

The Commission for Children and Young People and Child Guardian

promoting and protecting the rights, interests and wellbeing of all Queenslanders under 18

Advice to: Leanne Roberston, Department of Justice and Attorney-General
Topic: Queensland Law Reform Commission Report 'A Review of the Peace and Good Behaviour Act 1989'
Date due: 13 October 2008 (10.00am)

Thank you for inviting comment from the Commission for Children and Young People and Child Guardian (the Commission) in relation to the Queensland Law Reform Commission's (QLRC) report, *A Review of the Peace and Good Behaviour Act 1982* (the Report).

The Commission supports many of QLRC's proposals in the Report and appreciates the opportunity to provide feedback on the issues which will potentially impact on children and young people under the Personal Protection Bill 2007 (the Bill).

The Commission recommends that:

1. specific provision be made for children and young people in family relationships in the Personal Protection legislation if the Department of Communities' review of the *Domestic and Family Violence Protection Act 1989* determines that they should not fall within the scope of that Act.
2. the minimum age at which a child may be named as a respondent to a domestic violence order be considered as part of the Department of Communities' review of the *Domestic and Family Violence Protection Act 1989*.
3. courts be required to purposefully consider whether to permit the release of identifying information relating to a child or young person, instead of leaving it to one of the parties or the Magistrate to raise for the court's consideration.
4. government and non-government organisations make information available for children and young people about how to obtain/respond to a personal protection order when the Bill is enacted. The Commission commits to providing this information to children and young people.
5. the Bill be extended to cover circumstances where animals, pets or other items, which do not meet the current definition of a complainant's 'property', are harmed or destroyed by a respondent with a deliberate intention to intimidate or cause fear in a complainant.

Should children in 'family relationships' be able to apply for a protection order?

The Commission supports QLRC's recommendation that the Department of Communities urgently review the *Domestic and Family Violence Protection Act 1989's* coverage of children in family relationships. However, in the event it is determined that children and young people in family relationships should not fall within the scope of the *Domestic and Family Violence Protection Act 1989*, the Commission recommends that specific provision be made for them in the Personal Protection Bill 2007.

Further, as the *Domestic and Family Violence Protection Act 1989* does not specify a minimum age at which a child may be named as a respondent to a domestic violence order, the Commission recommends that this is considered as part of the Department of Communities' review of the *Domestic and Family Violence Protection Act 1989*, not just as it applies to children in family relationships, but also to children who fall into any of the other categories of domestic relationships under the *Domestic and Family Violence Protection Act 1989*, (eg. intimate relationships).

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Applications by young persons

The Commission agrees with QLRC that:

- the paramount consideration is to ensure that the proposed Bill provides young people who are in genuine need of protection with an accessible mechanism for applying for a personal protection order. Although in many instances, a young person could be represented by a parent or another person, there may be circumstances in which the young person may be unable or unwilling to obtain such representation. A young person, who has the capacity to understand the nature and consequences of a personal protection order, should be able to make an application with the leave of the court
- a young person, who has the requisite capacity to apply for a personal protection order on his or her own behalf, should be able to authorise another person to seek leave to apply for an order on behalf of the young person. The imposition of a requirement to obtain the leave of the court to apply for an order would enable the court to determine whether the child understands the nature and consequences of a personal protection order, and
- there should be no filing fee for applications made under the Bill to ensure that the safety and protection of persons should not depend on an applicant's capacity to pay the costs of filing an application for a protection order.

Applications on behalf of children

The Commission agrees with QLRC's recommendation that a child (a person under 18 years) may be an aggrieved person for a personal protection order with a specific provision included in the Bill to enable a parent to apply for a personal protection order on behalf of a child with the definition of parent to be modelled on s.10 of the *Education (General Provisions) Act 2006*.

The Commission also supports QLRC's recommendation that the Bill should include a 'catch-all' provision to the effect that any person, other than those specified, may apply to the court for leave to make an application for a personal protection order for an aggrieved person. This will assist children and young people to obtain assistance from another person in the event his/her 'parent' is unwilling or unable to make an application for the young person.

Mediation where one of the parties is a child

The Commission agrees with QLRC's recommendation that the court should be able to exercise its discretion as to whether to refer a matter to mediation in all cases regardless of whether the relevant party is an adult or a child. A discretionary approach is more appropriate as requiring mediation in all matters involving children could result in the inappropriate referral of matters to mediation and possibly cause detriment to the child.

The Commission also supports QLRC's recommendations that:

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- mediation should be referred by the court irrespective of whether all parties agree and the requirement of voluntariness under the *Dispute Resolution Centres Act 1990* should not apply to a referral made under the Bill
- mediation services referred under the Bill should be provided at no cost to the parties, and
- one of the factors a court should consider when deciding whether to refer matters to mediation is the relative bargaining positions of the parties.

Children's evidence

The Commission supports QLRC's recommendations that:

- the 'special witness' provisions in the *Evidence Act 1977* (Qld) will provide sufficient protection to vulnerable witnesses, including children, in giving their evidence in proceedings under the Bill
- the application of the 'special witness' provisions of the *Evidence Act 1977* (Qld) to proceedings under the Bill should not be limited by the provision that the court is not bound by the rules of evidence
- the appropriate weight to be given to a child's evidence, in particular, where the evidence has been unfairly obtained, will be determined in the court's discretion in each case
- the court should not be bound by the rules of evidence (except for the special witness provisions) but may inform itself in the way it considers appropriate
- the standard of proof should be on the balance of probabilities, and
- the court may receive evidence orally, in writing or in another way.

Exposure of children and young people to the criminal/juvenile justice system

The Commission notes that children and young people will be potentially exposed to the criminal justice system through breaches of orders made against them under the Bill. However, the diversionary measures available to police under the *Juvenile Justice Act* will apply to breaches of protection orders and would serve to divert juvenile offenders from the juvenile justice system in appropriate circumstances.

Notwithstanding that Queensland's current treatment of 17 year olds as adults in the criminal justice system is an area of significant concern for the Commission, it is ultimately a separate issue from the operation of this legislation.

Ultimately, the Commission agrees that if an order restraining a person from engaging in certain behaviour is to be effective, there must be an appropriate mechanism for enforcing the order against the person whose conduct is restrained by it. An order that cannot be enforced will be of no use to the person for whose benefit it was granted, and may even encourage the person responsible for the conduct complained of to believe that he or she can continue to engage in that conduct with impunity.

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The Commission considers that the following QLRC proposals are appropriate safeguards for children and young people in seeking to limit orders being made against children and young people and in the event they are made, minimise potential breaches of protection orders:

1. a court should be required to explain the nature, purpose and legal implications of the protection order application proceeding and the legal implications of the court making a protection order. The Commission agrees that the degree of formality associated with the court providing an explanation of an order emphasises the seriousness of the order and that making the court responsible for explaining an order would ensure the consistency of the information given to the parties to the proceedings.
2. if a respondent is present when a protection order is being made, and it is practicable for the court to do so, the court must explain certain matters about the order to each of those persons when making the protection order including the purposes and terms of the order, the consequences of contravening the order and that the order may be registered in another State or New Zealand without further notice to the respondent.
3. any explanation should be given in English or a language in which the person is fluent and in a way that ensures, as far as practicable, the person understands the explanation.
4. if a person to whom the court is required to explain the order is not present in court when the order is being made, or it is not practicable for the court to give the explanation at the time the order is being made, the registrar must ensure that a written statement containing the explanation is given to the person as soon as practicable.
5. a court should not make a consent order if an aggrieved person or a respondent for a protection order is a child. This will avoid children and young people agreeing to an enforceable order being made even when there is no proven conduct by the child or young person constituting grounds for making a protection order.
6. a proceeding for an offence against the Bill must be started by a police officer. This will ensure that making police responsible for the enforcement of protection orders is that the prosecution of a breach does not depend on the ability of a person protected by an order to prosecute the breach himself or herself. It will also enable police to have greater control in utilising the diversionary juvenile justice mechanisms under the *Juvenile Justice Act 1992* when dealing with criminal breaches by young people, as well as using discretion to decide, based on various considerations, whether to start a proceeding for an offence of breach of an order.
7. the role of police should be reviewed in five years from the date of implementation of the Bill in order to gauge the effectiveness and efficiency of police in enforcing orders.

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8. where a police officer has told the respondent about the existence of the protection order, the respondent must not be found liable for the breach unless the court is satisfied the police officer told the respondent about the condition the respondent is alleged to have contravened.
9. a respondent should be eligible to apply to vary or set aside the order if:
 - (a) there has been a material change of circumstances since the existing order was made
 - (b) the respondent cannot reasonably comply with the existing order
 - (c) the existing order does not adequately protect—
 - (i) for a personal protection order, the persons protected by the order or their property, or
 - (ii) for a workplace protection order, the persons protected by the order or property at the workplace
 - (d) there was a material error of fact or misdescription in the existing order
 - (e) the existing order was made because of fraud, or
 - (f) the existing order was made when a respondent was unable to be before the court, resulting in unfairness to the respondent.
10. the court should be able to give leave for a non-party leave to apply to vary or set aside an order (for example the Chief Executive of the Department of Child Safety).
11. the *Childrens Court Act 1992* should apply to proceedings under the Bill.

Respondents to protection order applications must be at least 10 years old

The Commission agrees with QLRC's proposal that a respondent to a protection order must be at least 10 years old.

Publication of proceedings

QLRC is proposing that a court may make a non-publication order prohibiting the publication of any information about the proceeding only if it is satisfied it is necessary to avoid serious harm or injustice to a person. In deciding whether to make a non-publication order, the court must take as the basis of its consideration the principle that it is desirable that hearings should be held in public and that evidence given before the court and the contents of documents filed with the court or received in evidence by the court should be available to the public and to all the parties.

The Commission supports the proposal to allow the Court to make a non-publication order of its own volition, but considers further specific guidance should be provided in the Bill for matters involving children and young people. Although QLRC contemplates non-publication orders being made in respect of any information about a proceeding under the Bill that identifies or is likely to identify a child concerned in the proceedings, or his or her whereabouts, no further guidance or criteria is suggested for the making of non-publication orders in matters involving children.

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In the Commission's view, the default position for publishing information about a child or young person involved in protection order proceedings and appeals should be similar to the approach taken in the *Domestic and Family Violence Protection Act 1989*.

The *Domestic and Family Violence Protection Act 1989* provides that, unless the court expressly permits (or it is permitted under a regulation¹), it is an offence to publish in a newspaper or a periodical or to otherwise disseminate by any means to the public or a section of the public (including by radio broadcast or television) a notification of proceedings identified by reference to the parties' names, or any account of proceedings that identifies or is likely to identify a child concerned in the proceedings.

This approach would require the court to purposefully consider whether or not to permit the release of identifying information relating to a child or young person, instead of leaving it to one of the parties to raise for the court's consideration, or for the court to raise and consider itself. The Commission considers that the potentially harmful consequences for children and young people as a result of this kind of publicity warrants more directed consideration by a court, beyond a 'general discretion' to make a non-publication order when it is necessary to avoid serious harm or injustice to a person.

Further, to avoid any confusion in applications involving a child or young person who is also in the child protection or juvenile justice system, the Bill should explicitly provide that in the event a child or young person subject to protection order proceedings or appeal proceedings under the Bill, is also a child within the meaning of s.189 of the *Child Protection Act 1999* or s.301 of the *Juvenile Justice Act 1992*, under no circumstances should information leading to the likely identification of that child be published. The Bill needs to be clear that it does not limit or affect the operation of sections 189 of the *Child Protection Act* and 301 of the *Juvenile Justice Act*.

The same should apply to a person or entity's entitlement to appeal a court's decision to make a non-publication order in the course of protection order proceedings. Sections 189 of the *Child Protection Act 1999* and 301 of the *Juvenile Justice Act 1992* should override a person or entity's right to appeal a non-publication order made notwithstanding their dissatisfaction with such a decision². A notation in the Bill to this effect would be sufficient to clarify this.

Restriction on duration of orders made against children

The Commission agrees with QLRC's recommendation that the Court's discretion should not be constrained in cases involving child respondents as there is already sufficient flexibility for a Court to limit the duration of a protection order in each case depending on its circumstances. There will be cases involving child respondents which are serious enough to warrant a protection order which is fixed for up to, or longer than 2 years. It would undermine the effectiveness and coverage of a protection order if all orders involving a child respondent were capped at a maximum duration. This could create a

¹ Section 6(1) of the *Domestic and Family Violence Protection Regulation 2003* (Qld) permits the publication of a notification or an account of proceedings if:

- the proceedings relate to a matter in the public domain¹, or
- the community has a legitimate interest in the proceedings¹.

² Para 16.40 on Page 436 of Volume 1 of the QLRC Report 'A review of the Peace and Good Behaviour Act 1982'

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gap between applications enabling a respondent to continue his/her behaviours which triggered the original order, without fear of criminally breaching an order. This would defeat the purpose of a protection order.

In the Commission's view, as there is nothing preventing the Court from making a protection order of less than 2 years duration, lengths of protection orders should be allowed to be tailored by the court depending on the unique circumstances of each case, including the child's age.

Service of documents on children

The Commission agrees with QLRC's recommendations that the Bill should:

1. include a provision to the effect that, a person serving a document on a child must do so:
 - (a) as discreetly as practicable, and
 - (b) not at, or in the vicinity of, the child's place of employment or school, unless there is no other place where service may be reasonably effected.
2. provide that if:
 - (a) for an application to make, vary or set aside a protection order, a child is an aggrieved person or a respondent, or
 - (b) for an application to register a corresponding order that is not dealt with by the court ex parte, a child is a person protected by the order or against whom the order was made,a copy of the application and notice of when and where the application is to be heard must be given by the registrar to a parent of the child.
3. include a definition of 'parent' modelled on section 10 of the *Education (General Provisions) Act 2006* (Qld) for the purposes of the provision requiring notification of applications involving a child on the child's parent (that is, a person who takes parental responsibility for a child).
4. include a provision to the effect that the requirement to give a copy of the application and notice of when and where it will be heard to the child's parent need not be complied with if the court makes an order that the documents are not required to be given to a parent of the child, or a parent of the child cannot be found after reasonable inquiry.
5. include a provision to the effect that in considering whether to make an order that a copy of the application and notice of when and where it is to be heard is not required to be given to the child's parent, the court must have regard to the best interests of the child and, for deciding what is in the child's best interests, the court must consider any expressed views of the child.
6. provide that failure to comply with the provision requiring notification of applications involving a child on the child's parent does not invalidate or otherwise affect an order made by the court on the application.

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Entitlement to appear before the court in protection order applications

The Commission agrees with QLRC's recommendation that an applicant, aggrieved person, respondent and any other person who is, or is sought to be, protected by the relevant protection order should be entitled to appear before the court in protection order proceedings. Hearing from other persons who have an interest in the proceeding would assist the court and enable the Department of Child Safety to seek leave to appear and inform the court of relevant matters where necessary. It would also help to prevent the following situation, identified by Legal Aid Queensland in its submission to QLRC, which currently occurs in application proceedings under the *Peace and Good Behaviour Act 1982*:

An application was brought by the father of a 16 year old girl against the girl's boyfriend. The father strenuously disapproved of the boyfriend and forbade his daughter seeing him. The 16 year old left home to live with family friends. The father brought a Peace and Good Behaviour application against the boyfriend, and named his daughter as also being in fear of the boyfriend. The application by the father had a significant impact on the rights of the 16 year old girl. At the first return date of the application, the issue of her standing to appear before the court and present her view was canvassed with the court. The court decided that she did not have standing to appear as she was not a party to proceedings.

The Commission also agrees with QLRC's recommendation that a copy of an application and notice of when and where the application is to be heard must be given to:

- (a) if the aggrieved person for the protection order applied for is not an applicant, each aggrieved person for the protection order, and
- (b) any other person whom the court directs is to be served.

This will allow young people who are sought to be protected by a protection order by someone else to be notified of an application and provide them with an opportunity to appear before the court in the application proceedings.

Applications made under the wrong legislation should not be fatal to proceedings

The Commission agrees with QLRC's recommendations that:

- if a court hearing an application for a protection order is satisfied the application should have been an application for a domestic violence order under the *Domestic and Family Violence Protection Act 1989*, the court may order that the proceeding be continued as if it were a proceeding on an application for a domestic violence order, and may make the other orders it considers appropriate in the circumstances
- if the court hears an application for a protection order as if it were an application for a domestic violence order, the *Domestic and Family Violence Protection Act 1989* applies to the application, and the proceeding under the Bill is discontinued, and

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- the *Domestic and Family Violence Protection Act 1989* should be consequentially amended to insert a reciprocal provision, so that, where the parties fall within the scope of the *Domestic and Family Violence Protection Act 1989*, the court may deal with an application for a protection order under the Bill as if it had been made under the *Domestic and Family Violence Protection Act 1989*.

Miscellaneous comments/recommendations

1. Government and non-government organisations should have information available for children and young people on their websites about how to obtain/respond to a personal protection order when the Bill is passed. This will assist children and young people's awareness of their legal rights and obligations. Relevant organisations might include police, child safety, youth advocacy centres and Legal Aid Queensland. The Commission commits to providing this information to children and young people.
2. The Commission is concerned that QLRC's recommended definition of 'property'³ will not capture situations where a respondent harms or kills a pet or animal which falls outside of this definition, but is intended to frighten or intimidate a complainant. For example, if an animal is not owned by the complainant or it is not at the complainant's premises, but the respondent knows that harming the animal (a stray dog for example) would intimidate or cause fear in the complainant. In order to capture these situations, the Commission recommends extending the definition of 'property' in the Bill to cover animals, pets or other items being harmed or destroyed which are not the property of the complainant, but the respondent inflicted the harm or destruction with an intention to intimidate or cause fear in the complainant. This could also be included in the Bill as one of the examples of the type of conduct that would constitute harassment and intimidation and an example specific condition to be adhered to by respondents in personal protection orders.

Please do not hesitate to contact Yvette Norris, Principal Policy Officer, Strategic Policy and Research Program (ph:3008 8986; e-mail: Yvette.Norris@ccypcg.qld.gov.au) should any aspects of this advice require clarification.

³ which will include property that a person owns, or does not own but is used and enjoyed by the person, is available for the person's use or enjoyment, in the person's care or custody, or at the premises at which the person is residing.