence was not proved, but the evidence did prove the respondent posed a threat to the aggrieved's safety and the police application for a protection order came after other attempts to alleviate the danger failed and there were strong public interest considerations in determining the present matter.

17.2 ASSESSING COSTS (R52)

Part 7 of the *Domestic and Family Violence Protection Rules 2014* sets out how costs are to be assessed:

- The court may fix the amount of the costs of the proceeding and order payment of the amount (r52(1));
- If the court considers it appropriate because of the nature and complexity of the proceeding, the court may order that the costs be assessed by a costs assessor (r52(2));
- For assessing costs under this rule, a lawyer is entitled to charge and be allowed costs in accordance with the scale set out in Schedule 1[121] of the Rules (r52(3)).

Note that if a party who obtains an order for costs of the proceeding under this section, has been ordered to pay losses and expenses under r44(2) for non-party compliance with a subpoena, the court may make another order it considers appropriate (r44(5)) (see paragraph 15.6.8).

[121] Schedule 1 costs are based on Schedule 3, Part 3 of the *Uniform Civil Procedure Rules 1999* and were updated pursuant to the *Uniform Civil Procedure Rules and Other Legislation Amendment and Repeal Regulation (No. 1) 2018* on 24 August 2018.

18 APPEALS (SS164-169)

A person who is aggrieved by any of the following decisions may appeal the decision to the District Court (s164):

- A decision to make a domestic violence order;
- A decision to vary, or refuse to vary, a domestic violence order;
- A decision to refuse to make a protection order
- A refusal to make a temporary order if the person sought such an order.

The *Uniform Civil Procedure Rules 1999* apply to an appeal under the DFVPA (s142(2)). See *BAK v Gallagher & Anor (No 2)* [2018] QDC 132 where Muir DCJ held, in an application for costs of an appeal under the DFVPA that the UCPR apply in respect of appeal costs.

See *XNR v AMF* [2022] QDC 197 where s164(c) was held not to apply in relation to the dismissal of an application under s38(3) (no appearance by applicant) as there was no decision made to refuse to make a protection order.

The notice of appeal must be filed within 28 days after the decision is made or, if the appellant was not present for the decision, 28 days after the appellant is served or is told about the decision (s165(4)).

The appellant must (s165(2)):

- Serve a copy of the notice on the other persons entitled to appeal against the decision and the police commissioner; and
- File the notice in the court that made the decision.

The registrar may ask the commissioner to serve the notice (s165(3)).

The appellate court may at any time extend the period for filing the notice of appeal (s165(5)). See *LBU v QPS & Anor* [2020] QDC 279 where leave to extend the time for filing was refused. The appeal was lodged some eight months after the decision appealed against and no reasons were advanced by the appellate for explain the delay in bringing the appeal. Rinaudo AM DCJ, cited the two considerations in *NBE v PRT & Anor* [2018] QDC 29 for extending the time to appeal (neither of which were addressed in the notice of appeal):

> a) Whether there is good reason for the delay; and
> (b) Whether it would be in the interests of justice to grant the extension.

See also *AEN v Queensland Police Service & Anor* [2022] QDC 27 where leave to extend the time for filing the appeal was refused. Although McDonnell DCJ was satisfied there was an adequate explanation for the delay (the appellant had been receiving treatment for a mental health condition), Her Honour was not satisfied it was in the interests of justice to extend the period of time for filing the appeal given the limited prospects of success of the appeal.

In *PR v KJ* [2022] QDC 29, Cash KC DCJ, dismissing the application for an extension of time to file the appeal, found there was no satisfactory explanation for a twelve month delay before the appeal was filed and no prospects of appeal success.

The start of an appeal does not affect the operation of the decision or prevent the taking of action to implement the decision (s166(1)), unless the court or appellate court makes an order staying the operation of the decision pending finalisation of the appeal (s166(2)).

See *ODE v AME* [2018] QDC 277 for an appeal against a decision to refuse a stay of a judgment declining to make a protection order. Porter KC DCJ found there was no basis to revisit an order of Koppenol DCJ to refuse the extension of a stay of the protection order on the basis there was no evidence of acts of domestic violence since the application for a temporary protection order.

See also *RTQ v OLB* [2019] QDC 216 which considered an application for a stay of a condition of a temporary protection order (that the child be returned to appellant father) pending an appeal. Reid DCJ considered whether s166(2) includes the power to reverse the practical operation of a decision, that is, whether the child should now be returned to the appellant husband. His Honour accepted that there may be such a power however in the circumstances it would not be appropriate to exercise the power[122].

The case *ADI v EGI* [2020] QDC 13[123] concerned an application to stay a decision to dismiss an application under s166, pending an appeal. In refusing the stay, Smith DCJA noted the DFVPA does not set out principles to be applied in deciding whether or not to grant a stay under s166. Relevant considerations include prospect of appeal succeeding; whether a refusal to grant a stay would render the appeal nugatory; whether irremediable harm would be suffered if a stay is not granted. At [6], *Aldridge v Keaton* [2009] FamCAFC 106 was applied, which sets out factors for consideration in the exercise of the discretion.

Section 168 of the DFVPA provides for the appeal to be decided on the court's record of the original hearing, but the appellate court may order that the appeal be heard afresh in whole or in part. See *JAW v Reed* where the appellant sought a hearing de novo of the proceedings, which was refused. Horneman-Wren SC DCJ in dismissing the appeal stated that the appellant was not in a position to call new witnesses at the appeal hearing; evidence which he sought to adduce was evidence which would have been adduced at the hearing; and difficulties faced in being self-represented should not be relied upon to demonstrate why an appeal ought to be conducted as a fresh hearing to enable a more prepared and rehearsed approach second time round.

Section 168(2) was considered in *WBI v HBY & Anor* [2020] QCA 24. The case concerned an application for leave to appeal against the decision of the District Court to hear an interlocutory application and an order that the matter be heard afresh, as per s168(2). The issue for the Court of Appeal was whether it had jurisdiction to hear an appeal from an interlocutory decision of the District Court with respect to an appeal pursuant to s168 of the DFVPA. The Court of Appeal struck out the

[122] The appellant also argued that the application for a protection order was an abuse of process and made for the purpose of assisting the aggrieved's position in relation to family law proceedings. This argument was dismissed by Reid DCJ.

[123] Smith DCJA also had regard to s48 *Human Rights Act 2019* in reaching his decision.

application for leave to appeal against the District Court's decision for want of jurisdiction, referring to s169(2) that the decision of the appellate court upon an appeal shall be final and conclusive. This precludes an interlocutory order of the District Court in the appeal to the Court of Appeal.[124]

In *HBY v WBI & Anor* [2020] QDC 81, the court heard the second respondent's application for an order that the order made on 31 May 2019 by Koppenol DCJ (that the order be heard afresh in whole) be discharged and it be ordered in substitution that the appeal be heard pursuant to s168(1) and be decided on the evidence and proceedings before the court that made the decision being appealed. Moynihan KC DCJ allowed the second respondent's application that the order made on 31 May 2019 be set aside. His Honour was not satisfied there was good reason to order that the appeal be heard afresh in part. His Honour dismissed the application for the appeal to be heard afresh to allow cross-examination of (stated) documents. His Honour was unable to make a determination in relation to two other documents as he did not have those documents before him. Therefore, that part of the appellant's application was reserved to the judge who will hear the appeal along with the issue of costs.

The appellate court may confirm the decision, vary it, set aside the decision and substitute another or set aside the decision and remit the matter to the court that made the decision (s169).

18.1 HEARING OF APPEAL – APPLICATION TO CHANGE VENUE

Morzone KC DCJ, in the decision of *MKA v WKT* [2018] QDC 73, considered an application to change the venue of an appeal against a domestic violence order from Coolangatta to Cairns. The protection order was made in the Magistrates Court at Coolangatta, but the appeal was filed in Cairns. The respondent to the appeal (aggrieved) sought to change the venue to Southport.

Rule 39 of the Uniform Civil Procedure Rules 1999 provides that a court can change the venue of a proceeding "*if it can be more conveniently or fairly heard or dealt with at a place at which the Court is held…*".

His Honour said that in weighing up matters of convenience and fairness, the following considerations were relevant:

- The cost, expense and inconvenience involved in a change of venue including disruption to Court schedules and a waste of Court resources.
- Delay if the venue were changed.
- Administration of justice which does not restrict the venue of an appellate Court.

In addition, the objects, and principles of the *Domestic and Family Violence Protection Act 2012* were of significance and there was evidence that the proceedings were likely to aggravate the mental health issues experienced by the aggrieved. After weighing the relevant considerations,

[124] The same issue was found in *LAP v HBY & WBI* [2021] QCA 122, where Fraser J held the Court has no jurisdiction to hear an appeal from a decision of the District Court exercising its appellate jurisdiction to vary a decision made by a Magistrate.

considerable weight was given to the effect on the respondent's health and the venue was changed to Southport.

MKA v WKT was cited in *LAF v AP* [2022] QDC 66 where Smith DCJA found, at [65], the Magistrate erred by not applying the s4 DFVPA principles when considering the application to change the venue. In that case, Smith DCJA found the matter should have been transferred from Noosa to Toowoomba as the appellant was the vulnerable one and more in need of protection given the serious allegations and her PTSD; the respondent was the only witness in his case; the children resided with the appellant and it would have been extremely disruptive to the children to have the hearing in Noosa; and there were more DV facilities in Toowoomba. At [57], s41D(2) gave the court the discretion to have the matters heard together and there was a discretion as to where they should have been heard. The fact that a hearing date had been set in Noosa was merely one factor to be considered, at [55].

18.2 HEARING OF APPEAL – NON-APPEARANCE BY APPELLANT

MIA v KAX [2022] QDC 198 considered the issue of whether there is a power to dismiss an appeal under the DFVPA where the appellant fails to appear for the hearing of the appeal. Byrne KC DCJ held, at [2], there is a power to dismiss an appeal where the appellant fails to file material required by practice direction and where the appellant fails to attend the hearing of the appeal.

19 INFORMATION SHARING (PART 5A)

19.1 COMMENCEMENT

New Part 5A (Information Sharing) of the DFVPA was inserted by the *Domestic and Family Violence Protection and Other Legislation Amendment Act 2016*[125]. Part 5A commenced on 30 May 2017.

19.2 PURPOSE (s169A)

The purpose of Part 5A is to enable particular entities to share information, while protecting the confidentiality of the information, for the purposes of assessing risk and managing serious threats to people's lives, health or safety as well as referring people who fear or experience domestic violence, or who commit domestic violence, to specialist DFV providers (s169A).

Where a request is made for information about a DFV matter that is not for the purpose of assessing or responding to a serious threat, then s160 applies (prohibition on obtaining copies of documents for proceedings).

Prior to the insertion of Part 5A, the DFVPA did not contain specific provisions to enable personal information to be shared. On 28 February 2015, the Special Taskforce on Domestic and Family Violence in Queensland (the Taskforce) released its report, "*Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (the *Not Now, Not Ever Report*)". The "*Not Now, Not Ever Report"* recommended a number of specific amendments to the DFVPA including the introduction of enabling legislation to allow information sharing between government and non-government agencies within integrated service responses, with appropriate safeguards, including protection for the sharing of information without consent if a risk assessment indicates it is for the purpose of protecting the safety of a victim or their immediate family (recommendation 78). The Taskforce also recommended that the Queensland Government develops and shares with relevant service providers clear guidelines to facilitate the information sharing within an integrated response with a continued focus on obtaining consent unless a high-risk threshold has been met (recommendation 79).

The Queensland Government accepted all the Taskforce recommendations directed to government and committed to explore current barriers to information sharing across agencies and addressing barriers through a legislative response as needed. Information sharing guidelines were also developed by the former Department of Communities, Child Safety and Disability Services for use by all agencies involved in information sharing (s169M).

The information sharing regime contained in the new Part 5A is a key outcome of the review of the DFVPA in relation to issues specifically identified by the Taskforce for consideration.

[125] This Act also implements the Taskforce recommendations for Queensland to participate in the National Domestic Violence Order Scheme (NDVOS) (see Chapter 19).

19.3 PRINCIPLES FOR SHARING INFORMATION (S169B)

Section 169B of the DFVPA sets out the principles underlying Part 5A including that a person's consent to share the information should be obtained whenever safe, possible, and practical (s169B(a)). However, the safety, protection and wellbeing of people who fear or experience domestic violence take precedence over gaining a person's consent to share information (s169B(b)).

Before disclosing information about a person to someone else, an entity should consider whether disclosing the information is likely to adversely affect the safety of the person or another person (s169B(c)).

The principles contained in s169B are consistent with the overriding principle for administering the DFVPA, contained in s4: the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.

19.4 DEFINITIONS (s169C)

Section 169C(1) of the DFVPA sets out the definitions of ***information***, ***prescribed entity***, ***specialist DFV service provider*** and ***support service provider.***

Information includes a document.

A ***prescribed entity*** means:

(a) The chief executive of a department that is responsible for any of the following matters-
    (i) adult corrective services.
    (ii) child protection services.
    (iii) community services.
    (iv) court services.
    (v) disability services.
    (vi) education.
    (vii) housing services.
    (viii) public health services.
    (ix) youth justice services.
(b) the chief executive of another department that provides services to persons who fear or experience domestic violence or who commit domestic violence.
(c) the commissioner of the Ambulance Service.
(d) the police commissioner.
(e) the chief executive officer of the Mater Health Service.
(f) a health service chief executive under the Hospital and Health Boards Act 2011.
(g) non-state school principals.
(h) another entity prescribed by regulation.

Specialist DFV service provider means a non-government entity funded by the State or Commonwealth to provide services to persons who fear or experience domestic violence or who commit domestic violence.

Support service provider means a non-government entity, other than a specialist DFV service provider, that provides assistance or support services to persons who may include persons who fear or experience domestic violence or who commit domestic violence.

19.5 INFORMATION SHARING REGIME (ss169D – 169J)

Part 5A, Division 2 of the DFVPA sets out when information can be shared by prescribed entities, specialist DFV service providers and support service providers. Under the legislative scheme, only ***specialist DFV service providers*** and ***prescribed entities*** can share information with each other for the purpose of assessing risk. Other ***support service providers*** may give information to ***specialist DFV service providers*** and ***prescribed entities*** but must not receive information or share information with any other person for this purpose.

Section 169D enables information to be shared for the purpose of assessing a domestic violence threat. The section provides that a prescribed entity or specialist DFV service provider may give information to any other prescribed entity or specialist DFV service provider if it reasonably believes a person fears or is experiencing domestic violence; and giving the information may help the receiving entity assess whether there is a serious threat to the person's life, health, or safety because of the domestic violence. A support service provider may only provide information for this purpose but is not enabled to share or receive information under this provision.

Section 169E enables information to be shared for the purpose of **responding to a serious domestic violence threat**. The section provides that a prescribed entity, specialist DFV service provider or support service provider may give information to any other prescribed entity, specialist DFV service provider or support service provider if it reasonably believes a person fears or is experiencing domestic violence; and giving the information may help the receiving entity to lessen or prevent a serious threat to the person's life, health, or safety because of the domestic violence.

Section 169G sets out the **permitted use of shared information** under Part 5A. A prescribed entity or specialist DFV service provider may use information to assess a serious threat and to lessen or prevent a serious threat to a person's life, health, or safety because of domestic violence.

Section 169H sets out who may give or receive information on behalf of an entity. Section 169J sets out restrictions on the information that may be shared by stipulating specific circumstances in which information sharing is not permitted.

19.6 CONFIDENTIALITY OF SHARED INFORMATION (s169K)

Section 169K of the DFVPA sets out the confidentiality requirements for information shared by a prescribed entity, specialist DFV provider or support service provider. The person receiving the information may only use the information, disclose or give access to the information if the use, disclosure or access is permitted under Part 5A, complies with the Information Privacy Principles under the *Information Privacy Act 2009* or is otherwise required or permitted by law. The maximum penalty for contravening Part 5A is 100 penalty units or two years imprisonment.

19.7 PROTECTION FROM LIABILITY FOR GIVING INFORMATION (s169N)

Section 169N of the DFVPA provides protection from liability for giving information. It states that where a person, acting honestly, gives information in compliance with Part 5A, they are not liable (subject to the exemptions outlined in s169O) for giving the information; and merely because they give the information, they cannot be held to have breached any code of professional etiquette or ethics or departed from accepted standards of professional conduct.

20 NATIONAL DOMESTIC VIOLENCE ORDER SCHEME (PART 6)

20.1 COMMENCEMENT

The scheme commenced on 25 November 2017[126].

Other states and territories have also passed legislation to support the national recognition scheme (see Schedule 25 for a summary of applicable legislation).

20.2 PURPOSE

Recommendation 90 of the "*Not Now, Not Ever Report*" supported the implementation of the national scheme for mutual recognition and enforcement of orders.

On 11 December 2015, the Council of Australian Governments (COAG) agreed to introduce the National Domestic Violence Order Scheme (NDVOS).

The NDVOS has two parts:

- A legal framework so that the domestic violence orders can be recognised and enforced nationally, without the need for manual registration; and
- A supporting technical capability for sharing information on domestic violence orders.

The amended Part Six of the DFVPA is intended to harmonise the national recognition of domestic violence orders to closely follow corresponding jurisdiction in other Australian jurisdictions; it does not seek to standardise orders or conditions.

20.3 DEFINITIONS

Section 171 of the DFVPA defines the following:

- ***Corresponding law*** means a law of another State that contains provisions that substantially correspond with this part.
- ***DVO*** means a local order, an interstate order, or a NZ order.
- ***Final order*** means a DVO that is an interim order.
- ***Interim order*** includes a temporary protection order, PPN, release conditions; another DVO made by a police officer; another DVO declared by regulation to be an interim order.
- ***Interstate orders*** defined in s173 as an order made by a court or a police officer of another State that is declared by regulation to be an interstate order.[127]
- ***Local order*** means a DVO, PPN or release conditions.
- ***New Zealand order*** means an order made under the *Domestic Violence Act 1995* (NZ) or under an Act repealed by that Act.

[126] The international day for elimination of violence against women.

[127] See s3 *Domestic and Family Violence Protection Regulation 2023*.

- ***Protected person*** means in relation to a local order – the aggrieved and each named person; or a person for whose benefit a DVO is made.
- ***Registered foreign order*** is defined in s174 as a NZ order that is a registered NZ order (s174(a)) or declared by regulation to be a registered foreign order (s174(b)).[128]
- ***Respondent –*** person against whom a DVO is made.
- ***Revoke*** **-** includes cancel.

20.4 WHAT ORDERS ARE NATIONALLY RECOGNISED ORDERS

From 25 November 2017, all orders are nationally recognised orders (recognised interstate orders):

- Protection orders and varied protection orders.
- Temporary protection orders and varied temporary protection orders.
- Police Protection Notices and Release Conditions.

In Queensland, an interstate order made in another jurisdiction is a **recognised interstate order** (s176A).

20.5 ENFORCEMENT OF RECOGNISED INTERSTATE ORDERS (s176D)

A recognised interstate order that has been properly notified under the law of the State in which it was made (s176D(1)):

- Has the same effect as a local order; and
- May be enforced as if it was a local order.

Orders made after commencement now have the words "Nationally Recognised Order" printed on the face of the order.

Section 176E provides how a maximum penalty for an **offence of contravening a recognised interstate order** is worked out. A previous contravention of a recognised interstate order that constituted an offence is to be treated as a previous offence of contravening a local order.

Section 176F provides that if a law of Queensland (for example, *Weapons Act 1990*) restricts, suspends or revokes the grant of an authorisation for a respondent named in a local order, this extends to the respondent named in a recognised interstate order.

20.6 VARIATIONS AND REVOCATIONS OF RECOGNISED INTERSTATE ORDERS

A person can apply for a new order although a recognised interstate order applies to the same respondent (s176C).

[128] See s4 of the *Domestic and Family Violence Protection Regulation 2023*.

A variation to a local order done in another state may be enforced against a respondent if:

- The variation was done by a court under a corresponding law; and
- The respondent was properly notified of the variation (s176D(3)).

20.6.1 Power of court to vary recognised interstate orders

A court may vary a recognised interstate order as if it were a local order (s176H) but not if it is an order that could not be varied in the State in which it was made (s176H(2)). For example, for South Australian intervention orders, a minimum period of twelve months must elapse before a defendant may apply for a variation of an intervention order[129].

If the court varies a recognised interstate order under this division, the State in which the order was made continues to be, for the purposes of this part, the State in which the order was made (s176H(5)).

An application to vary a recognised interstate order (s176I):

- Must be made to a court that would have power to hear the application if the recognised interstate order were a local order; and
- Must comply with any requirements that would apply if the recognised interstate order were a local order; and
- May be dealt with as though the recognised interstate order were a local order (s176I).

20.6.2 Decision about hearing of a variation application (s176J)

A court may hear or refuse to hear an application to vary an interstate order (s176J(1)). In hearing the application, the court may consider (s176J(2)):

- The State in which the respondent and each protected person under the recognised interstate order usually live or work.
- Any difficulty a party to a proceeding, other than the applicant, may have in attending the proceedings;
- Whether there is sufficient information available to the court.
- Whether there are contravention proceedings and the State in which those proceedings are being taken.
- The practicality of the applicant applying for and obtaining a local order against the respondent.
- The impact of the application on children.
- Any other relevant matters.

20.7 DECLARATION OF DVO AS RECOGNISED INTERSTATE ORDER (s225)

Orders, PPNs or release notices made before 25 November 2017 will only be enforceable in the State or territory in which they were made and previously registered. However, a court can declare that

[129] *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*, ss15 and 26(3)

the order is to be a nationally recognised order (s225) to which amended Part 6 applies. A declaration is not a new order.

An application for a declaration may be made by a person if they would be able to apply for a variation of the order (under s86 if the order is a DVO or under s176I if the DVO were a recognised interstate order). The application for a declaration as a recognised interstate order under s225 must be made in the approved form (s226).

If the Court is not satisfied that the respondent has been properly notified of the making of the interstate order, the court may refuse to declare the order (s225(5)).

20.8 EXCEPTIONS

- Victoria implemented retrospective legislation. All Victorian orders are considered to be nationally recognised orders.
- In South Australia, the respondent cannot make an application to vary an order within the first 12 months of a final order being made. DVOs made in South Australia do not have an expiry date.
- In Western Australia, a respondent must seek leave of the court to vary an interim order. There is no legislation which allows police orders to be varied or cancelled.
- In Victoria, a respondent must seek the leave of the court to vary an interim or final order.
- A Queensland order cannot be revoked in another State or territory, but the duration of the order can be varied.
- There are differences between states relating to discretion to suspend/revoke a weapons licence.

20.9 ORDERS FOR COSTS (s176G)

A recognised interstate order requiring the payment of money **cannot** be enforced (s176G(1)).

The recognition of an interstate order made in another State does not confer power in a Queensland Court to award costs (s176G(2)).

20.10 REVOCATION OF A RECOGNISED INTERSTATE ORDER (s176K)

A recognised interstate order is revoked if (s176K(1)):

- A court varies an order and states an end date on an order that does not have one.
- States an earlier end date than the date on which the order ends.

The order is revoked from the stated date of variation (s176K(2)).

20.11 REGISTRATION, AND VARIATION AND REVOCATION, OF NZ ORDERS (ss176L – 176Q)

20.11.1 Registration of New Zealand orders

Under the NDVOS, interstate orders are automatically recognised when made. The manual registration process (in place before the NDVOS was established) will no longer be necessary. However, the manual registration and variation processes for New Zealand orders registered or varied in Queensland will be retained.

(NB: New Zealand orders registered or varied interstate are treated as recognised interstate orders under s176A(1)(b). Variations of these orders are made under Part 3, Division 3 – Variation and revocation of recognised interstate orders.)

A person may apply to the clerk of a court for the registration of a New Zealand order. The application must be in the approved form (s176L). Section 176M provides that before registering a New Zealand order, the clerk must be satisfied that the order is in force by obtaining a certified copy, and that it has been served on the respondent pursuant to the *Domestic Violence Act 1995* (NZ).

If the clerk is satisfied that the order is in force and was served (as stated in s176M), the clerk must register the New Zealand order.

The clerk must try to obtain the copy and proof quickly, for example by fax, email other electronic means (s176M(2)).

The clerk of the court may refer the New Zealand order to the court for adaptation or modification if: -

- The clerk believes it necessary; or
- The applicant asks the clerk of the court to do so (s176N(2)).

The court may adapt or modify the New Zealand order for its effective operation in Queensland. The clerk must then register the order (s176N(3) and (4)). The order is registered for the period it was originally made (s176N(5)).

20.11.2 Variation or revocation of (Queensland) registered New Zealand order

Section 176P sets out the process to make an application to vary or revoke a New Zealand order registered in Queensland.[130] Section 176P(1) provides that an application can be made to a court to vary the New Zealand order as it is registered in Queensland, vary the period of its operation in Queensland, or revoke the registration of the order. Section 176P(2) sets out who can apply for a variation. Section 176P(3) sets out what the court can do.

A variation under s176P for a New Zealand order registered In Queensland will be recognised in another jurisdiction (see s176D(2)).

[130] Note the process for the variation of a New Zealand order registered interstate (see s 176A(1)(b), s 176H, s 176I)

Section 176Q sets out service implications for an application for the registration or variation of a New Zealand order in Queensland. Section 176Q(1) provides an applicant need not give notice to a respondent of such an application.

Section 176Q(2) provides where notice of an application has not been given to the respondent, the court:

- May hear and decide the application in the absence of the respondent (s176Q(2)(a); and
- Must not refuse to hear and decide the application merely because the respondent has not been given notice (s176Q(2)(b)).

Section 176Q(3) provides that any adaptation or modification made under s176N(3) is enforceable in Queensland without notice being given to the respondent. Section 176Q(4) provides that the applicant is not prevented from giving notice to the respondent.

21 OFFENCES (PART 7)

21.1 BREACH OF A DOMESTIC VIOLENCE ORDER (s177)

Section 177 of the DFVPA creates the offence of contravention of a domestic violence order.

In order to be convicted of an offence of breaching the order, the **respondent must have been present in court** when the order was made **or served with a copy** of the order **or told about the existence of the order by a police officer** (s177(1)). The respondent may be told of the order by a police officer in any way, including by telephone, email, SMS, a social networking site or other electronic means (s177(3)).

Before finding that a respondent has breached an order merely because a police officer told them about the existence of the order, the **court must be satisfied that the police officer told the respondent about the condition that is alleged to have been breached** (s177(4)). The prosecution bears the onus of proving, beyond reasonable doubt that the police officer told the respondent about the existence of the order or of a condition of the order (s177(5)).

In proceedings for an offence involving an interstate order, it is not a defence that a person did not know the interstate order could be registered or varied in Queensland or was registered or varied in Queensland (s177(6)).

See paragraph 20.9.3 below and *SH v Queensland Police Service* [2019] QDC 247 where Clare SC DCJ stated that not all contraventions are same.

See *Jones v Commissioner of Police* [2019] QDC 148 for an appeal against a conviction for contravention of a temporary protection order, where the appellant argued the conviction was not supported by the evidence.

See also *Queensland Police Service v ARH* [2019] QMC 16 for a contravention of a temporary protection order. In this case, the aggrieved approached the respondent and a conversation took place (the temporary protection order included a no contact condition prohibiting the respondent from contacting, remaining, or approaching the aggrieved, with a family law exception). His Honour held that the respondent contravened the temporary protection order as he remained in a place with the aggrieved and did not move away.

In *DYN v Queensland Police Service* [2020] QDC 47, Morzone KC DCJ allowed an appeal against sentence (manifestly excessive) for two counts of contravention of a domestic violence order, finding the learned Magistrate had been lead into error to vary a release date to a parole eligibility date and was right to originally set a parole release date.

In *SAI v Queensland Police Service* [2022] QDC 137, Holliday KC DCJ allowed an appeal against a conviction for contravention of a temporary protection order, ordering a retrial, where the Magistrate had been misdirected and made an erroneous finding of fact on a material point (regarding the measurement of the distance of the appellant from the aggrieved's residence).

In *Wilson v Commissioner of Police* [2022] QDC 269, Barlow KC DCJ allowed an appeal against a sentence imposed for contravention of a domestic violence order, which was to be served

cumulatively upon an existence sentence. Whilst the head sentence was appropriate, the parole eligibility date rendered the sentence manifestly excessive as the Magistrate had failed to take into account time already served and overlooked that a parole date (release or eligibility) relates to the overall period of incarceration (Link to case note).

In *KFL v Commissioner of Police* [2023] QDC 20, Holliday KC DCJ allowed an appeal against a sentence imposed for a contravention of a domestic violence order to the extent that no conviction was recorded (the $800 fine was undisturbed). The appellant had refused to leave the aggrieved's home after being allowed to reside there for a week. He was 37 years old with previous convictions for a contravention and assault committed against the same complainant. It was held the Magistrate did not comply with s13 of the *Penalties and Sentences Act 1992* by stating he took the guilty plea into account and did not have proper regard to s12 by not providing any reasons for recording a conviction.

21.1.1 Penalties for a breach

The maximum penalty for contravention of an order is 120 penalty units or three years imprisonment (s177(2)(b)) unless the respondent has been previously convicted of a breach within the preceding five years. In the latter case, the maximum penalty increases to 240 penalty units or five years imprisonment (s177(2)(a)).

The *Courts and Civil Legislation Amendment Bill 2017*, which received assent on 5 June 2017 amended s12A of the *Penalties and Sentences Act 1992* (commencing on assent):

- Amendments to s12A to relieve Magistrates of the administrative burden of ordering that the offence be recorded as a domestic violence offence. The amendments allow domestic violence notations to be automatically made on a person's criminal history or a formal record of conviction, subject to a contrary court order i.e., in the unlikely/remote circumstance that you find that an offence is not "also a domestic violence offence", this finding will be recorded on the Bench Charge Sheet as part of the sentence.
- The amendments also clarify that the prosecution bears the onus of proving that an offence is a domestic violence offence and that domestic violence notations do not apply to a person's traffic history.

21.2 BREACH OF A PPN (s178)

Sections 178(1) and (2) of the DFVPA create the offence of breaching a PPN, a copy of which has been served on the respondent.

21.2.1 Penalty for breach of a PPN

The penalty for breach of a PPN is 120 penalty units or three years imprisonment (s178(2)).

In the court hearing proceedings for the prosecution, the **court must consider** whether the PPN was issued in substantial compliance with Part 4, Division 2 (Power to issue PPNs) (s178(3)).

21.2.2 Power to issue PPNs

See also Chapter 3.4.

A police officer may issue a notice against a person if the police officer (s101(1)):

- Reasonably believes the respondent has committed domestic violence (s101(1)(a)); and
- If the Respondent is not present at the same location as the police officer, and the police officer has made a reasonable attempt to locate and talk to the respondent including by telephone to afford natural justice in issuing the notice (s101(1)(b)).
- Reasonably believes that no domestic violence order has been made, or police protection notice issued, that:
    - Names the respondent as a respondent and another person involved in the domestic violence mentioned in paragraph s101(1)(a) as the aggrieved; or
    - Names the respondent as an aggrieved and another person involved in the domestic violence mentioned in paragraph s101(1)(a) as the respondent (s101(1)(c)); and
- Reasonably believes that a PPN is necessary or desirable to protect the aggrieved from domestic violence (s101(1)(d)).
- Reasonably believes the respondent should not be taken into custody(s101(1)(e)); and
- Has obtained approval to issue the notice s102(1).

Before issuing a notice, the police officer must obtain approval of a supervising police officer.[131]

A police officer issuing a police protection notice must:[132]

- Personally serve the notice on the respondent (s109); and
- Give a copy of the notice to the aggrieved (s109A).

When serving the notice, the police officer must:[133]

- Explain the notice to the person (s110(2)(a)); and
- Take reasonable steps to ensure the person understands the nature and consequences of the notice (s110(2)(b)).

[131] See s102 for the requirements and s105 for the form of the notice.
[132] See s109. The notice takes effect from when the notice is served on the respondent – s109(2). A copy of the notice must be filed in the local Magistrates Court for the respondent: s111(1). Note: Failure to give a copy of the notice to the aggrieved does not invalidate or otherwise affect the notice – s109(3).
[133] See s110(2). See s110(3) in relation to what the police officer must explain.

21.2.3 Cross notices are not permitted (s103)

If a police officer issues a PPN (the first notice) naming a person as respondent (the first person) until the first notice stops having effect a police officer cannot issue a PPN that names the first person as an aggrieved and second person as respondent (s103).

21.3 BREACH OF RELEASE CONDITIONS (s179)

If a respondent contravenes release conditions imposed under s125 (see paragraph 22.4) following their detention in custody under s116, they commit an offence (s179).

If it is not reasonably practicable for the police officer to bring the respondent to court for the hearing of an application for a protection order or if the police officer has not obtained a temporary protection order, the respondent must be released from custody.[134]

A police officer must release the respondent from custody on release conditions that the police officer considers necessary or desirable to protect the aggrieved from domestic violence, a named person from associated domestic violence or a named person, who is a child, from being exposed to domestic violence committed by the respondent.[135] See paragraph 22.4.2 for more details about release conditions.

See *AHL v Commissioner of Police* [2017] QDC 176 for a case involving a contravention of release conditions (paragraph 21.10.2.3). See also *REW v Commissioner of Police* [2018] QDC 213 in relation to a contravention of release conditions and admissibility of improperly obtained material.

21.3.1 Penalty for breach

Maximum penalty is 120 penalty units or three years imprisonment (s179).

21.4 EVIDENTIARY AND PROCEDURAL PROVISIONS IN OFFENCE PROCEEDINGS (s189)

Evidentiary aids in criminal proceedings for breaches are contained in s189 – see paragraph 16.9.

21.5 CROSS-EXAMINATION OF PROTECTED WITNESSES IN OFFENCE PROCEEDINGS

Part 2 Division 6 of the *Evidence Act 1977* (Qld) provides a scheme for the provision of evidence by and cross-examination of protected witnesses. The *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* amended this division to introduce a new category of protected witnesses with respect to any offences in Part 7 of the DFVPA (which includes a contravention of a domestic violence order). It brings a complainant of a domestic violence offence within the protected witness scheme. It prohibits direct cross-examination by an unrepresented defendant. If cross-examination is to occur, it must be undertaken by a lawyer. It also provides additional requirements for protected witnesses who are not the complainant. Protected

[134] Section 125(1).
[135] Section 125(2).

witness status will apply to witnesses in criminal proceedings in the Magistrates Court and in the Supreme and District Courts.[136]

21.5.1 Who is a protected witness?

Section 21L(2) of the *Evidence Act 1977* provides that Part 2, Division 6 "Cross-examination of protected witnesses" applies to summary proceedings under the *Justices Act 1886* for a domestic violence offence (in additional to criminal proceedings, other than summary proceedings).[137]

A **"protected witness"** includes (s21M(1)):

- a witness under 16.
- a witness who is a person with an impairment of the mind.
- for a proceeding for a domestic violence offence or prescribed special offence, an alleged victim of the offence (s21M(1)(c)).
- for a proceeding for a prescribed offence, an alleged victim of the offence who the court considers would be likely to be disadvantaged as a witness, or to suffer severe emotional trauma, unless treated as a protected witness (s21M(1)(d)).
- for a proceeding for a domestic violence order-related offence – the aggrieved or a relative or associate of the aggrieved, in the domestic violence order; and who the court considers would be likely to be disadvantaged as a witness or suffer severe emotional trauma, unless treated as a protected witness (s21M(1)(e)).

It does not matter whether the proceeding in ss21M(1)(c) or (d) relates also to another offence that is not a domestic violence offence or a prescribed offence (s21M(2)).

A **"domestic violence order-related offence"**, in relation to a domestic violence order, is defined under s21M(3) as:

(a) an offence for the contravention of the domestic violence order under the DFVPA, s177(2); or
(b) an offence for an act or omission that also constitutes an offence in paragraph (a).

21.6 AGGRIEVED OR NAMED PERSON NOT GUILTY OF AN OFFENCE (S180)

An aggrieved or named person in a domestic violence order, PPN or release conditions, does not aid, abet, counsel, or procure the commission of an offence against sections 177, 178 or 179 listed above and is not punishable as a principal offender for encouraging, permitting, or authorising conduct by a respondent that contravenes the order, PPN or conditions (s180).

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[136] Explanatory Notes to *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022*, pages 10-11.
[137] Section 21L(1).

21.7 SUMMARY PROCEEDINGS FOR AN OFFENCE (s181)

An offence with a maximum penalty of more than three years is an indictable offence (s181(2)).

Section 181 provides that an offence against the DFVPA must be taken by summary proceedings under the *Justices Act 1886* **unless** the court is satisfied:

- At any stage after hearing any submissions by the prosecution and defence that because of the nature or seriousness of the offence or any relevant consideration the defendant if convicted may not be adequately punished on summary conviction (s181(6)(a)); or
- On application by the defence that there are exceptional circumstances for not dealing with the charge summarily (s181(6)(b)).

If the court abstains from jurisdiction, it must (s187(7)):

- Stop hearing the charge summarily, and
- Treat the proceeding as a committal.

A proceeding for an offence is started upon a complaint laid by a police officer (s181(3)) and must be started within one year after the offence is committed or one year after the offence comes to the knowledge of the complainant but within two years after the commission of the offence (s182).

The unpublished decision of Fantin DCJ in *R v* SC [2021] QDCPR 4 concerns s181 and whether the District Court has jurisdiction to hear and determine the counts of contravention of a domestic violence order, aggravated offence, transmitted from the Magistrates Court by registry committal or preferred by ex officio indictment. His Honour found s181 precludes charges for offences under s177(2)(a) being transmitted to the District Court by registry committal.

R v SC [2021] QDCPR 4

On 4 June 2019, the defendant consented, through a registry committal pursuant to s114 of the *Justices Act 1886*, to being committed for trial for nine offences [at 12] including (across two bench charge sheets): three counts of unlawful stalking, contravening a protection order and six counts of contravening a domestic violence order.

On 16 September 2019, based on offences disclosed in the depositions, an indictment was presented in the District Court at Cairns charging the defendant with:

- 1 x unlawful stalking contravening a protection order.
- 1 x rape
- 12 x contravening a domestic violence order (aggravated offence).

The proceedings were listed for trial 22 February 2021.

The Crown's application for a s590AA ruling (that the District Court has jurisdiction to hear and decide the 12 counts of contravention of a domestic violence order, aggravated offence) was heard on 30 October 2020, with further oral submissions on 29 January 2021.

The **defendant contends, despite electing a registry committal, the court does not have jurisdiction to hear and determine any of the counts of contravention of domestic violence order, aggravated offence**, because of the combined effects of ss181(4), (6) and (8) of the DFVPA.

The defendant's contentions are found at [16], namely that the mandatory provision of s181(6) was not complied with because a Magistrate did not abstain from dealing summarily with the charges and did not hear and decide the matters in s181(6) at all. Further, as six of the contravention charges were committed by registry committal pursuant to s114 of the *Justices Act 1886* rather than s104 of that Act, the requirements of s181(8) of the DFVPA were not complied with. The ex officio indictment charges were also not within the jurisdiction of the District Court given the non-compliance with s181. The defendant sought an order quashing the 12 counts of contravention of a domestic violence order, aggravated offence, pursuant to s596(2) of the *Criminal Code*.

The Crown's contentions are at [17] – s181 does not preclude a registry committal process, and even if it does, that does not affect the Crown's power under s561 of the *Criminal Code* to present indictable offences on indictment; s181(4) of the DFVPA does not override the clear power in ss560 and 561; s181(4) should be read in conjunction with s561; notwithstanding s181(4), the Crown is not only entitled but required to prefer those charges on indictment by s560.

Consideration [47] – [37]

Fantin DCJ noted on the evidence filed, at no stage did a magistrate abstain from dealing summarily with the charges that proceeded by way of registry committal. At [51], His Honour preferred the defendant's construction that **the combined operation of ss181(4), (6) and (8) displaces or overrides the process in s114 of the *Justices Act 1886* for a registry committal**.

His Honour notes, at [52]:

> *Section 181(4) of the DV Act, when construed in context and by reference to the language of the Act viewed as a whole, mandates that an indictable offence must be heard and decided summarily unless a magistrate abstains from jurisdiction under s181(6).*

His Honour explains how a Magistrate should apply s181(6), at [53]:

> *The use of the word "satisfied" in s181(6) imposes a positive obligation on a magistrate, when a charge for an indictable offence is before him or her, to consider and decide certain factual matters. In those circumstances, subsection (6) requires the magistrate to abstain from jurisdiction if "satisfied" of any of the matters in 181(6)(a) or (b)…*

At [54], on their face, ss181(4), (6) and (8) which are expressed in mandatory terms, exclude the operation of a registry committal. The legislature could have chosen to include a registry committal process as an exception in s181(4) but did not. His Honour notes, at [55]:

> *In my view there is not warrant to depart from the plain words of s181(4), (6) and (8) which do not permit a defendant to elect trial on indictment by registry committal process…. In my view those subsections preclude an offence under the DV Act proceeding by way of registry committal to the District Court under s114 JA.*

His Honour considers, at [57], the six charges transmitted by registry committal are before the court through an irregular process that did not comply with s181.

As regards the ex officio charges, it was His Honour's view that "…*the combined operation of subsections 181(4), (6) and (8) does not displace or override the power under s561 to indict without prior committal an offence under s177(2)(a) DV Act.*" As such, His Honour agreed with the Crown's submission that s181 cannot have been intended to extinguish or override the Crown's untrammelled power under s561 Code to prefer offences on indictment.

In conclusion, at [65], His Honour was satisfied that s181 of the DFVPA does preclude charges for offences under s177(2)(a) being transmitted to the District Court by registry committal, finding the relevant six counts transmitted purportedly by registry committal to be before the court irregularly. The six charges preferred on ex officio indictment were held to be before the court properly and within its jurisdiction.

Orders were made directing the parties to confer within seven days with a view to agreeing upon orders made to give effect to the Reasons and any relief sought.

21.8 NOTICE OF ALLEGED PREVIOUS CONVICTIONS

Note that s47 of the *Justices Act 1886* **Error! Bookmark not defined.** requires a notice of alleged previous convictions to be served with the complaint or served before the day of appearance or given to the defendant on the day of appearance, if the prosecution intends to rely on the previous conviction for the purpose of rendering the defendant liable to a higher penalty (s47(5)). The circumstance of aggravation must also be stated in the complaint (s47(4)).

See paragraph 21.10.5 for the effect of the notice (or absence thereof) on sentencing.

21.9 DEALING WITH A BREACH OF DVO AND ANOTHER CRIMINAL OFFENCE – S16 CODE

For the operation of, and interaction of, s16 of the *Criminal Code Act 1899*[138] and s138 of the DFVPA including whether s138[139] contains express provision for double punishment, see *QPS v DLA* [2015] QMC 6 and *R v MKW* [2014] QDC 300.

In *R v MKW* [2014] QDC 300, the defendant MKW was before the court on an indictment charging the defendant with an offence of unlawfully doing grievous bodily harm to RRB, his de facto partner. The alleged incident occurred on 3 February 2013 when the couple had been drinking with others at an address in Mt Isa. An argument developed and MKW struck RRB with a collapsible chair as a result of which RRB received treatment for a laceration to the head in the intensive care unit of the Mt Isa Hospital. Later that evening the defendant was charged with having breached a domestic violence

[138] Person not to be punished twice for same offence.

[139] Concurrent criminal proceedings

order. On 13 March 2013 he pleaded guilty to that charge and was sentenced to a period of 12 months imprisonment with parole release after serving four months.

On 13 June 2013, the police obtained a statement from a doctor at the Mt Isa Hospital which indicated that RRB had suffered injuries which, if left untreated, were likely to have caused disfigurement or loss of vision and could have proved life threatening. As a consequence, on 16 July 2013, three days after his release from custody, the applicant was charged with an offence of unlawfully doing grievous bodily harm to RRB.

In a pre-trial argument, the applicant/defendant sought an order for a permanent stay of proceedings on the indictment on the ground that continued prosecution would constitute an abuse of process. It was argued that the applicant had already been punished for the same act which gave rise to the present charge and that continued prosecution would therefore be in contravention of s16 of the *Criminal Code*, thereby constituting an abuse of process.

His Honour considered that the test which should be applied in the case before him is the test of punishable acts or omission articulated by Hanger DCJ in *R v Gordon; ex parte A-G Qld* [1975] Qd R 301 and adopted and applied by the Court of Appeal in *R v Dibble; ex parte Attorney-General (Qld)* [2014] QCA 8. His Honour concluded that:

> [9] *In my view, it is clear …that the act for which the applicant was punished in the Magistrates Court was the act of striking RRB with a chair and causing significant injury to her head. It is equally clear that this is the same act relied upon to found the charge in this court of unlawfully doing grievous bodily harm. It follows that ordinarily at least to further punish the defendant for that act would be an act in contravention of s16 of the Code.*

His Honour then turned to consideration of s138 of the DFVPA. The Crown had submitted that the specific sections of the DFVPA, and in particular, s138 served to authorise the continuation of proceedings against the applicant.

The critical question for His Honour was:

> *[13]… whether the prosecution of the applicant for the offence against the Domestic and Family Violence Protection Act constituted a "proceeding" under that Act. If so, then in terms of s138(3)(a) it does not affect any proceeding for an offence against him arising out of that same conduct; that is, it does not affect the proceeding for the offence of unlawfully doing grievous bodily harm.*
>
> *[14] Section 30 of the Act provides that if a respondent to a domestic violence order does not comply with the order, a police officer can charge that respondent with an offence. Penalties for contravention of an order are set out in s177. Section 181(1) of the Act provides that proceedings for an offence against the Act must be taken in a summary way under the Justices Act 1886.*
>
> *[15] In my view these provisions, and in particular s181, make it plain that proceedings for the breach of a domestic violence order are "proceedings under (the) Act" for the purposes of s138(3).*

His Honour distinguished the present case from *Dibble* in which the primary judge ruled that because the indictable offence there charged was based upon the same "basic act" as had constituted the summary offence of which the defendant had previously been convicted, to allow the indictment to proceed would be contrary to s16 of the *Criminal Code* and would constitute an abuse of process. In the present case, His Honour said, where the DFVPA specifically authorises the continuation of the proceedings, there can be no such abuse of the court's process.

Accordingly, His Honour dismissed the application to stay the indictment.

His Honour had earlier said that he was not for the present persuaded that a sentence order made against a person for a breach of a domestic violence order can properly be regarded as an "order made against a person under (the Act)" for the purposes of s138(4):

> *[12] … Depending on the ultimate outcome of this prosecution, this issue may require further submissions for it is at least arguable that the sentencing order is one made, not under the Domestic and Family Violence Protection Act, but under the Penalties and Sentences Act 1992 (Qld).*

At the conclusion of his decision, His Honour added that if his tentative view of s138(4) is correct, and if the applicant were to be convicted of the indictable offence, the question remains as to whether s16 of the Code prohibits him being further punished for that offence. At the very least, His Honour considered that ordinary and well-established sentencing principles would require that regard be had to the penalty imposed in the Magistrates Court for the breaching offence.

The question of whether s138(4) allows a defendant to be punished more than once for the same act in relation to two or more criminal offences was the subject of the decision *QPS v DLA* [2015] QMC 6. In that case, the defendant appeared before the Magistrates Court and pleaded guilty to two charges, one being an offence under s474.17(1) of the *Criminal Code Act 1995 (Cth)* of using a carriage service to menace or harass or cause offence and the other charge being a breach of a protection order. The act forming the basis of both charges was the same – posting various Facebook entries in relation to the aggrieved.

The Magistrate raised the question of how the defendant could be punished for both offences given s16 of the *Criminal Code Act 1899 (Qld)*. Both prosecutors (one Commonwealth and one police prosecutor) argued that s138(4) of the DFVPA allows the defendant to be punished more than once for the same act in relation to two or more criminal offences.

After considering the wording of s16, the decision in *Pearce v R* [1998] HCA 57, s138 of the DFVPA, the Explanatory Notes, the *Legislative Standards Act 1992*, the Australian Law Reform Commission's Family Violence – A National Legal Response Report (which considered a similar provision), the decision in *R v MKW* [2014] QDC 300 (above) and s45 of the *Acts Interpretation Act 1954*, His Honour said:

> *[30] It is clear from both the Acts Interpretation Act, together with a consideration of s16 of the Criminal Code and when considering the comments made by their Honours in the High Court decision of Pearce, that any provision which allows for an offender to be punished more than once for the same act or omission (so far as*

> *it related to two or more criminal offences) requires an express provision in the legislation to bring about this result.*
>
> *[31] Section 138 of the Domestic and Family Violence Protection Act 2012 does not expressly provide that an offender can be punished more than once for the same act or omission in relation to two or more criminal offences.*

It was submitted in that case that the decision of *R v MKW* [2014] QDC 300 was authority for the view that s138(4) of the DFVPA allows for the defendant to be punished more than once for two or more criminal offences arising from the same conduct. His Honour noted that the view expressed by the District Court judge in that case was a "tentative" view in relation to the operation of and the interaction of s138 of the DFVPA and s16 of the *Criminal Code* and therefore the decision was of no assistance in deciding the matter before him.

His Honour referred to a Northern Territory decision of *Ashley v Marinov* [2007] NTCA 1 which considered a case where the double-jeopardy rule applied in circumstances similar to the one before him where the Court of Appeal said that the conclusion they reached in that case does not necessarily mean that a person dealt with for an assault cannot be convicted also of an offence of breaching the terms of a domestic violence order:

> [17] … *Much will depend on the precise terms of the order said to be breached, the facts relied upon to constitute the breach and whether or not, even if a defence under s18 [of the Criminal Code NT] is not open, the court should nevertheless stay the prosecution as an abuse of process…*

In *QPS v DLA* [2015] QMC 6, his Honour found that to convict the defendant of both offences would be contrary to the provisions of s16 of the *Criminal Code* and ordered a permanent stay of the offence of breach of the domestic violence order.

(Note the comments made by the Magistrate that to simply convict and not further punish the defendant does provide for the defendant to be punished more than once for the same act because a consequence of a conviction for the breach of protection order was that the defendant would be liable for an increased penalty if he committed a subsequent breach.)

The issue raised in *JWD v The Commissioner of Police* [2019] QDC 29 was whether three concurrent probation orders for stalking, contravention of domestic violence order and breach of bail amount to double punishment contrary to s16 of the *Criminal Code*. In this case, the applicant appealed against the sentence imposed of three concurrent years' probation for use of a listening device to record private conversation; stalking; and contravention of domestic violence protection order, as well as an extension of time appeal due to an administrative error. Kent KC DCJ allowed the extension of time to appeal. Appeal against the recording of the conviction and penalty for stalking offence was disallowed. The sentences in relation to other offences were amended. Kent KC DCJ found the sentence imposed by the Magistrate for use of a listening device was outside the available range and was reduced from three years' probation to two years, with no conviction recorded. Probation orders for contravention of domestic violence order and breach of bail condition were set aside as double punishment for the same offence and, in lieu thereof, conviction of offence recorded and not further punished.

21.10 SENTENCING FOR BREACH OF DV ORDER, PPN OR RELEASE CONDITIONS[140]

21.10.1 General principles[141]

Under amendments to s177 of DFVPA which came into effect on 30 May 2017, the penalty for breach of a domestic violence order is:

- Three years imprisonment or 120 penalty units for a first breach; and
- Five years imprisonment or 240 penalty units where there has been a previous conviction for a breach within the past five years.

Notably, these maximum penalties were an increase on the penalties that applied under the DFVPA. It is recognised that when Parliament increases the maximum penalty for an offence "*this increase is indicative of the legislature's intention that this type of offending be viewed more seriously and that accordingly, more severe penalties be imposed for it.*"[142]

The *Domestic and Family Violence Protection Bill 2016 Explanatory Notes* (p 8) set out the explanation for the increase:

> *Until the Criminal Law (Domestic Violence) Amendment Act 2015 increased the penalties for breaching court issued DVOs, the maximum penalty for breaching PPNs and release conditions was consistent with the maximum penalty for breaching DVOs in circumstances where the respondent does not have any previous aggravating convictions.*
>
> *The Bill restores consistency by increasing the maximum penalty for breaching a PPN or a release condition from two years imprisonment or 60 penalty units to three years imprisonment or 120 penalty units.*

There is a wide range of conduct that can constitute a breach of a domestic violence order. However, a review of the authorities on sentencing reveals that in many cases the breach is accompanied by a more serious substantive offence with higher maximum penalties. Many of these will be covered in the criminal law benchbook.

See *NVZ v Queensland Police Service* [2018] QDC 216 where the contravention occurred during court proceedings (the appellant appearing via video-link from Woodford Prison and verbally abusing and threatening the aggrieved).

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[140] Extracts from a paper prepared by Judge P.E. Smith and Magistrate L. Shephard, *Sentencing for Domestic Violence Offences and Breaches*, June 2018 have been used throughout this part of the Benchbook.

[141] Extracts from papers prepared by (then) Magistrate Janelle Brassington (now Chief Magistrate of Queensland) have been used throughout this part of the Benchbook.

[142] *R v CBA* [2011] QCA 281 per Wilson AJA at paragraph [19]. And see also *General of Queensland* [2002] QCA 132. In *R v A B (No 2)* [2008] VSCA 39; (2008) 18 VR 391 the Victorian Supreme Court (paragraph [50]) discussed the effect of sentence increases:

> *The sentencing function is committed to Judges and Magistrates, but the parameters within which the discretion is to be exercised are fixed by Parliament. When the maximum penalty for an offence is increased — in this case, it was a 33% increase — the parameters are thereby changed. Thereafter the guidance to be derived from the pre-amendment sentencing practice is significantly reduced as a result.*

The focus here is on articulating some general principles in sentencing for domestic violence and on examining some comparative sentences that are breaches of DV orders.

21.10.2 General principles

In *NJB v Commissioner of Police* [2021] QDC 42, the appellant appealed against conviction and sentence for contravening a domestic violence order. The appeal against the conviction was dismissed (RS Jones DCJ was satisfied, at [53], beyond reasonable doubt the appellant was guilty of committing the offence for which he was charged). The appeal against sentence was upheld. His Honour found the failure to take the appellant's favourable antecedents into account amounted to an error in the exercise of the sentencing discretion.

See *LPN v Queensland Police Service* [2021] QDC 276 where Morzone KC DCJ, allowing an appeal against sentence for two counts of contravention of a domestic violence order, found that the learned Magistrate allowed the weight of the appellant's criminal history to overwhelm considerations of totality. At [36]:

> *…this characterisation of the appellant's past offending and past attempts of correction as indicia of prospects of rehabilitation, to overwhelm considerations of the very minor nature of the offending, as well as considerations of totality.*

21.10.2.1 *Youthful offenders*

In *R v* Kelley [2018] QCA 18, the Court Appeal, per Morrison JA, Sofronoff P and Phillipides JJA considered an appeal from the sentence of youthful offender (24 years at time of offence) for breach of a domestic violence order and assault occasioning bodily harm (DV offence). He pleaded guilty and was sentenced to three months actual imprisonment with parole release after one month and a conviction was recorded. He appealed against the sentence on the basis it was manifestly excessive. The issue was whether the judge failed to take account of mitigating factors including his youth and his submission that no conviction should be recorded as he wished to work in the mines in the future.

Consideration of *Penalties and Sentences Act 1992* s9(3).

To summarise, the Court of Appeal said:

> [43] Seriousness of offence should be balanced against fact he was a youthful first offender, with an unblemished record, good character, and excellent prospects of rehabilitation.
>
> [44] Crown did not press for a custodial sentence. No specific reference to age of offender as consideration.
>
> [50] Sentence was, at best, unduly punitive or the product of misapplication of relevant sentencing principles. Sentence set aside and appellant resentenced.

[53] Appropriate sentence was three months imprisonment suspended immediately for operative period of two years.

[54] Appropriate to record a conviction. Serious offence of DV carried out in breach of an order. Exceptional circumstances would be required to not record a conviction.

[55] Assertion of desire to work in the mines in the future was vague and not supported by adequate evidence.

The sentence was set aside except for recording of the conviction.

See also remarks made by Fraser JA in *R v McConnell* [2018] QCA 107 where the offender was 18 at the time of the offences and the complainant was 17 (see paragraph 20.10).

Kelley was subsequently considered in the District Court decision of *Bye v Commissioner of Police* [2018] QDC 74. In that case the appellant had pleaded guilty to four charges of common assault, one count of deprivation of liberty and one breach of bail condition. He was sentenced to three months imprisonment followed by two years' probation on the substantive counts and three months with a parole release date fixed on the last day for the breach of bail. The appellant was in a relationship with the complainant (not sexual). He was 22 and she was 18. She did not want to go to school one day. The appellant grabbed the complainant around the neck after she swore at him, put a rope across her mouth and tied her so she could not move. He also later pushed her into a wall and punched her when she phoned her mother. The appellant had a deprived upbringing in Burma (having lived in a refugee camp), had no previous convictions, and had not offended whilst on bail. A psychologist assessed him as a low risk of re-offending. The judge held that the three months for the breach of bail condition was excessive, and that insufficient weight was given to the psychological report. At [26], McGill DCJ said that he considered a sentence not involving actual imprisonment may have been within the range but that a sentence involving actual imprisonment was within the range. His Honour took into account the two months already served and placed him on two years' probation. His Honour noted at [25] that *Kelley* is not authority for the proposition that a young first offender could never face actual imprisonment.

21.10.2.2 *The importance of periods of actual custody as a deterrent*

Some statements of general principle from the Court of Appeal emphasise that "*significant sentences of imprisonment involving actual custody to deter not only individual offenders but the wider community"* are set out below.

The purpose of temporary protection orders is to protect those at risk and prevent future violence.

In *R v Wood* [1994] QCA 297, the Court stressed the deterrent aspect of the matter from the standpoint both of the public and the applicant personally. Behaviour like stalking, and violence related to a domestic relationship, was the type of conduct that would not be tolerated by the courts.

> "*Domestic violence orders imposing restraints of the kind involved here are practically speaking the only available means of curbing in advance conduct in the domestic context that is violent or likely to lead to violence. Unless breaches of such orders are, and are well known to be, visited with appropriate severity, they will quickly lose their value in the minds both of those who obtain them and of those who are subject to them. Apart from orders of that kind, the ordinary criminal law, operating as it does only after the event, arrives too late to be an effective deterrent. The wrongdoer is liable to prosecution and punishment, but only after the injury has, sometimes with fatal consequences, already been inflicted*". [p5]

From *R v Fairbrother; ex parte A-G (Qld)* [2005] QCA 105, McMurdo P provided useful guidance for sentencing judges saying (at [23]):

> *Domestic violence is an insidious, prevalent, and serious problem in our society. Victims are often too ashamed to publicly complain, partly because of misguided feelings of guilt and responsibility for the perpetrator's actions. Members of the community are often reluctant to become involved in the personal relationships of others where domestic violence is concerned. Perpetrators of domestic violence often fail to have insight into the seriousness of their offending, claiming an entitlement to behave in that way or at least to be forgiven by the victim and to evade punishment by society. Domestic violence has a deleterious on-going impact not only on the immediate victim but on the victim's wider family and ultimately on the whole of society. It is not solely a domestic issue; it is a crime against the State warranting salutary punishment. The cost to the community in terms of lost income and productivity, medical and psychological treatment and on-going social problems is immense. Perpetrators of serious acts of domestic violence must know that society will not tolerate such behaviour. They can expect the courts to impose significant sentences of imprisonment involving actual custody to deter not only individual offenders but also others who might otherwise think they can commit such acts with near impunity*.

Appeals are to a single judge of the District Court - s222 of the *Justices Act 1886*.

In *R v Mallie Ex Parte Attorney-General* [2009] QCA 109, McMurdo P at [32] noted:

> *If, as Mr Moynihan contends, the judge treated as mitigating the fact that Mallie committed the offence because he was in emotional turmoil after realising the complainant would not resume their relationship, then that was an error. When one party to a broken*

> *relationship intentionally commits serious violence against the party who seeks to end the relationship, this is not a mitigating feature. It is seriously anti-social conduct warranting a condign sentence to appropriately reflect society's disapprobation and the need for general and specific deterrence.*

Further in *R v Major Ex Parte A-G (Qld)* [2011] QCA 210, the offender pleaded guilty to seven counts of assault occasioning bodily harm, one count of threatening violence at night, one count of wounding and one count of assault occasioning bodily harm whilst armed. He also pleaded guilty to four summary offences including two breaches of domestic violence orders. At [53], McMurdo P noted:

> *The dreadful effects of prolonged episodes of domestic violence are notorious. They are consistent with those outlined in the complainant's victim impact statement, relevant parts of which were cited in the prosecutor's written submissions at sentence which defence counsel adopted. Deterrence, both personal and general, is an important factor in sentencing in domestic violence cases. So too is denunciation. The community through the courts seeks sentences which show the public disapprobation of such conduct. The effects of domestic violence go beyond the trauma suffered by victims, survivors and their children to their extended families, and friends. Domestic violence also detrimentally affects the wider community, causing lost economic productivity and added financial strain to community funded social security and health systems.*

See also *CBC v Queensland Police Service* [2019] QDC 003 for an appeal against sentence for contravention of a protection order of one month imprisonment cumulative on pre-existing three year sentence. The prosecution, at [26] conceded the sentence was excessive. In finding the sentence unreasonable and unjust, Morzone KC DCJ found the trial judge had erred in the exercise of his sentencing discretion. In re-sentencing the appellant, Morzone KC DCJ considered the purpose of sentencing and personal and general deterrence:

> *[39] The only purpose for which a sentence may be imposed by virtue of s 9(1) of the Penalties and Sentences Act 1992 (Qld) are to punish the offender to an extent or in a way that is just in all the circumstances, facilitate avenues of rehabilitation, deter the offender and others from committing a similar offence, make it clear that the community denounces the conduct in this offence, and protect the community. The relevant factors the court must have regard to are in s 9(2) of the Penalties and Sentences Act 1992 (Qld).*
>
> *[40] It is trite to say that the appropriate sentence will depend on the particular circumstances of the offending and the degree of culpability of the offender. The nature of the penalty in the form of*

a fine provides little by way of rehabilitation. The gravity of the offending is also gleaned by the maximum penalties, with due regard to the factors of general and, as appropriate, personal deterrence. For this offending, it is also relevant that imprisonment should only be imposed as a last resort and a sentence that allows the appellant to stay in community is preferable.

[41] The maximum penalty for the aggravated offences is five year imprisonment. Further to what I have said above, the nature and serious of the appellant's offending conduct is at the lowest end of the range. The case was wholly circumstantial, and her conviction was largely due to her co-operation and plea to the bare offending. The contravention of the order was minor as she arranged to retreat form the area.

[42] The appellant is a 27 year old aboriginal woman. Whilst she has relevant previous convictions for serious offences of violence, and she reoffended while on parole for those offences. However, her offending here was trivial by comparison and did not involve actual contact with or any violence towards the aggrieved.

[43] Personal and general deterrence are particularly important having regard to the prevalence of domestic violence and contravention of protection orders. This is also reflected in the aggravated offence and the higher maximum penalty. The fidelity by offenders to adhering to order assures the paramount need for the protection an aggrieved from domestic violence where a court found it necessary or desirable to meet that need.

[44] The circumstances of the offending, and the management of the case in the criminal justice system, have been unusual. Clearly enough the parole authorities are concerned about the appellant's performance while on parole. She has found herself in two bouts of imprisonment as a result of her ongoing alcohol mismanagement despite her parole conditions, and she has been returned to custody after her resentence and pending this appeal. The current offending is at the lowest end of the range; it seems to me that imprisonment will be disproportionate to the seriousness of the offending and too crushing on the appellant. I have taken into account the significant undeclarable period of pre-sentence custody.

CTC v Commissioner of Police [2019] QDC 250 was an appeal against sentence for contravention of a domestic violence order (sentence imposed upon a plea of guilty: three months imprisonment wholly suspended for two years; conviction recorded). Jarro DCJ dismissed the appeal, concluding the sentence was not manifestly excessive. His Honour's reasoning in relation to each ground of appeal is set out below:

Ground one: '*The applicant came before the court with a relevant criminal history. He is a mature man. He used actual violence, and a physical injury*

was sustained by the complainant, albeit of a limited nature. The offending was aggravated as the complainant was 23 weeks pregnant at the time and the violence was unprovoked' (at page five). In considering these aggravating features and the need for general deterrence to be reflected in the sentence given the prevalence of domestic violence in the community, Jarro DCJ considered the sentence imposed to be within the appropriate range.

Ground two: Jarro DCJ provided that the principle of "parsimony" is not a governing principle used in the exercise of discretion in sentencing and therefore the sentencing judge was not in error by not having regard to the principle.

Ground three: Jarro DCJ found that the magistrate appropriately balanced the applicant's mitigating circumstances against the applicant's aggravating factors and the need for deterrence.

See *BKA v Commissioner of Police* [2020] QDC 10 where a cumulative sentence was imposed without inviting submissions. In finding the sentence excessive, Byrne KC DCJ found the lengthy deferral of the parole eligibility date failed to reflect a few matters in the appellant's favour (his plea of guilty, no physical violence was inflicted, he had served roughly three months of pre-sentence custody that could not be declared as time already served).

The Court of Appeal, in *R v KAV* [2020] QCA 28 found the head sentence imposed (three years in respect of each count of unlawful stalking, contravening a court order and a concurrent period of one year's imprisonment in respect of the remaining count of unlawful stalking) was not manifestly excessive, taking account of the authorities, and fell within a proper exercise of the sentencing discretion. However, the requirement that the applicant serve nine months in actual custody failed to have proper regard to all the mitigating factors in the applicant's favour including:

- The pleas of guilty.
- The applicant had no relevant criminal history at the commencement of the offending conduct.
- The applicant had recently given birth; and
- Some 20 months had elapsed between the end of the stalking conduct and sentence and the applicant had committed no further offences.

The Court ordered the application for leave to appeal against sentence be allowed and that the sentence below be set aside to the extent that parole be fixed at 14 February 2020.

21.10.2.3 *Breach of Release Condition*

AHL v Commissioner of Police [2017] QDC 176

The appellant had pleaded guilty on the first court appearance to an offence pursuant to s179(2) of the DFVPA (breach of release conditions). The appellant was released from custody at the watch house at 3.35am on 8 July subject to conditions and was prohibited from contacting the aggrieved or asking someone else to do so. There were 19 calls on the appellant's mobile phone log to the aggrieved's phone between 3.53 am and 7.27 am on 8 July 2017. The respondent said he contacted the aggrieved as he had no transport or money.

On sentencing, he told the court that he and the aggrieved had a nine-month-old son, and he wanted to provide for him. He had consulted a psychiatrist to manage his emotions and impulse control. He said he had a full-time job and asked that any decision not put his job at risk. The prosecutor asked for an intervention order as part of a probation order.

The Magistrate then explained the concept of an intervention order and stood the matter down. A corrections officer reported that the respondent was not suitable for probation order as he could not comply with the reporting requirements due to his job and lack of transport, but he had expressed a willingness to comply with an intervention order. No submission was made by the prosecutor or self-represented litigant about penalty.

The Magistrate then gave her decision and made the intervention order and fined the respondent $500 with an immediate referral to SPER and a conviction was recorded.

Long SC DCJ considered the issue of whether a conviction should have been recorded; ss12 and 44 of the *Penalties and Sentences Act 1992* and found that the Magistrate had not given sufficient regard to s12(2)(c) and the effect of conviction of the appellant's employment. The conviction was substituted with no conviction recorded.

Long SC DCJ also noted that there was **no power** to order the intervention order as part of the sentencing process.

21.10.2.4 *Breach of Protection Order; Good Behaviour Condition*

In *D v W* [2010] QDC 270, a protection order was made with standard conditions (to be of good behaviour) on 30 October 2009. The appellant was the father of the aggrieved (his son).

An incident occurred at the Nerang Caravan Park where the aggrieved (son) and respondent (his father) lived together. The aggrieved son gave evidence. The appellant father did not. The son said he was watching television in the annex of the caravan and his father was asleep. He turned the sound on the television up

due to rain on the roof. He admitted to behaving badly by failing to turn down the television. The father grabbed the remote. An argument ensued and the son took the remote back. He said he lunged at his father, a struggle eventuated and during that struggle they ended up on the ground and the son bit the father's ear.

The father was convicted on the basis that his behaviour before the fight (snatching the remote control) breached the condition to be of good behaviour.

The Magistrate found the father guilty of breaching the protection order. The sentence imposed by the Magistrate was no conviction recorded and a 12-month behaviour bond with a recognisance of $500.

Samios DCJ accepted the Magistrate's finding that the snatching of the remote was a breach of the good behaviour condition. The father received a good behaviour bond. The sentence was not overturned on appeal.

EAV v Commissioner of Police [2016] QDC 237

The appellant EAV and the complainant were each subject to domestic violence protection orders issued in the Brisbane Magistrates Court on 8 July 2015 for a period of two years.

On 20 November 2015, police attended at their unit, following a dispute. EAV told police that he and the complainant were in a heated argument, which the complainant had initiated. The appellant said that he attempted to stand up from his seat when he bumped into the complainant, causing her to stumble onto the bed. The complainant slapped the appellant. EAV grabbed the complainant, threw her on the bed, placed his weight on top of her, and restrained her until able to stand up and walk downstairs from their apartment. The argument continued until police arrived.

The prosecutor informed the Magistrate that EAV had been helpful and cooperative with police; had made admissions regarding the physical side of the incident; and appeared remorseful for his actions.

The breach of the protection order was the second breach within a short period. EAV pleaded guilty to the breach. The Magistrate sentenced EAV to three months imprisonment, wholly suspended with an operational period of 12 months.

Dearden DCJ said the following matters were relevant:

- There were mutual, cross-orders for domestic violence in place at the time of the offending:
- The initial violence in the incident was, in fact, the complainant slapping the appellant.
- The appellant's violence, in response, was relatively low level (although nonetheless unacceptable).

- The appellant had been in receipt of medical care in respect of a significant mental health issue, and importantly, had undertaken the Anglicare Living Without Violence Program, which was a substantial program, indicating on his part a significant willingness to change.
- The appellant had expressed his remorse to police immediately after the event.

His Honour resentenced EAV to a combined order of 18 months' probation; with a special condition that EAV defendant submit to such medical, psychological, or psychiatric treatment and/or counselling, and/or programs, in respect of mental health issues, domestic violence, or any other matter considered relevant by an authorised corrective services officer, as directed by an authorised corrective services officer and 100 hours community service to be completed within 12 months. No conviction was recorded.

In *JMM v Commissioner of Police* [2018] QDC 130, the appellant appealed against the sentence imposed, upon a plea of guilty, of three months' imprisonment wholly suspended or twelve months for a contravention of a domestic violence order. The circumstances of the conduct giving rise to the offence involved verbal abuse to a child named on the domestic violence order, following a verbally provocation by the child. The domestic violence order contained the standard conditions pursuant to s56 of the DFVPA, including a condition that the appellant must be of good behaviour towards the child, must not commit associated domestic violence against the child and must not expose the child to domestic violence. It did not contain a "no contact" condition.

The appellant's behaviour fell within the definition of "domestic violence" in s8 of the Act because it was "emotionally or psychologically abusive" [at 45]. Fantin DCJ considered the behaviour wrong and inappropriate but at the least serious end of domestic violence. At [46] "*it was an unfortunate response to serious provocation (the use of a knife by a child with behavioural problems). There was no element of physical violence, actual or threatened, by the appellant*."

Fantin DCJ found the Magistrate erred in exercising the sentencing discretion by, at [51]:

1. *Allowing extraneous or irrelevant matters to influence her determination, namely the circumstances of the domestic violence order and the previous contravention offence, the criminal proceedings against the appellant's de facto and the child protection proceedings.*

2. *Rejecting the appellant's submission that the child was suffering chronic behavioural problems, was receiving psychological counselling and a psychiatric assessment was pending, and "diagnosing" that the child's behavioural problems were caused by the appellant "hurting him", when there was no evidence of the*

appellant being physically violent towards the child during this offence or the earlier contravention offence.

3. *Placing too much weight on the appellant's criminal history and allowing it to overwhelm other material considerations and the nature and objective seriousness of the offending.*

4. *Failing to take into account material considerations pursuant to s9 of the Penalties and Sentences Act 1992 (Qld) namely the nature and seriousness of the offence, the principle that the sentence imposed must not be disproportionate to the gravity of the subject offence and the principle that a sentence of imprisonment is a sentence of last resort and a sentence that allowed the offender to stay in the community was preferable; and*

5. *Breaching the rule of natural justice by failing to invite the parties to make submissions on whether a sentence of imprisonment was appropriate, in circumstances where no party had addressed the court on that possibility and where the court had not indicated it was considering it.*

Having identified the errors, Fantin DCJ conducted her own independent discretion and analysis of the relevant cases, and considered the sentence was manifestly excessive. Taking into account the cases and distinguishing the material facts, namely that the behaviour amounted to a single incidence of provoked verbal abuse and involved no violence, her Honour set aside the sentence of three months' imprisonment and ordered that the appellant be released under a probation order for six months.

In *BHN v Queensland Police Service* [2019] QDC 129, the appellant appealed against the sentence for one count of contravention of a domestic violence order (aggravated offence) on the grounds the sentence imposed, namely the parole release date, was manifestly excessive. The appellant was on parole at the time the offences were committed and was in custody for these offences at the time of the sentencing hearing. Morzone KC DCJ found the learned Magistrate, in setting a parole release date in excess of one third of the head sentence, to have failed to "*explicitly consider the aggregate sentence in order to determine whether a total sentence is just and appropriate bespeaks an error in the exercise of the sentencing discretion.*"

RMP v Buley [2021] QDC 228 was an appeal against sentence for contravention of a domestic violence order where Loury KC DCJ found the Magistrate had taken into account an irrelevant matter in determining an appropriate sentence. The irrelevant matter was that physical injuries to the aggrieved had been caused by the appellant, but the prosecution did not seek to prove the aggrieved's injuries were caused by the appellant.

21.10.2.5 *Breach of Protection Order and Public Nuisance*

GKW v Commissioner of Police [2008] QDC 143

GKW pleaded guilty to public nuisance and contravention of a protection order. He was sentenced to concurrent terms of three months and six months but cumulative on another term. There was confusion about when a parole eligibility date could be made, and it was wrongly held that the original sentence had to expire before a new date could be set.

The facts of the contravention were the appellant verbally abused and threatened the aggrieved. He then picked up a brick and threw it towards her, narrowly missing her. Neighbours and other persons intervened and assisted and protected the appellant's partner. The appellant then threatened violence against them. Trafford-Walker DCJ held that neither the sentence nor the cumulative order was excessive:

> *His criminal history is extensive, covering many offences of violence. The offence against his partner, when one of course looks at the circumstances, the domestic violence order was in place. Such orders are there for the protection of females and unless they are going to have some effect, then the protection is sought by such orders is just illusory. Persons must be aware that if they breach such orders, use, or threaten violence that punishment will follow.* [19]

However, the fixing of an earlier parole eligibility date was appropriate. [38]

In *Warburton v Queensland Police Service* [2012] QDC 256:, W was convicted of two offences of public nuisance and one offence of contravention of a protection order. He was sentenced by the Magistrate to three- and four-months' imprisonment (concurrent) for the offences of public nuisance and five months imprisonment (cumulative) for the DV offence. A parole release date was set after W served three months. Only the sentence for the DV offence was appealed.

The facts of the DV offence were the defendant, intoxicated, found the aggrieved in bed. He began eating dinner and then elbowed the aggrieved in the arm and pretended to jab at her with a fork. He threatened her *'I could half kill you with this. No, I could not hurt you with this*.' He then kicked the aggrieved causing her to fall hard on the floor and taunted her saying "*Your kids don't even love you and they hate your guts. No wonder your husband used to beat you up*.'

Despite having an extensive history for public order, drug, and alcohol related offending this was the defendant's first offence of this type. Everson DCJ allowed the appeal holding:

> *The maximum penalty for the offence of breach of a DVO is imprisonment for 12 months. It is, in my view, a manifestly excessive sentence to impose a penalty of five months' imprisonment for a first*

> *offence of this type in circumstances where the aggrieved suffered no physical injuries and having regard otherwise to the conduct of the appellant.* [p4]

His Honour resentenced the defendant to one month imprisonment cumulative with the other sentences with the date of appeal (13 July 2012) as the parole release date (approximately after serving two months imprisonment):

> *The offending in question is still serious, involving, as it does, not just threatened violence but actual violence directed towards the aggrieved. It also has occurred in the context of the appellant being drunk and aggressive in circumstances where this has given rise to other offences not long before.* [p4]
>
> *It is within range to impose a short period of imprisonment. In all of the circumstances, having regard to his criminal history and the nature of the offending, I believe it is appropriate to impose a sentence of imprisonment for one month*. [p5]

21.10.2.6 *Breach of Protection Order and Obstruct Police*

MH v Queensland Police Service [2015] QDC 124

The appellant pleaded guilty to one charge of breaching a domestic violence order and one charge of obstructing police on the same day. At about 12:30am on 2 February 2014, a resident contacted police and reported the appellant was outside a unit, banging on the front door and attempting to gain entry. There was the sound of the aggrieved and the sound of a baby crying coming from inside the unit. Police attended the unit at about 1am and spoke to the aggrieved who advised the police that the appellant had called her at about 10:30pm. During the course of this conversation, the appellant told her he was outside her unit. He then jumped her front fence and knocked on the side door. She let him inside, where he remained at the address for some time. He demanded to see a call list on her mobile telephone; an argument resulted. At about 12:30am, the aggrieved suggested they go outside to have a cigarette, and once outside the appellant was locked out of the property. This made him angry, and he started to bang on the door to gain entry. He was located and spoken to by police a short time later but denied being within 50 metres of the address. The defence solicitor submitted to the court that he banged on the door to be let back in to get his keys and mobile phone which he had left inside before he was locked out.

In relation to the obstruct police charge, when the police advised the appellant, he was under arrest he became very uncooperative and aggressive towards them and refused to follow simple requests and began walking away. He tensed his arms and used his body weight in an attempt to pull away, struggled violently with police and was eventually restrained with handcuffs. He was abusive and

threatening towards police. He was remorseful and was in regular good communications with the aggrieved, with who he had a 16-month-old daughter.

The appellant had a criminal history including minor drug offences (March 2002); obstructing police (January 2003); possessing bags and scales for cannabis (June 2003); stealing a street sign and minor drug charges (2003); minor charges relating to cannabis (July 2005). More importantly, in April 2008 he was convicted and sentenced to five years imprisonment suspended after serving two years, for an operational period of five years, for the offence of dangerous driving causing death. The victim of the offence was his brother who had taken a domestic violence order out against the appellant. The appellant who was unlicensed at the time, drove his care at the victim who was 40 meters away. The victim was struck and later died of his injuries. He told police he thought the victim would have jumped out of the way of the vehicle.

After taking into account the plea of guilty and agreeing that the facts did not demonstrate a high or even middle level of actual violence, the Magistrate referred to the criminal history and found the appellant at high risk of doing violence in the community stating: "*That is not the scenario for the court to be sentencing you to anything except imprisonment.*"

The Magistrate imposed three months imprisonment on each charge and wholly suspended the sentences for 12 months.

Smith DCJA considered the Magistrate erred in stating that a prison term was the *only option* in the case:

> *[35] It seems to me, taking into account the present relationship between the aggrieved and the appellant; the fact that no actual violence was involved with respect to the breach of the domestic violence order; the fact that the second charge involved obstructing police rather than an assault; the purposes of sentencing contained in s 9(1) of the PSA and the factors mentioned in s 9(2) of the PSA, this is a case where it would be desirable for the appellant to undergo probation with a condition that he attend domestic violence and anger management counselling.*
>
> *[36] I have had regard to the comparable decisions referred to in reaching this conclusion. Some caution should be applied to the decisions which considered the section before the maximum penalty was increased from nine months' imprisonment to two years' imprisonment.*
>
> *[37] In my view the community would far better be protected if the appellant undergoes a probation order with conditions. Although the 2008 offence was a serious one, it did occur some eight years ago when the appellant was much younger.*

> *[38] In the circumstances, subject to the consent of the appellant, I propose to record convictions on each count and to impose an 18-month probation order as specified in the order section of this judgment.*

His Honour then considered whether to make a protection order and decided it was desirable.

See *WPT v QPS* [2021] QDC 250 where Morzone KC DCJ dismissed an appeal against sentence for contravention of a domestic violence order, serious assault on a police office and obstruct police. The sentence imposed by the learned magistrate on the plea of guilty (15 months imprisonment for the offence of serious assault police officer, 12 month for the offence of contravention of domestic violence order and one month imprisonment for the offence of obstruct police, served concurrently, parole release date set at one third of the sentence) was not so manifestly excessive that it falls outside the permissible range in the circumstances of the case.

21.10.2.7 *Breach Protection Order No Conviction Recorded*

RMR v Sinclair [2012] QDC 204

The appellant pleaded guilty to contravening a protection order. He received three months imprisonment suspended forthwith for an operational period of 12 months. The appellant was 25 years old and had no previous convictions. The facts of the breach were serious.

The original order had been made in September 2011. It was a standard condition order. In February 2012 the couple argued in the kitchen at home. The appellant became aggressive. He ripped his partner's shirt apparently trying to strip her of it. She suffered bruising to the left upper arm. Shortly after, the appellant punched the external wall of the house, threw food onto the floor, and threw her mobile phone to the floor, breaking it. He left but returned, calmer, about 15 minutes later. He became aggressive again and ripped his partner's shirt from her body. They argued more. She told him to leave her alone or she would not see his unborn child. He grabbed her around the neck and said, 'If you don't let me see my daughter, I'll murder you.' He punched her on the back left side of the head. When police arrived, the appellant admitted assaulting the aggrieved and causing damage. He said he'd made a big mistake, acknowledging he should never have hit the aggrieved.

The appellant's lawyer submitted that in the appellant's favour were that the aggrieved supported him and they were accessing counselling, the appellant was still young with very good prospects of obtaining work in the mines if no conviction was recorded, he had been employed for four years as a security

guard. Brief evidence was tendered that the appellant also had a medical condition (ADHD and autistic spectrum disorder).

The Magistrate in imposing a suspended term of imprisonment found the violence against a pregnant woman extensive, the legislative purpose is to protect women, the community has an interest in the family's protection and the only appropriate penalty was imprisonment.

On appeal it was submitted a fine with no conviction recorded should have been imposed. Devereaux SC DCJ allowed the appeal and imposed a two-year probation order. At [18], His Honour held:

> *Because of:*
>
> - *the appellant's plea of guilty, coming after a statement to police signifying at least regret if not remorse.*
> - *the lack of criminal history and a good work record with prospects of future employment.*
> - *the support of the complainant and the expressed resolve to work at the relationship.*
>
> *I think the proper outcome in this case was a probation order. Such an order would strengthen the order made under the DVFPA by the supervision of the appellant and, presumably, the oversight of counselling programs and medical treatment. It would best produce the results envisioned in the purposes of the DVFPA, while still carrying a deterrent threat to the appellant and others in the prospect of re-sentencing upon breach.*

Taking into account those matters in s12 of the *Penalties and Sentences Act 1992*, no conviction was recorded. His Honour held at [19]:

> *Having regard to the matters set out in s12 of the PSA, particularly the appellant's antecedents and medical diagnosis and the prospect that a conviction might adversely affect his chances of gaining employment, I would not record a conviction.*

See also *AHL v Commissioner of Police* [2017] QDC 16 at paragraph 20.9.2.3.

21.10.2.8 *Breach of a TPO and Assault Occasioning Bodily Harm*

Commissioner of Police v DGM [2016] QDC 22

DGM (aged 20 years and an indigenous man with a drug addiction) assaulted his pregnant partner in her home at night. Their one-year-old child was "in earshot." DGM had been served with a temporary protection order (naming the complainant, the one-year-old and unborn child) two weeks earlier. DGM pleaded

guilty and was sentenced for the assault and was dealt with for repeated breaches of bail.

He was sentenced to 12 months imprisonment for assault occasioning bodily harm and concurrent lesser terms for the other offences. The Commissioner of Police appealed against the sentence. The sentence was increased on appeal from 12 months to 18 months.

Kingham DCJ provides a useful summary of the cases and relevant considerations in terms of mitigating factors:

Denunciation and Deterrence

- Are the dominant considerations on sentence for such offences.[143]

Bail – self surrender

- Performance on bail can be a mitigating factor *R v Bosnjak* [2007] QCA 325 Keane JA: *"*Rehabilitation *indicated by a lengthy period while on bail without reoffending is a factor which may* weight *significantly in an applicant's favour*." (That offender was compliant on bail for five years).
- In this case DGM was on bail for seven weeks, committed numerous bail offences in the three weeks before sentencing. "*His decision to voluntarily surrender might show a change of attitude, but it did not mitigate his violent offending…his history of non-compliance on bail and on community-based orders, his actions on the morning of sentence were too recent to reasonably enhance his prospects of rehabilitation*." [28] His voluntary surrender was largely irrelevant on sentence.

Youth

- DGM was 20 years old at sentence. His criminal history "*was not so extensive it* ***fatally weakened*** *his claim to age being a factor in mitigation." See also R v Kelley* [2018] QCA 18.

Support of Partner

- The complainant was in court to support DGM and wanted to continue the relationship with DGM. Kingham DCJ explains that reconciliation and coercion needs to be seen through the victim's lens:

  > [34] *Courts in Queensland and in other States of Australia have recognised the need to approach submissions about*

[143] *R v King* (2006) QCA 466 [18], *R v Rowe* NSW CCA 60451 of 1995 [130 NSW 233] *Pasinis v R* [2014] VSCA 97 [15] *Guy and Anderson* [2016] ACTSC 5 [78]*, R v Fairbrother* (as above)

reconciliation with real caution, because of the particular features of domestic and family violence. That fact that a victim is a reluctant complainant is not a mitigating factor[144]*. Likewise, reconciliation after the victim has complained ought not mitigate the sentence.*

[35] There may be cases in which reconciliation is relevant to an offender's prospects of rehabilitation. However, that comes from the offender's conduct, not the victim's forgiveness. The nature of the relationship means victims may, contrary to their own welfare, forgive their attacker. That does not reduce the risk posed by the offender and depending on the dynamics in a particular relationship, it could well exacerbate the risk. Necessarily, prospects of rehabilitation must be assessed by reference to the offender's attitude and conduct, not the victims.[145]

Rehabilitation

- In sentencing a young *indigenous* man with a drug addiction rehabilitation was an important consideration but not the dominant factor and needed to be balanced with the need to denounce and deter serious violence against a vulnerable victim.

21.10.2.9 *Breach of a Protection Order and Assault Occasioning Bodily Harm*

CCR v Queensland Police Service [2010] QDC 48*6*

In this case, CCR pleaded guilty to four counts of breaching a protection order and one count of assault occasioning bodily harm and one *Bail Act 1980* offence. He was sentenced to an effective sentence of three months' imprisonment followed by 12 months' probation. The facts (and sentences) were:

- The first offence occurred about 12 months after the original protection order was made and involved act of intimidation being shouting and yelling and smashing an iron (seven days imprisonment).
- CCR was not bought to court on this offence until April 2009 and before this, he committed the second breach on 4 March 2009 by attending the house and after an argument, smashing the TV in a cabinet while the aggrieved hid in the garage phoning police (one month imprisonment).
- On 21 March 2009, CCR again attended the house, there was an argument and the aggrieved locked herself in the bathroom while CCR made threats to harm her (two months imprisonment).

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[144] *R v Murray* [2014] QCA 160 [35]

[145] *R v Potter* [2019] QCA 162 , Holmes CJ, at [19], "*…it will often be the case in domestic violence offences that considerations of deterrence must override the particular wishes of the complainant*."

- The next offence occurred after his initial appearance in court for the first two offences and while he was on bail, when CCR attended the aggrieved's house to get her to withdraw the complaint. He grabbed her throat and choked her for a few seconds and then released her and threw her handbag in her face (three months imprisonment).
- The final offence, in July 2009, occurred when CCR was living with the aggrieved as he had no other place to go. There was an argument and she told him to leave. He then struck her on top of her head with his right fist causing the skin to break and blood to trickle down the aggrieved's face. CCR was charged with assault occasioning bodily harm and contravening a protection order (three months imprisonment followed by 12 months' probation).

CCR was 60 years of age with a history of offences of violence prior to 1992. He then had no offences for 16 years following his giving up alcohol. In 2008, there was one contravention of a protection order. CCR pleaded guilty and had some medical problems (including diabetes).

Robertson DCJ noted that although this type of offending was prevalent there were a dearth of comparable sentences. While the appeal was allowed on the basis of non-compliance with s13 of the *Penalties and Sentences Act 1992* his Honour imposed the same sentences saying at [40]:

> *As I have indicated, exercising the sentence discretion afresh in this case, leads me to the conclusion that the sentence imposed by her Honour was an appropriate one in all the circumstances. Domestic violence is common in our community, and it's deplored by right-minded people. In this case, the appellant presented as an upstanding member of the community whilst acting as a controlling bully in the privacy of his own home. Both personal and general deterrence applied in this man's case. He persistently offended over a significant period and seemed to have no regard to his wife's rights and no regard in some cases to the fact that he was on bail.*
>
> *In saying that, I accept that there was some evidence albeit of little weight, that the relationship was fractious and that the aggrieved person, to some extent, ambivalent towards her husband, a feature that is common in relationships of this kind. What is also clear is that for many years there were no recorded acts of domestic violence, and I can infer that the applicant's infidelity (referred to in Mr Messenger's submissions), during one of their separations perversely became the touchstone for the onset of this appalling behaviour by him towards his wife.*
>
> *It follows that in resentencing the offender afresh because of the sentencing error that was made, I would impose the same sentences.*

See also *BAB v Commissioner for Police* [2019] QDC 118 for sentencing for multiple contraventions of a domestic violence order and assault occasioning bodily harm, where the sentencing Magistrate was found to have failed to properly make the sentence for assault occasioning harm cumulative pursuant to S156A PSA.

21.10.2.10 ***Breach of Protection Order and the Family Law exception***

Where parties have ongoing contact due to Family Court parenting orders it is common for DFV orders to contain what is known as the "family Law exception" meaning that they can have contact to arrange or vary arrangements for children.

Likewise, parenting orders made in the Family Courts may permit contact to make parenting arrangements despite the existence of no contact orders made pursuant to the DFVPA.

In *Harvey v QPS* [2018] QCA 64, the Court of Appeal considered an appeal against numerous convictions for breaches of domestic violence orders by texting and telephoning the aggrieved. One argument on appeal was the appellant was justified in the offensive messages sent to the aggrieved as the Family Court order enabled contact for the purpose of arranging time with the children.

The Court of Appeal upheld the finding of the sentencing Magistrate that the orders did not permit him to communicate with the aggrieved in the way that he did. An element of reasonableness must apply to the communication.

In *Queensland Police Service v ARH* [2019] QMC 16, in considering whether a temporary protection order had been contravened, the court examined the meaning of "approach" and "remain" in a family law exception condition on a temporary protection order and the importance of the condition being clear and easy for parties to understand. His Honour found that even though the aggrieved had approached the respondent and engaged in a conversation, the respondent, by remaining and not moving away, contravened the temporary protection order. In his Honour's view, at [67], stating a specific distance would have clarified the orders and made it easier for people to understand.

A further case concerned the interpretation of "…in emergency circumstances" in a family law exception condition. In *MS v Commissioner of Police* [2020] QDC 51, Dearden DCJ dismissed an appeal against conviction for one charge of contravention of a domestic violence order. The appellant admitted to attempting to send an email to the aggrieved via her solicitors advising, and using deeply offensive language, of his recent diagnosis of a mental health condition (OCD personality disorder) and that their child should be monitored. The appellant argued that the communication regarded matters of parental responsibility, that Family Court orders required him to communicate with the aggrieved regarding those matters, and that it had not been proven that he had motive to do anything other than comply with those orders. The Magistrate found

that the communication breached the domestic violence order and that no exemption was afforded by the Family Court orders. The appellant's belief that his diagnosis was an emergency was 'without foundation'. His Honour agreed with the Magistrate's decision. The email communication was not for the sole purpose of communication regarding parental responsibility. His Honour found the email communication was a contravention of a temporary protection order, dismissing all grounds of appeal.[146]

21.10.2.11 *Serious domestic violence offences and antecedents reducing sentence*

In *R v Ali* [2018] QCA 212, the applicant was sentenced on 29 August 2017 by learned primary judge to:

- Attempted murder = 10 years imprisonment (conviction for DV offence recorded)
- Dangerous operation of motor vehicle = two years (conviction for DV offence recorded)
- Common assault = three years
- Going armed in public so as to cause fear = three years

The offending conduct was alleged to have occurred on a single day in Wacol in 2015 (the applicant ramming the complainant's car and attacking her multiple times with a machete). The applicant sought to argue as the grounds for appeal that the primary judge wrongly found an intention to kill for a longer period than was in fact the case (that is that the applicant held an intention to kill from the moment he drove down the complainant's street). Burns J found that the primary judge was entitled to form her own view of the facts at sentence consistent with the evidence at trial and the jury's verdict and it was open to her Honour to infer to the high degree necessary that the applicant held an intention to kill from the moment he drove down the complainant's street (he swerved to her side of the street, continued to drive towards her when she swerved to avoid him, deliberately accelerating into her stationary vehicle). At [24], for these reasons, it cannot be said that there is any substance in the proposition underlying the proposed grounds of appeal.

A sentence well in excess of 10 years was called for but was clearly reduced by the primary judge to take account of personal factors to the applicant (no

[146] The appellant sought leave to appeal the decision of Dearden DCJ in *MS v Commissioner of Police* [2021] QCA 31. Leave to appeal was refused. In her lead judgment, Her Honour Mullins JJA found, as the primary judge had found, at [20], there was no inconsistency and that condition six of the protection order did not preclude the application of the exception in paragraph 18 of the Family Court order. The email was not for the 'sole purpose of communication regarding parental responsibility' and did not fall within the paragraph 18 exception and therefore did not fall within condition 6 of the protection order. Accordingly, at [20], s24 *Criminal Code* did not apply to a mistake by the appellant in the interpretation of the Family Court order.

previous convictions, co-operation in the proceeding including early guilty pleas to counts one, five and six, presence of a mental health disorder at time of the offence which impaired his capacity to control his behaviour and the significant communication and other difficulties he had and would continue to experience in custody).

In all the relevant circumstances, 10 years imprisonment was not manifestly excessive.

In *R v MCZ* [2018] QCA 240, the applicant sought leave to appeal against sentence for endangering property by fire (three years imprisonment) and grievous bodily harm (seven years imprisonment with parole eligibility after two years including 362 days pre-sentence custody) on grounds sentence was manifestly excessive. The sentencing judge accepted that the applicant was genuinely remorseful, apologetic, and ashamed of his offending; the applicant cooperated with the police and prosecution; he entered a plea of guilty; he was otherwise of good character; imprisonment was found to be harder for the applicant than for others; and his risk of re-offending was found to be low.

There was no error in the authorities relied upon by the sentencing judge and there was no substance to the applicant's argument that the sentencing judge did not adequately take the applicant's antecedent into account. Fraser JA was not persuaded that in all the circumstances, the sentence is so severe as to evidence an error in the exercise of the discretion reposed by the sentencing judge. The sentence is not manifestly excessive.

In *R v LAN* [2019] QCA 76, the applicant sought leave to appeal against a sentence of nine years imprisonment for attempted murder (domestic violence offence) on the grounds the sentence was manifestly excessive. The sentencing judge, Boddice J, described the offending as being a 'sustained and brutal act of violence' towards a former partner. His Honour noted that the complainant had not suffered significant physical injury but had endured significant psychological injuries as a result.

In imposing sentence, Boddice J took into account the applicant's guilty plea as evidence of his cooperation (and saving the complainant the trauma of having to give evidence) and his personal circumstances. The applicant had suffered a dreadful childhood and had been kidnapped and forced to be a child soldier. The applicant had a psychiatrist's report which stated that these experiences left him with a range of mental health issues and would not respond well to a perceived threat. In this regard, His Honour noted that there was 'no threat at all' on the occasion in question and his offending meant there was good reason for the community to be protected from him in the future.

Boddice J considered that the applicant's mental health issues would make his incarceration harder and that, upon release, he faced a real likelihood of

deportation. In addition, it appeared that the applicant's father had been killed in his home country.

The applicant had a criminal history but no offences of violence. The sentencing judge referred to this history as 'relatively irrelevant'.

The Court of Appeal refused the application for leave to appeal. After considering relevant factors, Philippides JA held that the nine year sentence imposed on the applicant was within the sound exercise of the sentencing discretion and was supported by numerous authorities (including *R v Ali* [2018] QCA 212). (Link to case note).

In *SKS v Commissioner of Police* [2022] QDC 176, Smith DCJA found the Magistrate had erred by failing to consider the likely impact of immigration detention and deportation on the Appellant which amounted to a miscarriage of justice. After consideration of the comparable decisions, His Honour held the sentence was excessive, taking into account the serious nature of the breach and the mitigating factors and need for rehabilitation, and the absence of a significant history.

21.10.3 Recording Conviction

RAS v Commissioner of Police (No.2) [2012] QDC 239

RAS appealed against the recording of a conviction for contravening a protection order. He was also fined $1200. The appeal was allowed on the basis no submissions had been invited from the defendant before convictions were recorded. RAS was a security officer, and a conviction would put his licence in jeopardy. RAS had two previous breaches for contravention of protection orders and a breach of bail. These offences all related to breaches involved in contacting the aggrieved about custody matters and arranging the delivery of flowers.

Dearden DCJ exercising the discretion in s12 of the *Penalties and Sentences Act 1992* afresh determined no conviction should be recorded holding (at [9]):

> *Although it is a relatively marginal matter and there is no doubt that on the one hand the breach of the domestic violence order was a serious breach involving actual violence against the aggrieved, that does need to be balanced against the relatively minor nature of the two previous breaches of domestic violence orders and the breach of bail, and the potential effect on the applicant's economic wellbeing and prospects of finding employment.*

That RAS was presently in custody on remand for a fresh offence was held to be not relevant to the determination of the exercise of the discretion.

See also *SH v Queensland Police Service* [2019] QDC 247, an appeal against the recording of a conviction. In this case, Clare SC DCJ, in upholding the appeal, and finding the sentencing discretion had been miscarried, states that not all contraventions are the same, at [24]:

> *[24] Domestic violence is a matter of great concern to the community. Perpetrators should be accountable for their actions. The disruption to the lives of those aggrieved should be minimised. Where the parties had shared a home, a condition excluding the respondent is designed to enable the aggrieved to feel safe in her own home. To have that effect the ouster condition must be enforced. Recognition of those important principles however does not mean that all contraventions are the same. As the respondent conceded, this offender's contravention was low level. It was not of the character commonly associated with the contravention of a protection order. It was an isolated incident. Harm was neither intended nor suffered. There were other extenuating circumstances. In addition, there were favourable antecedents. The appellant had pleaded guilty. He had reasonable insight. He had a history of accessing services for self-improvement. He had a strong record of contributing to the community. His prospects of continuing to positively contribute were otherwise good. At the time of sentence, it was uncertain whether he would be able to continue in his work with a conviction. His blue card had been suspended, meaning a relevant regulating body was already aware of the matter.... Further there is the fact that the appellant already had a conviction recorded on his criminal record, although it did not have the same degree of social repugnance as a contravention of a protection order. In my view the balance of those circumstances would tend to weigh against recording a conviction.*

See also *R v Hollis* [2020] QCA 7 regarding the exercise of discretion in determining whether or not to record a conviction, including having regard to a consideration of factors which mitigated against the recording of a conviction (in this case, the impact on the appellant's social sphere and membership of yachting organisations).

See also *MB v Queensland Police Service* [2020] QDC 325 where Smith DCJA, noting the Magistrate did not fetter her discretion in recording a conviction, agrees with the Magistrate's decision at [40]:

> *The further issue then is the recording of a conviction. It may have been the case that if there was just one or two offences that I would have been inclined to not record a conviction and I accept there may be an impact on your assessment of suitability for visas as a result of recordings of convictions… but given the prolonged nature of the behaviour over four months and the more serious examples of what happened on the 27th of April and the 17th of May and the continuation after your release from custody I am going to record convictions in the absence of specific information that would preclude employment in light of as I said the overall accumulated seriousness of the behaviour.*

See also *R v Kowalczyk* [2021] QCA 154 where the recording of convictions for assault and contravention of a domestic violence order were upheld on appeal having regard to the seriousness of the offences and the related purpose of general deterrence, in circumstances where the appellant remained in immigration detention facing a real prospect of being deported.

See the decision of Loury KC DCJ in *RMP v Buley* [2021] QDC 228 which referred to *SH v Queensland Police Service* and *RAS v Commissioner of Police* and others. In this case, Her Honour noted the appellant's Blue Card had been withdrawn following a conviction for contravention of a domestic violence order. (The appellant ran his own business which involved the installation of air-conditioning in schools, which requires a Blue Card.) In favouring the non-recording of a conviction, at [42], Her Honour notes, "*The need for public denunciation of this offence, which is the purpose to recording a conviction is not such that it needs to be achieved to the detriment of the appellant's prospects of rehabilitation*."

21.10.4 Multiple Breaches of DV, other offences and Breach of Bail

IFM v Queensland Police Service [2016] QDC 40

The appellant and complainant had been in a de facto relationship for about one year. The appellant was convicted in the Magistrates Court at Townsville on 23 September 2015 of the following offences and sentenced as described:

- Contravene DVO 13 March 2015 - six months' imprisonment.
- Contravene DVO 13 May 2015 - 15 months' imprisonment.
- Breach bail condition 13 May 2015 - one-month imprisonment.
- Breach bail condition 30 May 2015 - convicted but not further punished.
- Contravene requirement 30 May 2015- convicted but not further punished.

The sentences of imprisonment were concurrent.

Durward SC DCJ, in dismissing the appeal held:

> *[10] In charge 1 the Appellant pushed the Complainant over and punched her to the jaw. No physical injury was alleged. The Appellant was on bail after he was arrested and charged.*
>
> *[11] In charge 2, some 2 weeks later, the Appellant grabbed the Complainant by the throat and hit her, knocking her to the ground. He kicked her in the body, dragged her to her feet and verbally abused her. He then dragged her to a nearby park, knocking her to the ground on the way, hit her in the head, picked her up and continued to drag her with him. Each of the Complainant and Appellant ran away when, it seems, neighbours said that the police had been called. No physical injury was alleged.*
>
> *[21]…the Respondent had submitted that the Appellant's conduct in this case involved significant aggravating circumstances, namely that the first breach of Domestic Violence Order was committed about two weeks after the expiration of a sentence imposed for a contravention of a condition of release; the offending in the second domestic violence offence was committed whilst the Appellant was on bail for the former offence; and the Appellant had previously been convicted of breaches of Domestic Violence Order including one committed upon the same complainant. Those are matters open for consideration on sentence.*

[22] The conduct of the Appellant in the second charge was sustained and patently violent. He knocked the Complainant to the ground with a blow and kicked her, picked her up and dragged her on her feet, knocking her down again with another blow and picking her up. Hence the conduct occurred not only in a residence but also in a public area. Intervention by neighbours was required in order for the police to be called to the scene.

Durward SC DCJ at [23] provides guidance on the **consideration of comparative sentences**:

[23] Every case depends very much upon its own circumstances and comparative sentences are only useful as a guide to a sentencing judicial officer if they reflect similar circumstances, similar conduct, similar antecedents and are truly comparable. Comparative sentences may have the function of indicating a range of sentencing or provide statements of principle stated by a Court of Appeal or another higher court. However, they do not mandate a particular sentence to be imposed by a Magistrate, who has a discretion which if exercised judicially provides him or her, as the case may be, to take account of the criteria to which I have referred. Provided there is an explanation for the sentence imposed which is capable of understanding by an appellate court, judicial discretion allows that judicial officer to impose a sentence which he or she thinks fits the circumstances and reflects all of the matters that are required to be taken into account on a sentencing proceeding.

[24] The Appellant's criminal history did not favour him, and His Honour clearly considered that that history was a very relevant factor. It was open for him so to do Veen v the Queen (No 2) (1988) 164 CLR 465. Insofar as the ground alleging a manifestly excessive sentence is concerned, I do not consider that His Honour has erred in any way and certainly I do not consider that the head sentence of 15 months imprisonment, imposed of course in respect of charge 2, was excessive when one considers the facts and circumstances and applies the principles to which I have referred in this judgment.

Durward SC DCJ, in **considering the early plea of guilty** stated, at [29]:

[29] When timely pleas of guilty are made, the general rule is that a defendant is prima facie entitled to *a discount that is a reduction, of actual prison time to be served, of one third of the head sentence. That 'one third' might be reduced for a number of reasons, including a demonstrated lack of remorse, or the lateness of a plea of guilty where the expense of a trial has already been incurred or witnesses, particularly vulnerable witnesses, have been exposed to court proceedings and particularly to cross-examination. There are, of course, other reasons which may impact on the quantum of any discount.*

In this case, the sentence of 15 months imprisonment was one half of the maximum penalty that then applied. The head sentence was not manifestly excessive. The appeal against sentence was dismissed.

Smith v Queensland Police Service [2015] QDC 152

The appellant, Smith, was convicted on 28 January 2015 on a plea of guilty of 11 offences - five of which were contravention of a domestic violence order and the remainder of which

included public nuisance, drunk or disorderly, fraud, wilful damage, and breach of bail. On the contravention of domestic violence order offences, the appellant was sentenced to 12 months imprisonment (Charge 3); six months imprisonment (Charge 6); nine months imprisonment (Charge 8); six months imprisonment (Charge 9) and nine months imprisonment (Charge 11). The contraventions occurred over a one-month period from 22 October 2014 to 23 November 2014. The sentence of 12 months imprisonment for Charge 3 was the most serious penalty imposed for all of the 11 offences. The sentencing Magistrate ordered that all terms of imprisonment be served concurrently; a parole date was set of 28 February 2015 and 61 days of pre-sentence custody was declared as time already served.

The appellant was 41 years of age and had a criminal history described by Morzone KC DCJ as "*lengthy, significant and concerning; and includes previous terms of imprisonment; however, the appellant has no prior convictions for violence or contravention of domestic violence orders*" (at [6]).

The appellant argued that the sentences imposed were manifestly excessive. The appeal focused particularly on the sentences in relation to convictions for contravention of domestic violence order and wilful damage. Hs Honour had the following to say in relation to the contravention of domestic violence order referring to a number of other cases:

> *[16] The appellant argued that the sentence of 12 months imprisonment for the contravention of the domestic violence order of 22 October 2014 (charge 3) is manifestly excessive in light of the maximum sentence, the particulars of the conduct, the appellant's lack of prior similar convictions and his personal circumstances.*
>
> *[17] As particularised above, charge 3, which occurred on 22 October 2014 and was the most serious of the contravention offences, carried the head sentence of 12 months imprisonment. The salient facts were that on 22 October 2014 at approximately 7 pm, the appellant and the aggrieved were at their home. Both became involved in a verbal argument in front of the home. At one point the victim entered her car in an attempt to leave, resulting in their argument escalating to physical violence. The appellant punched the aggrieved through the window and then grabbed her by her throat. At that time, a child (named in the order) was in the rear seat of the car. A witness approached the car upon hearing and seeing the argument in an attempt to intervene and stop the altercation. The appellant then threatened the witness, by turning and walking towards her. The aggrieved then drove away from the address.*
>
> *[18] The appellant relied on the decision of R v James [2012] QCA 256 as supporting a lesser head sentence for Charge 3. In that case the appellant waited for his de facto partner outside a toilet door at a hospital where the aggrieved was receiving treatment necessitated by an earlier assault by the appellant. The appellant punched her in the face causing pain, discomfort and swelling. The appellant had six prior breaches of domestic violence as well as convictions for offences of violence. A head sentence of 9 months imprisonment was upheld by the Court of Appeal. The maximum penalty applicable at the*

time was 12 months imprisonment, which was increased to 2 years and (3 years if previous convictions) on 17 February 2012.

[19] In TND v Queensland Police Service [2014] QDC 154 a 20 year old appellant became agitated and accused the aggrieved of 'getting smart' with him. He punched her to the left side of her face, causing a tooth to cut the inside of her cheek. The aggrieved threw a work boot at the appellant and left the room. During the arrest the appellant continued to threaten violence to the police, the aggrieved and a 12-year-old boy. As a consequence of appellant's previous like offending, he was dealt with on the basis that the higher maximum penalty of 3 years imprisonment applied. The sentence of 6 months imprisonment with immediate release on parole was upheld.

[20] In PMB v Kelly [2014] QDC 301, the appellant was asked by the aggrieved to fix a washing machine. The appellant opened and slammed shut the metal lid until it snapped off the machine. He then started banging the lid against the machine. He picked up an unopened can of Pepsi, threw it at the kitchen wall, causing it to spray Pepsi over the kitchen. He then grabbed a steak knife, held it in a threatening manner and said to the aggrieved, "Are you scared now?" He then stabbed a loaf of bread and threw the knife across the kitchen. He then grabbed the aggrieved and threw her onto the lounge. He attempted to take her phone from her, but she refused. He placed his hands around her neck and started choking her. She couldn't breathe and bit the appellant on the forearm. The appellant then threw the aggrieved onto the lounge room floor and, with a closed fist, punched her on the top of her head approximately 4 times. He then picked her up off the floor and slammed her into the tiled floor twice, causing her right temple to bang on the floor. He then placed his knee in her back and put her in a headlock. The aggrieved struggled to breath and again bit him on the fingers. She managed then to run out of the home and call police. An ambulance attended and she was transported to the Gold Coast University Hospital where she was treated. She suffered a swollen and bruised right eye, a bleeding upper lip and scratches on her arms. The appellant had 2 previous contravention convictions, which enlivened the higher maximum penalty of 3 years. The appeal judge found that the 12 months imprisonment with an "effective non-parole period [of] ... about three months" was not manifestly excessive.

[21] In Singh v Queensland Police Service [2013] QDC 037, the appeal was against concurrent periods of 9 months imprisonment and 2 years' probation for two charges of contravening a domestic violence order and one of breaching a bail undertaking. The more serious of the domestic violence order contraventions involved the appellant verballing abusing the victim and damaging property in the presence of their children. The appellant also head butted an informant. The sentences were reduced on appeal to 3 months imprisonment.

[22] Having regard to the circumstances of charge 3 in the present case, whereby the appellant punched the aggrieved through a car window, then grabbed her by her throat (all in the presence of a child) and also threatened a witness who attempted to intervene in the assault, I would categorise the appellant's conduct at a similar level of seriousness as that considered in R v

James and *TND v Queensland Police Service.* *However, unlike in R v James, the appellant in the present case is older with no prior similar offending, but the totality principle is relevant. The appellant's conduct in the present case is more serious than in Singh v Queensland Police Service but significantly less serious than the conduct of the appellant in PMB v Kelly.*

[23] It seems to me that the nature and serious of the conduct constituting charge 3 would warrant a penalty within the range of 6 to 9 months, subject to matters of mitigation and consideration of the totality principle.

[24] This then draws sharp focus on the other contravention offences which were of a lower order and occurred when the appellant was prohibited from using the internet or other communication devices (including social networking sites) to communicate with, publish pictures of or make comments concerning the aggrieved or the named relatives or associates of the aggrieved.

[25] Charge 6 involved the appellant sending 2 text messages to a friend of the aggrieved (who showed the messages to the aggrieved) containing degrading remarks about both the informant and the aggrieved. Charge 8 involved the defendant telephoning the aggrieved and threatening her with the words "You're fucking dead slut", and then terminating the call. Charge 9 involved the defendant sending a text message to a friend of the aggrieved remarking about conduct of the aggrieved's son. Charge 11 involved the appellant in relation to charge 10 filming those persons named in the order.

[26] Singh v Queensland Police Service may be of some assistance when considering those other contravention charges. It seems to me that the nature and serious of the conduct constituting charges 6, 8, 9 and 11 would warrant various penalties between the middle to low end of the range of 1 to 3 months imprisonment.

Note that the cases of *R v James* and *Singh v Queensland Police Service* referred to above both concerned the use to which previous convictions could be put, in the absence of a notice of alleged previous convictions under s47 of the *Justices Act 1886*. *R v James* preceded the Court of Appeal decision in *Constable S J Miers v Blewett* [2013] QCA 23 and the case of Singh followed that decision. These cases need to be considered in context and the amendment of s47 in 2014 considered in relation to later sentencing.

Gibuma v Queensland Police Service [2016] QDC 183

Gibuma, an indigenous man was present in the Magistrates Court at Innisfail when a domestic violence order with standard conditions was made.

On 30 September 2015, the Innisfail Police attended at the address of the complainant (aggrieved) in relation to a domestic disturbance. He was noted sitting in a chair in the driveway with the aggrieved over the road opposite, apparently trying to hide from him behind some bushes.

The aggrieved told police when they arrived at 2 pm that he had been there and had been drinking since 10am that morning and that a verbal argument had ensued. In the course of that argument, she flicked a towel at him which hit him in the eye and as a result of that, he pushed her on the forehead causing her to fall over. She attempted to run away. G tried to take hold of her, and her dress was torn on the back as she tried to get away. She succeeded in getting away and the matter was subsequently resolved by the police, who formally charged him with a breach of the domestic violence protection order. Bail conditions required him to have no contact with the aggrieved.

The applicant was convicted on his own plea of guilty to two counts of contravening a protection order, two counts of breach of bail and failure to comply with reporting conditions.

Gibuma had a particularly serious criminal history going back to 1975 including aggravated assaults, and breaches of protection orders.

Harrison DCJ said the real gravamen of Gibuma's offending was failure to comply with court orders and bail conditions: [24] …*even after allowing for his atrocious history no penalty in excess of 15 months would be justified…he is a pest and a nuisance but not particularly violent*.

His Honour sentenced Gibuma to 15 months imprisonment for the second contravention of the protection order to be served concurrently with shorter periods for the other offences.

In the decision of Smith DCJA in *LJS v Sweeney* [2017] QDC 18, the appellant on appeal received two years' imprisonment with a parole release date after eight months. The appellant pleaded guilty to two counts of contravening domestic violence orders; receiving tainted property; three counts of fraud; possessing dangerous drugs and assaulting or obstructing police. He had previous convictions for breaching domestic violence orders. As to the facts of the offence, the aggrieved was his ex-partner. There was a protection order issued against the appellant in her favour on 27 June 2014 which prevented contact. On 27 March 2016 she was at home asleep. She awoke to find him in the dwelling. She told him to "fuck off". She saw her phone in his pocket. An argument ensued and he punched her causing her to fall over and then left the dwelling with a mobile phone and $30.00 belonging to her. He was arrested on 23 June 2016 and declined an interview. As to the breach of the domestic violence order on 30 April 2016 the aggrieved was at an address and visiting her mother. He was also present. He asked her to stay when she went to walk away and she said she was leaving, he grabbed her by the arm and tried to walk her back into the house. She tried to pull away and he grabbed her by the back of the head and pushed her head into the fence and kicked her in the back. She called the police and reported the matter. He made a number of calls and sent text messages to her. No serious injury was alleged.

The court noted that the penalty had increased from three years to five years' imprisonment but there was an absence of comparable sentencing decisions since the increase of the maximum. It was held at [26]:

> *At first blush I would have considered a 3-year head sentence high, but within the sentencing range, but having considered the comparable decisions and noting the crown's concession, it would appear that a head sentence of 3 years' imprisonment was excessive despite the applicant's previous convictions. It seems to me that the parties' concessions that are 2 to 2 and a half years head sentence is within sentencing range in this matter is accurate and as such I should exercise the sentencing discretion afresh.*

Ultimately, the court considered that the appropriate penalty was one of two years' imprisonment to serve eight months. This was a case where the offences occurred after the amendments.

LJS v Sweeney was applied in *RJD v Queensland Police Service* [2018] QDC 147 by Morzone KC DCJ, dismissing an appeal against sentence on the grounds the sentence was manifestly excessive. The appellant was convicted and sentenced on his own plea of guilty in the Magistrates Court to three counts of contravening a domestic violence order (aggravated offence). He was sentenced to 18 months imprisonment for each offence, to be served concurrently and to be served cumulatively on a 15-month sentence he was then serving as a consequence of reoffending while on parole. The *Penalties and Sentences Act 1992* requires the court to have regard to sentences already imposed on the offender that have not been served (s9(l)) as well as any other relevant circumstance (s9(r)). The Magistrate was not referred to, nor appeared to take into account, the reoffending that breached an earlier probation order (two offences of contravention of a domestic violence order and an offence on common assault in respect of the same aggrieved).

The appeal focused on the decision of *LJS v Sweeney*. This decision was relied upon by the Magistrate who found that decision the most useful, of all the comparable decisions [17]. Morzone in his judgement distinguished *LJS v Sweeney* on its facts. In *Sweeney*, the offending was more serious, involved an offender with a longer criminal history for similar offences and extensive medical reports were presented (PTSD, antisocial behaviour traits, borderline intellectual impairment, substance abuse, victim of child sexual and emotional abuse). In the current case, the appellant had shown contempt for court orders, and the displayed the "*disturbing features of…returning to the residence on two further occasions to continue a course of abuse, intimidation, and domineering behaviour. This also included a threat to kill... and intimidation in relation to questioning the calling of police*" [at 40].

Morzone KC DCJ held in dismissing the appeal [at 42]:

> "*having regard to the sentencing principles, nature of the offending, the reoffending on probation and parole, the like offending against the same aggrieved, it was, I think, open for the Magistrate to look to the high end of the range*."

At [44] – [45]:

> "*It seems to me that while the sentence of 18 months imprisonment imposed by the learned Magistrate is harsh and perhaps higher than another Magistrate or Judge may impose, I'm not persuaded that it falls outside the permissible range of sentences for the offender and the offences. It seems to me that the learned Magistrate did appropriately, then, set a parole eligibility date, having regard to the period of imprisonment…*
>
> *[45] Consequently, it seems to me that notwithstanding that the learned Magistrate may have failed to take into account the breach of probation order in a specific way, no different sentence should be passed in the circumstances, and, even so, that aspect of the sentencing consideration is likely to have reinforced an imposition of a sentence at the higher end of the range."*

LJS v Sweeney and *RJD v Queensland Police Service* were considered in *OWL v Queensland Police Service* [2021] QDC 5 (appeal against sentence for one count of contravening a domestic violence order). In allowing the appeal, Clarke DCJ noted the defendant's legal representative had made conflicting and confusing submissions about the length of period of imprisonment the defendant was serving at the time of sentence. This led to the Magistrate referring to an incorrect length of the cumulative order for imprisonment which was not corrected by the parties at the time. His Honour stated, at [14] that he was:

> *"…satisfied the acting Magistrate misapprehended the length of the period of imprisonment the defendant was serving at the time of the sentence the subject of the appeal. In the circumstances, whilst I am satisfied the acting Magistrate did give sufficient reasons indicative of factoring in the totality principle, nonetheless an error has been established in the sentencing process."*

His Honour also noted, at [11]:

> "*…the learned acting Magistrate simply read the material tendered. In my view, this practice should be discouraged. Preserving the interests of an open court of record, I am of the view that at the very least, a summary of the allegations and all other pertinent and relevant matters should be stated in open court to adequately assist the court*."

In *SAE v Commissioner of Police* [2017] QDC 254, the appellant was sentenced to nine months imprisonment for contravening a domestic violence order committed whilst subject to a suspended six month sentence imposed for assault occasioning bodily harm whilst armed (in a domestic context). The contravention was committed two days after the imposition of the suspended sentence and involved physical assaults, abusive language, threats to kill and wilful damage of a mobile phone. Understandably the appeal was dismissed.

In *DAY v Commissioner of Police* [2018] QDC 3, the appellant pleaded guilty to nine breaches of DVO conditions and nine breaches of bail based on the same facts. The facts were that in breach of a temporary order the appellant contacted his ex-wife numerous times. On one occasion they spent the day together and had sexual intercourse. The last couple of

occasions involved the appellant calling and abusing her on the phone. It seemed clear though the appellant and the aggrieved maintained a sexual relationship and indeed numerous explicit videos and images were shared. The appellant had previous minor convictions but no similar previous. There were no allegations of physical violence. The appeal was allowed, and the appellant was sentenced to six months' imprisonment on one domestic violence order breach and two months' imprisonment on the others to be served concurrently. He was convicted and not further punished on the breaches of bail. The sentence was suspended after serving 42 days which was declared.

In *ETB v Commissioner of Police* [2018] QDC 026 the appellant pleaded guilty to two counts of breaching a DVO; one count of common assault; breaching a seven day suspended sentence. He was sentenced to nine months' imprisonment cumulative on the activated seven days. A parole release date was fixed after about two months. The facts were that on the first occasion the appellant called the complainant derogatory names and threatened to get a knife and slice his own throat. On the second occasion the intoxicated appellant returned home and abused the complainant. The complainant slapped the appellant across the ear. He then punched her in the left wrist and twice in the ear. The appellant had previously been convicted of breaching the DVO involving the same complainant. None of the previous involved actual assaults. The crown conceded the sentence with respect to the second incident was excessive. The judge also found that Magistrate erred in failing to take into account the complainant's slap to the appellant. The appellant was instead sentenced to a total of six months' imprisonment.

See also *AMD v Commissioner of Police (Qld)* [2019] QDC 22 where Loury KC DCJ found the sentence manifestly excessive. The appellant had been sentenced, upon pleas of guilty, to multiple offences including contravention of domestic violence orders, assault, breach of bail, trespass and assault or obstruct police. The Magistrate's sentencing remarks did not indicate how time spent in custody in NSW was taken into account which Loury KC DCJ held was likely due to the shortcomings of the submissions. There was no reference to s9(2)(k) of the *Penalties and Sentences Act 1992* and the totality principle. As such, Loury KC DCJ found a demonstrated error in the exercise of the sentencing discretion as determined according to the principles in *House v King (1936) 55 CLR 449, 505*. Accordingly, it was necessary to sentence afresh. The District Court set aside the sentences imposed by the Magistrates Court and imposed new sentences, to be served concurrently.

In *Baker v Queensland Police Service* [2019] QDC 258, the appellant argued that the contravention offence was his first breach against this particular complainant. Fantin DCJ however observed at [41]:

> *The fact that this was the appellant's first contravention against this particular woman is not a matter in his favour. What is relevant is that he had previously been convicted on earlier occasions of breaching domestic violence orders and of domestic violence offences but continued to reoffend.*

CEJ v Commissioner of Police [2020] QDC 32 concerned an appeal against sentences imposed (fines and levies) for multiple offences including for contravention of a domestic violence order. In upholding the appeal, Cash KC DCJ found that, considering the appellant's

financial position, the Magistrate erred in imposing such a financial burden and ordering the fines and compensation to be referred to the State Penalties Enforcement Registry. His Honour also found that intoxication, personality traits, and diagnosed mental illness contributed to the appellant's offending. The sentence should therefore have given more weight to rehabilitation than to deterrence, denunciation, and the protection of the community. He also took into consideration the appellant's age at sentencing, and the fact that his offences were "numerous but mostly not serious". Thus, the sentence of imprisonment was also inappropriate.

MYS v Commissioner of Police [2021] QDC 257 concerned an appeal against sentence for two counts of contravention of a domestic violence order (each with a circumstance of aggravation of a prior conviction), one count of possession of a restricted drug and one count of possession of utensils. The appellant was sentenced to a $250 fine in respect of the possession of the utensils charge and three months imprisonment on all other charges, to be served cumulatively on a sentence of 18 months imprisonment imposed on 7 April 2021, with immediate parole eligibility.

The appellant's submissions on the appeal against sentence on the ground it was manifestly excessive referenced the sentencing Magistrate placing too much emphasis on the appellant's poor criminal history such that he imposed a sentence that was manifestly excessive given the appellant's conduct (as submitted in the lower end of criminality for this style of offending), amongst other lesser complaints not made out.

At [26], Byrne KC DCJ stated: -

> *In my view it was open as an appropriate exercise of the sentencing discretion to require this appellant to service a period of actual incarceration, notwithstanding the objectively less serious features of his offending. While they are relevant, so too was his abysmal compliance with the law over the last 16 years, notable in respect of contravention of the domestic violence protection legislation in two States. His continued disobedience is also illustrated by his lengthy traffic history*.

His Honour ultimately found that whilst it was open to impose an actual period of imprisonment, the sentence was manifestly excessive because of the requirement that the term be served cumulatively on the term of imprisonment he was then serving on parole. The appeal was allowed. The sentence was set aside, and the appellant was re-sentenced [at 37]: -

- *In respect of both charges of contravening a domestic violence order with a circumstance of aggravation and in respect of the charge of possession of a utensil - three months imprisonment, wholly suspended with an operational period of 6 months.*
- *Each of those terms of imprisonment are to run concurrently with each other, and with the term of imprisonment imposed on 7 April 2021.*
- *In respect of the charge of possession of a restricted drug, the appellant is convicted and not further punished.*
- *Convictions are recorded in respect of each offence.*

21.10.5 Assault Occasioning Bodily Harm, Domestic Violence Offence

NAS v Queensland Police Service [2017] QDC 173

The appellant NAS was summarily convicted on his own plea of guilty on one charge of assault occasioning bodily harm whilst armed with an instrument. He was sentenced to 15 months imprisonment suspended after serving two months for an operational period of three years. He appealed against sentence.

The complainant was the wife of NAS. They had been married for a year and had a five-month-old baby. NAS was a New Guinea national staying with his father and stepmother in Brisbane on a tourist visa. No protection order was in place.

On the night of the offence, she told police (and it was not disputed) that the appellant became angry and threw an apple which struck the wall near the complainant. She was holding the baby at the time. The complainant tried to leave the premises with the baby. NAS grabbed her by the hair and struck her numerous times to the back of the head while she was curled over trying to protect the baby. NAS asked a witness to hold the baby so he could strike her. He prevented her from using her mobile phone to call police.

At first instance, he was sentenced to 15 months imprisonment, suspended after two months, with the Magistrate saying this was "the only appropriate term".

Reid DCJ found that the finding that this penalty was "the only appropriate term" was crucial and an error. His Honour referred to *R v Pierpoint* [2001] QCA 493 as comparable but more serious. In that case, Pierpoint was sentenced to 12 months imprisonment, with three months already served the sentence was wholly suspended with an operational period of 12 months.

A sentence of nine months imprisonment, suspended after two months, was imposed and the offence was declared a domestic violence offence.

See also *R v McConnell* [2018] QCA 107 in paragraph 20.10.

See also *Bye v Commissioner of Police* [2018] QDC 74 where McGill held [at 24] that *R v Kelley* (see paragraph 20.9.2.1) is not authority for the proposition that "*…a young offender who pleads guilty to an offence involving domestic violence is never to face actual imprisonment*."

In *JLK v Queensland Police Service* [2018] QDC 128, Fantin DCJ dismissed an appeal against a conviction for assault occasioning bodily harm (domestic violence offence). At [38], the defendant appealed on the basis that the Magistrate erred in finding the charge proved beyond reasonable doubt and that the verdict was against the weight of the evidence. At [43], Fantin DCJ noted, "*This is not a case that turned upon the complainant's evidence alone. The complainant's evidence was corroborated in important respects by three eyewitnesses, and the evidence of her injuries contained in the medical records and the photographs. There was a real dispute between the evidence of those four prosecution witnesses, and the evidence of the son and the [defendant].*" At [45] it was observed that

the Magistrate's findings "*were not 'inconsistent with facts incontrovertibly established by* the *evidence' or 'glaringly improbable'*."

Importantly, [at 54]:

> "*The Magistrate's finding that the complainant's inability to recount events soon after she had been assaulted did not detract from her evidence, is not an error. It is not uncommon for a witness who has been assaulted to not recall details of the event immediately after it happened, but to be able to give some account of it later to police and in court.*"

R v Lothian [2018] QCA 207, concerned an appeal against conviction and sentence for assault occasioning bodily harm and sexual assault (both domestic violence offences). The grounds of appeal centred on the reliance of CCTV footage which according to the appellant contradicted the complainant's account of events. In dismissing the appeal against the conviction, Morrison JA (lead judgment) found, at [78], "…*it was open to the jury to accept the substantive parts of the complainant's evidence, even if they accepted that some of her evidence was inconsistent with the CCTV footage*". The application for leave to appeal against sentence was dismissed. At [99], His Honour sets out his **reasoning that the sentence was not manifestly excessive**:

- Characterisation of the offending conduct means almost inevitable that a custodial sentence would be applied given it was after a trial and not on a plea of guilty.
- Sexual assault was brazened in that it was carried out in a public place, likely to have been done to demean or humiliate the complainant.
- Count two was more serious given its potential for harm (pushing onto a roadway onto a taxi which may or may not have been moving).
- Count two occurred in context of appellant evidently resenting the complainant ending their relationship and after she repeatedly rejected his attempts to interact with her at the nightclub.

At [100], His Honour was of view that the period of actual custody imposed by the learned sentencing judge (twelve months reduced to four months instead of usual 50 per cent of the head sentence) was a substantial benefit for the appellant given that his behaviour and the trial meant that there was no sign of remorse.

Leave to appeal against sentence was also refused in *R v Wells* [2018] QCA 236. The applicant was convicted upon guilty pleas and sentenced to:

- 15 months imprisonment - assault occasioning bodily harm whilst armed (domestic violence offence)
- Two years and six months imprisonment – indecent assault
- Two years imprisonment- indecent assault
- 12 months – two summary offences of indecent acts in a public place.

The applicant had an extensive criminal history in Queensland and NSW over 20 years, including indecent assault in 1995, indecent acts in 2001 and 2002 and sexual assault in 2005, and had served periods of imprisonment and other sentences designed to rehabilitate.

Fraser JA held "*Having regard to the matters identified by the sentencing judge, and particularly the brazen nature of the applicant's sexual offences, the circumstance that he repeatedly reoffended after he was arrested and released on bail, and the applicant's relevant criminal history, there is no reasonable basis upon which it could be concluded that the applicant's sentence is manifestly excessive*."

The applicant argued that as a result of unavailability of certain programs in prison he may be unable to apply for parole, resulting in him remaining in prison for all or most of his term. Fraser JA held that s180(2)(b) of the *Corrective Services Act 2006* "*could not be an obstacle to the applicant immediately applying for parole immediately after the determination of this application.*"

See *Lupson v Queensland Police Service* [2021] QDC 84 where Dann DCJ allowed an appeal against conviction for one count of assault occasioning bodily harm (domestic violence offence) in circumstances where the appellant was acquitted of the charge of contravention of protection order in the same trial. Her Honour found at [22], the matters the Magistrate found affected the complainant's credibility in relation to the charge of contravention of a protection order, could also affect the complainant's credibility generally.

In *The Queen* v *HCH* [2021] QCA 218, a global sentence was imposed at first instance for a total of 22 offences committed against the Applicant's partner. The applicant was sentenced to a head sentence of seven years for sexual assault, four years imprisonment on the count of assault occasioning bodily harm on the same indictment, and lesser sentences of imprisonment on all other charges. Sentences were ordered to be served concurrently and parole eligibility set after the applicant had served two and a half years.

Davis J, in the lead decision, observed that "*The maximum sentence for sexual assault is 10 years. That offence by itself must, in my view, attract at least five years imprisonment"* [page 7].

His Honour noted the serious and protracted period over which the offending was conducted and that it was committed in a domestic setting on some occasions in the presence of children.

In outlining the particularly demeaning, degrading, and humiliating nature of the offending, His Honour found that "*the imposition of a global sentence of seven years is well within the range of a sound exercise of sentencing discretion*". Application for leave to appeal dismissed.

21.10.6 Effect of notice of previous convictions (or absence thereof) on sentencing

As noted in paragraph 21.8, s47 of the *Justices Act 1886* requires a notice of alleged previous convictions to be served on a defendant if the prosecution intends to rely on a previous conviction for the purpose of rendering a defendant liable to a higher penalty (s47(5)).

Section 47(2) provides that where it is proved to the satisfaction of the court that the respondent has been served with a notice alleging a previous conviction, and the defendant is not present in person before the court, the court may take account of any such previous conviction so specified as if the defendant had appeared and admitted it.

Subject to that section, the circumstance that the defendant has been previously convicted of an offence may be relied on for the assessment of penalty for a simple offence**, whether or not a notice has been served or given under** s47(5) (s47(7)). If a notice has not been served or given under s47(5) reliance on the circumstance that the defendant has been previously convicted of an offence does not render the defendant liable to a greater penalty than that to which the defendant would otherwise have been liable (s47(8)).

Note that ss47(7) and 47(8) were part of amendments in 2014 designed to reinstate the understanding of the position prior to the judgment in *Constable S J Miers v Blewett* [2013] QCA 23.

The position prior to *Constable S J Miers v Blewett* [2013] QCA 23 was that where the notice has not been served, a previous conviction cannot be relied upon to put the defendant into the higher maximum penalty category, but may nevertheless be taken into account by the court for general sentencing purposes, in accordance with the position under the *Penalties and Sentences Act 1992* (Explanatory Notes to the Criminal Law Amendment Bill 2014). This is the position as stated in *R v James* [2012] QCA 256 per Henry J (with whom the President and Justice Holmes agreed):

> *[at p 4] …it is not the law where previous convictions could be, but are not, alleged by notice served with the complaint that the sentencing court is precluded from having regard to such convictions in imposing sentence. The failure to allege them by notice served with the complaint merely bears upon what the maximum penalty for the offence is, see Justices Act 1886 (Qld) s47(5). Whatever that maximum might be, the offender's criminal history will remain one of the matters a sentencing court may have regard to in determining an appropriate sentence. See generally, Penalties and Sentences Act 1992 (Qld) s9(2)(f) and s11 and in cases of violence see s9(4)(g).*

In *Constable S J Miers v Blewett* [2013] QCA 23, the Court of Appeal considered the question of whether the failure to expressly state the circumstances in the complaint where then s47(4) was applicable, or in a notice served with the complaint where then s47(5) was applicable, merely had the effect that the greater maximum penalty was inapplicable or whether it also had the effect of precluding the sentencing court from taking the circumstances into account at all in determining the appropriate sentence. The court concluded that the latter approach was the correct approach.

In his reasons (with which Holmes JA and Atkinson J agreed), Fraser JA acknowledged that the first, narrower view of the operation of the section was preferred in *R v James* [2012] QCA 256 but noted that the point was not argued in that case. His Honour was persuaded that the High Court authority on the closely analogous provision in the *Criminal Code* supports the broader view[147]:

> *[21] The Magistrate was correct in refusing to take into account the two previous convictions which had the legal effect under s80(1)(a) of the Domestic and Family Violence Protection Act 1989 of increasing the maximum penalty for the offences to which the respondent pleaded guilty. On the authority of The Queen v de Simoni, the inadmissibility of the two previous convictions could not be avoided merely by the prosecutor disclaiming reliance at the sentence hearing upon them as a circumstance rendering the respondent liable to the increased penalty of two years imprisonment...*
>
> *[23] The Magistrate was correct in holding that the evidence of the two previous convictions for offences against s80(1) of the Domestic and Family Violence Protection Act 1989 should not be received ….*

The decision in *Constable S J Miers v Blewett* [2013] QCA 23 was influential in *Singh v Queensland Police Service* [2013] QDC 37. Singh was sentenced to nine months imprisonment followed by two years' probation for two contraventions of domestic violence orders. The first offence occurred on 6 October 2012 and was a contravention of a temporary protection order. Singh was found standing over the aggrieved and pointing aggressively at her. In the residence were eight holes in the wall caused by Singh punching the walls. A window was broken.

Singh was taken into custody and released on bail with a no contact condition. On 4 November 2012, Singh attended the aggrieved's property, yelled insulting names at her, broke property and head butted an informant. Children and witnesses were present.

Singh had a relevant criminal history. In 2009, he received six months' probation for two counts of breaching a domestic violence order and in 2010, he received a short, wholly suspended sentence for two contraventions. In 2012, he received a $400 fine for entering with intent.

Initially, Robertson DCJ did not consider the sentence manifestly excessive:

> *[29] The sentence her Honour imposed is less than 50 per cent of the maximum. The maximum came into effect with the proclamation of the 2012 Act. These were acts which were particularly nasty and prolonged, involving domestic violence against an obviously vulnerable complainant by a mature man with four previous convictions for domestic violence committed against the same woman. The attacks were about a month apart and the second act of violence occurred whilst the appellant was on bail for the offence committed on 6 October 2012. He had also shown a disregard for court orders in the past and,*

[147] See *The Queen v de Simoni* [1981] HCA 31; (1981) 147 CLR 383, 388.

on this occasion, he again showed complete disregard for a specific condition in the bail undertaking. In my view, as the President noted in James, the only mitigating factor in this case is the early plea of guilty.

However, the case was reopened following the decision of *Constable S J Miers v Blewett*. In the appeal, none of the prior convictions had been subject to the required notice. The four previous convictions for similar offences were obviously an important factor in the imposition of the original sentence. The appeal was allowed, and a new sentence of three months' imprisonment was imposed.

As noted above, s47 of *Justices Act 1886* has since been amended to make it clear that the previous conviction can be taken into account whether or not the notice has been served but that it may not render the defendant liable to a maximum penalty higher than that to which the defendant would otherwise be liable.

See *HFC v Commissioner of Police (Queensland)* [2022] QDC 139 where it was said, at [44], the effect of s47(7) and (8), where no s47(5) notice had been served or given, was that the Magistrate was entitled to take the Appellant's prior convictions for contravening domestic violence orders into account when assessing penalty. The convictions did not however result in an increase in the maximum penalty.

21.10.6.1 *Notation of Domestic Violence Offence on Criminal History*

The *Courts and Civil Legislation Amendment Bill 2017* was passed by the Legislative Assembly on Tuesday 23 May 2017 and received Assent 5 June 2017.

Amendments to s12A of the *Penalties and Sentences Act 1992* commenced on assent:

- Amendments to s12A relieve Magistrates of the administrative burden of ordering that the offence be recorded as a domestic violence offence. The amendments allow domestic violence notations to be automatically made on a person's criminal history or a formal record of conviction, subject to a contrary court order i.e., in the unlikely/remote circumstance that you find that an offence is not "also a domestic violence offence", this finding will be recorded on the Bench Charge Sheet as part of the sentence.
- The amendments also clarify that the prosecution bears the onus of proving that an offence is a domestic violence offence and that domestic violence notations do not apply to a person's traffic history.

For further discussion on Sentencing in the National Bench Book, see Chapter 9.3 Sentencing.

21.11 DOMESTIC AND FAMILY VIOLENCE AS AN AGGRAVATING FACTOR ON SENTENCE

Domestic violence is an aggravating factor on sentencing. Section 9(10A) of the *Penalties and Sentences Act 1992* provides:

> In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.
>
> *Examples of exceptional circumstances:*
>
> (a) the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender.
> (b) the offence is manslaughter under the *Criminal Code Act 1899*, s304B.

When the provision was introduced the explanatory notes to the *Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015* said [p 2]:

> *An aggravating factor increases the culpability of an offender which means that the offender should receive a higher sentence within the existing sentencing range up to the maximum penalty for the offence. The amendment reflects community attitudes about the seriousness of criminal offences that occur in a domestic and family context and makes these offenders more accountable.*

See *JSB v Queensland Police Service* [2018] QDC 120 where the respondent pleaded guilty to contravention of a domestic violence order under s177(2) of the DFVPA. Fantin DCJ, at [39], notes that a s177(2) offence is a "domestic violence offence" for the purposes of the DFVA however it is not a "domestic violence offence" for the purpose of s1 of the *Criminal Code* and therefore is not a "domestic violence offence" for the purposes of s9(10A) of the *Penalties and Sentences Act 1992*.

The provision was considered by the Court of Appeal in *R v Hutchinson* [2018] QCA 29. Hutchinson was convicted of the manslaughter of his wife and one count of fraud related to mortgaging the family home. He was sentenced to 15 years and six months imprisonment. The offences were committed before the introduction of the section, but the sentencing judge took account of s9(10A) in determining penalty. Hutchinson appealed against the penalty.

Mullins J considered whether s9(10A) of the *Penalties and Sentences Act 1992* applied in circumstances where the offence was committed in March 2015 some 13 months before assent to the provision which occurred on 5 May 2016.

There are no express transitional provisions in the DFVPA. The sentencing judge had treated s9(10A) as a procedural amendment to which the common law presumption against retrospective operation did not apply.

Mullins J said at [39] that the nature of the amendment made by the insertion of s9(10A) is to direct the sentencing judge to treat the fact the offender has been convicted of a domestic violence offence as an aggravating factor to be taken into account when weighing up all of the relevant factors that apply to sentencing for that particular offence. Consistent with earlier authorities it is therefore a procedural provision.

Her Honour then considered whether the sentence was manifestly excessive and found that there was no error in principle.

The application for leave to appeal against sentence was dismissed.

The provision was also considered in the Court of Appeal decision of *R v McConnell* [2018] QCA 107. Fraser JA, in refusing leave to appeal against the severity of the sentence, cited *R v Hutchinson* (and others) in finding that the sentence, whilst severe, was not manifestly excessive. The applicant was convicted on his own pleas of guilty to one count of assault occasioning bodily harm, one count of deprivation of liberty and two counts of rape. Each offence was charged as a domestic violence offence. The applicant was 18 at the time of the offences; the complainant was 17 years old. Fraser JA said [at 22]:

> *…In particular, in conformity with s 9(10A) of the Penalties and Sentences Act, the circumstance that the offences committed by the applicant were domestic violence offences must be treated as an aggravating factor. That must be taken into account together with all of the other matters to which I have referred, including the protracted, demeaning, violent and very threatening character of the applicant's offences. As the sentencing judge observed, this is a difficult case in which to impose a sentence that properly balances all of the considerations a sentencing court is required to take into account. The applicant's plea of guilty and remorse, and especially his youthfulness and absence of previous convictions, are weighty mitigating factors. But denunciation and general deterrence are also important in sentences in this kind of offending. A different judge might have imposed a more lenient sentence, but my conclusion is that the sentence imposed upon the applicant, whilst severe, is not manifestly excessive.*

See the sentencing remarks of Dearden DCJ in *R v Cay* [2018] QDC 104 involving a number of criminal offences, two of which were also domestic violence offences. The following order was made:

1. Two counts of threatening violence: convicted and sentenced to 12 months' imprisonment.
2. Three charges of public nuisance: convicted and sentenced to one-month imprisonment.
3. Common assault – domestic violence offence: convicted and sentenced to two months' imprisonment.
4. Attempted enter premises with intent: convicted and sentenced to six months' imprisonment.
5. Wilful damage - domestic violence offence: convicted and sentenced to two months' imprisonment.
6. Assault or obstruct police: convicted and sentenced to one month imprisonment.

For the unreported sentencing decision of Morzone KC DCJ in *R v Webb* on 4 May 2016 regarding a breach of domestic violence order and one count of wounding (a domestic violence offence). A sentence of two years' imprisonment was imposed for the wounding offence and six months' imprisonment for breaching the domestic violence order, to be served concurrently.

In *MB v Queensland Police Service* [2020] QDC 325, in finding the sentence was not manifestly excessive, *JSB v Queensland Police Service* was cited as a comparable decision. Smith DCJA found at [59], despite being given multiple chances, the appellant continued to "thumb his nose" at the bail

conditions and the domestic violence order. Other factors under s9(2) which aggravated the matter were the emotional harm done to the victims and the damage, loss and injury caused.

In *SKS v Commissioner of Police* [2022] QDC 176 (which concerned an appeal against sentence for one count of contravention of a domestic violence order), *LJS v Sweeney*; *SAE v Commissioner of Police*; *DAY v Commissioner of Police*; *ETB v Commissioner of Police*; *RJD v Queensland Police Service*; and *Baker v QPS* were all considered by Smith DCJA in finding the sentence initially imposed (18 months, to serve six months) manifestly excessive.

21.11.1 Appeal decisions concerning domestic violence offences

Court of Appeal and District Court of Queensland decisions concerning a circumstance of aggravation that the offence was a domestic violence offence:

R v Ellis [2018] QCA 70 – Application for leave to appeal on the ground the sentence for (first count) the offence of torture (six and a half years imprisonment) was manifestly excessive. In refusing leave to appeal, Philippides JA found the sentence imposed was within the trial judge's discretion. The trial judge appropriately balanced the applicant's personal circumstances, including the fact that he was subject to domestic violence as a child, with the fact that he had a criminal history including domestic violence. At [26]:

> [26] *As the respondent submitted, the matters relevant to the level of penalty which distinguished the various comparatives put before the Court were properly recognised by the sentencing judge. Although the offending concerned a single episode, it involved the protracted perpetration of violence of a callous and brutal nature calculated to inflict physical and mental torture. The violence was inflicted in the complainant's house where she was entitled to be safe and protected and in the context of the applicant's irrational jealousy after the complainant ended their relationship. In addition, the conviction for domestic violence offences, was required to be treated by the Court as an aggravating factor.*

R v SDF [2018] QCA 316 - Application for leave to appeal against sentence allowed; Applicant resentenced. Applicant pleaded guilty (at a late stage) to one count of indecent assault with a circumstance of aggravation (domestic violence offence); sentenced to 12 months imprisonment, suspended after four months for an operational period of 12 months. (Link to case note).

R v SDD [2018] QCA 280 - Appeal against appellant's conviction on two counts of observations or recordings in breach of privacy, both being domestic violence offences. Leave granted to adduce further evidence. Complainant was under 16 years of age at the relevant time and appellant was her stepfather. Appellant acquitted on eight counts of indecent dealing and three other counts of observations or recordings in breach of privacy. (Link to case note).

Caddies v Birchell [2018] QDC 180 - Appellant convicted after trial of assault occasioning bodily harm (domestic violence offence). Appellant appealed against the conviction in the District Court; appeal against conviction was dismissed by McGill DCJ on 15 November 2017. Appellant appeals against sentence as manifestly excessive; appeal allowed on the basis the Magistrate gave no explanation as to consideration given to extra-curial punishment and how it should be taken into considerations of penalty to be imposed. Authorities in relation to the effect of extra-curial punishment and the relevance to sentencing were referenced. No explanation as to how Magistrate found there to be a lack of remorse in circumstances where the appellant had offered compensation. (Link to case in National Domestic and Family Violence Bench Book).

R v Storie [2018] QSC 298 - Sentencing remarks upon guilty pleas for one count each of entering premises, wilful damage, burglary whilst armed and murder (all domestic violence offences). Relevant particulars of case include previous threats to kill, escalation of violence, history of breaches of domestic violence orders, victim obtaining a temporary protection order 17 days before her death and defendant forming clear intention in that time to take his partner's life. (Link to case in National Domestic and Family Violence Benchbook).

R v GBF [2019] QCA 004 - Appeal against conviction for rape and indecent treatment of a child under 16) dismissed. Leave to appeal against sentence allowed and appeal against sentence allowed. Sentences of nine years imprisonment on two counts set aside and sentences of two years imprisonment imposed. Sentences on remaining counts confirmed. (Link to case note).

R v BDH [2019] QCA 47 - Appeal against conviction for six offences involving four counts of indecent treatment of child under 16 and under 12 and two counts of rape (all domestic violence offences). Contention by appellant that barrister at trial was incompetent; that manner of cross-examining complainant gave rise to miscarriage of justice; those convictions unsafe and unsatisfactory having regard to whole of the evidence. Morrison JA dismissed each ground of appeal as lacking in merit. (Link to case note).

R v HBW [2019] QCA 48**Error! Bookmark not defined.** - Appeal against conviction on count one: rape and count three: recording in breach of privacy (count two discontinued before trial). Both counts were domestic violence offences. In the lead judgement, Gotterson JJA finds the degree of consistency in the complainant's complaints and accounts noteworthy and finds no significant weakness in the prosecution case. Appeal dismissed. (Link to case note).

R v Sollitt [2019] QCA 44 – Applicant was convicted of two counts of assault occasioning bodily harm, one count of contravention of a domestic violence order and one count of rape. His appeal against the rape conviction was dismissed. (Link to case note).

R v Thompson [2019] QCA 46 – Application for leave to appeal against sentence (two counts of assault occasioning bodily harm, two counts of common assault, one count of assault occasioning bodily harm whilst armed and one count of wounding); no appearance by applicant at mention or appeal; total failure by applicant to take any steps to prosecute the application. In refusing the application for leave to appeal, Brown J reviewed the sentence of the learned sentencing judge and found no error by His Honour. The circumstances of the offending were the subject of an agreed schedule of facts. His Honour "noted that the sentence had to punish the applicant to an extent address deterrence, both personal and general, as well as the need to protect the community, but also to encourage the applicant's rehabilitation."

R v KAU [2019] QCA 73 – Appeal against conviction for two counts of rape (domestic violence offences) after a three-day trial (where the jury reached verdicts of not guilty on two other counts of rape). Appellant appealed on the basis the verdicts were inconsistent and the trial judge failed to direct the jury as to a mistake of fact. Bradley J, delivering the lead judgment, dismissed the appeal.

R v O'Malley [2019] QCA 130 – Appeal against sentence for manslaughter (domestic violence offence) on grounds sentence (11 years imprisonment) manifestly excessive. In dismissing the appeal, Bradley J, at [95]"

> *[95] Taking account of the seriousness of the offending manifested by the brutality of the applicant's assault and the relative defencelessness of the deceased, the applicant's remorse after the assault, his timely plea of guilty, his antecedents, his deprived social upbringing, his intellectual disability and the state of his mental health, and bearing in mind the need for some personal deterrence due to his past domestic violence offences and his moderate risk of reoffending, the related need for community protection, and the importance of denunciation of domestic violence offences causing death, I consider a sentence of 11 years imprisonment would punish the applicant in a way that is just in all the circumstances.*

R v Potter [2019] QCA 162 – Application for leave to appeal against sentence for one count of dangerous driving, one count of assault occasioning bodily harm while armed (both domestic violence offences) and one count of common assault. Grounds of appeal – sentence was manifestly excessive as sentencing judge has insufficient regard to his age (24 years at relevant time) and prospects of rehabilitation and that His Honour had no regard to personal circumstances of, and views and wishes of, complainant. Appeal allowed for counts one and three; refused for count two.

KRN v Queensland Police Service [2019] QDC 205 – appeal against sentence for multiple offences including contravention of domestic violence order (aggravated), wilful damage (DV offence), breach of bail, using a carriage service to menace, harass or cause offence

and driving under the influence, on ground sentence was manifestly excessive. Appeal dismissed.

R v Luxford [2020] QCA 272 – appeal against sentence for numerous domestic violence offences including choking, suffocation, or strangulation in a domestic setting. The appeal was upheld on the basis of an error in the exercise of the sentencing discretion because it did not give sufficient weight to the appellant's PTSD.

R v Blockey [2021] QCA 77 – concerned an application for leave to appeal against sentence for manslaughter, being a domestic violence offence, on the grounds the requirement to serve more than one third of the sentence was manifestly excessive. The appellant was a victim of domestic violence; the male deceased was the subject of a domestic violence order. At [10], the sentencing judge found, that "*…the applicant stabbed the deceased after he had pursued her into her home, with a degree of aggressive intent, and after he had at some stage, punched or slapped the applicant causing a bruise and some bleeding*." The Court noted the sentencing judge's remarks, at [11]:

> *The fact that you were such a victim of* domestic *violence as well as a perpetrator of domestic violence is, to my mind, sufficient to enable me to reach the conclusion that it is not reasonable in the present circumstances to treat the fact that your offending was a domestic violence offence as an aggravating feature.*

However, the sentencing judge concluded that "*the applicant's cooperation was tempered by…her failure to provide any comprehensive, reliable detail concerning the stabbing*". The Court found the sentencing judge's conclusion, at [19], was inconsistent with the conclusion that the material was sufficient to justify a finding that the "*…applicant had 'engaged in consciously informed obfuscation or denial' designed to minimise culpability*" and that this was a misapplication to the sentencing principles. At [20], there was no obligation on the applicant to provide a comprehensive, detailed account of the sequence of events concerning the stabbing. She accepted unlawfully causing the victim's death by stabbing him when she pleaded guilty to his manslaughter. Leave to appeal against sentence allowed. The appeal against sentence allowed.

R v SDM [2021] QCA 135 – appeal against sentence for count of rape (domestic violence offence) (third of three counts for rape) on grounds sentence manifestly excessive as (i) learned sentencing judge did not reduce the sentence sufficiently for appellant's guilty plea, and (ii) the making of a serious violence offence declaration (SVO) rendered the sentence excessive. Appeal allowed. SVO removed; more severe head sentence imposed but applicant has opportunity of earlier parole (applicant directed to give notice whether appeal is abandoned).

R v FBA [2021] QCA 142 – appeal against conviction for four counts of choking in a domestic setting. Considered the evidence of history of domestic violence and whether the jury had been properly directed. Sofronoff P and McMurdo JA agreed with Bodice J's reasons and conclusions in relation to ground four, and appeal dismissed. In relation to ground four, the Justices disagreed with Boddice J that the jury verdicts were unreasonable, unsafe, and unsatisfactory as the trial judge had misdirected the jury regarding the appellant's propensity to commit violence. However, Boddice J concluded it was open to accept the complainant's account of each offence as reliable and credible.

R v Hartas [2021] QCA 178 – dismissal of an application for leave to appeal against sentence for arson (domestic violence offence) on grounds insufficient weight given to applicant's personal circumstances and sentence was manifestly excessive. Circumstances of the offending involved the applicant throwing a Molotov cocktail at the complainant's carport and burning two cars.

R v Barclay [2021] QCA 193 – application for leave to appeal against sentence for multiple offences including common assault (domestic violence offence), strangulation in a domestic setting; wilful damage; assault occasioning bodily harm whilst armed (domestic violence offence); and deprivation of liberty (domestic violence offence). Distinguished *R v Luxford* [2020] QCA 272.

R v Gibbs; Ex parte Attorney-General (Qld) [2021] QCA 191 – appeal against sentence by Attorney-General on grounds the sentence imposed for two counts of choking and strangulation in a domestic setting were manifestly inadequate. Cited *R v Luxford* [2020] QCA 272, which was not inconsistent with the sentence imposed. The offender's PTSD caused the offending and therefore reduced the need for emphasis on both general and specific deterrence.

R v Marques Malaqueta [2021] QCA 195 – appeal against sentence for domestic violence offences including fraud to the value of $30,000 or more (four years imprisonment); attempted fraud to the value of $30,000 or more (two years imprisonment); unlawful stalking (two years imprisonment); and breach of bail (nine months imprisonment), on grounds the sentence manifestly excessive. Terms of sentence: suspended after serving 14 months; operational period of four years; to be served concurrently. The stalking particulars included the installation of surveillance equipment in the complainant's home and spyware on her phone. The applicant had attempted to leave the country two days before his sentencing hearing. The sentencing judge took into account the applicant's mitigating factors in his favour including his guilty pleas, his adjustment disorder, and the

hardship in prison due to his family being overseas. The applicant had failed to show the sentence was manifestly inadequate.

The Queen v HCF [2021] QCA 218 – application for leave to appeal against a global sentence imposed for 22 offences committed against the applicant's domestic partner. The applicant was sentenced to a head sentence of seven years for sexual assault on the second indictment, four years imprisonment on the count of assault occasioning bodily harm on the same indictment, and lesser sentences of imprisonment on all other charges. Sentences were ordered to be served concurrently and parole eligibility set at 19 October 2023, after the applicant had served two and a half years. Davis J, in the lead decision, observed that "*The maximum sentence for sexual assault is 10 years. That offence by itself must, in my view, attract at least five years imprisonment"* [page 7]. His Honour noted the serious and protracted period over which the offending was conducted and that it was committed in a domestic setting on some occasions in the presence of children. In outlining the particularly demeaning, degrading, and humiliating nature of the offending, His Honour found that "*the imposition of a global sentence of seven years is well within the range of a sound exercise of sentencing discretion*". Application for leave to appeal dismissed.

R v Lee [2021] QCA 233 – application for leave to appeal against sentence for domestic violence offences. This case involved multiple counts (29) including multiple domestic violence offences (14) against multiple complainants (3) including serious violent offences. Sentencing application amounted to an error. The sentencing judge did not state the sentence was reduced to reflect the fact that some of the offences were not serious violence offences therefore parole eligibility set at 80% of head sentence was an error. Leave to appeal granted. Applicant resentenced.

R v CCU [2022] QCA 92 – application for leave to appeal against sentence for 20 counts of violent offending against the applicant's then partner including assault occasioning bodily harm, strangulation in a domestic setting, common assault, and attempting to pervert justice. *Luxford* and *MDB* were found not to be comparable. Application dismissed.

R v GBI [2022] QCA 28 – application for leave to appeal against sentence for two domestic violence offences, assault occasioning bodily harm and torture (18 months on count one and six and a half years on count two). Application refused. Morrison JA in the lead decision found the sentencing judge correctly noted all of the facts of the offending and features and there was no error in the approach. The argument that the appellant's custodial behaviour was an 'excellent example of rehabilitation for release' was rejected as a reason to conclude manifest excess.

GHN v Commissioner of Police [2022] QDC 86 – appeal against sentence for four offences including two charges of contravention of a domestic violence order on the ground the Magistrate erred by imposing a sentence of imprisonment. Appeal allowed to the limited extent of amending the orders re the erroneous declaration of presentence custody, in breach of s159A(2)(c).

R v WBQ [2022] QCA 48 – application for leave to appeal against sentence for a domestic violence offence of one count of assault occasioning bodily harm whilst armed. Appeal allowed and sentences varied such that cumulative order be deleted. At [26], a sentence of nine month's imprisonment to be served concurrently *"…properly reflected the need for deterrence and denunciation, whilst acknowledging the applicant's cooperation and ongoing rehabilitation".*

YSD v Commissioner of Police [2022] QDC 92 - an appeal against sentence on the sole ground that the length of the operational period resulted in a sentence that was manifestly excessive. Fantin DCJ discusses suspended sentences and the use of operational periods, which must be proportionate to the offending and term of imprisonment imposed.

R v Solomon [2022] QCA 100 – Application for leave to appeal against sentence of seven years and six months with immediate parole eligibility for one count of manslaughter, a domestic violence offence on grounds sentence was manifestly excessive. Application refused. The offence was committed by the applicant in the course of an argument, against a history of significant domestic violence committed against her.

R v BDQ [2022] QCA 71 – Application for leave to appeal against sentence for domestic violence offences on the grounds the sentence imposed was manifestly excessive. The Applicant was found guilty and convicted following a five day trial of one count of maintaining a sexual relationship with a child, two counts of rape and one count of indecent treatment of a child under 16 who is a lineal descendant. He was sentenced to 12 years imprisonment for maintaining a sexual relationship with a child and convicted but not further punished in relation to the remaining three counts. The court found the sentence although in the upper end of what might be regarded as appropriate, was not outside the sentencing discretion and not manifestly excessive.

R v BDR [2022] QCA 85 – Appeal against conviction and sentence, after a trial, for three offences of rape, one offence of procuring a woman, without her consent, to commit an act of gross indecency, one count of unlawful choking and one charge of contravening a domestic violence order. Sentenced to eight years imprisonment with parole eligibility fixed at 19 July 2023. Appeal dismissed.

R v SDQ [2022] QCA 91 – Appeal against conviction, after trial, and sentence for two counts of rape, one count of choking and one count of common assault (domestic violence offences). Appeal allowed on the basis the jury was misdirected as to evidence of the complainant's distress being corroborative.

R v BDS [2022] QCA 144 – Appeal against sentence on ground the sentencing judge failed properly reflect the Appellant's plea of guilty. In the lead decision, Boddice J, agreed with the sentencing judge that the pleas of guilty had been entered at a very late stage and were not reflective of remorse or insight.

R v JAF [2022] QCA 105 – Application for leave to appeal against sentence, upon an early plea of guilty, for 17 counts of attempt to procure rape (four years for each count), nine counts of distributing intimate images (nine months for each count) and three counts of supplying a dangerous drug (three months for each count), sentences were to be served concurrently. Boddice J, in the lead decision, at [27], "*An effective head sentence of four years imprisonment for multiple counts of attempting to procure rape, committed over a protracted period, in the context of multiple counts of distributing intimate images of the same female complainant, was not manifestly excessive.*"

21.12 DOMESTIC VIOLENCE AS A MITIGATING FACTOR AT SENTENCE (S9 *PENALTIES AND SENTENCES ACT*)

The *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* inserts a new subsection in s9(2) of the *Penalties and Sentences Act 1992* to require a court, when sentencing an offender who is a victim of domestic violence, to treat the effect of the domestic violence on the offender and the extent to which the commission of the offence is attributable to the effect of the violence, as a mitigating factor – unless the court considers it is not reasonable to do so because of exceptional circumstances.

Similarly, the Amendment Act also amends the *Youth Justice Act 1992* to provide a mitigating factor for child offenders who are victims of domestic violence or have been exposed to domestic violence.

Unlike the PSA, the amendment to the YJA does not exclude the operation of the mitigating factor in any circumstance, including exceptional circumstances.[148]

21.12.1 Adult offender (ss9(2)(gb) and 9(10B) *Penalties and Sentences Act 1992*)

Section 9(2) provides for matters which the court must have regard to in sentencing an offender, including s9(2)(gb) which provides that without limiting s9(2)(g) (*the presence of any aggravating or mitigating factor concerning the offender*):

- whether the offender is a victim of domestic violence.
- whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender.

Section 9(10B) provides that in determining the appropriate sentence for an offender who is a victim of domestic violence, the court must treat as a mitigating factor –

- The effect of the domestic violence on the offender, unless the court considers it is not reasonable to do so because of the exceptional circumstances of the case; and
- If the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender – the extent to which the commission of the offence is attributable to the effect of the violence.

R v Hermansson; R v Ali [2022] QCA 243 was decided prior to the commencement of ss9(2)(gb) and 9(10B), however the Court of Appeal at [73]-[82] discussed non-physical domestic violence as a mitigating factor at sentence in the context of a young woman (Ali) who offended in compliance with her father's wishes, as a consequence of her cultural obligations and his previous threats (Link to case note).

Section 11(1) provides for various matters which a court may consider in determining the character of an offender, including s11(b): the history of domestic violence orders made or issued against the offender, other than orders made or issued when the offender was a child.

Section 11(2) provides that if oral submissions are made or evidence brought before the court about the history of domestic violence orders against the offender, the judge or magistrate may close the court for that purpose. Section 11(3) provides a definition of "domestic violence order" under this section.

21.12.2 Child offender (s150 *Youth Justice Act 1992*)

Section 150(1) provides for various matters that a court must have regard to in sentencing a child, including s150(1)(ga) which provides that: without limiting s150(1)(f) (*the presence of any aggravating or mitigating factor concerning the child*):

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[148] *Explanatory Notes to the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022*, pages 12-13.

- Whether the child is a victim or, or has been exposed to, domestic violence.
- Whether the commission of the offence is wholly or partly attributable to the effect of domestic violence, or exposure to domestic violence, on the child.

Section 150(6) provides for definitions of “domestic violence” and “exposed” (referring to ss8 and 10 of the DFVPA respectively).

22 POLICE ADDITIONAL POWERS

22.1 POLICE POWER TO DETAIN

A police office may take a person into custody if while investigating domestic violence, the officer reasonably suspects that the person has committed domestic violence and that another person is in danger of personal injury by the person or property is in danger of being damaged by the person (s116). The person must be taken to a holding cell or watch-house as soon as reasonably practicable (s117), and the police officer must prepare an application for a protection order (s118).

If reasonably practicable, the person must be brought before the court for the application to be heard while still in custody. If it is not practicable to bring the person before a court, the application must state the date and time for hearing of the application in the local Magistrates Court (s118(3)). The date must be within five business days if the court sits at least once a week; otherwise, the next sitting date of the local Magistrates Court (s118(4)).

A person cannot be questioned about their involvement in the commission of an offence or a suspected offence whilst detained (s120).

22.2 DURATION OF DETENTION (ss113 & 119)

The DFVPA imposes limitations on the period in which a person can be held in custody under s116. A person may only be held until the later of the following (s113):

A PPN takes effect when it is (s113(1)):

- Personally served on the respondent or in a way stated in a substituted service order; or
- A police officer tells the respondent about the existence and conditions of the notice.

A PPN continues in force until (s113(3)):

- A Magistrate makes a temporary protection order, or order and it is served and becomes enforceable under s177; or
- The proceeding is adjourned and the court does not make a domestic violence order or an order to extend the PPN; or
- The proceeding is dismissed.

In exceptional circumstances, a court may adjourn the application for a protection order and make an order to extend the PPN for not more than five business days or if the court is not sitting in the next five business days, until the next anticipated sitting date for the court (s113(3A).

Exceptional circumstances means unforeseen circumstances that cause the operational of the court of be significantly reduced (e.g. natural disaster, severe weather event or major public health event) (s113(5)).

An order to extend the PPN may be made without appearances by the parties to the application for the protection order (s113(3B). The court must take reasonable steps to notify the Commissioner of

Police and the parties to the application for the protection order of any extension to the PPN (s113(3D).

The PPN may only be extended once under this provision (s113(3C).

This provision applies to a PPN, whether the notice is issued before or after 23 September 2024 (s239) when the amendments to s113 by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* commenced.

If the court makes an order to extend the PPN, section 47B applies at the first mention for the proceeding that occurs after the making of an order.

A person may be held in custody until the later of (s119(1)):

- If it is reasonably practicable to bring the person before a court for a hearing of the application for a protection order whilst the person is still in custody and the court:
    - decides to make the DVO – when the court makes the DVO, and a police officer complies with s124(1)(b)[149]; or
    - adjourns the application and decides not to make a DVO – when the proceeding is adjourned; or
    - dismisses the application – when the application is dismissed.
- If it is not reasonably practicable to bring the person before a court for a hearing of the application for a protection order whilst the person is still in custody – when the application for a protection order is prepared and a police officer is able to comply with s124(1)(d)[150] or (e)[151];
- If a police officer obtains a temporary protection order under Division 4 (urgent temporary protection orders) whilst the person is still in custody – when the temporary protection order is made, and a police officer is able to comply with s124(1)(c)[152].

There is provision (s119(2)) to detain a respondent for a longer period if a police officer believes:

- It is necessary to make arrangements for the safety of an aggrieved or a child – can detain until arrangements are made but not more than four hours (ss119(2)(a) and (3)(b)) unless an extension is granted under s121.
- The person is intoxicated to an extent that they are unable to understand the nature and effect of the application, order or conditions that must be given to them under s124 – can hold until capable of understanding documents but no more than eight hours (ss119(2)(b) and (3)(a)).

[149] Section 124(1)(b) – upon the release of the person, serves a copy of the order in compliance with s184.
[150] Section 124(1)(d) If a PPN is issued under s101A, a police officer must personally serve the notice on the person and explain the notice in compliance with ss109 and 110. (Section 101A – issue of PPN when person is released from custody).
[151] Section 124(1)(e) If release conditions are imposed under s125 a police officer must personally serve a copy of the release conditions on the person.
[152] 124(1)(c) If a temporary protection order is made by a Magistrates under s131, a police officer must serve a copy of the order on the person in compliance with s133(1)(a).

- The person's behaviour is so aggressive or threatening that it presents a continuing danger of personal injury or property damage – can hold until the officer believes the person is no longer a continuing danger but no more than four hours (ss119(2)(c) and (3)(b)) unless an extension is granted under s121.

22.3 APPLICATION FOR EXTENSION OF DETENTION (s121)

If a police officer is authorised to detain a person for four hours (see above) the police officer can apply to a Magistrate for an extension before the detention period ends (s121). See paragraph 3.5 above.

22.4 POLICE CONDITIONS ON RELEASE OF PERSON FROM CUSTODY UNDER PART 4, DIVISION 2

22.4.1 Release of person from custody (s124)

When a person is released from s116 custody, a police officer **must** (s124):

- Serve on them (in compliance with s34) a copy of any application for protection order prepared under s118 (s124(1)(a)); and
- Serve on them (in compliance with s184) any domestic violence order made by the court under Part 3, Division 1 or 2 (s124(1)(b)); and
- Serve on them (in compliance with s133(1)(a)) a copy of any temporary protection order made by a Magistrate under s131 (s124(1)(c)); and
- Serve on them and explain any PPN (issued under s101A) (s124(1)(d)); and
- Personally serve a copy of any release conditions imposed under s125 (s124(1)(c)).

22.4.2 Release conditions (s125)

A police officer **must** release the detained person on conditions (release conditions) if:

- It has not been reasonably practicable to bring the person before the court to hear the application for a protection order (s125(1)(a)); and
- A police officer has not obtained a temporary protection order naming the person as respondent (s125(1)(b)); and
- The releasing police officer reasonably believes a DVO has been made or a PPN issued that names the person as the aggrieved and another person involved in the domestic violence for which the person was taken into custody as a respondent (s125(1)(c)).

The release conditions must be those that the police officer considers are necessary or desirable to protect the aggrieved from domestic violence, protect a named person from associated violence or protect a named person who is child from being exposed to domestic violence committed by the respondent. Release conditions can name persons as well as include the same conditions as PPNs (apart from a cool-down condition) (s125(4)).

The release conditions must include the standard conditions in s106 and **may** include the following (s106A):

- No contact.
- Ouster.
- If release conditions include ouster, return conditions,
- A condition that is necessary or desirable in the circumstances.

The release conditions continue in force until (s125(5)):

- A temporary protection order or order is made and served on the respondent or is otherwise enforceable under s177;153 or
- If the court adjourns the application without making an order, the adjournment; or
- If the court dismisses the application, the dismissal.

Note that if the court makes a temporary protection order in the same terms as the release conditions, the temporary protection order is taken to have been served on the respondent when the order is made.

See also:

- s126 for special provisions relating to Children in detention.
- s127 regarding taking a detained person to a place for treatment; and
- s128 regarding taking an intoxicated detained person to a place of safety.

[153] Section 177 sets out how a respondent is to be told about, or made aware of, an order before he or she can be convicted of a breach of the order (see paragraph 21.1).

23 BAIL

23.1 REBUTTABLE PRESUMPTION AGAINST BAIL

From 30 March 2017, the *Bail Act 1980* was amended by the *Bail (Domestic Violence) and Another Act Amendment Act 2017*.

Section 16 was amended to expressly provide that in considering an application for bail regarding any domestic violence offence or the offence of contravening a domestic violence order, the court or police officer must specifically consider the risk of further domestic violence or associated domestic violence being committed by the defendant in assessing whether the defendant represents an unacceptable risk. A legislative note was also added referring to existing s15(1)(e) of the *Bail Act 1980* regarding the evidence the court may receive and take into account in considering the risk of further domestic violence or associated domestic violence being committed by the defendant.

New s16(2)(f) provides:

> *If the defendant is charged with a domestic violence offence or an offence against the Domestic and Family Violence Protection Act 2012 s177(2) - the risk of further domestic violence or associated domestic violence, under the Domestic and Family Violence protection Act 2012, being committed by the defendant.*

In addition, s16(3) of the *Bail Act 1980* was amended to reverse the onus of proof in certain circumstances. One of those is where the defendant is charged with a "relevant offence" (see s16(3)(g) In such a case the court shall refuse bail unless the defendant can show cause why his detention is not justified). "Relevant offence" is defined in s16(7)(d) as an offence under s177(2) of the DFVP Act.

Section 16 of the *Bail Act 1980*, as amended, creates a rebuttable presumption that bail should be refused where the defendant (other than a child) has been charged with an offence against s177(2) of the DFVPA and there is an ***unacceptable risk*** that if the defendant is released on bail they will commit an offence, if:

- The offence involved the use, threatened use, or attempted use of unlawful violence to person or property; or
- The defendant, within five years before the commission of the offence, was convicted of another offence involving the use, threatened use or attempted use of unlawful violence to person or property; or
- The defendant, within two years before the commission of the offence, was convicted of another offence against s177(2) of the DFVPA.

In deciding whether there is an unacceptable risk, in addition to the matters in s16(2), the court or police officer should consider the risk of further domestic violence or associated domestic violence (s16(2)(f)).

Section 16 was considered by the Court of Appeal in *Ackland v Director Public Prosecutions (Qld)* [2017] QCA 75.

The appellant, Ackland was charged with assault occasioning bodily harm and chocking, suffocation, or strangulation in a domestic relationship. He had previously been dealt with for breach of a

protection order. The complainant attempted to withdraw the complaint. Ackland was refused bail by a Magistrate and appealed to the Supreme Court and again refused bail on the basis that he was an unacceptable risk. He appealed to the Court of Appeal seeking bail.

With respect to the attempted withdrawal by the complainant, the court noted that she did not allege that the purported events had not occurred but rather that she did not wish to proceed with the complaint. In dismissing the appeal, Atkinson J found:

> *[29] The behaviour alleged against the appellant occurred in a number of episodes over a prolonged period and included repeated punching and even an attempt at strangulation. The complainant's injuries could not be explained by his exculpatory version. Her reasons for withdrawing the complaint were, as his Honour found, motivated in part by fear and did not denounce in any way that the alleged offences did not occur. In those circumstances it could not be said that the reasons his Honour gave for not refusing bail were not reasonably open.*

23.2 CONDITIONS ON BAIL

Any bail order can be made on conditions - (s11(2) of the Bail Act 1980).

23.3 DEFINITION DOMESTIC VIOLENCE OFFENCE

"***domestic violence offence"*** in s16(7) of the *Bail Act 1980* is defined in s1 of the *Criminal Code Act 1899* as:

- An offence against an Act, other than the DFVPA committed by a person where the act done, or omission made, which constitutes the offence is also—
  (a) A domestic violence or associated domestic violence, under the DFVPA committed by the person; or
  (b) a contravention of s177(2) of the DFVPA.
- Note: Under s177(2) of the DFVPA, a respondent against whom a domestic violence order has been made under that Act must not contravene the order.

23.4 DEFINITION RELEVANT OFFENCE

"***relevant offence"*** in s16(7) for the purpose of s16(3) (rebuttable presumption against bail) means:

- An offence against s315A of the *Criminal Code;* or
- An offence punishable by a maximum penalty of at least seven years imprisonment if the offence is also a domestic violence offence; or
- An offence against s75, s328A, s355, s359E or s468 of the *Criminal Code* if the offence is also a domestic violence offence; or
- An offence against s177(2) of the DFVPA if:
  - The offence involved the use, threatened use, or attempted use of unlawful violence to person or property; or

- The defendant, within five years before the commission of the offence, was convicted of another offence involving the use, threatened use or attempted use of unlawful violence to person or property; or
- The defendant, within two years before the commission of the offence, was convicted of another offence against s177(2) of the DFVPA.

23.5 TRANSITIONAL PROVISION

The Amending Act has some retrospective effect - s46 of the *Bail Act 1980:*

- Sections 11-16 as amended by the amending Act, apply in relation to the release of a person on bail on or after the commencement.
- It is irrelevant whether the alleged offence in relation to which the person is released on bail happened or the proceeding for the offence was started before or after commencement.

24 DOMESTIC AND FAMILY VIOLENCE DEATH REVIEWS

Domestic and family violence death review mechanisms are based on the premise that these types of fatalities are rarely without warning and are generally preceded by violent or abusive incidents indicating a heightened risk of future harm. It is because of these indicators that these deaths are considered to be some of the most preventable types of deaths.

In recognition of this, Queensland has a two-tiered domestic and family violence death review process consisting of:

- Tier One: The Domestic and Family Violence Death Review Unit is based within the Coroners Court of Queensland and assists Coroners in understanding the context and circumstances of individual domestic and family violence deaths.
- Tier Two: The independent multidisciplinary Domestic and Family Violence Death Review and Advisory Board, (the Board) that is responsible for the systemic review of domestic and family violence deaths.

The Board was established by the *Coroners Act 2003* in 2016, in response to a key recommendation from the Special Taskforce on Domestic and Family Violence Final Report, "*Not Now, Not Ever: Ending domestic and family violence in Queensland*" (Queensland Government).

The Board undertakes systemic reviews of domestic and family violence deaths in Queensland. The Board is required to identify common systemic failures, gaps or issues and make recommendations to improve systems, practices and procedures that aim to prevent future domestic and family violence deaths.

The Board's Annual Report (2021-22) states the Board has made 65 recommendations to Government since the Board's establishment on 1 July 2016. The Government has accepted, or accepted-in-part, all but one of these recommendations.[154] The recommendations are aimed at changing organisational practices, educating providers, and influencing policy and reform.

Further information about the Board's role and functions, membership, data and research, systemic reports, Annual Reports and Government Responses can be found at: https://www.courts.qld.gov.au/courts/coroners-court/review-of-deaths-from-domestic-and-family-violence.

Magistrates are also referred to the session presented by Magistrate Jane Bentley at the 2022 Magistrates Domestic and Family Violence Conference, "*Applying learnings from the coronial jurisdiction*". Magistrate Bentley discusses recent domestic and family violence related deaths including Fabiana Palhares; Tara Brown; Teresa Bradford; Karina Lock; Doreen Langham; and Hannah, Aaliyah, Laianah and Trey Clarke. The video and slides from the presentation can be found here[155].

[154] The 2021-22 Annual Report of the Board reports that 61.5% of recommendations are completed and implementation is ongoing for 36.9% of recommendations.

[155] This link will only work for those with access to the Magistrates Online Intranet.

24.1 CASES EXAMINED BY THE DOMESTIC AND FAMILY VIOLENCE DEATH REVIEW AND ADVISORY BOARD

The Board examines clusters of cases based on common themes in order to identify systemic issues in the service system response to perpetrators, victims, or their children.

In 2018-19, the Board examined the following clusters of cases:

- Social and/or geographic isolation
- Priority populations (older people, people with disability, and LGBTIQ+ people)
- Filicides in the context of domestic and family violence
- Aboriginal and Torres Strait Islander youth suicides in the context of domestic and family violence.

In 2019-20, the Board explored the following key areas:

- Responding to victims of domestic and family violence.
- The impact of domestic and family violence on children and young people.
- Reflections on patterns of abuse, risk, and harm to find better ways to hold perpetrators to account.

The 2020-21 Annual Report examined the following priority areas:

- Focused attention on cases that have occurred in an area where a High-Risk Team or integrated service response is operating, and the victim or perpetrator was known to participating representatives or the team.
- Revisiting how systems and services respond to family violence among Aboriginal peoples and Torres Strait Islander peoples, families, and communities, particularly in remote areas of Queensland.
- Undertaking a deeper analysis of the frequency and incidence of service contact in these cases to better differentiate between opportunities for intervention immediately prior to a death, and over the longer term.

In 2021-22, the Board focused on cases that occurred in an area where a High-Risk Team and Integrated Service Response was operating, and the deceased was known to the Team or participating agency representatives. Other key focuses were:

- Integrated Service Responses and High-Risk teams; and
- Building upon the Board's prior findings and recommendations, exploring opportunities to more effectively protect victims and their children as well as hold persons who use violence to account *across* agencies and *over time*.

The 2022-23 Annual Report examined the following areas:

- Potential reform fatigue being experienced by agencies in circumstances where significant changes to the current domestic and family violence landscaping are ongoing;
- The continuing influence on accurately identifying how to best respond to the person must in need of protection;

- Monitoring the progress made in implementation of the Board's recommendations and supporting agencies with these implementation activities;
- The continuing influence on court support liaison officers for victims of domestic and family violence.

The report identified nine domestic and family violence related deaths in an intimate partner relationship and seven deaths in a family relationship in Queensland in 2022-23.

In its annual reports, recommendations of the Board aim to enhance the existing program of work already commenced and address systemic gaps where applicable.

Non-inquest findings into the death of Rinabel Tiglao Blackmore

Coroner's Court of Queensland
Coroner Wilson
4 April 2019

This judgment contains pertinent findings in relation to the dynamics of domestic violence, the elevated risk at the time of separation, issues for culturally and linguistically diverse women and the importance of safety planning. The Coroner, Magistrate Nerida Wilson [at 251] thanked Ms Blackmore's family for "*providing their consent to publish these non-inquest findings in the public interest and to assist and inform the current public discourse regarding domestic and family violence*."

Findings

Coroner Wilson found:

> *"…that Rinabel Tiglao Blackmore died as a result of a fatal head injury sustained when she exited a moving vehicle driven by her intimate male partner Shane Dickson at a speed of approximately 100 kilometres per hour on the Dingo Mount Flora Road, Middlemount, approximately 2.8km south of the Dysart Middlemount Road intersection. Her actions occurred in the context of a prolonged episode of domestic violence. In the preceding 40 hours she had been subjected to several causally connected episodes of verbal abuse and significant physical violence by Mr Dickson. Ms Blackmore's actions were a desperate act of self-preservation. I find that it is more probable than not that she exited the vehicle to escape the terror of the events unfolding inside whilst in fear for her life."*

Criminal proceedings against Mr Dickson

Mr Dickson was charged with the murder of Mrs Blackmore on 15 January 2015. He entered a plea of guilty to the alternative charge of manslaughter and was sentenced to seven and a half years imprisonment on 24 November 2016 in the Supreme Court of Queensland in Rockhampton, with a parole eligibility date of 15 July 2017. He was released to parole on 21 August 2018. The sentencing remarks are at paragraph 135.

Ms Blackmore had not previously reported domestic violence and had very limited known contact with services. Mr Dickson had an extensive history of domestic and family violence within other intimate and family relationships. He had a history of failing to comply with court orders.

Lethality risk factors

The coronial investigation identified the following lethality risk factors:

a) History of violence outside the family by perpetrator;
b) History of domestic violence (current partner);
c) History of domestic violence (pervious partners);
d) Prior threats to kill victim;
e) Prior attempts to isolate the victim;
f) Prior destruction or deprivation of victim's property;
g) Choked/strangled victim in the past;
h) Victim and perpetrator living in common-law;
i) Actual or pending separation;
j) Sexual jealousy; and
k) Victim's intuitive sense of fear of perpetrator.

Attempted strangulation as a predictive risk factor

Mr Dickson had a history of perpetrating non-lethal strangulation against former partners as well as family members (his mother). In Ms Blackmore's first and only report to police, which occurred 40 hours prior to the incident resulting in her death, she reported that Mr Dickson held his hand on her throat and tried to choke her. At [212], Coroner Wilson noted that non-lethal strangulation is often misidentified or minimised by victims, police, and the courts. At [209], the link between non-lethal strangulation and homicide is explained:

> *"According to World Health Organisation statistics, strangulation is a relatively common cause of homicide death, particularly for women. Prior attempted, non-lethal strangulation is one of the best predictors for the subsequent homicide of victims with research suggesting that the odds of becoming an attempted homicide victim increase by 700 per cent, and the odds of becoming a homicide victim increase by 800 per cent for women who had previously been strangled by their partner."*

Conclusion and findings

Ms Blackmore died within 40 hours of her first and only report of domestic violence to police. This case highlights the importance of police training in the dynamics of domestic and family violence. Opportunities were missed to support Ms Blackmore which could have prevented her from attending the residence alone to collect her personal belongings. This placed her at considerable risk.

Non-inquest findings into the death of Nyobi Jade Hinder, River Jamie Hinder and Charlie Hinder

Coroners Court of Queensland
Coroner Wilson
30 March 2020

Coroner Wilson found, inter alia, that Charlie Hinder intentionally killed himself and his two children as an act of spousal revenge (retaliatory filicide) by detonating explosives in a caravan. He intended

to kill Katherine Hinder in the explosion (who survived). Coroner Wilson acknowledged the courage and kindness of Katherine Hinder during her dealings with the Coroner's Office.

Cause of death:

> *Nyobi Hinder and River Hinder and their father Charlie Hinder died when Charlie intentionally detonated a commercial power gel mining explosive inside a caravan on the front lawn of the family home, killing himself and his children. He did so as an act of spousal revenge / retaliatory filicide coinciding with the breakdown of his marriage and during the period post-separation from his wife against a backdrop of escalating acts of emotional, psychological, and physical domestic violence. He also intended to cause the death of his wife in the same explosion however was unsuccessful.*

Coroner Wilson analysed the circumstances surrounding the deaths of Nyobi and River Hinder and their father Charlie Hinder. The nuances of domestic and family violence are discussed including the identification of problems with the police response to incidents of domestic and family violence in the weeks and months prior to the deaths perpetrated by Charlie Hinder.

Non-inquest findings into the death of Sarahjane Dower

Coroners Court of Queensland
Coroner Wilson
30 March 2020

Ms Dower was 26 years old at the time of her death. Her remains were located in a burnt-out vehicle in a rural area near Townsville. On the morning of her death, the day before Father's Day, Ms Dower met with her former fiancé, Kynan Devenna, at his residence to discuss a shared parenting agreement under the family law order in place. The initial plan was for them to meet in a public place. Mr Devenna attacked Ms Dower and stabbed her twice to the neck. He then transported her body to a rural area and incinerated her body twice in two days.

The Domestic and Family Violence Death Review Unit reviewed the police Brief of Evidence and provided a report as part of the coronial investigation. At [50] and [51], Coroner Wilson stated:

> *[50]: "The recognition of multiple risk factors within a relationship allows for a comprehensive assessment of risk, safety planning and, potentially the prevention of future deaths related to domestic and family violence. Assessing and determining the severity of domestic and family violence can assist services to identify and quantify the level of risk or danger; allocate resources; and assist victims to understand that they may be at a high risk of violence against them.*
>
> *[51] Currently the DFVDRU adopts the Ontario Domestic Violence Death Review Committee Coding Form as it provides a comprehensive list of 39 risk factors developed cumulatively over time from reviews of intimate partner homicides. The following 14 risk factors were identified as existing in the relationship of Ms Dower and DEVENNA:*

• History of domestic violence • Prior assault with a weapon • Child custody/access disputes • Actual or pending separation • Victim's intuitive sense of fear of the perpetrator • Prior threats to kill • Perpetrator - Depression-professionally diagnosed • Perpetrator - Prior destruction of victim's property • Perpetrator - Prior suicide threats and attempts • Perpetrator - History of violence outside of the family • Perpetrator - Mental health or psychiatric problems • Perpetrator - Failure to comply with authority • Perpetrator - Sexual jealousy • Perpetrator - Obsessive behaviour.

[52] The above assessment was limited to the documented history of domestic and family violence, as such, the presence of other relevant risk factors could not be excluded. Even with these limitations, the presence of such a significant number of risk factors indicates that Ms Dower's death was potentially preventable if all of this information had been available prior to the death and had prompted earlier recognition and action by both formal and informal support mechanisms."

Ms Dower filed an application for a protection order in the Magistrates Court. Ultimately the order was struck out. Mr Devenna used the Family Court Order to legitimise ongoing contact with Ms Dower and he used those interactions to abuse, intimidate and assault her. Ms Wilson had not been informed her application had been adjourned (by the police or the registry). Coroner Wilson found *"…in all likelihood, Ms Dower continued to operate under the belief that a protection order was in place, as she had not ever been informed to the contrary. She died at the hands of the Respondent, within 5 months of her application being struck out*."

Coroner Wilson acknowledged the landscape had changed since the death of Ms Dower, with the implementation of the Special Taskforce on Domestic and Family Violence in Queensland, resulting in better protections for victims, including the establishment of support services to assist victims navigate legal proceedings and amendments allowing the sharing of information between agencies and services. The sharing of information in relation to Ms Dower may have allowed for a greater understanding of the risk she was under. Coroner Wilson founded opportunities were missed in relation to Mr Devenna's disengagement from physiological treatment.

Inquest into the death of Hannah Ashlie Clark, Aaliyah Anne Baxter, Laianah Grace Baxter, Trey Rowan Charles Baxter and Rowan Charles Baxter

Coroners Court of Queensland
Deputy State Coroner Bentley
20 June 2022

Rowan Charles Baxter killed his wife, 33 year old Hannah Clarke, and their three children Aaliyah (six years old), Laianah (four years old) and Trey (three years old) by dousing them with petrol and setting them alight in their car. Mr Baxter also then killed himself.

There was evidence from Ms Clarke's family and friends as to Mr Baxter's controlling behaviours during their relationship. Mr Baxter was 11 years older than Ms Clarke. Mr Baxter sought to isolate Ms Clarke from her family, controlled what she wore, criticised her in front of other people,

demanded sex, refused to speak with Ms Clarke if she did not comply with his demands, accused Ms Clarke of having an affair, threatened to harm himself and listened to Ms Clarke's phone calls.

At the time of their deaths, Ms Clarke and her children were living with her parents and a domestic violence order was in place in favour of Ms Clarke. Mr Baxter's abusive and controlling behaviours continued, including taking one of their children for several days without telling Ms Clarke of their location, injuring Ms Clarke's wrist and loitering at Ms Clarke's workplace. Issues as to the custody arrangements of the children were ongoing.

The inquest examined the contact that Ms Clarke and Mr Baxter had separately with domestic violence services and counselling and the appropriateness of the responses of those services and the Queensland Police Service prior to their deaths.

Deputy State Coroner Bentley recommended that:

- Queensland Police Service implement 5-day face-to-face DFV training for specialist DFV officers
- Queensland Police Service add a mandatory face-to-face DFV module to the annual training required of all officers
- A trial of a multi-disciplinary specialist police station occur in Logan or Kirwan
- The Queensland Government fund men's behaviour change programs in prisons and the community

Inquest into the deaths of Doreen Gail Langham and Gary Matthew Hely

Coroners Court of Queensland
Deputy State Coroner Bentley
27 June 2022

Doreen Langham was 49 years old when she was killed by her former partner, Gary Hely. Ms Langham and Mr Hely commenced a relationship in 2018. Evidence of Ms Langham's family members demonstrate domestic violence in the relationship by Mr Hely. He sought treatment from medical practitioners for mental health, emotional and anger issues in 2020. The relationship ultimately broke down in February 2021 and Mr Hely moved out of their shared residence. Mr Hely's acts of coercive control escalated after this time.

Ms Langham obtained a domestic violence order against Mr Hely which ordered him not to, amongst other things, go within 100m of Ms Langham's residence or workplace, not to communicate with her and not locate her. Ms Langham reported breaches of this order to police several times. Prior to her death, Ms Langham had contact with 16 different police officers. Mr Hely was undeterred.

On the day of Ms Langham's death, Mr Hely purchased duct tape, rope, and fuel. He trespassed in Ms Langham's unit complex several times before she ultimately phoned 000 at 9:20pm to report a potential intrusion into her property. Mr Hely continued to roam around the complex. Police

attended at 1am, knocked on the door and left when there was no answer. Neighbours heard arguing from Ms Langham's unit at 3:40am. Shortly after, Mr Hely set Ms Langham's unit on fire. They both died in the fire.

Deputy State Coroner Bentley found that the Queensland Police Service missed countless opportunities for intervention and that the responses to Ms Langham's complaints and 000 calls were inadequate.

Deputy State Coroner Bentley recommended that:

- The Queensland Police Service trial a specialist victim centred police station in the Logan District staffed with multi-disciplinary teams who can provide an integrated response for domestic and family violence victims;
- A DV specialist social worker be embedded at every police station in the Logan District for 12 months; and
- The Queensland Police Service Operational Procedures Manual be amended so officers must view interstate records for all DFV matters.

25 *HUMAN RIGHTS ACT 2019*

The *Human Rights Act 2019* (HRA) was passed by the Legislative Assembly on 27 February 2019 and commenced in full on 1 January 2020. Since 1 January 2020, the Queensland Human Rights Commission can now take complaints under the HRA, only for matters which occur on or after this date.

The principle aim of the HRA is to ensure that respect for human rights is embedded in the culture of the public sector. The HRA requires public entities to undertake public functions in a principled way that places individuals at the centre of decision-making and service delivery.

The HRA protects **23 fundamental human rights** that are recognised in international covenants.

The HRA achieves a consolidated statutory protection of the following human rights, which are **not absolute** (they must be balanced against the rights of others and public policy issues of significant importance):

- Recognition and equality before the law
- Right to life
- Protection from torture and cruel inhuman or degrading treatment
- Freedom from forced work
- Freedom of movement
- Freedom of thought, conscience, religion, and belief
- Freedom of expression
- Peaceful assembly and freedom of association
- Taking part in public life
- Property rights
- Privacy and reputation
- Protection of families and children
- Cultural rights – generally
- Cultural rights – Aboriginal peoples and Torres Strait Islanders peoples
- Right to liberty and security of person
- Humane treatment when deprived of liberty.
- Fair hearing
- Rights in criminal proceedings
- Children in the criminal process
- Right not to be tried or punished more than once.
- Retrospective criminal laws
- Right to education
- Right to health services

The HRA requires **courts and tribunals** to interpret legislation that, to the extent possible, is consistent with its purpose in a way that is compatible with human rights (s48). This obligation does not authorise courts and tribunals to depart from Parliament's intention in enacting a particular law.

The interpretation by a court or tribunal must be consistent with the legislative purpose of the statutory provision. The HRA does not allow a court or tribunal to invalidate any laws.

Part 3, Division 3 of the HRA provides that so far as is possible to do so, **courts and tribunals must interpret legislation in a way that is compatible with human rights.**

Section 49 of the HRA provides:

(2) This section applies if, in a proceeding before a court or tribunal -
(a) a question of law arises that relates to the application of this Act; or
(b) a question arises in relation to the interpretation of a statutory provision in accordance with this Act.
(3) The question may be referred to the Supreme Court if -
(a) a party to the proceeding has made an application for referral; and
(b) the court or tribunal considers the question is appropriate to be decided by the Supreme Court.
(4) If a question is referred under subsection (2), the court or tribunal referring the question must not –
(b) make a decision about the matter to which the question is relevant while the referral is pending; or
(c) proceed in a way or make a decision that is inconsistent with the Supreme Court's decision on the question.

Section 53 of the HRA provides that the Supreme Court or a Court of Appeal may, in a proceeding, make a declaration of incompatibility to the effect that the court is of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights.

The term ***compatible with human rights*** is **defined in s8** of the HRA to mean:

*An act, decision or statutory provision is **compatible with human rights** if the act, decision, or provision—*
(a) does not limit a human right; or
(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.

This makes it clear that the proportionality analysis in s13 is relevant to the exercise of the court's power to make a declaration. This effectively **narrows the scope of the court's power** to issue a declaration since **the court may only issue a declaration after the court has first considered whether a limit on a human right is reasonable and demonstrably justifiable** in accordance with s13 and concluded that it is not.

A declaration does not affect the validity of the law, is not binding on the parties, nor does it create legal rights or a civil cause of action, but it does trigger a procedure whereby the incompatibility is brought to the attention of the Attorney-General and the parliament.

Remedies

There is no stand-alone legal remedy for contravention of the HRA. There is, however, a limited enforcement mechanism. The HRA provides that it is unlawful for a public entity to act or make

a decision in a way that is not compatible with human rights; or in making a decision, to fail to give proper consideration to a human right relevant to the decision (s58(1)). However, a person may only seek relief or remedy for this unlawfulness under s59(1) of the HRA if the person may seek relief or remedy in relation to an act or decision of the public entity on a ground of unlawfulness other than under s58(1). In practice this will mean where individuals have an independent cause of action against a public entity (for example, the right to seek judicial review of a decision of a public entity), a claim of unlawfulness under the HRA can be added to that existing claim. This is what is colloquially known as **a 'piggy-back' cause of action.**

Monetary damages will not be available for a contravention of the HRA itself, but a person will be entitled to any other relief or remedy they could have obtained in relation to an independent cause of action (for example, in the case of judicial review, quashing or setting the decision aside, or referring the decision back to the original decision maker for further consideration and redetermination). There is an entitlement to this remedy (except if it is damages) even if the person is not successful in their independent cause of action.

Relevantly, s9(4) of the HRA states that a **public entity does not include** –

(iv) a court or tribunal, except when acting in an administrative capacity.

A court or tribunal will only be a public entity for the purposes of the HRA when it is **acting in administrative capacity**. That expression is not defined in the HRA but can be interpreted in reference to the exercise of administrative power based on Australian public law principles – that is, **a court or tribunal will be acting in an administrative capacity for the purposes of the HRA when exercising power of an administrative nature, as distinct from judicial or legislative power**.

When ascertaining the distinction between administrative and judicial power, principles relating to the distinction at federal level may be applied but will not necessarily provide a universal test.

The following are examples of when courts have been deemed acting in an administrative capacity in the *Victorian Charter of Rights and Responsibilities 2006* (Vic), which has a similar provision to that of s9(4)(b):

- A Magistrate's decision to commit a person for trial.
- The issuing of a warrant.
- The Victorian Civil and Administrative Tribunal when acting in its original jurisdiction with regards to decisions around exemptions under the *Equal Opportunity Act 2010* (Vic); in determining an application for an order for the creation of tenancy; and guardianship orders.

Other tribunals, including medial practitioner's boards and mental health review boards, have also been taken to be public entities when acting in an administrative capacity.

A court or tribunal, when acting in an administrative capacity, will be a public entity and will therefore need to meet the obligations in s58 of the Act, that is to act or make a decision in a

way that is not incompatible with human rights; and in making a decision, to give proper consideration to a human right relevant to the decision.

Further information can be found on the Magistrates Intranet including links to the Judicial College of Victoria Charter of Human Rights and Responsibilities Benchbook.

25.1 JURISPRUDENCE

Domestic violence has long been recognised as a human rights issue by the United Nations. Whilst the Queensland jurisprudence is developing, reference can also be made to case law concerning domestic violence and human rights in other jurisdictions with a more developed human rights jurisprudence (see below). Reported cases referring to the HRA can also be accessed here – UQ Human Rights Case Law Project.

Queensland

Although the inception of the HRA is recent, the domestic and family violence jurisdiction has long considered the principals of human rights. The introduction of the HRA is an effective measure to further prevent and respond to cases of domestic and family violence on a state level.

Minimal commentary or application has so far been published regarding the HRA within recent case law. However, consideration of fundamental human rights law has been considered within the judiciary's obiter dicta in domestic violence cases.

The preamble to the DFVPA relevantly provides (in the first three of 10 paragraphs):

> *In enacting this Act, the Parliament of Queensland recognises the following—*
>
> *1 Australia is a party to the following instruments—*
> - *Universal Declaration of Human Rights*
> - *United Nations Declaration on the Elimination of Violence Against Women*
> - *United Nations Convention on the Rights of the Child*
> - *United Nations Principles for Older Persons*
>
> *2 Living free from violence is a human right and fundamental social value.*
>
> *3 Domestic violence is a violation of human rights that is not acceptable in any community or culture and traditional or cultural practices cannot be relied upon to minimise or excuse domestic violence.*

In *KBE v Queensland Police Service* [2017] QDC 326, Muir DCJ noted, at [14], the preamble of the DFVPA (as above) and that living free from violence is a human right and fundamental social value and that domestic violence is a violation of human rights and not acceptable in any community.

Smith DCJA considered the HRA in *ADI v EGI* [2020] QDC 13. The case examined an application for a stay of a decision of the Magistrates Court to dismiss and vary a domestic violence order. His Honour

reflected that when assessing the application, he must have regard to the relevant provisions of the HRA.[156]

In *LAF v AP* [2022] QDC 66, Smith DCJA, in relation to a request for the transfer of a cross application to a different court, noted at [62] under s31 of the HRA a party to a civil proceeding has the right to have the proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing. Smith DCJA noted the Magistrate "…*crossed the line here*" in his consideration of that application. See paragraph 17.1.

Victoria

Victoria enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic) on 25 July 2006 and has developed a body of jurisprudence accordingly. See the Judicial College of Victoria Charter of Human Rights and Responsibilities Benchbook (Victorian HR Benchbook) and the Victorian Human Rights Charter Case Collection.

NB: Chapter Two of the Victorian Human Rights Benchbook sets out the Charter's effects on courts including the direct application of Charter rights to courts:

> *Key aspects of the courts' role under the Charter are the requirement that courts consider human rights when interpreting laws (s32), and the Supreme Court's mechanism for informing the Executive and Parliament when it finds legislation inconsistent with Charter rights (declarations of inconsistent interpretation, ss36 – 37).*

The Victorian Charter was interpreted in *Smith and Others v State of Victoria* (2018) 56 VR 332. The case concerned an application for a summary dismissal of the plaintiffs' negligence claim against the State of Victoria. The claims were 'police tort claims' based on **allegations that the police failed to uphold human rights under their common law duty of care**, in relation to a number of instances of family violence perpetrated against the plaintiffs (mother and her three children) by the father of the children.

Justice John Dixon noted that, in 2008, the Parliament stated a number of core objectives of the *Family Violence Protection Act 2008* (Vic) including that "*family violence is a 'fundamental violation of human rights and is unacceptable in any form*"[157].

The judgment contains pertinent findings in relation to the complex dynamics of family violence and the elevated human rights risks present when police officers breach their owed duties of care. The plaintiffs alleged the police officers and senior officers owed duties of care to them as victims of family violence. As such, the plaintiffs asserted the police officers in charge and senior officers acted in breach of the plaintiffs' human rights and obligations as public authorities ascertained in ss 13(1), 8(2), 8(3) and 17(1) of the Charter[158].

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[156] ss17, 26, 31 and 48 of *Human Rights Act 2019* at [8].
[157] *Smith and Others v State of Victoria* (2018) 56 VR 332 at [7].
[158] Ibid at [40]; ASOC [124]–[135], specifically raising ss13(1), 8(2), 8(3) and 17(1) of the *Charter*.

Justice Dixon, in refusing the application for a summary dismissal on behalf of the State of Victoria, effectively opened the door for a duty of care owed by police but in exceptional circumstances. At [170]:

> *In no case has a court determined that no duty of care was owed in circumstances that demonstrate the degree of proximity between the plaintiffs and the police that is likely to be demonstrated on the evidence in this case at trial and in the legislative and policy framework that prevail in respect of domestic violence at the relevant time.*

His Honour determined, at [169], if he were to "*accede to the defendant's application the plaintiffs would be* forever *shut out from seeking to prove their claim at trial. An application for summary dismissal is an extreme measure and has always been acknowledged as such*."

His Honour ultimately held that the defendant had not proven that no duty of care could arise on the assumed facts, and rather, the issue must be determined once the facts are established at trial.

The Supreme Court of Victoria assessed the human rights functions of **protection of family and children against family violence** and **the right to a fair hearing** in the *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221.

The appeal concerned four Aboriginal siblings who lived together for some years with their mother in the home of their grandparents. The children's mother was drug addicted and her behaviour was a source of physical and emotional disruption to the children. The children were also deemed at risk of being exposed to domestic violence from their mother and maternal grandmother.

The appeal by the Secretary to the Department of Human Services, brought pursuant to s329(1) of the *Children, Youth and Families Act 2005* (Vic), was against a decision by the Children's Court revoking custody to the Secretary in relation to the four Aboriginal siblings. In so dealing with a child, the secretary was required to have regard to the best interests of the child as the first and paramount consideration (s174).

The case considered the interpretation of the Charter in regard to:

a. The specified human right in s17(2).
b. The definition of public authority in s4(1)(b) of the Charter, as the Children's Court was not acting administratively and therefore, fell outside the scope of public authority and so was not bound by s38(1) of the Charter to act compatibly with the human rights which it specified.
c. Under s62(b) of the Charter, the human right to a fair hearing in s24(1) applied to proceedings in the Children's Court where the proceeding came within the scope of that right.

Protection of families and children: s17(2)

Bell J reviewed the findings from the High Court of Australia's determination of the principle of the best interest of the child. For example, in Northern Territory v GPAO,[159] Gleeson CJ and Gummow J

[159] *Northern Territory v GPAO* (1999) 196 CLR 553.

said the best interests of the child was an "*important and salutary principle of substantive law, adopted by courts exercising parens patriae jurisdiction for more than a century*".

As such, His Honour concurred at [14]:

> *The paramountcy principle is now specified as a human right in s17(2) of the Charter, which provides that every child has the right 'to such protection as is in his or her best interests and is needed by him or her by reason of being a child'. In s17(2), the Charter also specifies the human right to protection of the family*.

Right to a fair hearing: s24(1)

The rules of natural justice and the human right to a fair hearing were also considered and required the court to adopt a procedure which is appropriate in the circumstances by having regard to those best interests, and a balanced consideration of other interests.

Bell J considered the issue raised by the Secretary's second ground of appeal on whether the court erred in law and breached the rules of natural justice [at 154]. Prior to considering the issue, His Honour gave reasons for concluding that the human right to fair hearing, pursuant with s24(1) of the Charter was applicable [at 155-157]:

> *In the first place, the human rights which are engaged may be relevant to the interpretation of the provisions of the Children, Youth and Families Act. As required by s32(1) of the Charter, those provisions must be interpreted compatibly with human rights in so far as it is possible to do so consistently with their purpose. In the second place, as will be seen, the right to a fair hearing has direct application to the Children's Court.*
>
> *The human rights of children which will be engaged in hearings in protection proceedings are the right to the protection of family in s17(1), the right to the protection of children in their best interests as children in s17(2), and the right to be afforded a fair hearing as a party to a civil proceeding in s24(1). The human right of a child to freedom of movement in s12, to have their privacy, family and home not unlawfully and arbitrarily interfered with in s13(a) (which embodies personal inviolability) and to enjoy their culture (this includes the right to enjoy their Aboriginal culture in a case, as here, of Aboriginal children) in s19(1) and (2) may also be engaged in the hearing, depending on the circumstances of the particular case.*
>
> *It is not only the human rights of children which might be engaged in protection proceedings in the court. Where family members are parties to the proceeding, they too may have engaged the human right to a fair hearing specified in s24(1) and the right to protection of family in s17(1).*

Conclusion and Findings:

This case involving family violence and child protection demonstrated that the procedural powers of the court are not absolute. Bell J determined that the court must observe the rules of "*natural justice and act compatibly with the human rights of children, parents and others to a fair hearing under s24(1) of the Charter*." [at 283].

As such, the best interests of the children and procedural rights of the Secretary were not breached, and the appeal was dismissed [at 284].

New Zealand

The *Human Rights Act 1993* aims to protect human rights in New Zealand in general accordance with United Nations Human Rights treaties. Disputes under the New Zealand Act are determined by the Human Rights Review Tribunal, the High Court, Court of Appeal and Supreme Court.

New Zealand decisions can be searched here.

United Kingdom

The *Human Rights Act 1998* received Royal Assent on 9 November 1998, commencing in full in October 2000. The Act sets out the fundamental rights and freedoms that everyone in the UK is entitled to and incorporates the European Convention on Human Rights into British law.

UK Decisions can be searched here.

European Union

The European Court of Human Rights has developed a body of jurisprudence. Decisions can be searched here.

United Nations

A number of UN bodies have provided guidance in relation to the intersection between international human rights law and domestic violence, including the Committee on the Elimination of Discrimination against Women in its General Comment 19 – Violence against Women.

25.2 FURTHER INFORMATION

- *Human Rights Act 2019*
- Explanatory Notes
- Queensland Government Human Rights Portal
- Queensland Human Rights Commission
- Australian Human Rights Commission (see link to AHRC and domestic and family violence page)
- University of Melbourne – Human Rights Law Research Guide: New Zealand
- New Zealand Human Rights Commission
- University of Melbourne – Human Rights Law Research Guide: United Kingdom
- Commonwealth Forum of National Human Rights Institutions

26 APPROVED SERVICE PROVIDERS INTERVENTION PROGRAMS

The DFVPA is administered under the principle that people who commit domestic and family violence should be held accountable and if possible, provided with an opportunity to change.

The DFVPA includes provision for the court to make an intervention order for the respondent (perpetrator) when the domestic violence order is being made. The intervention order requires the respondent to attend an approved provider for assessment of their suitability to participate in an approved intervention program and/or counselling (ss68-75 of the DFVPA). See also paragraph 9.9.

Specific information about approved providers [here] (as at 15 June 2021) and a link to the up-to-date (as at January 2024) list of approved providers and approved intervention programs, under s75, here.

27 CASES

CASES

28 TABLE OF CASES WITH REFERENCE TO ISSUE

Case Name	Issue
ABF v DZT [2020] QDC 136	Application to vary protection order; inadequate reasons
Ackland v Director of Public Prosecutions [2017] QCA 75	Bail; unacceptable risk
ACP v McAulliffe [2017] QDC 294	Necessary or desirable
ADH v ALH & Commissioner of Police [2017] QDC 103	Evidence; standard of proof
ADI v EGI [2020] QDC 13	Stay of decision pending appeal Regard to *Human Rights Act 2019*
AEN v Queensland Police Service [2022] QDC 27	Order made in absence of respondent; application to extend time for filing appeal
AHL v Commissioner of Police [2017] QDC 176	Sentencing: breach of release condition; recording conviction
AJC v Constable Kellie-Ann Gijsberten & Ors [2019] QDC 195	Cross applications Procedural fairness Cross-examination by respondent
AJS v KLB & Anor [2016] QDC 103	Necessary or desirables
AKM v CJM [2021] QDC 199	Emotional or psychological abuse
AMA v PGM [2021] QDC 26	Non-appearance by respondent
AMB v TMP & Anor [2019] QDC 100	Meaning of 'emotional abuse' Section 37(1)(b) had domestic violence been committed. Was an order necessary or desirable
AMD v Commissioner of Police (Qld) [2019] QDC 22	Sentencing: Contravention of DVO; multiple offences; totality principle
Armour v FAC [2012] QMC 22	Can court make an order if the aggrieved does not want to proceed? Meaning of "Necessary or desirable"
ARTE v Nugent & Anor [2020] QDC 268	Necessary and desirable; s37(2): requirement to consider views and wishes of people who fear domestic violence; ouster condition; apprehension of bias and fair hearing

Ashley v Marinov [2007] NTCA 1	Whether Charge for Criminal offence Breach of DV order is double jeopardy; cited in *R v MKW* [2014] QDC 300
ATD v TBC [2020] QDC 236	Single act of domestic violence; cross applications
ATJ v SLK [2018] QDC 191	Whether domestic violence had been committed Evidence: s145 – court can inform itself in any appropriate way including by submissions
Attorney-General for the State of Queensland v Samuels [2021] QCA 107	Appeal against sentence for strangulation offence
AVI v SLA [2019] QDC 192	Whether domestic violence had been committed
AVI v SLA (No.2) [2019] QDC 2017	Appeal costs
AZ v BY [2017] QDC 67	Meaning of "Necessary or desirable" requires evaluative consideration including of conditions that could be included in order
BAB v Commissioner for Police [2019] QDC 118	Sentence appeal: contravention of DVO and assault occasioning bodily harm; cumulative sentence
Bailey (a pseudonym) v Bailey (a pseudonym) [2021] QDC 99	Consent orders; explanation of orders
BAK v Gallagher & Anor (No 2) [2018] QDC 132	Application for appeal costs
Baker v Queensland Police Service [2019] QDC 258	Multiple contraventions of domestic violence orders
Baron v Walsh [2014] WASCA 124	Intimidation by multiple complaints to AHPRA, minor claims, interlocutory applications and threats preceding the conduct
BBB v RAB [2006] QDC 080	Meaning of "**Intimidation**" "*process where the aggrieved is made fearful or overawed, …with a view to changing behaviour*". Meaning of "**harassment**;" "*Repeated or persistent conduct which is annoying or distressing rather than causing fear*"
BHN v Queensland Police Service [2019] QDC 129	Sentencing: Contravention of DVO; parole release date manifestly excessive
BJH v CJH [2016] QDC 27	Order not "necessary or desirable."
BKA v Commissioner of Police [2020] QDC 10	Sentence appeal
BM v CM & Anor [2020] QDC 30	Appeal against naming of child
Briginshaw v Briginshaw (1938) 60 CLR 336	Evidence: higher degree of certainty on balance of probabilities required, the more serious the allegations and grave the consequences
BUI v SNL & Anor [2021] QDC 285	Making of protection order; procedural fairness; ouster condition

Bye v Commissioner of Police [2018] QDC 74	Sentencing: youthful offender
Caddies v Birchell [2018] QDC 180	Sentencing: domestic violence offence
CBC v Queensland Police Service [2019] QDC 003	Sentencing: contravention of DVO; manifestly excessive; deterrence
CCR v Queensland Police Service [2010] QDC 486	Sentencing: failure to comply s 13 *Penalties and Sentences Act 1992*
CED v HL [2016] QDC 345	Naming Child in Order; removing child from order
CEJ v Commissioner of Police [2020] QDC 32	Sentence appeal: multiple offences and contravention of DVO
Commissioner of Police v DGM [2016] QDC 22	Sentencing: general principles; reconciliation/ongoing relationship with complainant
Constable S J Miers v Blewett [2013] QCA 23	Sentencing: Notice of previous convictions
CPD v Ivamy & Anor [2018] QDC 244	Whether the order was "necessary or desirable"
CPS v CNJ [2014] QDC 047	Continuous contact / comments verbal and text were domestic violence. Necessary or desirable
CR v CM [2015] QDC 146	Similar fact evidence
CTC v Commissioner of Police [2019] QDC 250	Sentence: contravention of DVO
D v G [2004] QDC 477	Meaning of Intimidation (cited in *DGS v GRS* [2012] QDC 074)
D v W [2010] QDC 270	Breach of condition to be of good behaviour
DAY v Commissioner of Police [2018] QDC 3	Sentencing: multiple breaches of DV & other offences
Dey v Victorian Railways Commissioner (1949) 78 CLR 62	Costs "frivolous or vexatious" cited *Voth v Manildra Flour Mills*
Director-General, Department of Child Safety v TGH and others [2007] QChC 6	Calculation of time protection order in force
DGE v REU [2023] QDC 35	Appeal against making of protection order: contested application; non-English speaking parties; unrepresented party; cultural considerations
DGS v GRS [2012] QDC 074	Examples of "Intimidation."
DJS v A Police Officer & Anor [2021] QDC 148	Procedural fairness: evidence of motive important to issue of credibility
DL v MD & Queensland Police Service [2022] QDC 228	Meaning of "family relationship"
DLM v WER & The Commissioner of Police [2022] QDC 79	Emotional abuse and controlling behaviour; necessary or desirable; family law orders; subpoenas.
DMK v CAG [2016] QDC 106	Whether an order was "necessary or desirable" requires liberal interpretation of phrase

DMO v RPD [2009] QDC 92	Evidence: procedural fairness required
DWB v Protheroe [2022] QDC 113	Evidence; adequacy of reasons
DYN v Queensland Police Service [2020] QDC 47	Sentencing: contravention of DVO
EAV v Commissioner of Police [2016] QDC 237	Sentencing: breach of protection order, no conviction recorded
ECW v ECW [2018] QDC 166	Application to vary DVO – duty to consider original grounds & findings of court that made the DVO
EKL v Commissioner of Police & PEL [2020] QDC 194	Procedural fairness; cross-examination
ETB v Commissioner of Police [2018] QDC 026	Sentence: contravention of DVO, assault
EVE v ETT [2021] QDC 161	Emotional or psychological abuse; appeal costs
FAJ v FJH [2024] QDC 23	Test for "necessary or desirable" – requires an explicit finding as to the assessment of the risk of future acts of domestic violence
FCA v Commissioner of the Queensland Police Service [2014] QDC 46	Whether an order was "necessary or desirable" Order not "necessary or desirable"
GHN v Commissioner of Police [2022] QDC 86	Sentencing: presentence custody
Gibuma v Queensland Police Service [2016] QDC 183	Sentencing; breach of protection order, breach of bail and other offences; indigenous offender
GJL v JW [2023] QDC 36	Appeal against making of protection order: adequate reasons in a contested application
GKE v EUT [2014] QDC 248	Whether an order was "necessary or desirable" and consideration of future risk Three stage tests
GKW v Commissioner of Police [2008] QDC 143	Sentencing; cumulative order
GRP v ABQ [2020] QDC 272	Temporary protection order and cross application; failure to provide adequate reasons
Grace v Peter [2024] QSC 69	Oral application to withdraw an application for a domestic violence order
Harvey v QPS [2018] QCA 064	Breach of protection order; family law exception
HBY v WBI & Anor [2020] QDC 81	Appeals: application for interlocutory order
HDI v HJQ [2020] QDC 83	No power to grant a stay
HFC v Commissioner of Police (Queensland) [2022] QDC 139	Sentencing: previous convictions
HZA v SHA [2018] QDC 125	Appeal costs
IFM v Queensland Police Service [2016] QDC 140	Sentencing; breach of protection order, breach of bail and other offences; early guilty plea; indigenous offender

Jacara Pty Ltd v Perpetual Trustees WA Ltd [2000] FCA 1886	Similar fact evidence cited *CR v CM* [2015] QDC 146
JAW v Reed [2018] QDC 178	Whether act of domestic violence committed Appeals, hearing de novo
JC v KP [2017] QDC 175	Consent orders and requirement to explain order before made. Explanation of proposed order to the aggrieved Court may enlist assistance in explaining the proposed order
JKL v DBA [2020] QDC 159	Fair hearing; respondent without benefit of English as primary language
JKL v DBA (No. 2) [2022] QDC 142	Application to vary; procedural fairness where self-represented litigant (s146)
JLK v Queensland Police Service [2018] QDC 128	Sentencing: assault occasioning bodily harm (domestic violence offence); manifestly excessive
JMM v Commissioner of Police [2018] QDC 130	Sentencing: contravention of DVO; manifestly excessive; procedural fairness
Jones v Commissioner of Police [2019] QDC 148	Contravention of temporary protection order; evidence
Jones v DBA [2019] QDC 149	Varying temporary protection order under s42 (not give power to vary into a five-year final order)
JSA v MPR [2022] QDC 111	Necessary or desirable; costs – malicious and vexatious proceedings
JSB v Queensland Police Service [2018] QDC 120	Domestic violence: Emotional or psychological abuse; whether s9(2A) *Penalties and Sentences Act 1992* extends to emotional abuse *Penalties and Sentences Act 1992* s9(10A) and meaning of "domestic violence offence"
JWD v The Commissioner of Police [2019] QDC 29	Sentencing; manifestly excessive; s16 *Criminal Code;* contravention of DVO
KAV v Magistrate Bentley & Anor [2016] QSC 46	Withdrawal of application before hearing: costs
KBE v Queensland Police Service [2017] QDC 326	Temporary protection order in absence of respondent; costs; domestic violence and human rights
KEM v GYB [2020] QDC 262	Making of protection order under s42
KFL v Commissioner of Police [2023] QDC 20	Appeal against sentence for contravene DVO: sentencing considerations under ss12 and 13 *Penalties and Sentences Act 1992*; guilty plea; recording a conviction
KJW v PQV & Anor [2022] QDC 200	Non-appearance of respondent; procedural fairness
KRN v Queensland Police Service [2019] QDC 205	Sentencing: multiple offences and contravention of DVO
LAF v AP [2022] QDC 66	Fair hearing: lack of procedural fairness, decision made in absence of evidence of aggrieved; person most in need of protection; cross applications before different courts; inadequate reasons; human rights; s4 principles not followed
LAF v AP (No 2) [2022] QDC 104	Appeal costs

LAP v HBY & WBI [2021] QCA 122	Appeal: want of jurisdiction
LAP v HBY & Anor [2021] QCA 123	Appeal costs
LBU v QPS & Anor [2020] QDC 279	Temporary protection order & PPN; extension time to appeal
LJC v KGC and Commissioner of Police [2012] QDC 67	Cited in *DMO v RPD* [2009] QDC 92
LJS v Sweeney [2017] QDC 18	Sentencing: multiple breaches of DV & other offences
LJP v Harrison [2023] QDC 257	Directions to restrict cross examination of an aggrieved by a self-represented respondent without full compliance with s151(4)
LKF v MRR [2012] QDC 355	Subjective test of intimidation but also objective enquiry. Characteristics of parties or relationship may be relevant. Costs: Meaning "Malicious, Frivolous or vexatious"
LKL v BSL [2015] QDC 337	Failure of Aggrieved to file affidavit does not render proceedings a nullity. Personal evidence of aggrieved not required. Meaning "Malicious, Frivolous or vexatious"
LPN v Queensland Police Service [2021] QDC 276	Sentencing: contravention of DVO; totality principle
Lupson v Queensland Police Service [2021] QDC 84	Appeal against conviction for AOBH
MAA v SAG [2013] QDC 031	Intimidation and harassment though multiple complaints to Child Safety
MAN v MAM [2003] QDC 398	Meaning of Intimidation (cited in *DGS v GRS* [2012] QDC 074)
MB v Queensland Police Service [2021] QDC 325	Recording of conviction; DFV as an aggravating factor
MDE v MLG & Queensland Police Service [2015] QDC 151	Meaning of "Couple Relationship" Meaning of "Necessary or desirable" Three stage tests
MH v Queensland Police Service [2015] QDC 124	Sentencing: s9(2) *Penalties and Sentences Act 1992*
MIA v KAX [2022] QDC 198	Hearing of appeal: appellant failure to appear
Minister for Immigration and Ethnic Affairs v Pochi [1980] FCA 85	Evidence: standard of evidence required
Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23	Similar Fact Evidence Cited in *CR v CM* [2015] QDC 146
MKA v WKT [2018] QDC 73	Hearing of appeal – application to change venue
MNT v MEE (No 2) [2020] QDC 100	Appeal costs

MNT v MEE [2020] QDC 126	Meaning of emotional or psychological abuse; controlling behaviour
Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] Ch 119	Evidence: similar fact evidence
MS v Commissioner of Police [2020] QDC 51	Family law exception
MS v Commissioner of Police [2021] QCA 31	Family law exception
Mudie v Gainriver Pty Ltd & Anor [2002] QCA 546	Costs: Meaning "Malicious, Frivolous or vexatious" Cited in *LKF v MRR* [2012] QDC 355
NAS v Queensland Police Service [2017] QDC 173	Sentencing: domestic violence offence
NBE v PRT & Anor [2018] QDC 29	Procedural fairness: conduct of proceedings in absence of applicant. Evidence: non-appearance by applicant Costs
NJB v Commissioner of Police [2021] QDC 42	Sentencing: contravention of DVO
NVZ v Queensland Police Service [2018] QDC 216	Sentencing: contravention of DVO; manifestly excessive
ODE v AME [2018] QDC 277	Appeal - stay of judgment
OMD v Queensland Police Service & Anor [2021] QDC 282	Making a protection order – s37; unauthorised surveillance; harassment; emotional abuse; necessary or desirable – risk of future domestic violence, impact of family law matters, lack of being fearful; police investigations; delay impacting the duration of an order
OSE v HAN [2020] QDC 309	Power to summarily dismiss
OWL v Queensland Police Service [2021] QDC 5	Sentencing: contravention of DVO
PAD v GA [2022] QDC 125	Necessary or desirable
Pavelescu v Pisa [2021] QCA 167	Appeal costs
Pearce v R [1998] HCA 57	Whether Charge for Criminal offence Breach of DV order is double punishment
PMB v Kelly [2014] QDC 301	Early plea of guilty
PR v KJ [2022] QDC 29	Extension of time to appeal; consent order (understanding proceedings)
PRH v LPL & Anor [2021] QDC 17	Ouster condition – necessary or desirable; fair hearing
PR v KJ (No.2) [2022] QDC 78	Appeal costs
QKL v Queensland Police Service [2021] QDC 195	Natural justice: order made in absence of a hearing
QPS v DLA [2015] QMC 6	Whether charge for Criminal offence and Breach of DV order is double punishment; S16, *Criminal Code Act (1899)*
Queensland Police Service v ARH [2019] QMC 16	Contravention of a temporary protection order

Queensland Police Service *v KBH* [2023] QDC 26	Appeal against sentence: multiple contravention offences; coercive control
R v A B (No 2) [2008] VSCA 39	Sentencing: where maximum penalty increased parameters of sentencing change
R v AJB [2019] QDC 169	Meaning of "choke": stopping of breath
R v Ali [2018] QCA 212	Sentencing: serious violent offence (domestic violence offence); antecedents
R v Barclay [2021] QCA 193	Sentencing: appeal; multiple domestic violence offences
R v BDH [2019] QCA 47	Sentencing: appeal against conviction, domestic violence offences
R v BDK [2020] QCA 48	Appeal against conviction and sentence for strangulation offence
R v BDQ [2022] QCA 71	Sentencing: domestic violence offence
R v BDR [2022] QCA 85	Sentencing and conviction: serious violent offences (domestic violence offences) including rape, choking and contravention of a domestic violence order
R v BDS [2022] QCA 144	Sentencing: contravention of domestic violence orders, rape, choking or strangulation in a domestic setting; late plea of guilty
R v Blockey [2021] QCA 77	Sentencing: appeal against sentence for manslaughter, domestic violence offence
R v Bosnjak [2007] QCA 325	Sentencing: bail compliance
R v Cay [2018] QDC 104	Sentencing
R v CBA [2011] QCA 281	Sentencing
R v CCU [2022] QCA 92	Sentencing: whether manifestly excessive
R v Dibble; ex parte Attorney-General (Qld) [2014] QCA 8	Sentencing; Cited in *R v MKW* [2014] QDC 300
R v Ellis [2018] QCA 70	Sentencing: Domestic violence offence
R v Fairbrother; ex parte A-G (Qld) [2005] QCA 105	Sentencing Principles; deterrence
R v FBA [2021] QCA 142	Appeal against conviction – choking in a domestic setting; propensity evidence
R v GBF [2019] QCA 004	Sentencing: Domestic violence offence
R v GBI [2022] QCA 28	Sentencing: Domestic violence offences
R v Gibbs; Ex parte Attorney-General (Qld) [2021] QCA 191	Sentencing: choking and strangulation in a domestic setting
R v Gordon; ex parte A-G Qld [1975] Qd R 301	S16 *Criminal Code (1899)*
R v Green (No. 3) [2019] ACTSC 96	Strangulation: definition of choking, strangulation

R v HBW [2019] QCA 48	Sentencing: appeal against conviction, domestic violence offences
R v HBZ [2020] QCA 7	Non-fatal strangulation: definition of "choking"
R v Hartas [2021] QCA 178	Sentencing: arson (domestic violence offence)
R v Hermansson; R v Ali [2022] QCA 243	Appeal against sentence for drug offence: non-physical domestic violence as a mitigating factor at sentence (decided prior to commencement of ss9(2)(gb) and 9(10B) *Penalties and Sentences Act 1992*)
R v Hollis [2020] QCA 7	Sentencing appeal: recording of conviction
R v Hutchinson [2018] QCA 29	Sentencing S9(10A) *Penalties and Sentences Act 1992*
R v JAF [2022] QCA 105	Sentencing: multiple counts of DV offences
R v James [2012] QCA 256	Sentencing; cited *Smith v QPS* [2015] QDC 152
R v JML [2019] QDCPR 23	Sexual assault counselling privilege
R v KAU [2019] QCA 73	Appeal against conviction; domestic violence offences
R v KAV [2020] QCA 2	Sentencing: domestic violence offence
R v Kelley [2018] QCA 18	Sentencing; youthful offender
R v Kowalczyk [2021] QCA 154	Sentencing: assault and contravention of domestic violence order; recording of convictions
R v LAN [2019] QCA 76	Sentencing: attempted murder (domestic violence offence); manifestly excessive; antecedents
R v Lothian [2018] QCA 207	Sentencing: assault occasioning bodily harm and domestic violence offence
R v Luxford [2020] QCA 272	Sentencing: multiple domestic violence offences including strangulation
R v Major Ex Parte A-G (Qld) [2011] QCA 210	Sentencing: assault occasioning bodily harm and domestic violence offence
R v Mallie Ex Parte Attorney-General [2009] QCA 109	Sentencing: assault occasioning bodily harm and domestic violence offence
R v Marques Malaqueta [2021] QCA 195	Sentencing: fraud and attempted fraud (domestic violence offences); stalking (installation of surveillance equipment and spyware).
R v McConnell [2018] QCA 107	Sentencing: assault occasioning bodily harm and domestic violence offence Sentencing: domestic violence as aggravating factor
R v MCW [2018] QCA 241	Sentencing: choking, suffocation or strangulation in a domestic setting; procedural fairness; manifestly excessive
R v MCZ [2018] QCA 240	Sentencing: serious violent offence (domestic violence offence); antecedents
R v MDB [2018] QCA 283	Sentencing: choking, suffocation or strangulation in a domestic setting; manifestly excessive
R v MKW [2014] QDC 300	Whether charge for Criminal offence and Breach of DV order is double punishment

R v Murray [2014] QDC 250	Sentencing; reconciliation/ ongoing relationship with complainant
R v O'Malley [2019] QCA 130	Sentencing: manifestly excessive, manslaughter (DV offence)
R v Pierpoint [2001] QCA 493	Sentencing: assault occasioning bodily harm; DV offence
R v Potter [2019] QCA 162	Sentencing: support of complainant Sentencing: assault occasioning bodily harm when armed; manifestly excessive
R v RBE [2021] QCA 146	Sentencing: manifestly excessive; arson (domestic violence offence)
R v Robertson [2017] QCA 164	Sentencing: manifestly excessive; parole release date
R v RT (No 2) [2020] QDC 158	Definition of choking
R v SC [2021] QDCPR 4	Committal process for contravention offences; s181
R v SDD [2018] QCA 280	Appeal against conviction for contravention DVO
R v SDF [2018] QCA 316	Sentencing: domestic violence offence, aggravating factor
R v SDM [2021] QCA 135	Sentence appeal: domestic violence offence, aggravating factor; SVO
R v SDQ [2022] QCA 91	Sentence and conviction: domestic violence offences; misdirection of jury
R v Sollitt [2019] QCA 44	Sentencing: multiple offences and contravention of DVO
R v Solomon [2022] QCA 100	Sentencing: manifestly excessive
R v Storie [2018] QSC 298	Sentencing: domestic violence offence; manifestly excessive
R v Sutton [2015] QSC 110	Considerations for evidence by audio link
R v Thompson [2019] QCA 46	Sentencing: appeal, no effort to prosecute the application; deterrence
R v T; Ex parte Attorney-General of Queensland [2002] QCA 132	Sentencing: increase in penalty
R v War Pensions Entitlement Appeals Tribunal; ex parte Bott (1933) 50 CLR 228	Evidence; not bound by rules
R v WBQ [2022] QCA 48	Sentencing: cumulative v concurrent
R v Webb 4 May 2016, unreported	Sentencing: wounding (domestic violence offence) and breach of DVO
R v Wells [2018] QCA 236	Sentencing: assault occasioning bodily harm (domestic violence offence)
R v Wood [1994] QCA 297	Sentencing Principles; deterrence
RAS v Commissioner of Police (No.2) [2012] QDC 239	Sentencing; recording conviction
RBG v BKS & Anor [2021] QDC 234	Appeal against making of domestic violence order; necessary or desirable; appeal costs

RC v MM [2018] QDC 276	Whether an order was "necessary or desirable"
RCK v MK [2018] QDC 181	Hearing of application in absence of respondent Evidence, standard of proof
REW v Commissioner of Police [2018] QDC 213	Contravention of release conditions
RMP v Buley [2021] QDC 228	Sentencing: contravention of a domestic violence order; recording of conviction
RIS v DOL & Anor (No. 2) [2021] QDC 157	Appeal costs
RIS v DOL & Anor [2021] QDC 154	Cross applications; procedural fairness; evidence; restrictions on cross examination
RJCS v Queensland Police Service [2023] QDC 18	Appeal against sentence for multiple offences (DV offences): making of protection order was not a form of extra-curial punishment
RJD v Queensland Police Service [2018] QDC 147	Sentencing: Multiple contraventions of DVO; Manifestly excessive
RMR v Sinclair [2012] QDC 204	Sentencing: s 12 *Penalties and Sentences Act 1992*
RQM v PAK & Anor [2023] QDC 53	Appeal against the making of a protection order: self-represented; procedural fairness
RTQ v OLB [2019] QDC 216	Appeal: stay of condition of temporary protection order
RWT v BZX [2016] QDC 246	Costs order made where proceedings vexatious
S v T [2018] QDC 49	Appeal costs
SAE v Commissioner of Police [2017] QDC 254	Sentencing: multiple breaches of DV & other offences
SAI v Queensland Police Service [2022] QDC 137	Offence: contravention of a temporary protection order
SCJ v ELT [2011] QDC 100	Onus of Proof on applicant
Secretary to the Department of Human Services v Sanding (2011) 36 VR 221	Human rights: right to family life, right to fair hearing
SGLB v PAB [2015] QMC 8	Permanent Stay of Proceedings where abuse of process
SH v Queensland Police Service [2019] QDC 247	Appeal against contravention of DVO
SHW v ABC [2021] QDC 151	Necessary or desirable – risk of future violence; emotional abuse
Singh v Queensland Police Service [2013] QDC 037	Sentencing: Taking into account previous convictions
SK (A Child) v Commissioner of Queensland Police & Anor [2023] QDC 65	Appeal against making of protection order; juvenile relationships; meaning of "couple relationship"; necessary or desirable; procedural fairness
SKS v Commissioner of Police [2022] QDC 176	Sentencing: one count of contravention domestic violence order

SLC v Queensland Police Service and SLC [2023] QDC 78	Costs application after a successful appeal against the making of a protection order
SMF v PDF & Anor [2020] QDC 174	Subpoena: No time restriction on request or service; procedural fairness
Smith and Others v State of Victoria (2018) 56 VR 332	Human rights: duty of care
Smith v Queensland Police Service [2015] QDC 152	Sentencing
STO v Queensland Police Service & Another [2020] QDC 139	Failure to appear by respondent; notice of adjournment
Sudath v Health Care Complaints Commission [2012] NSWCA 171	Evidence
TAF v AHN [2021] QDC 204	Necessary or desirable; restrictions on cross-examination; bias
The Queen v DBW [2021] QCA 234	Sentencing: strangulation, suffocation offence
The Queen v de Simoni [1981] HCA 31	Effect of previous convictions
TJA v TJF [2014] QDC 244	Whether bail conditions mean order not "necessary or desirable"
TJB v CRC [2022] QDC 67	Necessary or desirable; emotional abuse
TMG v Commissioner of Police [2021] QDC 286	Procedural fairness: refusal to grant leave to file affidavit material; necessary or desirable
TND v QPS [2014] QDC 154	Sentencing, cited in *Smith v Queensland Police Service [2015] QDC 152*
Voth v Manildra Flour Mills Pty Ltd [1990] HCA 55	Costs: Meaning oppressive" Cited in Oceanic Shipping case and *LKF v MRR* [2012] QDC 355
W v D [2008] QDC 110	Meaning of "intimidation": "*to terrify, overawe or cow*." Meaning of "harassment": "To trouble by repeated attacks, subject to constant molesting or persecution"
WAJ v CRA [2021] QDC 85	Evidence: domestic violence committed in New Zealand
Warburton v Queensland Police Service [2012] QDC 256	Sentencing: first offence
WBI v HBY & Anor [2020] QCA 24	Appeal: interlocutory application
Wilson v Commissioner of Police [2022] QDC 269	Sentence appeal: parole eligibility date when imposing cumulative sentence
WJ v AT [2016] QDC 211	Cross Applications and considering who is most in need of protection
WJM v NRH [2013] QMC 12	Meaning of "necessary or desirable"
WPT v QPS [2021] QDC 250	Sentence: contravention of DVO

XNR v AMF [2022] QDC 197	Non-appearance of applicant; costs; procedural fairness
YSD v Commissioner of Police [2022] QDC 92	Sentencing: suspended sentences and use of operational periods
YTL v Commissioner of Police [2019] QDC 173	Fair hearing
YTL v The Attorney-General for the State of Queensland [2020] QDC 44	Appeal against conviction for contempt
YY v ZZ [2013] VSC 743	Behaviour "towards" another person
ZXA v Commissioner of Police [2016] QDC 248	Directions for trial, lack of affidavit by aggrieved
ZTP v BBY [2023] QDC 59	Appeal against the making of a protection order: necessary or desirable

29 LEGISLATION

LEGISLATION

30 NATIONAL DOMESTIC VIOLENCE ORDERS SCHEME: COMPARATIVE TABLE

	Queensland	New South Wales	Victoria	Tasmania
Relevant Legislation	*Domestic and Family Violence Protection Act 2012*	*Crimes (Domestic and Personal Violence) Act 2007*	*Family Violence Protection Act (Vic) 2008* *National Domestic Violence Order Scheme Act 2016 – treatment of non-local DVOs*	*Family Violence Act 2004* *Domestic Violence Orders (National Recognition) Act 2016 – treatment of non-local DVOs*
Types of orders which are national orders – court issued	Protection order – *see section 26* Protection order, varied order – *see section 91* Temporary protection order – *see section 27* Temporary protection order, varied order – *see section 48*	Interim apprehended domestic violence order – *see section 22* Final apprehended domestic violence order – *see section 16*	Family violence interim intervention order – *see section 53, Family Violence Protection Act* Family violence final intervention order – *see section 74, Family Violence Protection Act*	Interim Family Violence Order – *see section 23, Family Violence Act* Family Violence Order (final) – *see section 16, Family Violence Act*
Types of orders which are national orders – police issued	Police protection notice – *see section 101* Release conditions – *see section 125*	Provisional apprehended domestic violence order – *see section 25*	Family violence safety notice – *see section 24, Family Violence Protection Act*	Police Family Violence Order, can be for up to 12 months – *see section 14, Family Violence Act*
General court issued order period	Five years – *see section 97(b)*	12 months, if defendant is under 18; otherwise two years after the date the order is	If no period is specified in the order, until order is revoked or	Interim Family Violence Orders remain in force until finalisation of proceedings

	Queensland	New South Wales	Victoria	Tasmania
		made, unless a period is specified by the court – *see section 79A* ADVO may be of indefinite duration – *see section 79B*	set aside by a court – *see section 99, Family Violence Protection Act* If the respondent is a child, no more than 12 months unless exceptional circumstances – *see section 98, Family Violence Protection Act*	For final orders (Family Violence Order) the period is at the Magistrates discretion (most are ordered to run for a 12 month period) or until an order is made revoking the FVO – *see section 19, Family Violence Act*
Treatment of pre 25/11/17 orders	Orders need to be declared a national order	Orders need to be declared a national order	All orders active at 25/11/17 will be national orders (Orders made prior to 25/11/17 will not have the national statement included on the order)	Orders need to be declared a national order
Can orders be revoked in this state/territory	No	Yes – *see section 73*	Yes – see *section 100, Family Violence Protection Act*	Yes – *see section 20 and related section 18, Family Violence Act*
Eligible relationships	Spousal Relationship (married, former spouse, de facto, civil partnership) – *see section 15* Engaged – *see section 17* Couple relationship – *see section 18* Informal care relationship – *see section 20*	*Section 5(1):* A person has a domestic relationship with another person if the person – (a) is or has been married to the other person, or (b) is or has been a de facto partner of that other person, or (c) has or has had an intimate personal relationship with the other person, whether or not the intimate	Family member - Includes children and any person regarded as being "like a family member" – *see section 8, Family Violence Protection Act* Domestic partner – *see section 9, Family Violence Protection Act* Relative – *see section 10, Family Violence Protection Act*	*See section 4, Family Violence Act* *family relationship* means a marriage or a significant relationship within the meaning of the *Relationships Act 2003* (see below), and includes a relationship in which one or both of the parties is between the ages of 16 and 18 and would, but for that fact, be a significant relationship within the meaning of that Act;

	Queensland	New South Wales	Victoria	Tasmania
	Parent/former parent of a child – *see section 16* Family Relationship – *see section 19* *a child cannot be named as an aggrieved or respondent in a DVO where a family relationship applies – *see section 22(2)*	relationship involves or has involved a relationship of a sexual nature, or (d) is living or has lived in the same household as the other person, or (e) is living or has lived as a long-term resident in the same residential facility as the other person and at the same time as the other person (not being a correctional centre), or (f) has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person, or (g) is or has been a relative of the other person, or (h) in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship		*Relationships Act 2003* For the purposes of sections 4 and 5 , persons are related by family if – (c) one is the parent, or another ancestor, of the other; or (d) one is the child, or another descendant, of the other; or (e) they have a parent in common.

	Queensland	New South Wales	Victoria	Tasmania
		system of the person's culture. *Section 5(2):* Two persons also have a domestic relationship with each other for the purposes of this Act if they have both had a domestic relationship of a kind set out in (a), (b) or (c) above with the same person * a woman's ex-partner and current partner would therefore have a domestic relationship with each other for the purposes of this Act even if they had never met.		
Limitations on variations	A child can be named as an aggrieved or respondent – *see section 22* A child will not be able to apply to vary a nationally recognised order unless the relationship is eligible A Queensland order cannot be revoked. However, the order can be varied to change	Leave of the court required to vary or revoke a police-initiated order if one or more of the protected person(s) is a child. Leave cannot be granted if it would significantly increase the risk of harm to the child – *see section 72B* The court must decline to hear an application to vary or revoke in respect of a police-initiated order unless notice of	The court must provide leave for a respondent to make an application to vary or revoke an order – *see section 109, Family Violence Protection Act*	Application for variation may only be made with leave of the court and the court is not to grant leave unless satisfied that there has been a substantial change in the relevant circumstances – *see section 20, Family Violence Act* *N.B: section 18* (Matters to be considered in making FVO) applies to *section 20*

	Queensland	New South Wales	Victoria	Tasmania
	the duration of the order – *see section 91* *Section 92* sets out the considerations of the court when a variation may adversely affect aggrieved or named person. Qld Police must be provided a copy of the application for variation – *see section 95*	the application was served on police. Police have standing – *see* section 72C Court may decline to hear an application if satisfied that there has been no change in circumstances – *see* section 73(3)		
Length of interim/temporary court issued orders	Until a new order is made and served on the respondent – *see section 98*	Until final order made, or order is revoked, withdrawn or dismissed – *see* section 24	Until final order or court's refusal to make final order – *see* section 60, *Family Violence Protection Act*	Interim Family Violence Orders remain in force until final order or until a date as ordered by the court – section 23(2), *Family Violence Act*
Party titles	Aggrieved Applicant Respondent Child of the aggrieved Associate of the aggrieved	Protected person Defendant	Applicant Affected family member Protected person Respondent	Protected persons Affected children Respondent Applicant
Weapons	Weapons licence revoked/suspended on the – • making of a DVO order; • issuing of a police protection notice; or	Weapons and firearms licences are suspended/revoked upon an interim/final order being made – *see* section 98ZJ	If the court makes an interim or final order, it may include a condition suspending or revoking the respondent's firearms authority or weapons approval –	A Family Violence Order may require the not possess firearms specified in the order or forfeit any firearms in their possession – *see* section 16(3)(b), *Family Violence Act*

	Queensland	New South Wales	Victoria	Tasmania
	• making of release conditions. *See section 176F(4)*		*see* section 95, *Family Violence Protection Act* If the court chooses to include a condition under *section 95*, no appeal lies against a decision under the *Firearms Act 1996* or the *Control of Weapons Act 1990* and the respondent may not apply under *section 189* for a declaration that the person is deemed not to be a prohibited person for that Act – *see section 171, Family Violence Protection Act*	A Police Family Violence order may require the respondent to surrender any firearm or other weapon – *see section 14(3)(c), Family Violence Act* A Police Family Violence Order suspends any licence or permit relating to the possession of a firearm and prohibits any such license or permit from being granted to the respondent, during the period which the order is in force – *see section 14(15), Family Violence Act*
Service	*See section 184* – A respondent who *is present* when the order is made, is deemed to be served; a copy of the order to be provided in person or posted to the last known address If the respondent *was not present*, a copy must be provided to the respondent by a police officer or be told of the existence of an order by a police officer	Order must be served personally on the defendant but if defendant in court and unable to serve a copy can post it to the defendant - section 31, section 77 To establish a breach of an order, defendant must have been served with the order or have been present in court when order made – *see section 14(2)*	Orders must be served personally – *see section 201, Family Violence Protection Act* Orders must be served by the appropriate registrar of the court, or police officer, or by way of a substituted service order – *see section 202, Family Violence Protection Act* An order made in court in the presence of a respondent is an	A Family Violence Order takes effect upon the making of the order if the respondent is present before the court or, if they are not present, when the respondent is served personally with the order or a copy of it – *see section 25, Family Violence Act*

	Queensland	New South Wales	Victoria	Tasmania
			active/enforceable order – *see section 96, Family Violence Protection Act*	

	South Australia	Western Australia	Northern Territory	Australian Capital Territory
Relevant Legislation	*Intervention Orders (Prevention of Abuse) Act 2009*	*Restraining Orders Act 1997*	*Domestic and Family Violence Act 2007*	*Family Violence Act 2016*
Types of orders which are national orders – court issued	Interim intervention order (and summons) – *see section 20* Final intervention order – *see section 23* *N.B:* Prior to 2015 intervention orders were not labelled as DV or non-DV related. The issuing court or police will need to provide guidance on whether or not there is a "DV concern" – *see sections 15A and 29C* Orders can be made on criminal charges on the Court's own volition when considering a bail application – *see Bail Act section 23A*	Interim order – *see sections 29(1)(a), 43A(7)(a), 63(4b)* Final Orders: Family violence restraining order (FVRO) – *see section 10G* Conduct agreement order – *see section 10H* Violence restraining order (VRO) – *see section 13* Telephone Order: means a FVRO or VRO made on a telephone application – *see sections 17-24* Restraining orders made under *section 63*	Domestic Violence Order (final and confirmed) Interim Domestic Violence Order – *see section 35*	Family Violence Order Interim orders (general and special) – *see Division 3.3*

	South Australia	Western Australia	Northern Territory	Australian Capital Territory
	Orders can be made when sentencing – *see Criminal Law (Sentencing) Act section 19A*	FVRO or VRO made if personal violence – *see section 60A*		
Types of orders which are national orders – police issued	Interim intervention order issued by police - *see section 18*	Police Orders – *see section 30A*	Police Domestic Violence Order – *see sections 72, 73, 74*	N/A
General court issued order period	Intervention orders are ongoing and continue in force, subject to variation or substation, until revoked. Consequently, the issuing authority may not fix a date for expiry or limit the duration of an intervention order – *see section 11*	Family restraining order: period specified in the order, or if no date specified, two years – *see section 16A* Orders made under *section 63A* are in force for the period of the life of the person who committed the offence – *see section 63A(1)(a)* Police Orders: 72 hours; order lapses if not served on bound person within 24 hours – *see section 30H*	Domestic Violence Orders (not including interim orders) are in force for the period stated in the order- *see section 27*	A final order remains in force for two years, or a shorter period if so stated in the order. If there are special or exceptional circumstances that justify a longer period, the final order may state a longer period. If the final order is made by consent, it cannot be for a period longer than two years.
Treatment of pre 25/11/17 orders	Orders need to be declared a national order – *see sections 29ZB, 29ZC, and 29ZD*	Orders need to be declared a national order	Orders need to be declared a national order	Orders need to be declared a national order

	South Australia	Western Australia	Northern Territory	Australian Capital Territory
Can orders be revoked in this state/territory	Interim interventions orders issues by police may be revoked by the Commissioner of Police upon personal service of a notice of revocation on the defendant – *see* section 19 Court issued orders can be revoked – *see section 26* A DVO ceases to be recognised if it is revoked in SA or another jurisdiction and that revocation is recognised in SA – *see* section 29F Defendant cannot apply for revocation for 12 months following the making of the final order, or until such date set by the court – *see* section 15	Yes Respondent requires leave of court to make application – *see section 46*	Yes – *see* section 51	Yes – *see Part 6* Respondent requires leave of the court to apply for a review of a final order – *see section 89.*
Eligible relationships	A domestic relationship between two persons – *see* section 8(8)	Family Relationship – *see section 4*	Domestic relationship – *see* section 9	Family member (includes a current or former domestic or intimate partner) – *see section 9* A person may apply for a Family Violence Order for their child or children (under 18 years old or

	South Australia	Western Australia	Northern Territory	Australian Capital Territory
				with impaired decision-making ability) who ordinarily leave with them.
Limitations on variations	A defendant cannot make an application to vary or revoke an order within 12 months of the final order being issued – *see section 15*	Respondent requires leave of court to make application – *see section 46* If application to vary is made and served prior to the expiry of the order, the order does not expire until determined by the court – *see section 45(6))* The court when hearing an application can: (a) cancel the original order and make a replacement order that contains the variations; or (b) make an additional interim order or final order, to be read with the original order, that states the variations - *see section 49*	Who may apply for variation – *see* section 48*(1)* An application for variation may be made by, or for, only one person even though more than one protected person is named in the DVO – *see section 48(2)* A defendant may apply for a variation only with the leave of the Court – *see section 48(3)* The Court may grant leave to the defendant only if satisfied there has been a substantial change in the relevant circumstances since the DVO was made or last varied – *see sections 48(4),(5)* And interim Domestic Violence order cannot be varied - As set out in Part 2.8, Division 1 section 47 'This division applies to a court DVO other than an interim DVO'.	Who may apply for variation- *see section 82* If the Magistrates court receives an application to amend a protection order, the registrar must: (a) set a return date as soon as practicable for a preliminary conference; (b) serve a copy of the application and a timing notice for the conference on the other party; and (c) given the applicant a copy of the timing notice for the conference – *see section 82A* The Magistrates Court may only amend the protection order if satisfied that: (a) the amendment will not adversely affect the safety of the protected person or a child of the protected person; and

	South Australia	Western Australia	Northern Territory	Australian Capital Territory
				(b) the order as amended could be made on application for a protection order; and (c) if the amendment would reduce the protection of the child who is 15 years or younger – the child is no longer in need of the greater protection provided by the unamended protection order- *see section 83*
Length of interim/temporary court issued orders	In force until further orders or until revoked – *see section 11*	Interim orders remain in force until one of the following occurs – (a) a final order comes into force; (b) a final order hearing is concluded; (c) the interim order is cancelled or expires; (d) if it is a telephone order, after 3 months - *see section 16(4)*	An interim domestic violence order remains in force until it is revoked or, a court of summary jurisdiction domestic violence order is made for the same parties – *see section 35(3)*	General interim order must not be in force for more than 12 months plus any extensions due to non-service – *see section 24.* Special interim order ends when the first of the following occurs: i. special interim order is revoked. ii. application for final order on which special interim order was made is discontinued or dismissed. iii. a final order is made, and the respondent is present when it is made.

	South Australia	Western Australia	Northern Territory	Australian Capital Territory
				iv. a final order is made and served on a respondent who was not present when the order was made – *see section 30*
Party titles	Protected person(s) Applicant Defendant	Person protected Person seeking to be protected Bound Person Respondent	Defendant Protected Person(s)	Affected person Protected person Respondent
Weapons	An intervention order must include terms for the surrender of firearms in the possession of the defendant and disqualification from holding or obtaining a licence or permit to possess firearms – *see* section 14 The court need not include any of these terms in a final intervention order of satisfied that the defendant has never been guilt of violent or intimidatory conduct and need to have a firearm for purposes related to earning a livelihood - *see* section 14(2)	Every FVRO or VRO includes a restraint prohibiting the bound person from being in possession of a firearms, or firearms licence, or obtaining a firearms licence – *see section 14(1)* However, the court may permit the respondent to have possession of a firearm if satisfied of the conditions set out in *section 14(5)*	A license, permit, or certificate of registration for the possession of firearms is automatically suspended on the making of an interim domestic violence order – *see* section 39, *Firearms Act* A license, permit, or certificate of registration for the possession of firearms is automatically on final domestic violence order – *see* section 40(1)(a), *Firearms Act*	If a non-local FVO that is a recognised FVO disqualifies a person from holding a non-local weapons license or type of non-local weapons license, the person is also disqualified from holding a local prohibited weapons permit or local prohibited weapons permit of the same type – *see section 129(1)* The registrar of firearms must revoke any local prohibited weapons permit held by a person, or refuse to issue a local prohibited weapons permit to a person, if the person is disqualified from holding the non-local weapons licensed by a

	South Australia	Western Australia	Northern Territory	Australian Capital Territory
				recognised FVO -*see section 129(2)*
Service	An interim intervention order issued by police must be served personally on the defendant – *see section 18(4)* A final intervention order is served on the defendant if: the order is served on the defendant personally, the order is served in a manner ordered by the Court or, the defendant is present in the court when the order is made – *see section 23(5)* These conditions are the same for service of a court issued interim intervention order – *see section 21(8)* If an interim intervention order is confirmed, the order continues in force as a final intervention order without any further requirement for service – *see section 23(4)*	A respondent who is present when order is made is deemed to be served – *see section 55(3a)* A restraining order is to be served personally unless – (a) the registrar has authorised oral service under *section 55(2)* (b) the order may be served by post – *see section 55(3)* (c) the court makes an order for substituted service under *section 60*	*See section 119* - A copy of a DVO is given to the defendant if: a) for a court DVO – the defendant was before the issuing authority when it was made; or (b) it is served in a way mentioned in *section 25 of the Interpretation Act*; or (c) a police officer informs the defendant, orally or in writing, of its making and terms; or (d) it is given to the defendant in another way the Court or a magistrate orders	An application for a protection order and timing notice must be served personally on the respondent – *see section 70A(1)* If personal service is not reasonably practicable, the court may order that the application be served in a way that the court considers it likely to bring the application and timing notice to the attention of the respondent – *see section 70A(2)* A Magistrates Court may dismiss an application for a protection order if satisfied that: ○ the application cannot be served on the respondent. ○ No alternative way of service would be effective to serve the application on the respondent; and ○ The respondent has not intentionally avoided service – *see section 70B.*

	South Australia	Western Australia	Northern Territory	Australian Capital Territory
				If a court makes a protection order, the registrar must serve two copies (for an interim order) or one copy (for a final order) on the respondent. The service must be personal unless the respondent when the protection order is made or the court makes an order under section 70A(2). A court may direct that a document required to be served on someone be served by a police officer -*see section 70E*.