

Law Reform Commission of Western Australia

Enhancing Family and Domestic Violence Laws

Discussion paper
Project 104

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To

Law Reform Commission of Western Australia
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Table of Contents

1 General comment

1.1 Proposal 52

2 Police Response to Family and Domestic Violence

2.1 Proposals 1 and 2

2.2 Proposal 3

2.3 Proposal 4

2.4 Proposal 5

3 Restraining Orders

3.1 Question 15

4 Criminal Offences

4.1 Proposal 28

4.2 Question 20

4.3 Proposal 29

5 Criminal Practice and Procedure

5.1 Proposal 34

1 General comment

The Law Society of Western Australia (**Society**) is grateful for the opportunity to comment on the Law Reform Commission of Western Australia (**Commission**) Discussion Paper, *Enhancing Family and Domestic Violence Laws* (**Discussion Paper**).

The Discussion Paper describes laws relating to family and domestic violence as a sensitive and complex area of law. The Society considers that these factors render the Commission's detailed review and analysis particularly commendable.

Further to the topics addressed in the Discussion Paper, the Society's Law Access scheme receives numerous requests for pro bono assistance from applicants with property settlement matters involving domestic violence.

The lack of legal aid in this area poses an unnecessary barrier to victims of domestic violence trying to leave abusive relationships.

The Society makes the following comments and observations in relation to some of the proposals and questions raised in the Discussion Paper.

Proposal 52

That the Law Society of Western Australia ensure that there are Continuing Professional Development programs delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence – including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities – be made available to lawyers on a regular basis.

- 1.1 The Discussion Paper recognises the need for greater training in relation to family and domestic violence, and proposes training for police officers, judicial officers and lawyers.

The Society provides a large range of CPD sessions through each calendar year. The Society actively considers which topics are in demand, and will refer Proposal 52 to its Education Committee.

The Society regularly invites experts from a range of agencies to deliver CPD to lawyers, but the Society has limited ability to influence the programs offered by other CPD providers and agencies.

The body responsible for the general oversight of Continuing Professional Development is the Legal Practice Board.

2 Police response to family and domestic violence

Proposal 1

That the Restraining Orders Act 1997 (WA) (or any new legislation dealing with family and domestic violence restraining orders) provide that if a person reports an act of family and domestic violence to a member of the Western Australia Police (or a person employed by the Western Australia Police) the person who receives the report is required to formally record the report and provide the person reporting the act of family and domestic violence with a report number.

Proposal 2

That where an accused is charged with breaching a violence restraining order by making contact with the person protected by the order via electronic means, the Western Australia Police ensure that sufficient information to demonstrate the content of that communication is included in the police brief for prosecution as early as possible.

- 2.1 The Society supports the need for WA Police to formally record all reports of an act of family and domestic violence, and bolster its systems to ensure detailed information is contained within prosecution briefs.

However, it is essential that the police records are materially accurate. The Society has been informed of examples of inaccurate records. Later reliance on inaccurate records can result in injustice.

Proposal 3

That the definition of a senior officer under s 62D(8) of the Restraining Orders Act 1997 (WA) be amended to provide that a senior officer is a police officer who is senior in rank to the officer making the application and is of or above the rank of sergeant.

- 2.2 Currently, police officers have limited power to enter premises where the officer has a reasonable suspicion that an act of family and domestic violence has been committed. Generally, police officers may not exercise that power without approval of a “senior officer”, presently defined as “above the rank of inspector” (see s 62D(8) of the *Restraining Orders Act 1997*).

The recommendation in Proposal 3 that the definition of senior officer be amended to a police officer who is senior in rank to the officer making the application and is of or above the rank or sergeant would be consistent with the definition of senior officer under section 38A of the *Criminal Investigation Act 2006*. The Society supports this proposal.

Proposal 4

That s 62D(3) of the Restraining Orders Act 1997 be amended to provide that:

A police officer making the application for approval to a senior officer must –

- (a) give the address, or describe the premises, to which it relates, and, if known, the person to whom it relates; and*
- (b) state the grounds on which the police officer suspects that –*
 - (i) a person is on the premises; and*
 - (ii) a person has committed, or is committing, an act of family and domestic violence against another person.*

- 2.3 Arguably, as presently drafted, police officers may not enter premises if the person suspected of committing family and domestic violence has left the premises. Proposal 4 recommends a minor drafting change to enable police officers to enter a premises provided any person is still on the premises. The Society agrees with the Commission that this is a sensible approach.

Proposal 5

That the Western Australia Police provide more regular training to all police officers in relation to family and domestic violence and that this training be delivered by a range of agencies with expert knowledge of the contemporary nature and dynamics of family and domestic violence including specific issues in relation to Aboriginal communities, multicultural communities and people with disabilities.

- 2.4 The proposal to provide more training to police officers, delivered by a range of agencies, with regard to specific individuals in relation to particular communities, is supported.

3 Restraining orders

The Commission reviewed restraining order legislation in each jurisdiction and recommended that Western Australia include an objects clause confirming that the objects of the *Restraining Orders Act 1997* (or any new legislation dealing with family and domestic violence restraining orders) be:

- (a) To maximize safety for children and adults who have experienced family violence;
- (b) To prevent and reduce family violence to the greatest extent possible; and
- (c) To promote the accountability of perpetrators of family violence for their actions.

These objects are provided in the present Victorian legislation, and supported by the Australian Law Reform Commission and the New South Wales Law Reform Commission.

The Society considers that the insertion of an objects clause can serve to focus consideration of the above matters, and accordingly supports this proposal.

Question 15

Should s 61A of the Restraining Orders Act 1997 be amended?

3.1 Section 61A(4) states:

- (4) *Except as provided in subsection (6), if the person is a child a penalty must be imposed on the person for the relevant offence that is or includes —*
- (a) *imprisonment under the Young Offenders Act 1994 section 118(1)(a); or*
 - (b) *detention under the Young Offenders Act 1994 section 118(1)(b).*

The Society opposes mandatory sentencing as an unnecessary and harmful fetter of judicial discretion. It is therefore the Society's view that section 61A should be amended to allow for greater judicial discretion in relation to penalties for a child offender.

4 Criminal Offences

Proposal 28

- 1 *That the definition of 'violent personal offence' in s 63B of the Restraining Orders Act 1997 (WA) be expanded to include criminal damage by fire (s 444), disabling by means of violence in order to commit an indictable offence (s 292); stupefying in order to commit an indictable offence (s 293); acts with omission to cause bodily harm with intent to harm (s 304); and acts intended to cause grievous bodily harm (s 294).*
- 2 *That the Criminal Code (WA) be amended to provide for a higher statutory penalty for the offences of criminal damage under s 444 (other than criminal damage by fire), deprivation of liberty under s 333, threats under ss338A–C, and assault causing death under s 281 if the offence is committed in circumstances of aggravation as defined under s 221.*
- 3 *That if point 2 above is implemented, s 63B of the Restraining Orders Act 1997 (WA) should, for the sake of clarity, be amended to remove the offences of deprivation of liberty under s 333 and threats under ss338A–338C of the Criminal Code.*

Question 19

Should the proposed amended s 63B of the Restraining Orders Act 1997 (WA) be transferred into the Sentencing Act 1995 (WA) or the Criminal Code or remain in the Restraining Orders Act 1997 (WA)?

- 4.1 The Society does not offer specific comment in relation to Proposal 28 and Question 19, although supports generally the proposed consistency in the application of circumstances of aggravation in relation to violent personal offences.

Question 20

Should the Western Australia Police be required to record, as a circumstance of aggravation alleged in relation to a particular offence as part of the offence description, whether the victim and the accused were in a family and domestic relationship? If so, should this be recorded:

- (a) *in the statement of material facts;*
(b) *in the prosecution notice; or*
(c) *elsewhere.*

- 4.2 The Society understands that the current practice in charging the circumstance of aggravation that the accused was in a family and domestic relationship with the victim is:

- Where s 221 of the Criminal Code applies, the specific circumstance of aggravation is pleaded in the particulars of the offence contained on the Prosecution Notice; and
- Where it exists as an aggravating factor to be taken into account at sentencing, without serving to increase the applicable maximum penalty, it is properly included in the Statement of Material Facts that is put before the sentencing Judge.

If a charge is proceeding on indictment and s 221 applies, the specific circumstance of aggravation is pleaded on the indictment. These practices are consistent with the pleading of all criminal offences within Western Australia, and the Society considers continued consistency in the pleading of offences to be an important consideration.

If it is the case that circumstances of aggravation are not being pleaded specifically on either prosecution notices or the indictment, the Society considers that the appropriate mechanism for resolving the issue is increased training for the Police and Prosecutors responsible for drafting Prosecution Notices and Indictments.

The Society suggests consideration be given to the consistent recording of the specific nature of a circumstance of aggravation attached to an offence on the offender's criminal history. This will ensure that prosecutors, judicial officers, Community Corrections officers, and the Parole Board have streamlined access to information to assist them in assessing:

- The risk that an accused person or offender poses to victims;
- The likelihood of reoffending generally; and
- The treatment and management needs of the offender.

Proposal 29

That the Western Australian government conduct a review into the appropriateness or otherwise of the current criminal laws in relation to cyberstalking and other forms of abusive or threatening behaviour undertaken by electronic means.

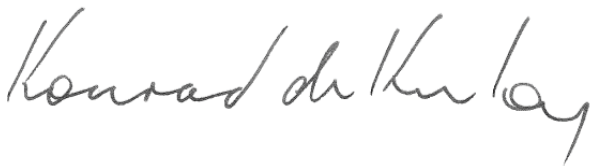
- 4.3 The Society offers its support for Proposal 29, and notes the increased prevalence of the use of electronic media (including mobile telephones and social media) in a broad range of offending including:
- threats;
 - stalking; and
 - sexual offences.

It is significant that electronic media can also be used to engage in abusive or threatening behaviour that is not captured by the existing framework of criminal law. There is increased recognition within the community of the advent of “cyberbullying” and the susceptibility of children to such conduct, and the Society encourages any review that is conducted to take these matters into account.

5 Criminal Practice and Procedure**Proposal 34**

That the Western Australia Police ensure that the brief to prosecution prepared by the arresting officer for every family and domestic violence related offence includes the accused’s national criminal record as soon as is practicable after the person is charged.

- 5.1 The Society supports proposal 34 and the attendant observation that national criminal records should be included in the brief for all offences, not just those relating to family and domestic violence.



Konrad de Kerloy
President

27 February 2014