Parliamentary Committees

Domestic and Family Violence Protection Bill 2011

Report No. 6

Community Affairs Committee

November 2011

Community Affairs Committee

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Acknowledgements

The committee thanks those who briefed the committee, made submissions, gave evidence, and participated in its inquiry. In particular the committee acknowledges the assistance provided by the Department of Communities and Queensland Police Service.

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Chair's foreword

The Hon Karen Struthers MP, Minister for Community Services, Housing and Minister for Women, introduced the Domestic and Family Violence Protection Bill 2011 on 6 September 2011 and the House referred the bill to the Community Affairs Committee for examination. The bill's key focus is to maximise the safety and protection of victims and see perpetrators of violence held more accountable.

The committee received two submissions and held a public briefing with the Minister and departmental officers on 11 October 2011 and a public hearing on 12 October 2011 where the committee heard further evidence from the Minister, departmental officers and a number of witnesses who had made submissions.

The committee heard strong support for the proposed legislation to be passed. There were contrasting views, however, about whether intervention programs are best mandated by courts or engaged in voluntarily. The committee concluded that this is ultimately a policy question and that the terminology in the bill should accurately reflect the adopted approach. The committee has also recommended that this bill include provisions to facilitate enhanced information exchange between Queensland Government agencies and the Family Court of Australia in circumstances of domestic and family violence.

On behalf of the committee, I would like to thank those that took the time to provide submissions and the departmental officers and individuals who met with the committee to offer further evidence and information during the course of this inquiry.

Finally, I would like to thank the other members of the committee for their continuing hard work and support.

Paul Hoolihan MP
Chair

Abbreviations

ALRC	Australian Law Reform Commission
DV	Domestic violence
DVO	Domestic violence order
DVIO	Domestic violence intervention order
FCA	Family Court of Australia
FLA	Family Law Act
MOU	Memorandum of Understanding
QPS	Queensland Police Service

Executive summary

On 6 September 2011, the Hon Karen Struthers MP, Minister for Community Services, Housing and Minister for Women, introduced the Domestic and Family Violence Protection Bill 2011 and the House referred the bill to the Community Affairs Committee for examination and report to the Legislative Assembly by 19 November 2011.

The bill updates and modernises the *Domestic and Family Violence Protection Act 1989* and addresses the 2009-2014 Queensland Government Strategy to reduce domestic and family violence.

The objectives of this bill are to:[1]

1. Maximise the safety, protection and wellbeing of people who fear or experience domestic violence, and to minimise disruption to their lives;
2. Prevent or reduce domestic violence and the exposure of children to domestic violence; and
3. Ensure that people who commit domestic violence are held accountable for their actions.

These objectives are achieved by:

1. Allowing a court to make a domestic violence order (DVO) to protect against further domestic violence;
2. Giving police particular powers to respond to domestic violence, including the power to issue a police protection notice; and
3. Imposing consequences for contravening a DVO or police protection notice, in particular liability for commission of an offence.

The committee called for submissions via an advertisement in *The Courier Mail* on 17 September 2011 and received submissions from two stakeholders. This was followed by a public ministerial briefing to the committee on the bill on 11 October 2011 and a public hearing on 12 October 2011 where the committee heard further evidence from the Minister and the two stakeholders who had made submissions. The committee also sought further clarification of some matters in follow up correspondence with the Minister.

The committee identified the following policy issues after considering advice from the technical scrutiny secretariat, written submissions and evidence presented by witnesses at hearings:

1. 'Intervention Orders' in Division 6 of the bill have a different meaning in Queensland to South Australia, Victoria, Western Australia, and the Family Court of Australia where orders by the same name are the legal equivalent of a DVO in Queensland. This has the potential to create unnecessary confusion, particularly for those persons arriving in Queensland with Intervention Orders issued in one of these jurisdictions.
2. Reference to 'orders' in Division 6 attracted conflicting criticisms.
    a. The committee heard concerns that respondents attending intervention programs ordered by the court under this Division may be perceived to be 'mandated' to do so rather than voluntarily agreeing to attend. For some respondents this may create a disincentive to participate because they feel stigmatised at the prospect of being under an 'order of the court'.

[1] Explanatory Notes, Domestic and Family Violence Protection Bill 2011 (Qld), p. 4.

b. The committee also heard and considered the contrary view that it is problematic that there are no sanctions for respondents who do not comply with Intervention Orders under Division 6.

3. The need for provisions to support an improved interface and protocols for information exchange between the Queensland Magistrates Courts, Queensland Police Service (QPS), and the Family Court of Australia (FCA) when addressing domestic and family violence.

4. Potential evidentiary barriers to the Police Protection Notice application process created by requirements for proof of delegation and the approval of the supervising officer authorised by the police commissioner under cl. 102 (2).

5. The potential need to exempt travel time from the limitation to the detention period in cl. 119 in order to accommodate rural and isolated localities.

6. In circumstances where parties to a proceeding either consent to an order or do not oppose the making of the order, cl. 51(1), puts the onus on the respondent to take positive steps to oppose/challenge the order rather than on the police or the aggrieved to establish that an order is necessary.

7. Issues arising in circumstances where the aggrieved is occupying a home that is either wholly owned or mortgaged solely in the name of the respondent and where the respondent subject to an order under cl. 63 refuses to maintain the mortgage payments or opts to put the property up for sale.

8. The importance of adequately resourcing police training to support the implementation of the new legislation.

9. The need to monitor resourcing to ensure that intervention programs ordered under Division 6 are available statewide to support access to this option and that the effectiveness of intervention programs is carefully monitored, evaluated and reported upon.

10. The importance of publishing evaluation reports of the interagency family violence strategy at the Gold Coast and the specialist domestic violence court pilot site in Rockhampton funded by the Department of Communities.

Having considered the views and evidence presented during its examination of the bill, the committee recognises the significance of the bill in modernising the legislative framework to make the law more accessible to the community. The committee unanimously recommends that the bill be passed while also recommending that the bill be amended to:

1. Align the proposed policy and legislative frameworks in the application of Intervention Orders in accordance with recommendations two and three.

2. Facilitate enhanced exchange of information between Queensland Government agencies and the Family Court of Australia in accordance with recommendation four.

Recommendations

1 Introduction

1.1 Role of the Committee

Section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the bill; and
- the application of the fundamental legislative principles to the bill.

In examining a bill referred to it, the committee is to:[2]

- determine whether to recommend that the bill be passed;
- may recommend amendments to the bill; and
- consider the application of fundamental legislative principles contained in Part 2 of the *Legislative Standards Act 1992* to the bill and compliance with Part 4 of the *Legislative Standards Act 1992* regarding explanatory notes.

This report indicates the committee's determinations on the matters set out above.

On 6 September 2011, the Hon Karen Struthers MP, Minister for Minister for Community Services, Housing and Minister for Women, introduced and referred the Domestic and Family Violence Protection Bill 2011 to the committee for examination and report to the Legislative Assembly by 19 November 2011.

Standing Order 133 provides that a portfolio committee to which a bill is referred may examine the bill by any of the following methods:[3]

- calling for and receiving submissions about a bill;
- holding hearings and taking evidence from witnesses;
- engaging expert or technical assistance and advice; and
- seeking the opinion of other committees in accordance with Standing Order 135.

After referring the bill to the committee, the Minister wrote to the committee on 6 September 2011 to confirm that the following three phase consultation process had taken place during the development of the bill:[4]

1. November 2009 – December 2009 with government and non-government stakeholders to develop the scope of the review and the key issues for inclusion in the consultation.
2. March 2010 – May 2010 – Release of the review of the *Domestic and Family Violence Protection Act 1989*. This phase involved input from over 400 members of the public through the Department of Communities *Get Involved* website. This phase also included 22 public consultation sessions in 17 regions of Queensland. A further 214 written responses were received on the consultation paper and 365 people attended the public consultation sessions.
3. July 2011 – August 2011 - Exposure draft of bill publicly released on the Department of Communities website. A further 24 submissions were received in response to this document.

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[2] Legislative Assembly of Queensland, Standing Rules and Orders of the Legislative Assembly, Standing Order 132(1), p. 29.

[3] Legislative Assembly of Queensland, Standing Rules and Orders of the Legislative Assembly, Standing Order 133, p. 29.

[4] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 6 September 2011, pp. 1-2.

> The Minister states that feedback was largely positive and constructive… and that as far as possible the bill reflects the feedback provided.

In addition to the above processes, the Minister also sought advice from the Minister's Domestic and Family Violence Strategy Implementation Advisory Group, a group of seven community members with specialist expertise and experience in the domestic violence sector. There was also an interagency working group with representatives appointed from key Queensland Government agencies.[5]

In conducting its examination, the committee sought further detail from the Department of Communities on the consultation undertaken in relation to the bill. The committee called for submissions via an advertisement in *The Courier-Mail* on 17 September 2011 and received submissions from two stakeholders (see Appendix A). This was followed by a public ministerial briefing to the committee on the bill on 11 October 2011 and a public hearing on 12 October 2011 where the committee heard further evidence from the Minister and also from two stakeholders (see Appendix C). Transcripts of briefings by the Minister and departmental officers and the public hearing, and submissions received and accepted by the committee are published on the committee's webpage at www.parliament.qld.gov.au/committees.

1.2 Policy objectives of the Domestic and Family Violence Protection Bill 2011

The objectives of this bill are to:[6]

1. Maximise the safety, protection and wellbeing of people who fear or experience domestic violence, and to minimise disruption to their lives;
2. Prevent or reduce domestic violence and the exposure of children to domestic violence; and
3. Ensure that people who commit domestic violence are held accountable for their actions.

These objectives are achieved by:

1. Allowing a court to make a domestic violence order (DVO) to protect against further domestic violence;
2. Giving police particular powers to respond to domestic violence, including the power to issue a police protection notice; and
3. Imposing consequences for contravening a DVO or police protection notice, in particular liability for commission of an offence.

The bill proposes the following important changes to the current legislative framework:[7]

1. A chronological approach to responses to the experience of domestic violence and is written in a plain English style to assist people who are self-representing in proceedings.
2. A preamble and a set of guiding principles (clause 4) to assist in the administration of the legislation.

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[5] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 6 September 2011, p. 2.

[6] Explanatory Notes, Domestic and Family Violence Protection Bill 2011 (Qld), p. 4.

[7] Explanatory Notes, Domestic and Family Violence Protection Bill 2011 (Qld), pp. 3-9.

3. A modernised definition of domestic violence (clause 8) to take account of the Australian Law Reform Commission recommendations and research findings.[8] This definition includes behaviour that is physically or sexually abusive, emotionally, psychologically, or economically abusive, threatening or coercive, or behaviour that in any other way controls or dominates another person causing fear.
4. A shift in the emphasis from the current element of 'likelihood' of violence with a requirement to focus on the protective needs of the aggrieved (clause 37).
5. Guidance to a court on when to name a child on a DVO (clause 46).
6. New conditions that can be attached to a protection order (clauses 56-59).
7. A new category of order known as an Intervention Order which:
   - Can require respondents to attend intervention programs or counselling (clause 69).
   - Clarifies the matters to be considered when issuing 'ouster' orders (clause 63).
   - Enables the court to issue an order to protect an unborn child (clause 67).
8. Creating a duty for a police officer to investigate domestic violence (clause 100).
9. Creating a new power to issue a police protection notice in circumstances of low to medium level incidents (clause 101).
10. Extending current powers for police to detain a perpetrator for longer in high-risk situations to enable sufficient time for the person to 'cool off' and/or 'sober up' (Part 4 Division 3).
11. Creating a new power for police to require a respondent to remain at a place so that they can serve a notice upon the person (clause 134).
12. Increasing the penalties for contravening a DVO (clauses 177 and 178).

[8] Australian Law Reform Commission & Law Reform Commission New South Wales, *Family Violence - A National Legal Response: Final Report*, Australian Law Reform Commission, Canberra, 2010. Accessed from: http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114 on 26 October 2011.

2 Examination of the Domestic and Family Violence Protection Bill 2011

2.1.1 General Recommendation

Having regard to the policy objectives of the bill and after considering the submissions and hearing the evidence from all stakeholders, the committee has concluded that the bill represents an important reform to the current legislative framework governing domestic and family violence. The committee accepts that the bill seeks to place greater responsibility for the use of violence on perpetrators of violence and to increase the ability of the court to focus on the safety and wellbeing of victims. The committee acknowledges the important changes effected by the bill's new broader definition of domestic violence and the widespread community support for these changes.

Recommendation 1

The committee unanimously recommends that the bill be passed.

2.1.2 The language of 'Intervention Orders'

An 'Intervention Order' in Victoria (VIC), South Australia (SA), Western Australia (WA), and the Family Court of Australia (FCA) is akin to the enforceable DV protection order in Queensland. The committee is concerned that the similarity of the terminology may therefore cause confusion as to the nature of the order and its consequences, particularly for aggrieved persons registering orders that originated in another jurisdiction. The Minister responded by stating that:[9]

> *The bill uses the term 'intervention order' to describe an order that enables a respondent to participate in a structured program or counselling provided by an approved provider. This term was chosen, in part, because it is common for the social and behavioural sciences to use the term 'intervention' to describe programs or counselling aimed at assisting people to address the issues or problems they experience…. The Minister's Domestic and Family Violence Strategy Implementation Advisory Group (DFVSIAG) recommended the use of the term which is currently used in the bill, intervention order, noting this provides the most accurate reflection of the expected outcomes from a respondent's referral to a program or counselling.*

The explanatory notes to the bill indicate that Intervention Orders are designed to increase the safety of victims of DV and to make perpetrators more accountable.[10] In other jurisdictions these types of arrangements are known as:

- Counselling Order
- Intervention Program
- Order for Rehabilitation Program

The stated policy intent of Division 6 of the bill is to establish an incentive-based rather than punitive system.[11] However, the committee heard from one witness that reference to an 'order' issued by a

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[9] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, pp. 2, 3.

[10] Explanatory Notes, Domestic and Family Violence Protection Bill 2011 (Qld), p. 8.

[11] K Struthers, Minister for Community Services and Housing and Minister for Women, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011.

court in Division 6 may suggest that it is a mandated order.[12] Some members of the committee are concerned that this may undermine the stated policy objective by decreasing respondents' willingness to voluntarily participate in programs and potentially bear the stigma associated with being under the supervision of the court.[13]

In contrast to this objection about the language of an 'order', some stakeholders and other members of the committee are concerned that the reference to an order is a misnomer because it creates a false perception that Intervention Orders (like protection orders) are accompanied by direct sanctions for non-compliance.[14]

The Minister responded by stating that reference to an 'order' is generally understood and recognised to carry with it the legitimate institutional authority of the court and is therefore more likely to encourage compliance:[15]

> *It is considered that the word "order" is appropriate to reflect the fact that an intervention order results from a decision which is made by a court that the respondent's participation may be beneficial. A person may indicate that he or she is prepared to consent to an intervention order, but ultimately the assessment process, and all other processes and requirements, cannot be initiated unless a court decides to make an order under part 3 (Domestic violence orders), division 6 (Intervention orders) of the bill. Further, the use of the word order is consistent with the requirement that programs or counselling must be subject to an approval process and reflects the importance of complying with the court's determination.*

Having considered these views on the issue of language, the committee resolved that there was little benefit in retaining the term 'Intervention Order' in Division 6 because:

1. It will create confusion that can by avoided by using an alternative term, which would differentiate it from orders with the same name issued in other jurisdictions.
2. The reference to an 'order' is both misleading and potentially stigmatising and does not sufficiently reflect the consensual nature of the arrangement.

The committee notes that the notion of an 'agreement' is already in use in the context of the *Family Responsibilities Commission Act 2008* and that this wording more closely reflects the nature of the arrangements in Division 6.

Having regard to all of the above views –

Recommendation 2

The committee unanimously recommends that, in the interests of clarity and accuracy, the term Intervention Order in Division 6 is replaced with 'Intervention Agreement'.

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[12] D Awyzio, Council Member, Queensland Law Society, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011, p. 9.

[13] F Simpson, Committee Member, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011, p. 9.

[14] D Awyzio, Council Member, Queensland Law Society, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011, p. 9; K Hendrie, private individual, *Submission No. 1*, 2011, p. 1.

[15] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 3.

2.1.3 Absence of penalties for Intervention Orders

The committee received submissions and heard evidence from witnesses with conflicting views on the issue of penalties for Intervention Orders under Division 6.[16] The committee acknowledges the Minister's view about the importance of encouraging respondents to voluntarily commit to changing their behaviour and not to penalise those who attempt to do so.[17] However, the committee is also concerned that there should be some consequence for respondents who offer undertakings of compliance to Magistrates, which are not borne out by their behaviour after a court appearance. The committee therefore sought an explanation from the Minister at the public briefing as to why there are no sanctions proposed for non-compliance with Intervention Orders in Division 6. At the public briefing, the Minister responded by indicating that:[18]

1. The intention of Division 6 is not to introduce mandated counselling programs.
2. The regime should be incentive-based rather than punitive in nature.
3. Voluntary compliance is preferable.
4. Respondents who do not comply with Intervention Orders are at risk of attracting further interest from the police if they persist with violence and do not complete the requirements of the order.
5. The Commonwealth Government through the National Strategy on Violence Against Women and Children is currently attempting to develop national guidelines and standards for perpetrator programs.
6. The Commonwealth Government through the National Strategy on Violence Against Women and Children is currently looking at whether these programs should be mandated or not.
7. Intervention programs are currently not available in all areas of Queensland.
8. The success of intervention programs is variable for different individuals.

The committee also considered the indirect mechanism available to enforce an Intervention Order under cl. 37(2)(b) of the bill. When a court is making a protection order, the court may consider whether an Intervention Order has previously been made against the respondent and whether the respondent has complied with the order. This provision addresses situations where the respondent has had an order in relation to the current aggrieved or another person in the past and their compliance with such orders. Similarly under cl. 91(2)(c), the court may vary a protection order if:

1. It receives an application; or
2. The respondent has been convicted of an offence involving domestic violence under cl. 42; or
3. The Children's Court is hearing a child protection proceeding under cl. 43 and it is considering making a DV protection order against a parent.

In these circumstances before it varies a DV protection order,the court must consider whether an Intervention Order has previously been made against a respondent and if the respondent has complied with the order. Furthermore, under cl. 91(3) when varying an order, the court must make a copy of the varied order and any changes to its conditions. This then enables the court, if it so

[16] K Hendrie, private individual, *Submission No. 1*, 2011, p. 1; D Awyzio, Council Member, Queensland Law Society, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011, p. 9.

[17] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 4.

[18] K Struthers, Minister for Community Services and Housing and Minister for Women, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011.

wishes, to mandate a respondent's attendance at an approved program under Division 6 as a condition of a varied DV protection order under cl. 57 and for non-compliance to be treated as a breach of the order under cl. 177 or cl. 178 of the bill.

The Minister also highlighted that:[19]

> *It is not considered appropriate to subject a respondent to a criminal sanction if he or she fails to comply with an intervention order imposed as a result of a civil domestic violence proceeding. This is because the intervention order operates on the basis that a respondent consented to the order being made and the order operates in the context of a civil law regime which generally imposes restrictions on a respondent's behaviour (as opposed to imposing positive obligations which require a respondent to do something). A respondent should not be punished for making a genuine attempt to confront his or her behaviours but faltering part-way through a program.*
>
> *Further, the prospect of a criminal sanction being imposed for failing to comply with the order may discourage respondents who may otherwise be prepared to consent to an order. It is expected that respondents who are represented by lawyers would be advised not to consent to an intervention order if the breach of an order carried the risk of a criminal penalty.*
>
> *There are indications that the threat of a criminal sanction for failing to complete a program is not a clear incentive to a person to complete a program. In a small evaluation of the Gold Coast men's domestic violence perpetrator program, only 20 men out of 38 completed the program that was ordered as part of a sentence of probation……In the absence of clear evidence that a penalty for not complying with a court order to participate in an intervention program increases the rate at which participants complete a program, the intervention order provisions in the bill do not include a penalty to remove a barrier to respondents entering an intervention program.*

Having regard to all of the above issues, the committee concluded that by definition an 'order' should be enforceable.

Recommendation 3

The committee unanimously recommends that if the terminology in Division 6 is not amended in accordance with Recommendation 2 of this report, then Division 6 should be amended to include additional enforcement provisions for non-compliance.

2.1.4 Possible evidentiary barriers for police

The committee received a submission and heard a witness's concerns about potential evidentiary barriers to the Police Protection Notice application process. This concern suggests that the requirements in cl. 102(2) to prove a delegation and to obtain the approval of a supervising officer authorised by the police commissioner may be operationally problematic.[20]

[19] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 4.

[20] K Hendrie, private individual, *Submission No. 1*, 2011, p. 1.

The Minister responded by indicating:[21]

> *The requirement for a supervising officer to approve the issuing of a notice is a safeguard for the new police power to issue a police protection notice. This safeguard recognises that a police officer can, by issuing a police protection notice, place conditions on a respondent that expose the respondent to the possibility of a criminal charge before a court has considered whether there is sufficient evidence that the respondent has committed domestic violence.*
>
> *Clause 189 has been included in the bill to reduce the evidentiary burden on a police officer who is prosecuting a respondent for breaching a police protection notice. Clause 189 allows the following matters relating to the issuing of a police protection notice to be proven simply by providing a certificate signed by the police commissioner attesting to the matter:*
>
> - *that a particular police officer issued a particular police protection notice on the day and at the time stated in the certificate;*
> - *on the relevant day, a particular police officer was a supervising police officer under section 102;*
> - *the particular supervising police officer approved the issuing of the particular police protection notice on the day and at the time stated in the certificate.*
>
> *A court will be required to accept this certificate as proof of the matters it states unless the defendant (that is, the respondent charged with breaching the police protection notice) indicates that he or she wishes to challenge the accuracy of a matter. In this way, this clause removes the need for the prosecution to provide a copy of an instrument of delegation for a supervising police officer unless the basis of the officer's authority is specifically challenged.*
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> *Section 4.10 of the Police Service Administration Act 1990 allows the Commissioner for Police to delegate this power to issue an evidentiary certificate so that it does not, in turn, place an excessive burden on the Commissioner.*
>
> *Together, these provisions provide appropriate safeguards on the issue of police protection notices while balancing the evidentiary and administrative burden on the Queensland Police Service.*

The committee considered all of the views presented in respect of this issue and concluded that the Minister's explanation was satisfactory.

2.1.5 Detention Period

The committee considered the suggestion raised in a submission about the potential need to exempt travel time from the limitation to the detention period in cl. 119 in order to accommodate rural and isolated localities. The committee heard evidence from Mr Ken Hendrie indicating that in rural and remote areas the maximum detention period under cl. 119 is likely to be insufficient to enable a police officer to apprehend and transport the respondent and process the application for the protection order. Mr Hendrie suggested that the provision be amended to exempt travel time from the definition of the period of detention.[22] Although this may not be a common problem, there are a small number of settlements and communities (mostly Indigenous communities in western Queensland and Cape York) where the nearest police station is two or more hours drive.

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[21] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, pp. 7-8.

[22] K Hendrie, private individual, *Submission No. 1*, 2011, p. 2.

The committee also considered that cl. 119 was identified as an FLP issue by the technical scrutiny secretariat because, during the period of detention, the rights, liberties, and obligations of individuals are dependent on the exercise of administrative power. In recognition of the encroachment to the rights and liberties of individuals, which occurs when a respondent is taken into custody, the Australian Law Reform Commission has recommended that this power should be used sparingly.[23]

The committee considered Mr Hendrie's submission, but was concerned that if the proposal was implemented, it would mean that individuals living in remote areas who are detained would have less protection to their rights and liberties than those people living within close proximity to a police station.

The Minister commented on this issue by stating that:[24]

> *Detention is a significant infringement of a person's rights and liberties and, for this reason, it is necessary that the powers of detention conferred by the bill are justified, certain and limited. The fundamental legislative principles set out in section 4(3) of the Legislative Standards Act 1992 require legislation to have sufficient regard to the rights and liberties of individuals. This includes ensuring legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review (section 4(3)(a))…. The respondent should not be penalised because the incident occurred some distance from a station. As long as the respondent is detained away from the aggrieved, including in a police vehicle travelling to a police station or watch-house, then the purpose of the detention, which is to protect the aggrieved, is fulfilled. Commencing the detention period when an officer arrives at a police station or watch-house would create uncertainty about the total period for which a person could be detained, effectively allowing a person to be detained for an indefinite period of time. This would also reduce the safeguard to prevent inappropriate detours or stops for an extended period of time during transit to a police station or watch-house.*

The committee considered all of the views presented in respect of this issue and concluded that the Minister's explanation was satisfactory.

2.1.6 Consent orders and the reversal of the onus of proof

In circumstances where parties to a proceeding either consent to an order or do not oppose the making of the order, cl. 51(1), the committee was initially concerned that the provision puts the onus on the respondent to take positive steps to oppose/challenge the order rather than on the police or the aggrieved to establish that an order is necessary. The technical scrutiny of legislation secretariat identifies cl. 51(1) as an FLP issue and states that this clause:

> *Arguably serves to reverse the onus in respect of DV proceedings because it allows a DV order to be made or varied (by a court) where parties to the order either consent to the making of the order/variation, or where they do not oppose the making of the order. This in effect puts an onus on a respondent to take positive steps to oppose/challenge the making of the order, rather than on police or the aggrieved to establish that the order is necessary.*

The Queensland Law Society in its evidence to the committee commented on the operation of cl. 51(1) potentially reverses the onus of proof by authorising the court to make consent orders

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[23] Australian Law Reform Commission & Law Reform Commission New South Wales, *Family Violence - A National Legal Response: Final Report,* Australian Law Reform Commission, Canberra, 2010, sec. 9. Accessed from: http://www.alrc.gov.au/publications/9.%20Police%20and%20Family%20Violence/police-powers-dealing-family-violence.

[24] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, pp. 6-7.

where a respondent has not opposed an application. They argue that by inference this then shifts responsibility to the respondent to actively contest an application rather than placing onus on the police or aggrieved to demonstrate that an order is necessary. The Queensland Law Society went on to suggest that it could be beneficial if there was provision on the DVO to note where an order was made by consent.[25]

The committee notes that the policy position underpinning the operation of cl. 51(1) is based on the desire to provide greater protection for aggrieved parties and children by facilitating enhanced access to civil remedies, such as DVOs.[26]

The committee also notes that the Queensland Law Society's suggestion to include a requirement for courts to distinguish between DVOs made by consent or otherwise may have the unintended consequence of 'stratifying' orders into those which are considered more or less worthy of police intervention in the event of a reported breach.[27]

The Minister responded to this point by stating that:[28]

> *A consent order is initiated by the parties to a proceeding and can only proceed where all parties to the proceeding agree to conclude the proceedings by the court making a domestic violence order in particular terms. Where this occurs, the presiding magistrate will generally ask the respondent whether he or she opposes the making of an order in the terms proposed. For the court to make a consent order, the only matter that must be proven to the court is that a relevant relationship exists between the aggrieved and the respondent (clause 51(1)(a)). The onus to prove this matter remains with the party who initiated the application; the applicant. Because the order is to be made with the agreement of both of the parties, the court does not have to be satisfied that the respondent has committed domestic violence or that an order is necessary (clause 51(1)(b)).*
>
> *If the respondent indicates that he or she does oppose an order being made, or does not consent to the order being made, then the court must decide the application on the evidence. In these circumstances, the applicant will continue to bear the onus of proving to the court the matters set out in clause 37 (when court may make protection order).*
>
> *Clause 51 does not impose an onus to prove any matter on a respondent who consents to, or does not oppose, the making of an order. Nor does the reference in clause 51(1) to the respondent not opposing the making of the order require the respondent to actively defend the allegations made in the application to avoid the court making a consent order. The onus of proving any matter of which the court is required to be satisfied remains with the applicant at all times.*
>
> *Clause 51 will not operate when a respondent is silent in court. If the respondent is not present in court, or is present in court but does not in any way indicate whether he or she does or does not oppose the application, the court cannot make a consent order. In these circumstances, the court will have to hear and decide the application based on the evidence presented. The applicant retains the onus of proof.*

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[25] D Awyzio, Council Member, Queensland Law Society, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011, p. 9.

[26] Explanatory Notes, Domestic and Family Violence Protection Bill 2011 (Qld), p. 51.

[27] D Awyzio, Council Member, Queensland Law Society, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011, pp. 8-9.

[28] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 10.

The committee considered all of the views presented in respect of this issue and concluded that the Minister's explanation was satisfactory.

2.1.7 Improving information sharing between Magistrates Courts, Queensland Police Service and the Family Court of Australia

Numerous reviews[29] have identified the need for improved interface between state and territory courts, police, and the Family Court of Australia when addressing domestic and family violence. The Minister stated in her response to the committee:[30]

> *The Domestic and Family Violence Protection Bill 2011 can only regulate the use of information arising from domestic violence proceedings. It is beyond the legislative power of the Queensland Parliament to make laws that govern the information that the Family Court can provide to a state court. Therefore, this issue was not considered in the development of the Domestic and Family Violence Protection Bill 2011.*

The committee thanks the Minister for her advice and wishes to reassure her that it is well aware of the constitutional limitations to the state's jurisdictional power.

The Minister goes on to note that the Australian Law Reform Commission's (ALRC) report, *Family Violence – A National Legal Response*, examined and expressed its support (via recommendation 30-16) for the current information sharing protocols such as those set up in Western Australia and Tasmania, to exchange information between the Family Court and Magistrates Courts when dealing with family violence matters.[31]

This information exchange is supported by existing legal frameworks through the use of s. 121 (9) of the *Family Law Act 1975 (C'wlth)* which authorises the communication of matters arising in Family Court proceedings to persons concerned in proceedings in another court.

The committee observes that in the ALRC report, the submissions from the NSW Ombudsman noted that 'barriers to information sharing are not always legislative in character. Often the obstacles are administrative and cultural.' Indeed, after reviewing a wide range of submissions and considering all the evidence on the operation of s. 121 (9), the ALRC concluded that:

> *In the Commissions' view, the exception to allow disclosure to persons concerned in any court proceedings for use in connection with those proceedings sufficiently enables the sharing of information for the purpose of protection order proceedings under state and territory family violence legislation. The Commissions are not, therefore, recommending that s121 be amended.*

However the committee is concerned that new Queensland legislation should remove all doubt that there is no legislative barrier to the flow of information from the police and Magistrates Courts to the Family Court of Australia. The committee notes that Tasmania has a complementary provision in s. 37 of the Tasmanian *Family Violence Act 2004* that states:

> *A personal information custodian, within the meaning of the Personal Information Protection Act 2004, acting in good faith, does not commit a breach of that Act by reason*

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[29] See Australian Law Reform Commission & Law Reform Commission New South Wales, *Family Violence - A National Legal Response: Final Report,* Australian Law Reform Commission, Canberra, 2010, ch. 30 (Information Sharing). Accessed from: http://www.alrc.gov.au/publications/9.%20Police%20and%20Family%20Violence/police-powers-dealing-family-violence.

[30] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 5.

[31] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 5.

> *only of collecting, using, disclosing or otherwise dealing with personal information for the purpose of furthering the objects of this Act.*

Similarly in s. 70A of the *Restraining Orders Act 1997* of Western Australia, an explicit head of power is provided to authorise an interested party to:

> *provide to another interested party prescribed information if the parties agree that the provision of such information is necessary to ensure the safety of a person protected by a violence restraining order, or the wellbeing of a child affected by such an order.*

Provisions of this type underpin the development of protocols and Memoranda of Understanding in jurisdictions such as Western Australia and Tasmania.

In her reply to the committee's question on this issue, the Minister's acknowledges this point but then comments, that 'the (Tasmanian) protocol is reportedly used infrequently'.[32]

The committee accepts that, while the protocol may be used infrequently, Tasmania has established a lawful means of addressing what is, in a very practical sense, a major issue for many people seeking legal protection in circumstances of family violence.

The committee notes in the Minister's response that the sharing of information between courts has recently been referred for consideration by the relevant Commonwealth, State/Territory Ministerial Council meeting:[33]

> *At the meeting of the Standing Committee of Attorneys-General held on 21 and 22 July 2011, the Ministers agreed to develop a national response to the ALRC's report. This work is expected to include consideration of the recommendations related to sharing information between courts and, in particular, consideration of the protocol that has been set up in Tasmania. The Queensland Government will take part in the development of a national response to the ALRC report through the Standing Committee of Attorneys-General.*

The committee supports the development of a nationally consistent approach to this issue but is concerned that the process of reaching national agreement on such matters is often characterised by significant delays. In this context, the committee wishes to highlight its concern about the potential human cost of such delays.

The committee also notes that the Minister has not provided a compelling reason why the current Queensland legislative proposal should not include an equivalent head of power for information exchange in the bill along the lines of the Tasmanian legislation. Such action would enable work to proceed immediately on the development of protocols for information exchange in Queensland and does not preclude the possibility of future amendments to the Queensland legislation to introduce a national uniform framework for information exchange when it is eventually agreed at the Ministerial Council.

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[32] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 5.

[33] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 5.

Recommendation 4

The committee unanimously recommends that:

i. An equivalent provision to s. 37 of the Tasmanian *Family Violence Act 2004* is incorporated into the bill to authorise the collection, use, disclosure, or otherwise dealing with personal information for the purpose of furthering the objects of the legislation.

ii. Representatives of the Family Court of Australia are invited to participate in processes for the joint development of protocols for information sharing with relevant Queensland Government agencies dealing with domestic and family violence.

2.1.8 Ouster orders

The committee asked the Minister how the bill deals with circumstances where the aggrieved is occupying a home that is either wholly owned or mortgaged solely in the name of the respondent and where the respondent subject to an order under cl. 63 refuses to maintain the mortgage payments or opts to put the property up for sale.

The committee heard evidence from the Minister in response to this issue which indicated that:[34]

1. This is primarily a matter for the Family Court to determine if there is to be a division of assets or to be ongoing maintenance.
2. It is likely that such matters may not come before the Family Court immediately.
3. The need for financial upkeep of the house to pay the mortgage is a factor that may guard against an ouster order being the appropriate condition in such an instance.
4. If someone has sought an ouster order and it proves financially difficult the bill enables them to seek a variation to the order.
5. If the aggrieved party's income is not sufficient for the home to continue to be affordable, it may be sold.

The Minister subsequently stated in her written response to this issue that:[35]

> *The Domestic and Family Violence Protection Bill 2011 has a protective purpose; its main aim is to maximise the safety, protection and wellbeing of people who fear or experience domestic violence. The bill's purpose does not extend to securing the financial independence or support of the aggrieved and any child, as desirable as this outcome may be. Therefore, the bill does not give the court the power to order an ousted respondent to continue to pay the mortgage or to refrain from selling the property.*
>
> *If the parties intend to separate permanently, the Family Court is the appropriate forum for financial and property issues associated with their relationship to be litigated and resolved.*

[34] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 8; D Raeburn, Manager, Community Policy, Child Safety, Youth and Families Policy and Performance, Department of Communities, *Public Briefing Transcript*, Community Affairs Committee, Brisbane, 11 October 2011, p. 6; K Struthers, Minister for Community Services and Housing and Minister for Women, *Public Briefing Transcript*, Community Affairs Committee, Brisbane, 11 October 2011, p. 6.

[35] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 9.

To impose a set of financial or property considerations in the ouster provisions would be onerous for the courts and would also create a significant evidentiary burden for applicants and aggrieved persons. This may compromise the ability of a court to act quickly to make a protection order where an order is sought urgently.

A state law that allows a state court to make orders about the distribution of property between two parties to a relationship who have separated or the financial obligations of one separated party to the other may also be inconsistent with the provisions of the Family Law Act 1975, a Commonwealth law. A state legislature would have to exercise great care in considering a state law that deals with the same subject matter as a Commonwealth law as section 109 of the Commonwealth of Australia Constitution Act provides that a state law that is inconsistent with a Commonwealth law invalid to the extent of the inconsistency.

In imposing any conditions, including an ouster condition, on a domestic violence order, the court is required to consider whether the condition is necessary in the circumstances and desirable in the interests of the aggrieved, any named person or the respondent and that the safety, protection and wellbeing of people who fear or experience domestic violence are paramount (clause 57). An ouster condition will not always be an option that is desirable in the interests of the aggrieved and any children who reside with the aggrieved. It may be that it is unsafe for the aggrieved and children for the respondent to know of their whereabouts. Alternatively, it may be that the aggrieved and any children do not have the financial resources to allow them to continue residing in their usual home.

The aggrieved is in the best position to ascertain whether or not she or he can continue to make rent or mortgage payments if the ongoing financial support from the respondent is withdrawn. In many situations, a respondent may also be contractually obliged by a lease or loan agreement to continue to make the rent or mortgage payments, even though he or she may no longer reside in the subject premises. The respondent's interest in maintaining the value of assets that are solely owned by the respondent or jointly owned by the parties is also likely to serve as a deterrent to the respondent failing to maintain the property.

An ouster condition can also be removed at any time during the life of a temporary protection order or protection order, on an application for variation of the order by the applicant, aggrieved, or respondent. This may occur when an aggrieved decides that she or he cannot continue to make rent or mortgage payments on the subject property or where a subsequent family law order imposes conditions which are not consistent with the ouster condition.

The committee considered all of the views presented in respect of this issue and concluded that the Minister's explanation was satisfactory.

2.1.9 Resourcing Queensland Police training for the implementation of the legislation

The committee sought information from the Minister about the proposed resourcing arrangements to support the implementation of the legislation. The committee notes the response to this question from the Minister indicated that:[36]

1. Funding has been allocated by QPS from within an existing allocation in anticipation of the legislation being passed.
2. The new legislation does not necessarily require a lot of additional resources, as it is primarily about improved ways of doing things within QPS.

[36] K Struthers, Minister for Community Services and Housing and Minister for Women, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011, pp. 3, 4.

The committee also noted the correspondence from the Police Commissioner in response to this question which indicates that:[37]

> *A substantial amount of research and planning has been undertaken in relation to expected costs that the Service will incur during the implementation phase. The amount of $300,000 has been identified as an approximate figure, consisting of $150,000 for both QPRIME and training development and implementation.*
>
> *I am advised that a submission for this amount has been prepared by the Domestic and Family Violence Unit for consideration by the QPS Finance Committee.*

The committee notes the proposed budget allocation by QPS for police training to support the implementation of the new legislation and wishes to express its strong support for the QPS Domestic and Family Violence Unit submission for an allocation of $300,000.

Recommendation 5

The committee unanimously recommends that the passage of the bill is supported by a Queensland Police Service allocation to assist the Domestic and Family Violence Unit implement the new legislation.

2.1.10 Resourcing for Intervention Programs

The committee raised concerns with the Minister about the adequacy of resources available for intervention programs available under Division 6 of the bill. The Minister acknowledged the importance of adequately resourcing Division 6 intervention programs so that they are available statewide to support the court's access to the option of Intervention Orders. The Minister indicated that she shared the committee's concerns about this issue and also highlighted the following in relation to intervention services for respondents:[38]

1. There is currently activity at the national level to establish uniform national minimum standards for the conduct and content of programs. The Minister would prefer to await the finalisation of this work before further expanding these programs.
2. These programs need to be evaluated to determine whether they are sufficiently effective to justify ongoing investment.
3. There is currently no agreement on an 'objective' set of measures to guide courts in their assessment of the respondent's compliance with an Intervention Order.

The Minister in her written response to the committee has stated that:[39]

> *The National Council to Reduce Violence against Women and their Children in its report, Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021, discussed perpetrator programs and some of the existing limitations in their use. The report highlights the following:*

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[37] R Atkinson, Commissioner, Queensland Police Service, Correspondence, 21 October 2011, pp. 2-3.

[38] K Struthers, Minister for Community Services and Housing and Minister for Women, *Public Hearing Transcript*, Community Affairs Committee, Brisbane, 12 October 2011, p. 4; K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 11.

[39] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 11.

- *there is no nationally consistent approach to perpetrator programs*
- *programs vary in terms of content, duration, practices, philosophical and therapeutic frameworks and evaluation methods*
- *service deliverers and academics who contribute to program development and knowledge in this area are diverse and disconnected*

In particular, the National Council concluded that perpetrator programs must be more broadly evaluated to understand what works effectively, noting that:

- *few programs have been comprehensively evaluated over the long-term for their effectiveness in stopping men's violence; and*
- *the evidence that is available is contentious, as it tends to rely on criminal justice data rather than feedback from victims of violence, who may not report incidents to police.*

The report makes a number of recommendations in relation to perpetrator intervention programs including the need for a perpetrator research agenda, including longitudinal research that has a particular focus on: what changes problem behaviour; what maintains behaviour change; the utility of risk assessment tools; the effectiveness of various recidivism reduction strategies; and takes account of different offender characteristics and cultures.

… The National Plan includes a number of immediate national initiatives that relate to perpetrator interventions, including:

- *To conduct research into perpetrator interventions, and use this to develop best practice guidelines and national standards.*
- *The Commonwealth to provide funding to expand the number and standard of perpetrator interventions through a once-off reward payment to the states and territories at the end of the first three-year action plan. Funding will support greater integration between police, the courts, corrections and family violence and community services.*
- *Commonwealth to provide funding to increase evaluation of interventions to both build the evidence base and support development of national standards.*

In addition to the above initiatives the Minister has indicated that in Queensland there are currently a number of criminal law options available to require offenders to participate in intervention programs. These options include:[40]

- Intervention Programs as a condition of a bail undertaking – Bail Act 1980.
- The Breaking the Cycle of Domestic and Family Violence in Rockhampton trial, which also uses bail conditions.
- Intervention program as a condition on a probation Order – Penalties and Sentences Act 1992, which is the basis of the program at the Gold Coast.

[40] K Struthers, Minister for Community Services and Housing and Minister for Women, Correspondence, 20 October 2011, p. 12.

Recommendation 6

The committee unanimously recommends that:

i. The Minister continues to monitor and report on the developments and evaluation outcomes for domestic violence intervention programs to guide decision making about the future resourcing of programs provided under Division 6 ; and

ii. In the interim, the Minister ensure that domestic violence intervention programs under Division 6 of the bill are supported by adequate resourcing.

2.1.11 Specialist Family Violence Courts

There is currently one specialist domestic violence court pilot site in Queensland (in Rockhampton), which is funded by the Department of Communities. There is also an interagency strategy at the Gold Coast. New South Wales, Western Australia, Australian Capital Territory, South Australia, and Victoria now all have family violence courts.

The committee requested a copy of the evaluation report on the pilot project in Rockhampton. In her reply to this request, the Director General of the Department of Communities stated:[41]

> *I refer to your request… for a copy of an evaluation report for the Breaking the Cycle of Domestic and Family Violence in Rockhampton trial. On this occasion, I raise an objection to providing this document to the committee on the following grounds:*
>
> - *All evaluation materials relating to the Breaking the Cycle of Domestic and Family Violence in Rockhampton trial are a work in progress and, at this time, there is no final-endorsed evaluation report for the trial.*
> - *The trial is about testing a model in which the different agencies and parts of the service system involved in responding to domestic violence work together to provide an integrated service response with the aim of improving the safety and wellbeing of people affected by domestic and family violence by intervening as early as possible. The trial is not directly relevant to the policy objectives or detailed provisions of the Domestic and Family Violence Protection Bill 2011.*
>
> *I am pleased to provide you with the following general information about the Breaking the Cycle of Domestic and Family Violence in Rockhampton trial.*
>
> *The Breaking the Cycle of Domestic and Family Violence in Rockhampton initiative aims to ensure more timely and cohesive services are available for people affected by domestic and family violence in Rockhampton. It will improve the integration of human and justice service systems through better information-sharing and coordinated service delivery. This initiative includes funding for a range of services including court support, safety upgrades, brokerage support, and case management. Access to services will be coordinated through a Case Coordination Team.*
>
> *In 2010-11, 624 referrals (an increase of 181 from last year) have been received by the Breaking the Cycle team. The attached brochure has been prepared to facilitate referrals to the service. Of these, 198 people have become clients, 306 have declined to receive a service and 117 referrals were being actively followed up (as at 30 June 2011) to engage them with the services available.*

[41] L Apelt, Director-General, Department of Communities, Correspondence, 20 October 2011, p. 1.

Client support: Service providers report that clients have indicated to their service professional that they have had positive support experiences and have significantly benefited from the supports personally, emotionally, mentally and legally.

Statutory intervention: Preliminary data suggests that clients receiving support from the Breaking the Cycle Team or intensive case management services have fewer Child Safety child concern reports, notifications, and investigations and assessments. There have been early signs that Indigenous repeat offences and jail sentences may be reducing. There have been indications that numbers of adjournments and breach charges are decreasing, and court matters are being resolved more quickly.

Client access: Preliminary data suggests that clients have been more likely than before to attend their court hearing. And that increased funding to existing services has eliminated waiting lists and allowed a greater range of comprehensive service options to be provided to a greater number of clients, and to a wider range of clients including perpetrators and victims.

Strengths and critical enablers:

- *A shared recognition that domestic and family violence is an important issue that needs immediate collaborative attention by multiple agencies.*
- *Key leaders and champions at state, regional and service delivery points have taken a role in overseeing and driving the initiative, and maintaining and building a consistent vision and commitment.*
- *Formal overarching protocols, agreements, and structures which have been collaboratively developed across agencies.*
- *Queensland Police Service is a strong and consistent referring body to the initiative.*
- *Stakeholders coming to the cross-agency table are willing to compromise, learn, negotiate, and contribute to the initiative.*
- *Common supportive views amongst participating agencies and service providers on the benefits of an integrated service delivery approach, and a shared acknowledgment on the value of such processes as client information sharing, collaborative cross-agency decision making and planning, and building inter-agency relationships have developed.*

The committee thanks the Department of Communities for the information it has provided in response to its request for a copy of the evaluation report of the trial *Breaking the Cycle of Domestic and Family Violence* in Rockhampton. The committee notes the preliminary positive results provided by the department and the unavailability of the report at this time. The committee has considered the view that the findings contained in this report are not 'directly relevant to the policy objectives or detailed provisions of the Domestic and Family Violence Protection Bill 2011'. On this occasion, the committee does not share this view. The committee remains interested in the results of this trial and will follow up with a further request to the Department of Communities for a copy of the evaluation to be provided to the committee when it is available.

3 Fundamental legislative principles

3.1 Rights and liberties of individuals

Does the bill have sufficient regard to the rights and liberties of individuals?

3.1.1 Ouster condition

Clause 63 of the bill allows a court that finds a domestic violence (DV) respondent has committed DV against an aggrieved applicant to impose an ouster condition on that respondent that prevents the respondent from remaining at premises, entering or attempting to enter premises, or approaching within a stated distance of premises (cl. 63(1)) and can apply to premises in which the respondent lives or has lived together with the aggrieved, premises in which the respondent has a legal or equitable interest, and premises where the aggrieved or a named person lives, works or frequents (cl. 63(2)). Such conditions are permitted under s. 25 and 25A of the current *Domestic and Family Violence Protection Act 1989*.

Clause 64(2) outlines matters to be considered by a court when deciding whether to make an ouster condition, including the needs of the aggrieved and any child living with the aggrieved (cl. 64(2)(a)-(f)) and the accommodation needs of the respondent (cl. 64(2)(g)). In addition to those matters, the overriding consideration for the court is the principle in ss. 57(2) that the safety, protection, and wellbeing of people who fear or experience domestic violence, including children, is of paramount importance. Clause 64(3) requires a court to give reasons for imposing or not imposing an ouster condition when one is sought.

The bill will allow an ouster condition to be imposed (without prior notice to the respondent) in respect of an urgent temporary protection order (cl. 47), however the ouster condition only becomes enforceable after the respondent is served. The respondent will have the opportunity to present submissions to the court about the application for an ouster condition at the next court return date.

3.1.2 Prohibition on weapons

Clause 83 declares categories of people who would otherwise be exempt from holding a weapons license because of their employment as not being entitled to that exemption if they are named as a respondent to a domestic violence order (DVO). Clause 83 largely adopts s. 23 of the *Domestic and Family Violence Protection Act 1989*. This provision can operate to the detriment of a person's employment. The example given in the explanatory notes for this bill,[42] notes that a police officer employed by the Queensland Police Service who is a respondent to a DVO would be restricted to duties which do not involve the possession or use of a weapon for the period of time that the DVO is in force. This provision operates automatically, with no discretion for a magistrate to overrule it. As stated in the explanatory notes for the bill, the provision is considered necessary given the safety risk for an aggrieved and any children of the aggrieved if a respondent is allowed to have access to weapons while a DVO is in force.

3.1.3 Ex parte proceedings

Clause 47 will permit a temporary protection order to be made by a court against a DV respondent even where the respondent has not been served with a copy of the application for a protection order and is not present in court to respond to the application. The court may make a temporary protection order if it is satisfied that it is necessary or desirable to protect a person named in the application for a protection order, from domestic violence. This retention of a court's ability to make a temporary protection order without proof of service derives from s. 39D of the *Domestic and*

[42] Explanatory Notes, Domestic and Family Violence Protection Bill 2011 (Qld), p. 22.

Family Violence Protection Act 1989, which allows a court to make an order where it appears that a person named in an application is in danger of personal injury or where property of an aggrieved/named person is in danger of substantial damage.

Clause 47 requires a court to consider whether the making of the temporary protection order, despite the respondent having not been served, is necessary or desirable to protect a person named in the application, from domestic violence. As discussed in the explanatory notes, if there are concerns about how a respondent will react to receiving an application for a protection order, and they are served with a temporary protection order at the same time as they are given notice of the application for a protection order, they become aware that the aggrieved applicant is protected by a court order from that point in time. As noted above, a **cl. 63** ouster condition may also be imposed on a cl. 47 temporary protection order (without prior notice to the respondent) although the order (and ouster condition) will only become enforceable after service.

Although cl. 47 temporary protection orders will generally be made without the court having heard from the respondent or a person acting on their behalf, the respondent will have an opportunity to respond to the application and the making of the temporary order, at the next court return date after he or she is served. Further, the respondent cannot be punished for breaching conditions of the order until they have been served with the order, or advised by police of the conditions of the order (cl. 177(1)). The nature of temporary protection orders is that they are made in situations where there is urgency or concern about the respondent committing domestic violence during the time that would normally elapse between service and hearing of a DVO application.

Clause 39 largely adopts s. 49 of the *Domestic and Family Violence Protection Act 1989* and outlines options for a court where a respondent served with an application for a protection order does not appear in court to respond to the application. One option is for the court to hear and decide the application in the absence of the respondent (*ex parte)* and to make a protection order where it is satisfied that the grounds for making the order are sufficiently addressed in the application.

The bill's protections relevant to a cl. 39 *ex parte* proceeding are that the application must be personally served on the respondent (cl. 34); it must advise the consequences of non-appearance, including the possibility of an order being made in the respondent's absence; it must state the grounds of the application (cl. 32); and notify the date, time and place for hearing of the application (cl. 33). A further safeguard is that a respondent can appeal the making of a protection order under part 5, division 5 of the bill.

3.1.4 Limiting contact with child(ren) of a respondent

Clause 58(f) allows a court to impose a condition on a respondent that prohibits stated behaviour of the respondent towards a child of the aggrieved, or a child who usually lives with the aggrieved, including prohibiting the respondent's presence at or in a place associated with the child. If the child is the child of the aggrieved and the respondent, such a condition will limit the respondent's access to their own child, and is usually done to reduce the risk that the child might be exposed to domestic violence.

Whilst this obviously impacts on the rights of a respondent parent by limiting their access to their child, this may be authorised under cl. 62(2) of the bill which allows a court to impose a condition of a respondent that would prevent or limit contact between the respondent and a child of the respondent if the condition limits that contact only to the extent that is necessary for the child's safety, protection or wellbeing.

3.2 Administrative power

Are rights, obligations, and liberties of individuals dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?

3.2.1 Police Protection Notices (PPN)

Clause 101 allows a police officer to issue a police protection notice (PPN) against a person (the respondent) if the officer is at the same location as the respondent, reasonably believes the respondent has committed domestic violence, reasonably believes that no other DVO or PPN has been issued in respect of the respondent and the aggrieved, reasonably believes a PPN is required to protect the aggrieved from domestic violence and reasonably believes the respondent should not be taken into custody. Approval of a supervising police officer is required under cl. 102 for the PPN to be issued.

The PPN will include the conditions that the respondent be of good behaviour towards the aggrieved and not commit domestic violence, and may, at the issuing police officer's discretion, include a condition requiring the respondent to remain away from stated premises for up to 24 hours. Breach of a PPN is an offence under cl. 178, carrying a maximum penalty of 60 penalty units or 2 years imprisonment.

The explanatory notes (at p.11) advise that the reason for allowing PPNs is:

> *'to address a gap in the current range of responses available to police officers when they attend a domestic violence incident. A police officer's ability to ensure protection for an aggrieved is in place in a timely way can be limited by the availability of a court to hear an application for a domestic violence order. Many domestic violence incidents occur outside of the local court's business hours and, in some rural and regional areas, the local court may not sit frequently.'*

Under the existing *Domestic and Family Violence Protection Act 1989*, where there is a degree of urgency or a danger that the respondent will injure someone or damage their property, police can make direct application to a magistrate outside of business hours for an urgent temporary protection order, or can detain a respondent for up to four hours and then release them on conditions similar to those for a DVO.

Absent that degree of urgency or apprehended immediacy of danger, the police may only make an application on behalf of the aggrieved and wait for the application to come before the court. The aggrieved is not protected during the period until the court hears the application, which can be a delay of several days or longer in remote areas. A PPN is an immediate response from police attending the incident. The notice contains the same standard conditions as a court issued DVO and provides the option of a 24 hour 'cool-down' condition, which requires the respondent to stay away from stated premises and not contact the aggrieved. The PPN thus offers some degree of immediate protection for an aggrieved, and avoids difficulties of later locating and serving a respondent.

Safeguards on the exercise of this significant administrative power by police include:

- Requiring the issuing officer be satisfied it is 'necessary or desirable to issue the PPN to protect the aggrieved' (cl. 101(d));
- Requiring the issuing officer obtain the approval of a supervising officer to issue the PPN (cl. 102);
- Where a cool-down condition will remove the respondent from premises, the issuing officer must consider the respondent's accommodation needs (cl. 108);
- The issuing officer must explain the PPN to the respondent and the aggrieved and take reasonable steps to ensure that they understand the PPN and its consequences (cl. 110);
- The issuing officer must personally serve the notice on the respondent (cl. 109);

- The PPN is taken to be an application for a protection order to trigger future judicial scrutiny (cl. 112);
- An existing DVO, of which the officer is unaware, will take precedence over the PPN to the extent of any inconsistency between the PPN and DVO (cl. 114);
- A court must consider a PPN within 28 days of its issue (cl. 105). Where the local court sits at least weekly, the PPN must be considered within 5 business days of being issued (cl. 105(2)(i));
- A court, in hearing an offence for the contravention of the notice, must consider if the notice was properly issued at first instance (cl. 178(3));
- A PPN will only contain one standard condition, being that the respondent be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved (cl. 106). The optional 24 hour 'cool-down' condition is the only other condition that can be imposed.

3.2.2 Powers of detention

Currently, the *Domestic and Family Violence Protection Act 1989* allows a person to be detained until a DVO is made by a court or magistrate, or an application for an order is completed and served on that person. The Act also allows police to continue to detain a person until necessary arrangements for safeguarding an aggrieved are completed. In any of these scenarios, the detention period cannot exceed four hours.

The bill expands the current police powers of detention for DV incidents. **Clause 119** allows a person to be held in custody for up to 4 hours, including where a police officer reasonably believes a person's behaviour is so aggressive or threatening that it would present a continuing risk of injury to a person or of property damage (cl. 119(2)(c)). If the person is intoxicated to the extent that they cannot understand the nature and effect of a DVO, application, or release conditions, given to them under cl. 124, they can be held until they sober up, to a maximum of 8 hours detention (cl. 119(3)).

Clause 121 will also allow a police officer to apply to a magistrate for an extension of the initial 4 hour detention period for up to a further 4 hours in limited circumstances. The magistrate can extend detention under cl. 121 when he/she is satisfied that the nature and seriousness of the alleged domestic violence requires the extension, and when the extension is necessary to make arrangements for the safety of the aggrieved or a child, or to address police concerns about the respondent's aggressive behaviour.

Safeguards on the exercise of this administrative power of detention by police include:

- A police officer must reasonably suspect a person has committed DV and that there is a danger injury or property damage before taking the person into custody (cl. 116);
- A police officer must not question a detainee under these provisions about a criminal offence while they are in custody (cl. 120);
- If a court hears and dismisses an application for a DVO or decides not to make an order the detainee must be released (cl. 119(1)(a)(ii) and (iii));
- An application for extension of the detention period must be made to a magistrate before the initial 4 hour detention period expires (cl. 121);
- The person detained, or the person's lawyer, must be advised of an application for an extension (cl. 121(4)) and given an opportunity to present submissions to the magistrate, provided this would not unduly delay the application (cl. 121(10));
- A magistrate can only extend the detention where the nature and severity of the DV incident warrants the extension (cl. 122(1)(a));
- Additional safeguards apply where a child is taken into custody (cl. 126); and
- Amendments to the Police Powers and Responsibilities Regulation 2000 will clarify that detaining a person under this new legislation is an enforcement act and must be recorded in the register of enforcement acts. This will then activate safeguards within the Police Powers

and Responsibilities Act 2000, including provisions enabling people to access information from the register (see explanatory notes, p.15).

3.2.3 Release Conditions

Clause 125 allows a police officer to release a person from custody on conditions that the releasing police officer considers appropriate when the person is being released because it has not been possible to bring them before a court within the period of detention. Contravention of such release conditions attracts a maximum penalty of 60 penalty units or 2 years imprisonment (cl. 179). Currently, under the *Domestic and Family Violence Protection Act 1989* a person can also be released on conditions of a similar nature and effect as conditions on a DVO (including 'no contact' conditions) and the conditions can name a child, relative or associate of an aggrieved as a 'named person' whom the conditions of the order will also apply in respect of.

The key reforms of this bill over the current provisions are:

- Where a court makes a DVO against a respondent who is already subject to release conditions, those release conditions continue in force until they are served with the DVO. If the court does not make a DVO, the conditions cease to have effect (cl. 125(5)).
- If a 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 it is made (cl. 125(6)).
- The maximum penalty for breach of release conditions has doubled from one to two years imprisonment.

3.2.4 Direction to remain at a place

Clause 134 allows a police officer to direct a respondent to remain in a particular place to enable service of an application for a protection order, a DVO or a PPN. They can direct the person stay for one hour, or longer time as is reasonably necessary, with there also being a requirement that the PPN, DVO or application is served without unreasonable delay. This provision aims to facilitate service and thwart any deliberate attempts by a respondent to avoid service. It will also allow service in instances where officers inadvertently locate a respondent in the course of their other work (such as random breath testing or other roadside stop) and do not have a copy of the relevant order or notice with them. In such cases, they can arrange for the respondent to be told about the existence of the order and the conditions imposed by it.

An order will be enforceable (under cl. 177(1)(c) and cl. 177(4)) if a magistrate is satisfied the respondent was told by police about the existence of the order and its relevant conditions. An officer issuing a 'stay' direction must advise the person that failure to comply with the direction without reasonable excuse is an offence (maximum penalty is 40 penalty units - cl. 134(8)).

3.3 Natural justice

Is the bill consistent with principles of natural justice?

3.3.1 Closed courts

Typically, it is considered desirable that court proceedings be open to the public to facilitate openness and accountability in the administration of justice. The nature of the matter being dealt with by a court does, however, allow for some discretion in the application of this principle. For example, s. 99J of the Child Protection Act 1999 and s. 20 of the Childrens Court Act 1992 enable a court to be closed for proceedings involving children.

Clause 158 of this bill requires domestic violence proceedings to be conducted in a closed court, reflecting the current position under s. 81 of the *Domestic and Family Violence Protection Act 1989*. The court does, however, retain its discretion to open the proceedings or part of the proceedings to

the public or a specific person. The provision also allows (as is presently the case) an aggrieved to have a support person present in court.

However, where a person is convicted of an offence involving domestic violence, cl. 42 allows the court to make or vary a protection order. Those connected proceedings must be held in open court, subject to the court's discretion under s. 70 of the Justices Act 1886 to exclude a person from criminal proceedings. The explanatory notes advise that 'given the highly sensitive nature of domestic and family violence, and the fact that children are often involved in proceedings, allowing for courts to be closed is considered to be justified in the circumstances.'

Complementing the closed court requirement of cl. 158, cl. 159 of the bill prevents publication (to the public) of either information given in evidence in proceedings under the bill, or information that is likely to identify, or lead to the identification, of a party, witness or child concerned with such proceedings. The maximum penalty for an individual prosecuted for publishing such information is 100 penalty units or 2 years imprisonment and for a corporation is 1,000 penalty units. Publish is defined in terms of publishing 'to the public' (cl. 159(3)). According to the explanatory notes for this bill.[43]

> *The proposed definition of publish will not include a person who is required to copy or forward documents to another person where this is undertaken in the course of representing or assisting a person who is involved in proceedings.*

Such exemption does not occur in the present exemptions to this section set out at cl. 159(2)(a)-(f). However, it could be brought under cl. 159(2)(g) which exempts (from the offence provision) publication permitted under a regulation. The exemptions in cl. 159(2), include

- Instances where the court orders publication;
- Notices displayed in court;
- Publication of genuine research or in a recognised series of law reports;
- Where identification is not possible from the publication; or
- Where individuals to whom the information relates have consented to the publication.

Although provisions such as clauses 158 and 159, appear to conflict with the principle that courts be opened to the public, the personal and private nature of domestic violence matters and the need to protect children involved in such matters appear to justify the closure of the court in certain circumstances, as well as the ban on identifying publications.

3.3.2 Ex parte applications and orders

As noted above under 'rights and liberties', this bill allows for ex parte applications and ex parte orders to be made in a number of circumstances (for examples, see clauses 23(4), 27, 34, 36, 39(2)), 42(7), 43(8), 47(2)]. The nature of ex parte proceedings means that the court may hear some applications and make some orders (for example, temporary protection orders) without the respondent having first been served a copy of the application and given a chance to respond to the allegations/claims made in it. The policy reasons behind this are explored further above as indicated, and in the explanatory notes. However, ex parte proceedings by their very nature do infringe on the principle of natural justice that a person has a right to be heard in respect of matters pertaining to them.

[43] Explanatory Notes, Domestic and Family Violence Protection Bill 2011 (Qld), p. 20.

3.4 Onus of proof

Does the bill reverse the onus of proof in criminal proceeding without adequate justification?

Clause 8 of this bill defines the meaning of domestic violence. Clause 8(4) states that:

> *To remove any doubt, it is declared that, for behaviour mentioned in subsection (2) that may constitute a criminal offence, a court may make an order under this Act on the basis that the behaviour is domestic violence even if the behaviour is not proved beyond a reasonable doubt.*

The subsection 8(2) as referred to in cl. 8(4) gives a list of types of conduct/behaviour that constitutes domestic violence. Whilst such behaviour may and often would constitute a criminal offence (in breach of the *Criminal Code*), to meet the criminal standard/burden of proof the behaviour would need to be proven to have been committed by an accused beyond a reasonable doubt. For the purposes of this bill, such behaviour need not meet the criminal burden of proof before a DVO can be made in respect of it. Clause 145(2) specifically states that if the court is to be satisfied of a matter, the court need only be satisfied of the matter on the balance of probabilities. This lesser, civil standard of proof reflects the quasi-criminal/administrative nature of orders of this type and enables action to be taken to help prevent future occurrences of domestic violence, even where the evidence supporting the original allegation may be insufficient to meet a criminal burden of proof. This will enable more DVO orders to be made and will enable orders to be made in circumstances where, but for such a provision, an order might not have been able to be made because a burden of proof had not been met.

Needing only to meet a lower standard of proof than the criminal standard will facilitate the making of DVOs to protect victimised persons. What must be considered and weighed by the Committee in deciding whether that standard of proof is sufficient, however, is the significant maximum penalty set for breaching a DVO (being an order made on evidence that was not required to be proven beyond a reasonable doubt). The maximum penalty set by cl. 177(2) for contravening a DVO is 60 penalty units ($6,000) or 2 years imprisonment. Where an offender has been previously convicted for contravening a DVO, PPN or release conditions within the 5 years before the current conviction for contravening a DVO, the maximum penalty increases to 120 penalty units ($12,000) or 3 years imprisonment.

Clause 51(1) also arguably serves to reverse the onus in respect of DV proceedings because it allows a DV order to be made or varied (by a court) where parties to the order either consent to the making of the order/variation, or where they *do not oppose* the making of the order. This in effect puts an onus on a respondent to take positive steps to oppose/challenge the making of the order, rather than on police or the aggrieved to establish that the order is necessary.

3.5 Immunity from proceedings

Does the bill confer immunity from proceeding or prosecution without adequate justification?

Clause 180 provides that an aggrieved or another person named in a domestic violence order does not, under s. 7 of the *Criminal Code*, aid, abet, counsel or procure the commission of an offence of contravening a DVO, PPN or release conditions because the person encourages or allows conduct by the respondent that contravenes the order, notice, or conditions. Section 7 of the *Criminal Code* enables persons who aid, counsel or procure another person to commit an offence to be charged with the commission of the offence. The effect of clause 180 is to provide immunity from prosecution for an aggrieved who could be considered to have consented to the respondent breaching an order, notice or release conditions. An example is when an aggrieved to a DVO invites a respondent to premises despite knowing the order prohibits the respondent from having contact with the aggrieved.

As noted in the explanatory notes for this bill, the Australian Law Reform Commission's (ALRC) 2010 report, *Family Violence – A National Legal Response*, notes that charging an aggrieved in this situation is contrary to the policy behind protection orders, which are intended to be enforced against the person who uses the violence and not the victim. Further, the threat or potential of a criminal charge may deter a victim from reporting breach of an order. Consequently, the ALRC recommended that a person protected by a protection order should not be charged with, or found guilty of, an offence of aiding, abetting, counselling, or procuring a breach of that protection order.

Under cl. 180, therefore, a respondent can be prosecuted for breaching a DVO/PPN/release conditions by approaching an aggrieved, in circumstances where the aggrieved would, but for the operation of this clause, otherwise be liable for aiding etc the commission of that offence. The explanatory notes for the bill advise that this reflects the current practice of police in dealing with these situations. Police officers have discretion in deciding whether to charge and prosecute a respondent and, where a person is charged and prosecuted for a breach, the complicity of the aggrieved in that breach can be used to mitigate the sentence. There are obligations under the bill on courts and police officers to explain to respondents the consequences of breaching orders. Ultimately, the onus is on the respondent to comply with the conditions of an order they are subject to, even where contact may have been invited by an aggrieved.

Clause 190 affords a police officer immunity from civil liability for an act done, or omission made, honestly and without negligence under this Act. This provision acknowledges that police officers responding to domestic violence incidents often have to make quick decisions under volatile circumstances and that an officer should be free to act appropriately, in accordance with the Act, even where that might encroach on a person's civil liberties, without being concerned about the possibility of litigation.

The term 'member of the Queensland police service' includes civilian members of the police service who are required to undertake actions in support of operational police. Clause 190 does not provide total immunity and an officer may still incur civil liability if his or her actions are negligent or in bad faith. Where cl. 190(1) prevents a civil liability attaching to a QPS officer, the liability instead attaches to the State under cl. 190(2).

3.6 Aboriginal tradition and Island custom

Does the bill have sufficient regard to Aboriginal tradition and Island custom?

The bill has regard to Aboriginal tradition and Island custom in respect of the definition of 'parent' in cl. 16 and the definition of 'family relationship and relative' in clause 19.

Clause 16 specifically includes within the definition of parent in respect of Aboriginal and Torres Strait Islander children, persons who, under the respective tradition/custom, are regarded as a parent of that particular child. **Clause 19(4)** acknowledges that Aboriginal people and Torres Strait Islanders may (along with people of some non-English speaking communities or people of particular religious beliefs) have a wider concept of a 'relative' than is ordinarily understood by the term.

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Appendices

Appendix A – List of Submissions

Sub #	Submitter
1	Mr Ken Hendrie
2	Queensland Law Society

Appendix B – Summary of Submissions

Queensland Law Society

Queensland Law Society made a submission to the Minister on the Draft Exposure bill and also made submissions on the Review of the *Domestic and Family Violence Protection Act 1989*. The key matters raised in its submission were:

- The need to include persons who have previously suffered physical, emotional or domestic abuse or violence within the classes of recognised vulnerable persons (clause 4 (2) (c)).
- The merit of creating a duty to identify the person most in need of protection in situations where there are conflicting accounts or indications that both parties are committing DV (clause 4 (2) (d)).
- The need for greater clarity regarding the application of DVOs for children in informal care relationships (clause 22).
- Suggestion that clauses 53 and 54 be amended to make provision for the confidentiality of child information recorded on a DVO.
- The need to clarify the scope of the definition of 'the aggrieved' (clause 164), particularly in the context of child protection proceedings.
- To dispense with the default requirements for service of documents where the respondent is a child (clause 188).
- Concern about the competing interests of a child for safety and any condition imposed on a respondent limiting contact with the child. There was support for the constraints to the court's duty to limit contact between respondents and children outlined in clause 62 (2).

Mr Ken Hendrie

- Mr Hendrie expressed concern that clause 73 does not impose any penalty on the respondent for breach of an Intervention Order. Suggested that this contradicts one of the main objects of bill: people who commit domestic violence are held accountable for their actions. Noted that in Division 6, Intervention Orders can only be made with the consent of the respondent and that failure to consent, or not fulfilling a commitment, should be accompanied by consequences.
- On the issue of police protection orders (clause 101), he questioned the requirement to obtain approval from a supervising officer (clause 102) as a balance against the serious penalty associated with a breach of such an order. He noted that the limits attached to the orders (clauses 105 (2) and 106) mean that the requirement to obtain the approval of a supervising officer not involved in the investigation is onerous and obstructive to one of the main objects of the bill (clause 1 (a) …to maximise safety and protection). He suggested an alternative approach whereby notices issued under clause 102(2) should be approved by an officer of the rank of sergeant or above. This small amendment would shift the onus of proof for delegations of authority under 4.10 of the PSA Act.
- He asked that the committee consider an amendment to clause 119, which currently limits the detention period to 4 hours from when they are first taken into custody, to incorporate an exemption for time spent travelling to the watch house. He highlights the importance of the need for greater time to prepare applications when transporting respondents to isolated police stations.

Appendix C – Witnesses at public hearing – 12 October 2011

Witnesses are listed in order of appearance at the public hearing

Witnesses
Hon Karen Struthers, Minister for Community Services and Housing and Minister for Women
Ms Di Raeburn, Manager, Domestic Violence Legislation Review, Department of Communities
Ms Deborah Awyzio, Council Member, Queensland Law Society
Mr Matt Dunn, Principal Policy Solicitor, Queensland Law Society
Ms Raylene D'Cruz, Policy Solicitor, Queensland Law Society
Mr Ken Hendrie