

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

DOMESTIC VIOLENCE ORDINANCE 1986

No. 52, 1986

The primary purpose of this Ordinance is to update and consolidate the law of the A.C.T. concerning domestic violence.

The Ordinance and consequential amendments contained in the Domestic Violence (Miscellaneous Amendments) Ordinance 1986 are based, in part, on the recommendations of the Australian Law Reform Commission contained in its Report No.30 entitled "Domestic Violence". They also take account of relevant legislation in New South Wales, South Australia, Western Australia, Tasmania and Queensland.

In brief, the Domestic Violence Ordinance 1986 provides that where the Magistrates Court is satisfied, on the balance of probabilities, that a person has engaged in or threatened to engage in conduct that constitutes a domestic violence offence (as defined) in respect of the spouse of the person or a child of the person or of a spouse of the person or has behaved in such an offensive or harassing way as to cause the spouse to fear for his/her safety or for the safety of any child involved, the Court may make an order restraining that person from that or other relevant conduct and may impose certain prohibitions or conditions. These include prohibiting that person from being on premises where the spouse or child resides or works; prohibiting that person from being on specified premises frequented by the spouse or child, and prohibiting that person from damaging property belonging to the spouse or child.

In making such an order, the matters that the Court is required to have regard to include the need to ensure that the spouse or child is protected from violence or harassment, the welfare of a child, the accommodation needs of the spouse and child and any hardship that would be caused to a person.

Provisions have been included to enable the Court to make an interim protection order where it is satisfied that it is necessary to do so to ensure the safety of the spouse or a child, pending the hearing of the full application.

Special provision is made for the granting of bail by police in cases involving domestic violence offences.

The Ordinance provides that, where a copy of an order or an interim order has been served personally on the person concerned or that person has had the order explained to him/her by the Court, contravention of that order in any respect is an offence.

Details of the Ordinance are as follows:

Section 1 provides that the Ordinance may be cited as the Domestic Violence Ordinance 1986.

Section 2 provides that the Ordinance will come into force on a date fixed by notice in the Gazette.

Section 3 contains definitions for the purposes of the Ordinance. Included in the definitions are -

- "child" is defined in relation to a person to include anyone under the age of 18 years who normally or regularly resides with that person or of whom that person is a guardian

- "de facto spouse" is defined to cover two persons of the opposite sex living together as husband and wife although not legally married to each other
- "domestic violence offence" is defined as a prescribed offence committed by a person against that person's spouse or against a child of that person or of a spouse of that person
- "prescribed offence" is defined to mean murder, attempted murder, manslaughter, and attempted manslaughter, and other offences against the person contained in the Crimes Act 1900 of the State of New South Wales in its application to the Territory, and attempts to commit such offences
- "respondent" is defined to mean the person in respect of whom an order is sought or made
- "spouse" is defined to include former spouse, de facto spouse and former de facto spouse.

Section 4 provides for the making of protection orders. Sub-section 4(1) provides that the Court must be satisfied on the balance of probabilities that the respondent -

- (a) has engaged in conduct constituting a domestic violence offence and unless restrained is likely to engage in further conduct constituting that or another domestic violence offence;
- (b) has threatened to engage in conduct that would constitute a domestic violence offence and unless restrained is likely to engage in conduct that would constitute that or another domestic violence offence; or

(c) has engaged in conduct of such an offensive or harassing nature that a spouse of the respondent fears for his/her safety or for the safety of a child of either the spouse or respondent.

If the Court is so satisfied then it can make an order restraining the respondent and may impose any of the prohibitions and conditions set out in section 9.

Sub-section 4(2) provides that the conduct referred to in sub-section 4(1) includes conduct occurring outside the Territory.

Section 5 provides that an application for a protection order may be made by:

- (a) the spouse in respect of whom the alleged conduct has been or is likely to be engaged in;
- (b) where the alleged conduct involves a child - the person with whom the child normally resides or a parent or guardian of the child; or
- (c) a police officer.

Section 6 provides that the Clerk of the Court shall fix a date for the hearing of an application that is not more than 2 days after the date on which the application is filed.

Section 7 provides that if a police officer is the applicant then the spouse in respect of whom, or in respect of whose child, the alleged conduct has been engaged in is a party to the proceedings. Sub-section 7(3) provides that where the alleged conduct involves a child then the Clerk of the Court is to cause a copy of the application and notice of the hearing to be given to the person with whom the child normally resides (if that is not the respondent) and to any parent or

guardian with whom the child does not normally reside. Such persons may, on application to the Court, be made parties to the proceedings.

Sub-section 8(1) provides that provisions of the Magistrates Court (Civil Jurisdiction) Ordinance 1982 relating to details to be specified on an application and to medical evidence, do not apply to proceedings under this Ordinance. Sub-section 8(2) provides for the service of affidavits and sub-section 8(3) provides that wherever a period of 5 days or less is prescribed for a purpose under the Ordinance it does not include any day on which the office of the Court is closed.

Section 9 sets out the restrictions the Court may impose as part of a protection order. These are set out in sub-section 9(1) and include prohibiting the respondent from being on premises where the spouse or child resides or works, or on specified premises which they frequent; from being in a prescribed locality; from approaching within a specified distance of the spouse or child; from contacting, harassing, threatening or intimidating the spouse or child, and from damaging property of the spouse or child. Sub-section 9(2) provides that the Court may make orders notwithstanding any legal or equitable interest the respondent may have in the premises or the property.

Section 10 provides that the Court shall have regard to certain matters in determining an application for a protection order. These are set out in sub-section 10(1) and include the need to ensure that the spouse or child is protected from violence or harassment; the welfare of any child; the accommodation needs of the spouse and child, and any hardship that would be caused to the respondent or any other person. Sub-section 10(2) provides that the Court shall consider the need to ensure that the spouse and child are protected from violence or harassment and the welfare of the child as being of primary importance.

Section 11 provides that when the Court makes a protection order it may recommend that either or both the respondent or the spouse of the respondent participate in counselling of a nature specified by the Court.

Section 12 provides for service by the Clerk of an application for a protection order and a notice of proceedings personally on the respondent and, where the applicant is a police officer, on the spouse in respect of whom, or in respect of whose child, the alleged conduct has occurred.

Section 13 provides that where the respondent has been served with notice of the proceedings and fails to appear in person at Court, then the Court may either proceed to hear and determine the matter in the respondent's absence or, where the Court considers it appropriate, it may adjourn the matter and issue a warrant for the respondent to be apprehended and brought before the Court.

Section 14 provides for the making of interim protection orders. Sub-section 14(1) will enable the Court to make an interim order where it is satisfied that it is necessary to do so in order to ensure the safety of the spouse or a child pending the hearing of the full application. Sub-section 14(2) requires that before the Court makes an interim order the application must be supported by oral evidence on oath from the applicant or the spouse of the respondent. Sub-section 14(3) sets out the restrictions that may be imposed in an interim order.

Section 15 provides that where a Court proposes to make a protection order or an interim protection order and the respondent is before the Court then before making the order the Court shall explain to the respondent (in language likely to be readily understood by him/her) the purpose, terms and effect of the order, the consequences that may follow if the order is contravened and the means by which the order may be varied or revoked.

Section 16 provides that a protection order can be made even if the respondent has been charged with an offence arising out of the same conduct that gave rise to the application for the order.

Section 17 provides that a protection order remains in force for no longer than 12 months. An interim protection order remains in force for no longer than 10 days, unless that period is extended by the Court.

Section 18 provides that a party to the proceedings may apply to the Court for the variation or revocation of a protection order or an interim protection order. Sub-section 18(3) provides for service of such applications on each person who was a party to the proceedings in which the original order was made. Sub-section 18(4) provides that in determining whether to vary or revoke a protection order the Court shall have regard to the matters set out in section 10.

Section 19 provides for the service of protection orders and interim protection orders. Sub-section 19(1) provides that the Clerk shall cause copies of such orders to be served personally on the respondent and for copies to be forwarded to the Commissioner of Police and to each other person who was a party to the proceedings.

Section 20 defines 'prescribed person' for the purposes of the conditions which may be imposed by way of recognizance pursuant to section 24 of the Ordinance.

Section 21 requires a police officer who has custody of a person who has been charged with a domestic violence offence or an offence against section 27 of the Ordinance following arrest without warrant, and who is not brought before the Court forthwith, to inform the offender of his/her rights in relation to bail and to provide the person with reasonable facilities to exercise those rights. If a person applies for

bail, the police officer for the time being in charge of the relevant police station is required to consider the question of whether or not the person should be admitted to bail.

Section 22 requires an authorised police officer, when considering whether or not to admit a person to bail, to afford the person charged or his/her representative and the police officer in charge of the investigation of the offence an opportunity to make submissions concerning the matters relevant to a bail decision under section 23 of the Ordinance and to make his/her decision in relation to bail in light of those submissions. If in light of the material before him/her the authorised police officer is of the view that it is appropriate to release the offender on his/her recognizance conditioned only on his/her appearance before the Court he/she shall release the person on recognizance with or without sureties to appear before the Court at the date, place and time specified in the recognizance. The maximum period during which a person may be at liberty on bail granted by an authorised police officer is until the next sitting day of the Court.

Where the authorised police officer is of the view that it would not be appropriate to release the person on bail subject only to a condition relating to his/her appearance before the Court, the police officer shall have regard to the other conditions which may be imposed under section 23 of the Ordinance and decide whether the imposition of one or more of those conditions would make it appropriate to release the person on bail (sub-section 22(3)).

Sub-section 22(4) provides that an authorised police officer may not admit to bail a person charged with a domestic violence offence of murder or attempted murder.

Section 23 sets out the criteria relevant to determining whether or not the person should be released on bail. The criteria fall into three categories i.e. matters relating to the probability of the person appearing in court in respect of the relevant offence, matters relating to the interests of the person and matters relating to the protection of the community.

Section 24 sets out a number of conditions which may be attached to bail which are particularly relevant in the domestic violence context. These conditions include, that the person not harass or molest, or cause another person to harass or molest, a specified prescribed person and that the person not be in premises in which a specified prescribed person resides or works. The conditions imposed are not to be more onerous than is necessary in the interests of justice or the protection of the community (sub-section 24(3)).

Section 25 provides that where a person is charged with a number of offences of which one is a domestic violence offence or an offence against section 27 of the Ordinance, the authorised police officer is to consider the question of bail in relation to all charges together and to make one decision in relation to all charges, to require the person to enter into only one recognizance and to impose the same conditions in relation to each of the charges.

Section 26 provides that an authorised police officer, who decides to refuse to admit a person to bail or to admit a person to bail subject to conditions is required to inform the offender of the decision and that the person is entitled to communicate with a legal practitioner. Upon request by the person charged, the police officer is to provide that person with reasonable facilities to communicate with a legal practitioner.

Sub-section 26(3) provides that where an authorised police officer decides to admit a person to bail then he/she is to take all reasonable steps to inform, as soon as practicable, the spouse in respect of whom the alleged conduct was engaged in and, where the alleged conduct involved a child, the person who has the care and control of the child, of the decision and of any conditions imposed. Where the decision is made not to admit the person to bail then he/she is to inform that spouse of the decision.

Section 27 provides that where the respondent was present when a protection order or interim protection order was made or, where the respondent was not present but a copy of the order or interim order has been personally served on the respondent, and he/she contravenes that order in any respect, he/she is guilty of an offence punishable on conviction by a fine not exceeding \$1,000 or imprisonment for a period not exceeding 6 months, or both.

Section 28 provides for alternative means of service or for substituted service where it appears to the Court that personal service of an application under the Ordinance is not reasonably practicable.

Section 29 provides that the Court may direct, in light of the material before it, that a document required to be served on a person be served by a police officer. Where such a direction is given then an authorised police officer shall, when requested to do so by the Clerk, arrange for the document to be served by a police officer.

Section 30 will place certain restrictions on the publication of reports of proceedings under the Ordinance so as to protect the identity of parties or witnesses in the proceedings or persons related to or associated with parties. Sub-section 30(2) provides penalties on conviction for an offence against this section - a fine not exceeding \$25,000 for a body

corporate and a fine not exceeding \$5,000 or imprisonment not exceeding 2 years, or both, for a natural person. Sub-section 30(3) provides that no proceedings for an offence against the section shall be commenced except by, or with the consent in writing of, the Attorney-General or the Director of Public Prosecutions.

Section 31 deals with appeals to the Supreme Court from the making, variation, revocation or refusal to make a protection order.

Section 32 preserves the operation of sub-section 547(1) of the Crimes Act 1900 of NSW in its application to the Territory (recognizances to keep the peace) and Part X of the Magistrates Court Ordinance 1930 (sureties to keep the peace).

Authority: Sub-section 12(1) of the
Seat of Government (Administration)
Act 1910