

1998

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**DOMESTIC VIOLENCE (AMENDMENT) BILL 1998
MAGISTRATES COURT (AMENDMENT) BILL (No. 2) 1998
BAIL (AMENDMENT) BILL 1998**

EXPLANATORY MEMORANDUM

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**DOMESTIC VIOLENCE (AMENDMENT) BILL 1998
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Explanatory Memorandum

Outline

The *Domestic Violence Act 1986* (the Principal Act) provides for a civil system of enforcement procedures for the protection of victims of domestic violence.

The Domestic Violence (Amendment) Bill 1998 (the Bill) amends the Principal Act to give effect to a number of recommendations of Report No 11 of the ACT Community Law Reform Committee (CLRC). These amendments enhance the protective nature of the Act, particularly in a situation where there is an ongoing risk to a victim of domestic violence Key amendments included in the Bill.

- insert a definition of 'domestic violence' to enable an applicant to rely on a broader range of conduct as the basis for obtaining a protection order and provide a single ground for obtaining a protection order;
- provide greater flexibility in the time frames permitted for listing applications for hearing,
- enable the Court to impose such conditions on the respondent as it considers necessary or desirable in the circumstances,
- provide that an order made under the wrong Act is valid where it could have been made under the correct Act;

- enable the Community Advocate to apply for an order on behalf of certain persons under a disability,
- provide that the Registrar or Deputy Registrar may make consent orders and uncontested variations or revocation orders in particular circumstances,
- enable a variation of a protection order or an interim protection order in circumstances where the respondent has not been served by either the applicant or the respondent,
- authorise the Chief Magistrate to give such directions to the Registrar as the Chief Magistrate considers appropriate for the purposes of defining and limiting matters in dispute and to ensure that the parties are taking all necessary measures to enable proceedings to proceed as quickly and efficiently as possible,
- authorise a Deputy Registrar to make any orders with the consent of parties detailing the scheduling and preparation of a matter for hearing, including orders relating to admissions, undertakings, interlocutory matters and adjournments;
- clarify the scope of restrictions on publication and printing of proceedings under the Act,
- insert references, in the Act, to the relevant procedural provisions in the *Magistrates Court (Civil Jurisdiction) Act 1982* which apply under the domestic violence legislation, and

- enable the Court to order a party to compensate another party, if satisfied that, the conduct of that party has been frivolous, vexatious or has not been in good faith

The Magistrates Court (Amendment) Bill (No.2) 1998 (the Magistrates Court Bill) amends the *Magistrates Court Act 1930* and the *Bail (Amendment) Bill 1998* amends the *Bail Act 1992* consistent with the amendments made to the Principal Act and to reflect the recommendations of the ACT Community Law Reform Committee.

Financial Impact

There are no financial implications

DOMESTIC VIOLENCE (AMENDMENT) BILL 1998

Notes on clauses

FORMAL PROVISIONS

Clauses 1, 2 and 3 are formal provisions setting out the short title of the Bill, commencement arrangements and providing that a reference to the "Principal Act" in the Bill, is a reference to the *Domestic Violence Act 1986*

INTERPRETATION

Clause 4 amends section 3 of the Act - an interpretation provision.

Paragraph 4(a) omits the definition of 'household member as the persons to whom this definition applied are now included in the definition of 'relevant person' inserted by **paragraph 4(d)**.

Paragraph 4(b) replaces the current definition of 'domestic violence offence' to reflect the revised meaning of this term pursuant to ***new paragraph 4A(1)(c)***.

Paragraph 4(c) revises the definition of 'protection order' consequential on the amendment of section 4

Paragraph 4(d) inserts a number of new definitions for the following terms which are introduced by the Bill - 'Community Advocate'; 'domestic violence', 'the *Magistrates Court (Civil Jurisdiction) Act 1982*' and 'relevant person'

The definition of 'relevant person' establishes the nature of the relationship which must exist between the respondent and an aggrieved person, for an order to be made for the protection of an aggrieved person, pursuant to the Act.

SUBSTITUTION

Clause 5 repeals sections 4, 5 and 6 of the Principal Act dealing with the making of orders, applications for orders and date for hearing and substitutes ***new sections 4, 5 and 6***.

Protection Orders

New subsection 4(1) enables the Court where it is satisfied, on the balance of probabilities, that a person has engaged in conduct that constitutes domestic violence, to make a protection order against the person in accordance with Part II of the Act, restraining the respondent from engaging in conduct that constitutes domestic violence

New paragraph 4A(1)(c) unlike the current corresponding provision of the Act does not required that a domestic violence offence cause physical or emotional harm to the relevant person, for the conduct to come within the definition of domestic violence

New subsection 4(2) provides that a protection order may contain one or more of the conditions set out in section 9.

New subsection 4(3) has the same effect as the repealed subsection 4(2) and provides that a person may rely on conduct committed either within and outside the Territory which would constitute domestic violence for the purposes of obtaining a protection order in the Territory

New subsection 4(4) confirms that the Court may make a variation order or a revocation order, where a protection or order has been made. This is one of a number of amendments to the Act to locate provisions dealing with variation and revocation of orders in the provisions dealing within the substantive provisions of the Act dealing with procedures for obtaining an order. Section 18, dealing with variation and revocation of orders is, consequently, repealed by clause 19.

Nature of domestic violence

New subsection 4A sets out what conduct constitutes domestic violence

New subsection 4A(2) provides that the reference in the **new subsection 4A(1)** to conduct that constitutes an offence includes conduct engaged in outside the Territory, that would constitute an offence if it were engaged in within the Territory. Together with **new subsection 4(3)**, this ensures that a protection order applies to any conduct engaged in by the respondent, whether in the Territory or outside the Territory, which would constitute domestic violence under the Act .

Applications for orders

New subsection 5(1) varies from repealed section 5, by enabling the Community Advocate to apply for a protection order on behalf of a child or an aggrieved person who is under a disability within the meaning of the *Magistrates Court (Civil Jurisdiction) Act 1982*

New subsection 5(2) provides that an application to vary or revoke a protection order may be made by a person who is a party in the proceedings in which an order was made or in proceedings in which the order was previously varied or by a person who the Court is satisfied would have been entitled to make an application if an earlier application had not been made against the respondent

New subsection 5(3) ensures that the Court does not proceed with an application made by the Community Advocate unless it is satisfied that the Community Advocate is an appropriate person to make the application in the circumstances

New subsection 5(4) provides that, an application for a protection order or for a variation or revocation of a protection order is, subject to Part II of the Act, to be made in accordance with the procedure set out in Part III of the *Magistrates Court (Civil Jurisdiction) Act 1982* (MC(CJ) Act)

New subsection 5(5) provides that the new section does not affect any right that a person would have, other than pursuant to this section to make an application on behalf of an aggrieved person or a relevant child. This enables a guardian appointed under the *Guardianship and Management of Property Act 1991* and any other person who in the Court's opinion is an appropriate person who can make an application in the circumstances, as an appropriate person who can make an application on behalf of an aggrieved person

Date for return of application before the Court

Subsection 6(1) provides that unless the **new subsection 6(2)** applies, an application for a protection order, a variation and a revocation order must be listed for hearing within 2 days of filing.

New subsection 6(2) provides greater flexibility than the present section 6 of the Act, by enabling the Registrar to fix a later date for hearing that is not more than 21 days after the date of filing where the application is not for an *ex parte* order, an applicant requests a later date and the Registrar is satisfied that the later date is appropriate to provide reasonable time for service of an application on a respondent. This reflects the fact that it can be clear at the time of making an application that it will not be possible to serve the respondent within 2 days. It avoids the need, in those circumstances for the applicant to return for a hearing, which will inevitably be adjourned.

PARTIES

Clause 6 amends section 7 of the Principal Act, which sets out the persons who are parties to proceedings, to the effect that where an applicant is a person who makes an application on behalf of an aggrieved person, the aggrieved person shall be a party to the proceedings.

REPRESENTATION OF CHILDREN

Clause 7 amends section 7A of the Act, dealing with the representation of children, so that the provisions of the section apply in respect of an application for the variation or revocation of a protection order, as well as to an application for a protection order.

COURT TO BE INFORMED OF RELEVANT CONTACT ORDERS

Clause 8 amends section 8A of the Principal Act, which requires that the Court be informed of relevant contact order made under the *Family Law Act 1975* (Cth), when an application is made for a protection order. The amendment applies this requirement where an application is made for a variation or revocation of a protection order.

INSERTION

Clause 9 inserts after section 8A of the Principal Act a new section 8B titled 'Evidence'.

New subsection 8B(1) provides that where the Court is satisfied that it is appropriate, in proceedings under the Act, it may permit evidence to be given orally or in writing otherwise than on oath and inform itself on any matter in any manner it thinks fit.

New subsection 8B(2) provides that this new section does not limit the application of the evidentiary procedure as set out in Part XV of the MC(CJ) Act.

RESTRICTIONS IN ORDER

Clause 10 amends section 9 of the Principal Act dealing with restrictions that can be imposed on a respondent by a protection order.

Paragraph 10(a) amends subsection 9(1) to enable the Court to impose such restraints or conditions on the respondent as the Court is satisfied are necessary or desirable in the circumstances. This broadens the scope of the conditions that may be imposed by the Court, beyond the examples in subsection 9(1) which, prior to this amendment, have been a finite list of the conditions which could be imposed.

Paragraph 10(b) amends paragraph 9(1)(h) by inserting a new paragraph 9(1)(ha) which prohibits a respondent from doing any of the things referred to in paragraphs (a) to (f), subparagraph (g) (l) and paragraph (h) in relation to a child of the aggrieved person. This replaces subsection 9(3) of the Principal Act which is omitted by **paragraph 10(c)**.

MATTERS TO BE TAKEN INTO ACCOUNT

Clause 11 amends section 10 of the Principal Act dealing with matters to be taken into account by the court in determining an application for a protection order. The amendments effected by **clause 11** are consequential upon the new definition 'domestic violence' resulting from **new section 4A**

CONSENT ORDERS

Clause 12 amends section 10A of the Principal Act relating to consent orders. The amendment is intended to reflect the fact that conduct other than criminal conduct can constitute domestic violence. The use of the word 'guilt', in the present provision, is suggestive of a focus on criminal conduct. Orders should be able to be made, with the consent of the parties, in the absence of any admissions or proof as to the conduct of the respondent

SUBSTITUTION

Clause 13 repeals section 11 of the Act relating enabling the Court to recommend a party participate in counselling and substitutes a **new section 11** titled 'Recommendations by the Court'.

New section 11 provides that where a Court hears an application to make or vary a protection order, the Court may recommend that the parties participate in counselling, training, rehabilitation or assessment of a kind the Court specifies.

SERVICE OF APPLICATION

Clause 14 amends section 12 of the Principal Act dealing with service of an application for an order on the relevant parties. The amendment applies the service requirements to applications for a variation or revocation of an order.

PROCEDURE IN ABSENCE OF RESPONDENT

Clause 15 amends section 13 of the Principal Act dealing with the procedure that applies when a respondent is absent from the proceedings. The amendment enables this provision to apply to proceedings for variation or revocation of an order, as well as proceedings for a protection order.

INTERIM ORDERS

Clause 16 amends section 14 of the Principal Act dealing with interim orders.

Paragraph 16(a) enables an interim order to be made where an application for a protection order or a variation of such an order has been made.

Paragraph 16(b) repeals subsection 14(2) of the Act. A *new subsection 14(2)* is substituted to enable an interim protection order to be made by oral evidence given on oath or, in certain circumstances, by affidavit evidence given by the applicant. The Court may make an interim protection order where the application is supported by affidavit evidence, where it is satisfied that it would be unreasonable in the circumstances to require the applicant to give oral evidence, for example, if the applicant were incapacitated or would suffer a hardship in attending Court to give oral evidence.

Paragraph 16(c) removes the words from subsection (2B) which have been picked up in the operation of the ***new subsection 14(4)***

Paragraph 16(d) inserts a new provision consistent with the provisions dealing with protection orders, to the effect that an interim order applies in respect of a respondent's conduct within and outside the Territory.

Paragraph 16(e) adds ***new subsection 14(4)*** to enable section 14 to apply to variation or revocation of an interim protection order.

EXPLAINING PROPOSED ORDERS

Clause 17 amends section 15 of the Principal Act dealing with the requirement for the Court to explain proposed orders. The amendments enable the provisions to apply whether the court is making a protection order or varying a protection order.

DURATION OF ORDER

Clause 18 amends section 17 of the Principal Act dealing with the duration of orders. **New subsections 17(3) and (4)** enable an interim order to be made for up to 21 days. However, the interim order can only exceed 10 days if the Court is satisfied that it is unlikely that a respondent can be served within the 10 day period.

REPEAL

Clause 19 repeals section 18 of the Principal Act dealing with variation and revocation of orders as these matters are now dealt with in the provisions dealing with protection orders.

INSERTION

Clause 20 inserts a number of new sections dealing with procedural issues and relocating the provision dealing with breach of an order

Practice Directions

New section 19A is intended to make clear, in the Act, that directions which may be given by the Court, pursuant to section 394 of the MC(CJ) Act, may include directions with respect to procedures to be followed to expedite proceedings under the Act. The provision makes particular reference to the use of conferences and other informal procedures, which can be important methods of ensuring that proceedings are not unduly protracted.

Limitation on Powers of Registrar

New section 19B provides that the Registrar shall exercise the powers under section 405 of the *Magistrates Court (Civil Jurisdiction) Act 1982*, which gives the Registrar power to make consent orders, only with the authorisation with the Chief Magistrate.

Application not invalid because made under the wrong Act

New subsection 19C(1) applies where; a person has applied in good faith for a protection order under Part II of the Act, the person was not entitled to apply for a protection order in respect of the alleged conduct of the respondent, but was entitled to apply for a restraining order under Part X of the *Magistrates Court Act 1930* and proceedings have commenced on the basis of the application.

New subsection 19C(2) sets out the Court's options where the proceedings have not concluded at the times it becomes apparent that the application has been made under the wrong Act

New subsection 19C(3) provides that where proceedings have been concluded before it becomes apparent that the application was sought under the wrong Act, any order purportedly made under the Act is valid as if the application and order had been made under the relevant provisions of the Magistrates Court Act.

New subsection 19C(4) provides that where the Court opts for proceedings to continue under the Act, the proceedings shall continue as if the applicant were a person entitled to apply for an order under the Act.

New subsection 19C(5) provides that where the Court opts to continue proceedings under Part X of the *Magistrates Court Act 1930*, the proceedings shall be continued as if the application had been made and proceedings commenced under that Act

The basis for **new section 19C** is that a person who could have obtained a protection order under the Act or a restraining order under the *Magistrates Court Act 1930*, should not be disadvantaged because the order is mistakenly made pursuant to the wrong Act

Offence

New section 19D relocates the provision creating the offence of breaching an order from 'Part IV - Miscellaneous' to 'Part II - Protection Orders' of the Act. It does not alter the substance of the provision

Recovery of certain expenses

New subsection 19E(1) provides that where the Court is satisfied that an application is frivolous, vexatious or has not been made in good faith and a person other than the applicant has reasonably incurred expenses in relation to the proceedings in respect of the application the Court may order the applicant to pay a specified amount, not exceeding the expenses incurred, to that person by way of recompense

New subsection 19E(2) provides that the amount specified in the order is a debt due to the person by the applicant

New subsection 19E(3) provides that this new section does not limit the power of the Court under the MC(CJ) Act to make an order for the payment of costs in proceedings under the Act. The effect of this amendment is to enable the Court to allow a respondent to recover costs and compensation

REPEAL

Clause 21 repeals section 27 as it is now replaced by ***new section 19E***

RESTRICTION ON PUBLICATION OF REPORTS AND PROCEEDINGS

Clause 22 amends section 30 of the Principal Act dealing with restrictions on publication or reports of proceedings. The current section 30 refers to restrictions on the printing or publishing of material

New subsection 30(1) refers to 'dissemination by any means' of material. This is intended to overcome any narrow interpretation of 'print' and 'publish', reflecting the wider range of modes of communication of information than printing or publishing. It is broadly consistent with provisions in the *Family Law Act 1975* (Cth) restricting the dissemination of identifying material.

SUBSTITUTION

Clause 23 repeals section 30A of the Act dealing with exemptions from the prohibition on publication. Presently section 30A enables dissemination of information by a party to proceedings to another person and to a court or tribunal under the *Family Law Act 1975* (Cth). A **new section 30A** is substituted.

The change effected by **new subsection 30A(2)** is to enable dissemination of, otherwise, protected information in the following additional circumstances:

- with the authorisation of the Court,
- where it is a transcript or court document for use in connection with court proceedings or determination of an application for legal aid,
- for the purpose of law reports,
- to a person in connection with the person's professional practice

New subsection 30A(3) provides the Court can only give permission to the dissemination of information where the Court is satisfied that it is in the public interest, it will promote compliance with the order or is necessary or desirable for the proper functioning of the Act.

New subsection 30A(4) provides that the word 'Court' in subsection (2) includes an officer of the Court acting in the proceedings. The effect of this amendment is to clarify the category of persons who may act on the Court's behalf.

SCHEDULE 1A

Clause 24 amends Schedule 1A of the Principal Act which lists the offences in the *Crimes Act 1900*, which when committed by a person in relation to a 'relevant person' within the meaning of the Act are a domestic violence offence

Paragraph 24(a) is consequential on the restructuring of the provisions of the Act setting out what is meant by a 'domestic violence offence'.

Paragraphs 24(b) and (c) are to the effect that where a person aids or abets another in the commission of a domestic violence offence, incites another to commit a domestic violence offence or conspires with another to commit a domestic violence offence, that person will commit a domestic violence offence.

SCHEDULE 2

Clause 25 amends Form 2 in Schedule 2 of the Principal Act to enable it to apply, as appropriate, to both a protection order and an interim protection order

CONSEQUENTIAL AMENDMENTS

Clause 26 consequentially amends provisions in the Principal Act consistent with the new shorthand reference to the *Magistrates Court (Civil Jurisdiction) Act 1982*, adopted in the Bill

DETAILS OF THE MAGISTRATES COURT (AMENDMENT) BILL (No. 2) 1998

The Magistrates Court (Amendment) Bill (No. 2) 1998 (the Bill) amends the *Magistrates Court Act 1930* (the Act) to achieve consistency between the provisions of the Act relating to restraining orders and provisions of the *Domestic Violence Act 1986*, as amended by the Domestic Violence (Amendment) Bill 1998

Notes on Clauses

TITLE

Clauses 1, 2 and 3 are formal provisions setting out the short title of the Bill, commencement arrangements and providing that a reference to the Principal Act in the Bill, is a reference to the *Magistrates Court Act 1930*

Clause 4 amends section 198 of the Principal Act dealing with entitlement to apply for a restraining order. These amendments bring the Act into line with the *Domestic Violence Act 1986* as amended by the Domestic Violence (Amendment) Bill 1997.

Paragraph 4(a) omits subparagraph (i)(c)(iii) and substitutes a provision which enables the Community Advocate to make an application for a restraining order on behalf of a child.

Paragraph 4(b) inserts after paragraph (1)(c) ***new paragraph (ca)*** enabling the Community Advocate to make an application on behalf of an aggrieved person who is a person under a disability within the meaning of the *Magistrates Court (Civil Jurisdiction) Act 1982*.

Paragraph 4(c) inserts three additional subsections to section 198

New subsection (3) provides that the Court shall not proceed with an application made by the Community Advocate unless it is satisfied that the Community Advocate is an appropriate person to make an application in the circumstances

New subsection (4) provides that the section does not affect the operation of Part XI Magistrates Court (Civil Jurisdiction) Act in relation to an aggrieved person

New subsection (5) provides a definition for 'Community Advocate'

Clause 5 amends section 200 which provides that where the applicant is not the aggrieved person, the aggrieved person is nonetheless a party to the proceedings. The amendment applies this provision in circumstances where the Community Advocate is the applicant

RESTRICTION ON PUBLICATION OF REPORTS AND PROCEEDINGS

Clause 6 amends section 206P of the Principal Act dealing with restrictions on publication or reports of proceedings. The current section 206P refers to restrictions on the printing or publishing of materials

New subsection 206(1) refers to 'dissemination by any means' of material. This is intended to overcome any narrow interpretation of 'print' or 'publish' and instead reflect the wider range of modes of communication of information

INSERTION

Clause 7 inserts two additional sections in the Act

Limitations on Restrictions

New section 206PA refers to the exemptions from the prohibition on publications. The change effected by **new subsection 206PA(2)** is to enable dissemination of, otherwise, protected information in the following additional circumstances:

- with the authorisation of the Court;
- where it is a transcript or court document for use in connection with court proceedings or determination of an application for legal aid;
- for the purpose of law reports,
- to a person in connection with the person's professional practice

New subsection 206PA(3) provides the Court can only give permission to the dissemination of information where the Court is satisfied that it is in the public interest, it will promote compliance with the order or is necessary or desirable for the proper functioning of the Act

New subsection 206PA(4) provides that the word 'Court' in subsection (2) includes an officer of the Court acting in the proceedings. The effect of this amendment is to clarify the category of persons who may act on the Court's behalf.

Application not invalid because made under the wrong Act

New section 206PB(1) applies where, a person has applied in good faith for a protection order under Part II of the Act, the person was not entitled to apply for a protection order in respect of the alleged conduct of the respondent, but was entitled to apply for an order under the *Domestic Violence Act 1986* and proceedings have commenced on the basis of the application

New subsection 206PB(2) sets out the Court's options where the proceedings have not concluded at the times it becomes apparent that the application has been made under the wrong Act

New subsection 206PB(3) provides that where proceedings have been concluded before it becomes apparent that the application was sought under the wrong Act, any order purportedly made under the Act is valid as if the application and order had been made under the relevant provisions of the Magistrates Court Act.

New subsection 206PB(4) provides that where the Court opts for proceedings to continue under the Act, the proceedings shall continue as if the applicant were a person entitled to apply for an order under the Act

New subsection 206PB(5) provides that where the Court opts to continue proceedings under the *Domestic Violence Act 1986*, the proceedings shall be continued as if the application had been made and proceedings commenced under that Act

The basis for **new section 206PB** is that a person who could have obtained a restraining order under the Act or a protection order under the *Domestic Violence Act 1986*, should not be disadvantaged because the order is mistakenly made pursuant to the wrong Act

DETAILS OF THE BAIL(AMENDMENT) BILL 1998

The Bail (Amendment) Bill 1998 (the Bill) amends the *Bail Act 1992* (the Act) to achieve consistency with the *Domestic Violence Act 1986*, as modified by the Domestic Violence (Amendment) Bill 1998.

Notes on Clauses

TITLE

Clauses 1, 2 and 3 are formal provisions setting out the short title of the Bill, commencement arrangements and providing that a reference to the Principal Act in the Bill, is a reference to the *Bail Act 1992*.

INTERPRETATION

Clause 4 amends section 3 of the Act - an interpretation provision.

Paragraph 4(a) replaces the current definition of 'domestic violence offence' to reflect the revised meaning of this term pursuant to new paragraph 4A(1)(c) of the Domestic Violence (Amendment) Bill 1998

Clause 5 is consequential on restructuring of the offence provisions in the Domestic Violence Act as amended by the Domestic Violence (Amendment) Bill 1998

Clause 6 modifies section 8A of the Act relating to the granting of bail by a police officer to a person charged with a domestic violence offence. The amendments go to terminology only and are not intended to alter the effect of the existing provision.

Paragraph 6(a) amends subsection 8A(1) by omitting the words "victim or an associated person" and substituting "relevant person"

Paragraph 6(b) amends subsection 8A(3) by omitting the words "victim or an associated person" and substituting "relevant person"

Paragraph 6(c) amends subsection 8A(5) by removing the definition of an "associated person" and inserting a new definition of "relevant person". The definition of "relevant person" refers to a person against whom the alleged conduct is directed and to a class of persons related to that person but who may not necessarily fall within the household context

Clause 7 amends the Schedule to the Act by inserting two technical amendments