

CITATION: *Hennessy v CB* [2020] NTLC 015

PARTIES: Samantha Hennessy

V

CB

TITLE OF COURT: LOCAL COURT

JURISDICTION: CIVIL

FILE NO(s): 22025486

DELIVERED ON: 13 November 2020

DELIVERED AT: DARWIN

HEARING DATE(s): 28 August 2020

JUDGMENT OF: Norrington JR

**CATCHWORDS:**

*CIVIL LAW – DOMESTIC AND FAMILY VIOLENCE ACT 2007* (NT) – Application to vary or revoke a domestic violence order – Whether a police DVO can be varied or revoked under Part 2.8.

*CIVIL LAW – DOMESTIC AND FAMILY VIOLENCE ACT 2007* (NT) – Review of a police DVO – Whether the Court can review a police DVO under Part 2.9 once the matter is before the Court.

*CIVIL LAW – DOMESTIC AND FAMILY VIOLENCE ACT 2007* (NT) – Whether the Court has the power to vary or revoke a police DVO on an interim basis under Part 2.10.

*CIVIL LAW – DOMESTIC AND FAMILY VIOLENCE ACT 2007* (NT) – Whether the Court has an implied power to vary or revoke a police DVO on an interim basis.

*Domestic and Family Violence Act 2007* (NT), s 3, s 4, s 16, s 19, s 27, s 32(2), s 35, Part 2.6, s 41, s 42, s 43, s 44, s 47, s 52A, Part 2.8, Part 2.9, s 72, s 73, s 74, s 75, s 76, s 77, s 78, s 79, Part 2.10, s 80, s 81, s 82, s 83

*Domestic Violence Act 1992* (NT), s 6A, s 6B

*Interpretation Act 1978* (NT), s 62A, s 62B

*Local Court Act 2015, s 6*

*Northern Territory Local Court Practice Directions, Direction 30.8*

*AB v Hayes & Anor* [2019] NTSC 13

*Balchan v Anthony* (2008) NTSC 02

*Bonney v Thompson* [2011] NTSC 81

*Houseman v Higgins* [2015] NTSC 88

*Knight v Raddie* [2013] QMC 15

*Malogorski v Peart* [2011] NTSC 86

*Muir v Nunn* [2006] NTSC 71

*Pelechowski v The Registrar, Court of Appeal* [1999] HCA 19

*Police v Natasha George* [2015] NTMC 018

*Valentine v Eid* (1992) 27 NSWLR 615

**REPRESENTATION:**

<i>Counsel:</i>	Commissioner for Police:	Ms Thomson
	Defendant:	Self-represented
	Protected Person:	Self-represented
<i>Solicitors:</i>	Commissioner for Police:	Solicitor for the Northern Territory

Judgment category classification: A

Judgment ID number: NTLC 015

Number of paragraphs: 107

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 22025486

BETWEEN

**Samantha Hennessy**

Applicant

AND

**CB**

Defendant

AND

**CC**

Protected Person

CORAM:

NORRINGTON JR

REASONS FOR JUDGMENT

(Delivered 13 November 2020)

**Introduction**

1. An authorised police officer made a police DVO against the defendant on 13 August 2020. The Police DVO was made under Part 2.6 of the *Domestic and Family Violence Act 2007* (“the Act”). The terms of the order are:

The defendant is now restrained from directly or indirectly:

1. Approaching, contacting or remaining in the company of the protected person/s (contact includes by mail, phone, text messages, facsimile, email or other forms of communication).
2. Approaching, entering or remaining at any place where the protected person/s is living, working, staying, visiting or located.
3. And must vacate the premises at [address].
4. causing harm or attempting or threatening to cause harm to the protected person/s

5. causing damage to property, or attempting or threatening to cause damage to property of the protected person/s.
  6. intimidating or harassing or verbally abusing the protected person/s.
  7. exposing any child/children of the parties to domestic violence.
2. The defendant was also charged with two counts of damage to property, two counts of sexual intercourse without consent and one count of aggravated assault. The charges arose from the same alleged facts that were the basis for the police DVO. The defendant was remanded in custody.
  3. The domestic violence proceedings first came before the Local Court on 14 August 2020. The matter was mentioned with the related criminal file. The Court ordered that both matters be adjourned to 23 September 2020 into the preliminary examination mention list.
  4. On 19 August 2020 the protected person filed an *Application to Vary or Revoke* under Part 2.8 Division 1 of the Act (“the Application”). In that application the protected person sought to “*revoke all order*”. This Application was listed for mention on 25 August 2020.
  5. At the mention of the matter on 25 August 2020 a duty lawyer was assisting the protected person. The duty lawyer in addressing the Court acknowledged that the *Application to Vary or Revoke* was the incorrect vehicle to vary or revoke a police DVO. The duty lawyer then indicated that the protected person wished to make an oral application for a review of the police DVO under Part 2.9 of the Act (“Part 2.9 review”).
  6. I informed the parties that due to the wording of Part 2.9, such a review could only be conducted by a Judge of the Local Court and not a Judicial Registrar constituting the Court under Section 6 of the *Local Court Act 2015*.
  7. Counsel for the Commissioner for Police confirmed that they opposed the revoking of the Police DVO and submitted that they were not in a position to argue a Part 2.9 review on that day and that the matter should be adjourned to a later date for the hearing.
  8. The matter was adjourned until 28 August 2020 at 9.00am for mention of the *Application to Vary or Revoke*, but it was noted that there may be a possible oral application for a Part 2.9 review on that day.
  9. At the mention on 28 August 2020 before me, the protected person appeared on her own behalf without the assistance of a duty lawyer. The defendant appeared via AVL from prison and was also self-represented.
  10. I indicated to the parties that I would hear submissions regarding the Court’s power to vary or revoke an unconfirmed police DVO generally, but more specifically whether a Part 2.9 review could be sought once the matter was before the Court.
  11. After hearing submissions from counsel for each party, I adjourned the matter to 4 September 2020 to deliver judgment. On 4 September 2020 I made the following orders:
    1. The *Application to Vary or Revoke* is dismissed.
    2. The oral application for a review under Part 2.9 is declined.

3. The matter was adjourned to 10am on 23 September 2020 for mention with related criminal file 22025368.
  4. A call up notice shall issue for the defendant to appear by AVL.
12. I indicated to the parties that I would deliver my reasons for the decision at a later date. These are the reasons for that decision.

### **Protected Person's contentions at the hearing**

13. The protected person was very emotional in her presentation to the Court. Due to the protected person's emotional state and English appearing to be her second language, she had great difficulty in answering questions or articulating her basis for the Court varying or revoking the police DVO. Based on my recollection of what was communicated through her duty solicitor at the previous mention of the matter and also based on some of the answers she gave to questions at the hearing, I understood her position to be as follows:
- (a) The protected person wanted the police DVO to be revoked;
  - (b) If the Court was not prepared to revoke the Police DVO then the protected person would like the Police DVO to be varied to allow her and the children to speak to and visit the defendant in prison.
14. Although, it was not formally articulated by the protected person, I accepted that she relied on her *Application to Vary or Revoke* filed on 19 August 2020 and in the alternative, she sought that the Court conduct a Part 2.9 review.
15. The protected person relied upon an affidavit that she swore on 19 August 2020 and filed with the Court in support of her *Application to Vary or Revoke*. The protected person also handed up a letter that she had typed, signed and dated 27 August 2020. The letter was addressed to '*To the Honorary Judge in charge*'. I received the tendered letter and marked it as Exhibit 'P1'.
16. The hand written affidavit of the protected person provided as follows:
1. *I would like to revoke all orders against my husband [CB].*
  2. *My husband is a good man good father good husband, good friend to anyone that knows him.*
  3. *We love each other very much, please give us a chance to work on our marriage*
  4. *That day 12 August 2020 I went to the Police I was in the state of anger, it was a heat in the moment.*
  5. *I miss him, our daughter miss him and need him. We all at home miss him and want him back at home with us.*
  6. *I miss him so much. He will never hurt me or the kids.*
  7. *Please don't split us as a family, we deserve second chance as everybody else does.*
  8. *I want him home where he is belong.*
  9. *We all want him home so we can do all our family things together again.*

17. The letter from the protected person to the Court (exhibit P1) provided:

*Re: Revoking or varying DVO against my husband [CB] DOB [DOB]*

*With this I, [CC] of [address] ask Your Honour to revoke the DVO so that I and my kids especially me and [CB]'s baby [CA] to be able to visit him in jail to hug him and kiss him and feel close to him or to be able to communicate thru phone and also writing to each other.*

*I haven't got a copy of the DVO since the day of my husbands arrest 13 Aug 2020. The Police Officer Ms. Sam Hennesy only gave me the DVO today 27 August at my residence and she also said that the Police stands with the DVO but it is all up to the judge. So with this Your Honour I ask to revoke the DVO. After all we are husband and wife and we love each other very much. My husband also asked to have our daughter come visit him in remand.*

*Thank You for your understanding and consideration*

18. It is important to note that the protected person does not retract her complaints to police or suggest that her complaints were untrue or misinterpreted.
19. Unsurprisingly, the protected person did not make any submissions about the court's power to vary or revoke an unconfirmed police DVO.

## **Police contentions**

20. The Commissioner for Police relied upon the statutory declaration of Samantha Hennesy declared 13 August 2020 which was filed with the Court and marked as exhibit A2. This document detailed the original complaints made by the protected person which resulted in both the criminal charges and the police DVO. It is not necessary to set out in detail the particulars of the allegations for the purpose of this hearing.
21. A statutory declaration of Samantha Hennesy declared 27 August 2020 was also handed up at the hearing and marked as exhibit A1. This statutory declaration was drafted after the protected person had contacted the police and asked to withdraw her complaint. Paragraph 8, 9 and 14 of the statutory declaration provides as follows:

8. *I arranged [CC] to attend Palmerston Police Station to make an audio/visual statement in relation to her withdrawal of complaint. This was completed and during her statement, [CC] informed me that everything that she had reported in her initial statement was true. She told me that since talking to her mother, and a friend and being told by them that she should be happy to have a husband who loves her and wants to be with her, and that she had done the wrong thing reporting it to Police, she wanted to withdraw all charges and the DVO.*

9. *[CC] further informed me that she believed that because she had reported the matter to Police, the deft would not behave in that manner any further.*

.....

14. *[CC] did confirm that she was still upset and hurt regarding the reported assaults however just wants him home. She said that if he returned home she would just give him what he wants (sex) when he wants it regardless of how she is feeling at the time. (tired, not in the mood).*

22. Counsel for the Commissioner for Police handed up written submissions and made brief oral submissions in answer to some of my questions. The position of the police can be summarised as follows:
- (a) The police are opposed to the revoking of the police DVO;
  - (b) The police are opposed to a varying of the Police DVO to allow contact between the protected person and the defendant pending the finalisation of the criminal proceedings;
  - (c) It was submitted that the Court only has the power to vary or revoke a police DVO prior to confirmation under Part 2.8 Division 2 and Part 2.9.
  - (d) Part 2.8 Division 2 does not apply because there is no urgent circumstances and there has no substantial change in relevant circumstances since the police DVO was made; and
  - (e) In relation to a Part 2.9, it is accepted that the Court may vary or revoke a DVO pursuant to a review.
23. Despite being invited to do so, no submissions were made by counsel for the police as to whether a Part 2.9 review could be sought. Further, no submissions were made as to whether a Part 2.9 review could occur once the matter was before the Court.

## **Defendant's contentions**

24. The defendant did not make any submissions.

## **Relevant Legislation**

25. The power for an authorised police to make a Police DVO is found in section 41 of the Act. The section provides:

### **41 When authorised police officer may make DVO**

- (1) An authorised police officer may make a domestic violence order under this Part (a *police DVO*) if satisfied:
  - (a) it is necessary to ensure a person's safety:
    - (i) because of urgent circumstances; or
    - (ii) because it is not otherwise practicable in the circumstances to obtain a Local Court DVO; and
  - (b) a Local Court DVO might reasonably have been made had it been practicable to apply for one.
- (2) The police DVO may be made even if the defendant has not been given an opportunity to answer any allegation made in relation to the making of the DVO.

*Note: For provisions about the content of DVOs, see Part 2.3.*

26. Once a Police DVO is made and the order is given to the defendant, the order is taken to be a summons on the defendant to attend court under section 44. The section provides:

**44 DVO taken to be summons to appear before Court**

The copy of the police DVO given to the defendant is taken to be a summons to the defendant to appear before the Court, at the time and place shown on it for its return, to show cause why the DVO should not be confirmed by the Court.

*Notes*

- 1 *Part 2.10 deals with the confirmation of DVOs.*
- 2 *On confirmation of a police DVO, conduct that constitutes a contravention of the DVO may still be an offence even if the Court order made on the hearing is not given to the defendant before the defendant engages in the conduct, see section 120(2).*

27. Part 2.10 of the Act provides for the process to be followed when a defendant is summoned to attend court for a hearing to decide if the police DVO is to be confirmed or revoked. The Part provides:

**Part 2.10 Confirmation of domestic violence orders**

**80 Application of Part**

This Part applies if the defendant is summoned to appear before the Court to show cause why a DVO should not be confirmed.

*Note: Sections 37, 44, 59, 71 and 79 provide for a summons to the defendant.*

**81 Appearing at hearing**

- (1) Subject to applicable procedural directions, a protected person may appear at the hearing of the proceeding.
- (2) If the defendant has been summoned under section 44 or 71, the Commissioner is a party to the proceeding.

**82. Decision at hearing**

- (1) At the hearing, the Court may, by order:
  - (a) confirm the DVO (with or without variations); or
  - (b) revoke the DVO.
- (2) The Court must not confirm the DVO unless:
  - (a) it is satisfied the defendant has been given a copy of the DVO; and
  - (b) it has considered any evidence before it and submissions from the parties to the DVO.



28. A party may apply to a judge for a review of a police DVO under Part 2.9. The Part provides:

**72 Application for review**

A party to a police DVO may apply to a Judge for a review of the DVO.

**73 How application is made**

- (1) The application may be made by phone, fax or another form of electronic communication.
- (2) If a party wants to apply for a review of the DVO:
  - (a) the party must tell a police officer; and
  - (b) the police officer must facilitate the application.
- (3) To facilitate the application, the police officer must:
  - (a) contact a Judge; and
  - (b) ensure the application complies with applicable rules and practice directions relating to making the application; and
  - (c) ensure the Judge is given the information required for the application.

**74 Deciding application**

- (1) In reviewing the DVO, the Judge must consider the same matters required to be considered in deciding:
  - (a) whether or not to make a DVO; and
  - (b) the terms of a DVO.

*Note*

*Part 2.2 provides for the matters to be considered in making a DVO and Part 2.3 provides for the content of a DVO.*

- (2) The Judge may, by order:
  - (a) confirm the DVO (with or without variations); or
  - (b) revoke the DVO.
- (3) The Judge must:
  - (a) record the reasons for the decision; and
  - (b) inform the police officer of the reasons.

**75 What police officer must do if DVO is revoked**

If the Judge makes an order revoking the DVO, a police officer must inform the parties to the DVO of:

- (a) the order; and
- (b) the reasons for it.

**76 What police officer must do if DVO is confirmed without variations**

If the Judge makes an order confirming the DVO without variations, the police officer must inform the parties to the DVO of:

- (a) the order; and
- (b) the reasons for it.

**77 What Judge must do if DVO is confirmed with variations**

If the Judge makes an order confirming the DVO with variations, the Judge must inform the police officer of:

- (a) the terms of the DVO as varied; and
- (b) the time and place for the return of the DVO as varied.

**78 What police officer must do if DVO is confirmed with variations**

(1) If the Judge makes an order confirming the DVO with variations, the police officer must:

- (a) complete a form of order as directed by the Judge; and
- (b) write on it:
  - (i) the Judge's name; and
  - (ii) the date and time it is made.

(2) As soon as practicable after the form of order is completed, a police officer must:

- (a) give a copy of it to the parties to the DVO; and
- (b) send the original of it to the Court.

*Note for subsection (2)(a)*

*A DVO is given to the defendant if it is given in any of the ways mentioned in section 119.*

**79 Order taken to be summons to appear before Court**

*If the Judge makes an order confirming the DVO (with or without variations), the form of order given to the defendant is taken to be a summons to the defendant to appear before the Court, at the time and place shown on it for its return, to show cause why the DVO as varied should not be confirmed by the Court.*

*Note: Part 2.10 deals with the confirmation of DVOs.*

## **Nature of Police DVO**

- 29. A Police DVO is a type of DVO that can be made by an 'authorised police officer'. This includes an officer of or above the rank of senior sergeant or an officer in charge of a police station.<sup>1</sup>
- 30. Once made, a Police DVO is of a similar nature to an ex parte DVO made under section 32(2) or an ex parte variation made under Part 2.8 Division 1 Subdivision 4 of the Act. Each of these types of orders are taken to be a summons on the defendant to appear before the Court and show cause why the DVO should not be confirmed.<sup>2</sup> The confirmation hearing for all of these types of orders takes place in accordance with Part 2.10 of the Act. Until confirmed by the Court under Part 2.10, these types of orders are subject to confirmation.

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<sup>1</sup> Definition of 'authorised police officer' is found in section 4 of the Act.

<sup>2</sup> See sections 37, 44 and 59 of the *Domestic and Family Violence Act 2007*

31. The Police DVO, the ex parte DVO and the ex parte variation of a DVO are not interim orders. They should not be confused with interim orders such as a section 35 ‘interim court DVO’ or a section 52A ‘interim court variation order’.
32. In *Bonney v Thompson* [2011] NTSC 81, Justice Kelly considered the nature of an ex parte DVO under the Act as compared to an interim court DVO. Her Honour said<sup>3</sup>:
32. If the Court makes a CSJ DVO in the absence of notice to the defendant pursuant to s 32, then the provisions of ss 36, 37 and 82 apply: a copy of the order must be given to the parties by a clerk of the Court [s 36]; that copy of the order is taken to be a summons to the defendant to appear before the Court at the time and place shown for its return, to show cause why the DVO should not be confirmed by the Court [s 37]; the Court then holds a hearing at which time it may confirm the DVO (with or without variations), or revoke the DVO [s 82(1)]. The Court must not confirm the DVO unless it is satisfied that the defendant has been given a copy of the DVO and the Court has considered any evidence before it and submissions by the parties [s 82(2)].
  33. Because of the provisions of s 18 and s 19, before making a CSJ DVO under s 32 in the absence of notice to the defendant, the Court will already have considered a range of relevant matters (set out in s 19) and must have been satisfied “that there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant” [s 18]. In those circumstances, an applicant may well have a reasonable expectation that, unless the defendant appears to oppose the confirmation of the DVO, it is likely to be confirmed – although of course the magistrate must still be satisfied of the requisite matters.
  34. If a CSJ DVO is made under s 32 in the absence of notice to the defendant, the DVO will be for the full term which the Court considers would be appropriate for a final order, and otherwise in identical terms to the proposed final order – but be subject to revocation if not “confirmed” under s 82.
  35. An interim DVO, made pursuant to s 35 is a different kind of order. It may be made at any time – before all of the evidence is in, or even before any of the evidence is in. Under normal circumstances, as in the case of an interim injunction, it would be expected that an interim DVO under s 35 would be made for a limited period only – for example until the resumed hearing of an application which has been adjourned for some reason. It cannot be expected that the magistrate making an interim DVO will necessarily have been able to consider all of the matters set out in s 19 or be satisfied that a CSJ DVO should be made. In those circumstances, there can be no legitimate expectation that an interim DVO will be “confirmed”.
33. Her Honour went on to observe that an ex parte variation under section 56 similarly results in an order that is expressed as a final order that is subject to confirmation<sup>4</sup>:
40. In the case of an order under s 56 (as with a CSJ DVO under s 32 made without notice to the defendant), the variation order should not be for a limited (interim) duration, but in the form, and for the duration, which it is proposed the Court will eventually confirm under s 82. This is because the copy of the order served on the defendant under s 58 serves as a summons to show cause

<sup>3</sup> *Bonney v Thompson* [2011] NTSC 81 at 32-35

<sup>4</sup> *Bonney v Thompson*, *ibid* at 40.

why “the DVO” (ie the DVO a copy of which the defendant has been given) should not be confirmed: if the DVO made under s 56 is not the same as that proposed to be “confirmed”, the defendant will not have had notice of the application against him.

34. Justice Kelly made this same observation again in the matter of *Malogorski v Peart* [2011] NTSC 86. Her Honour found<sup>5</sup>:

[31] Under this procedure in the NT Act, the ex parte order made under s 32 continues in force unless revoked. The confirmation process does not give rise to a new order, it simply confirms and continues the existing ex parte order.

[32] Because of this, and because the copy of the ex parte DVO made under s 32 of the NT Act is the only notice which is given to the defendant of the order which the applicant seeks to have made against him, the order which is confirmed under s 82 of the Act should be in exactly the same terms as the ex parte order made under s 32, including the duration of the order, unless the court specifically exercises the power to vary the order under s 82(1)(a).

35. In making her findings, Her Honour noted<sup>6</sup> that Riley J (as he then was) expressed a similar view in *Balchan v Anthony* (2008) NTSC 02. In that matter, His Honour was considering similar provisions under the predecessor to the current Act<sup>7</sup>. His Honour found<sup>8</sup>:

[14] In my view the proper construction of the provision is that the ex parte order continues in force unless revoked. The confirmation process does not give rise to a new order. If an order is “confirmed” it is, to adopt the dictionary definitions, established more firmly or ratified. It does not cease to exist. It is not replaced by another order. The requirement that there be service of the confirmed order upon the defendant is necessary to make the defendant aware of any changes to the terms of the order and to alert him to the duration of the order. In the event that the order is varied, until service of the varied order, the defendant will continue to be bound by the terms of the order with which he was originally served save insofar as those terms may have been ameliorated upon the confirmation hearing.

36. The views outlined above by Justice Kelly in *Bonney v Thompson* (supra) and *Malogorski v Peart* (supra) were both *obiter dictum*. However, given the level of consideration undertaken in those matters and the status of the Court, such comments are persuasive and carry great weight on my determination.

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<sup>5</sup> *Malogorski v Peart* [2011] NTSC 86 at 31 and 32.

<sup>6</sup> Referred to by Her Honour in footnote 23.

<sup>7</sup> The predecessor to the current Act was the *Domestic Violence Act 1992*.

<sup>8</sup> *Balchan v Anthony* (2008) NTSC 02 at 14.

37. Other attributes of a Police DVO are that they do not cease upon the first mention of the matter in Court and do not require a duration to be set when they are made. They continue in full force until such time as they are revoked by the Court. In relation to the duration of a DVO, section 27 of the Act provides:

**27 Duration of DVO**

A DVO (other than an interim court DVO) is in force for the period stated in it.

*Note: For the duration of an interim court DVO, see section 35(3).*

38. A police DVO is defined as a ‘DVO’ under the definitions contained in section 4 of the Act. However, this Court in *Police v Natasha George* [2015] NTMC 018<sup>9</sup> and the Supreme Court in *Houseman v Higgins* [2015] NTSC 88<sup>10</sup> has found that a police DVO continues in full force until the Court is able to finally determine the matter and that a police DVO is not subject to section 27 of the Act.
39. A further characteristic of a Police DVO, an ex parte DVO and the ex parte variation of a DVO is that they do not become ‘court DVO’s’ until they are confirmed by the Court under Part 2.10. Section 4 of the Act contains the definition of ‘court DVO’. The definition provides:

**Court DVO means:**

- (a) a Local Court DVO; or
  - (b) an interim court DVO; or
  - (c) a consent DVO; or
  - (d) a DVO made by a court under Part 2.7; or
  - (e) a DVO confirmed by the Court under Part 2.10.
40. Accordingly, a Police DVO, an ex parte DVO and the ex parte variation of a DVO do not fall within the definition of ‘court DVO’. That is, unless they are considered to be an ‘interim court DVO’.
41. The definition of ‘interim court DVO’ as found in Section 4 of the Act refers to an order made under section 35(1). Section 35(1) provides:

**35 Interim court DVO**

- (1) At any time during the proceeding for the hearing of an application for a Local Court DVO, the Court may make a domestic violence order under this section (an interim court DVO).

42. For the reasons already outlined above<sup>11</sup>, an ‘interim court DVO’ is a different type of order to an ex parte DVO made under section 32(2) and the ex parte variation of a DVO made under Part 2.8 Division 1 Subdivision 4 of the Act. Further, given that a Police DVO is not a “*proceeding for the hearing of an application for a Local Court DVO*”, this type of order does not fall into the definition of a ‘interim court DVO’ and, *ipso facto*, a ‘Court DVO’.

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<sup>9</sup> *Police v Natasha George* [2015] NTMC 018 at 27 to 30.

<sup>10</sup> *Houseman v Higgins* [2015] NTSC 88 at 8 to 14.

<sup>11</sup> See *Bonney v Thompson* [2011] NTSC 81 at 32 – 35; and *Malogorski v Peart* [2011] NTSC 86 at 31 and footnote 23;

43. This interpretation is consistent with the Parliament’s intention expressed in the Attorney-General’s second reading speech for the Bill to the current Act. The Attorney-General said the following:

The bill will also simplify processes regarding Domestic Violence Orders. There will be two general types of orders that can be sought and made: court orders; and police orders. Court orders are made via the usual process; that is, by a standard application to the court by an applicant, to be now known as a protected person, or a police officer on their behalf. Police orders are those made by an authorised police officer in urgent circumstances where it is not practicable to obtain a court order, but where an order is necessary to ensure the safety of a victim. Police orders are generally made in remote and regional areas.<sup>12</sup>

44. It is significant that a police DVO is not a ‘court DVO’ because it affects the avenues available to a party to appeal, vary, revoke, review or to set aside the police DVO.
45. Part 2.8 of the Act contains the Court’s power to vary or revoke a DVO. However, Section 47 provides:

**47 DVOs to which Division applies**

This Division applies to a court DVO other than an interim court DVO.

[emphasis added]

46. A party therefore cannot make a Part 2.8 Division 1 application to vary or revoke a police DVO as it is not a ‘court DVO’.
47. A police officer does have the ability under Part 2.8, Division 2 to apply to a Judge for a variation of a Police DVO in urgent circumstances, provided there has been a substantial change in the relevant circumstances since the police DVO was made.<sup>13</sup> This avenue was added to the Act through the *Domestic and Family Violence Amendment Act 2010*. In the second reading speech to the Bill the Attorney-General said:

Variation or revocation of DVOs in urgent circumstances: currently, applications to vary or revoke a DVO in urgent circumstances can only be made in respect of Court DVOs. Police are able to apply under sections 64 to 71 of the act to a magistrate over the telephone, or via a fax or other electronic communication, for the variation of the DVO if they are satisfied that there has been a substantial change in relevant circumstances since the DVO was last varied or was made.

A police officer may only make such an application in urgent circumstances when it is not practicable to obtain an order of variation by application to the court. The act does not provide for variation of police DVOs, as a police DVO must be confirmed by the court. However, police DVOs are sometimes unconfirmed by the court for a period of time. Usually, this is in remote areas where there may be up to three months between sittings of the court. The bill provides that a police officer may apply to a magistrate in urgent circumstances in the same manner as a court DVO to seek variation of the police DVO.<sup>14</sup>

[emphasis added]

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<sup>12</sup> Northern Territory, DEBATES – Wednesday 17 October 2007, page 4847

<sup>13</sup> Section 65 of the Act.

<sup>14</sup> Northern Territory, DEBATES – Wednesday 20 October 2010, page 6428.

48. The only option available to a party (other than a police officer) to have a police DVO varied or revoked prior to a section 82 confirmation hearing is by way of a Part 2.9 review of a police DVO by a Judge. This process is analogous to a judge's review of bail in circumstances where the Police have refused bail.
49. Part 2.9 of the Act outlines a process by which a party can inform a police officer that they wish to seek a review and the police officer must facilitate the application for the review<sup>15</sup>. At such a review the Judge may confirm the police DVO with or without variation or revoke the Police DVO. If the police DVO is confirmed, with or without variation, the order to taken to be a fresh summons for the defendant to show cause as to why the order should not be confirmed at a Part 2.10 confirmation hearing.<sup>16</sup>
50. For the same reasons outlined in paragraphs 39 to 43 (above) a Part 2.9 confirmation order made following a review of a police DVO is not a 'court DVO'. A police DVO only becomes a 'court DVO' if it is confirmed under Part 2.10. In effect, a Part 2.9 confirmation order is a confirmation of the Police DVO subject to a further confirmation at a Part 2.10 hearing.
51. The Act does not provide any guidance as to the status of a police DVO that has been confirmed under Part 2.9 subject to a further confirmation at a Part 2.10 hearing. My view is that it can only be described as a 'DVO subject to confirmation'. As is outlined above, other DVO's that fall into this category are:
- (a) an ex parte DVO made under section 32(2);
  - (b) an ex parte variation of a DVO made under Part 2.8 Division 1 Subdivision 4 of the Act; and
  - (c) an urgent variation made under Part 2.8, Division 2.
52. All of the above are not 'court DVOs' or 'interim DVOs' under the Act and they are all subject to confirmation at a Part 2.10 hearing.
53. The final aspect of a Police DVO is that when the matter comes before the Court for the Part 2.10 confirmation hearing, the Court has limited options available to deal with the matter. Section 82(1) outlines what the Court 'may' do at a hearing. The two options are to either to confirm the Police DVO (with or without variation) or to revoke the Police DVO. There is no express power to vary the Police DVO without confirmation under section 82. Accordingly, it appears that a Part 2.10 confirmation hearing is intended to be a final determination of the matter and does not allow for an interim variation to be made. As will be seen at paragraphs 87 and 88 below, the Court does have the power to adjourn the matter at the Part 2.10 confirmation hearing.
54. However, if the defendant does not attend a Part 2.10 hearing in response to the summons to show cause and the Court confirms the police DVO with variation, the confirmation must be a confirmation subject to a further confirmation hearing, with a fresh summons to issue to the defendant to show cause as to why the varied order should not be confirmed. This is principally the case in circumstances where the variation adds greater restraints on the defendant.

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<sup>15</sup> Section 73 of the Act.

<sup>16</sup> Section 79 of the Act.

55. For example, a defendant may be served with a police DVO in non-harm terms and therefore have an expectation that the order served will be the order that the Court will confirm if they do not attend Court. If at the Part 2.10 confirmation hearing the Court confirms the order with variation to become a full-non-contact order, the defendant will not have been given the notice that is required by section 82(2)(a). As Justice Kelly stated in *Bonney v Thompson* (supra) at 40, the order served on the defendant needs to be:

...in the form, and for the duration, which it is proposed the Court will eventually confirm under s 82. This is because the copy of the order served on the defendant under s 58 serves as a summons to show cause why “the DVO” (ie the DVO a copy of which the defendant has been given) should not be confirmed: if the DVO made under s 56 is not the same as that proposed to be “confirmed”, the defendant will not have had notice of the application against him.

56. In the matter of *AB v Hayes & Anor* [2019] NTSC 13 Justice Southwood also considered the defendants right to procedural fairness if the police DVO is to be varied. His Honour said<sup>17</sup>:

Further, the circumstances both of the defendant and the protected person may change significantly between the making of an order under s 41 of the Act and the hearing in the Local Court. Finally, ‘variation’ in this context is the action of making some change or alteration in the domestic violence order as the Local Court considers to be just or desirable in the circumstances of the particular case. The most important thing is that procedural fairness requires the Judge hearing the matter to give a defendant notice of any change being contemplated by the Judge and an opportunity to be heard as to the proposed change.

57. In summary a police DVO has the following attributes:

- (a) it is not an *interim DVO*;
- (b) it is not a *Court DVO*;
- (c) it cannot be the subject of a Part 2.8, Division 1 application to vary or revoke;
- (d) a section 35 interim DVO cannot be made in the police DVO proceedings;
- (e) a police DVO can be the subject of an application by a police officer to vary (but not revoke) under Part 2.8, Division 2 if there are urgent circumstances and there has been a substantial change in relevant circumstances since the police DVO was made;
- (f) a police DVO can be the subject of a review by a Judge under Part 2.9;

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<sup>17</sup> *AB v Hayes & Anor* [2019] NTSC 13 at 60.



- (g) a police DVO has no duration and continues in full force until it is revoked or it is confirmed by the Court; and
- (h) a police DVO becomes a *Court DVO* if confirmed (with or without variation) at a Part 2.10 confirmation hearing.

## **The protected persons Application to Vary or Revoke the police DVO**

58. For the reasons outlined in paragraphs 39 to 46 above, the protected person's *Application to Vary or Revoke* filed on 19 August 2020 must be dismissed. A Police DVO cannot be subject to a Part 2.8 Division 1 application.

## **Part 2.9 Review**

59. There are two primary questions to be determined in relation to a Part 2.9 review:
- (a) Can a party (other than a police officer) apply for a review of a police DVO; and
  - (b) Can a Part 2.9 review be sought once the matter is before the Court.
60. I am not aware of any written decisions, reported or otherwise, addressing these matters. There have been a number of conflicting *ex tempore* decisions from this Court from time to time. Some judicial officers have entertained oral applications for a Part 2.9 review and others have rejected such applications on the basis that the Court has no such power.
61. In any event, I am not bound by any of these *ex tempore* decisions. The doctrine of *stare decisis* dictates that a judicial officer is bound by decisions from a superior court. Judicial officers are not bound by decisions from other judicial officers from the same Court or indeed from decisions from other inferior courts<sup>18</sup>. However, judicial comity requires that a judicial officer should not depart from a finding of a fellow judicial officer without good reason for doing so. In *Valentine v Eid* (1992) 27 NSWLR 615 at 622, Justice Grove observed that:

I emphasise that I am not suggesting that a Local Court may not be considerably advantaged by reference to a relevant judgment of the District Court and I would expect that, except on rare occasions, such judgment would be compellingly persuasive and I hold no more than that a binding precedent has not been created. I refer to Lord Goddard's statement of principle in *Police Authority for Huddersfield* that a judge of first instance of the High Court will follow a decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity—a principle now extended to apply to divisional courts in *Britain: R v Greater Manchester Coroner; Ex Parte Tal* [1985] QB 67 at 81. As comity is required between courts of equal rank, co-ordinate decision must also exist between the Local Court and District Court and a magistrate should not depart from following any decision of the District Court unless after earnest consideration and for good reason he or she became convinced that the decision was wrong.

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<sup>18</sup> *Valentine v Eid* (1992) NSWLR 615 at 619 – 623

62. Acting Magistrate Stark in the matter of *Knight v Raddie* [2013] QMC 15 summarised the rationale behind decisions such as *Valentine v Eid* at 47–51:

[47] One of the justifications for the view stated in this line of authorities is that only superior courts are the subject of a regular system of reporting in law reports. In *Townpub Pty Ltd v PJ Ryans’s Hotels Pty Ltd*, it was noted that the widespread availability of District Court judgements has weakened this argument (at paragraph 62). I think this is partly correct, but only partly for a number of reasons.

[48] First, not all decisions of the District Court are published electronically. By way of example, the decision of *Bond v Commissioner of Police* has not been published electronically by the District Court.

[49] Second, because the court is routinely dealing with an unrepresented party (I would think this is particularly so in the case of appeals of traffic prosecutions) the court will often not have the benefit of informed legal argument from both ends of the bar table, or the assistance of the research capability that a represented party would bring.

[50] Third, as is noted in *Valentine v Eid*, “the formidable case load in the District Court necessarily demands frequent ex tempore judgment which does not lend itself as a source of systemic derivation of precedent”. ((1992) 27 NSWLR 615 at 621). While this is speaking of the District Court in New South Wales, I would think the same comment applies equally in Queensland.

[51] All of these things compound upon each other to raise the likelihood of the court delivering decisions without reference to previous decisions of the court or of other jurisdictions on the same subject matter, and this heightens the risk of inconsistency.

[footnotes excluded]

63. I agree with this analysis. The domestic violence application list that occurs at the Local Court generally has parties that are either self-represented or represented by duty lawyers. Legal arguments usually occur within busy lists after duty lawyers have obtained brief instructions. Legal arguments rarely occur at a devoted hearing time where fully briefed counsel is able to make detailed and well researched submissions. In addition, the workload of a Local Court Judge rarely permits a written detailed decision to be delivered.

### **The power to vary or review an unconfirmed police DVO**

64. Police DVO’s were first introduced under the *Domestic Violence Amendment (Police Orders) Act 2005*. The Act amended the predecessor to the current Act<sup>19</sup> to allow an authorised police officer to make a Police DVO rather than an officer having to call a magistrate after hours to get an urgent DVO. The purpose of the amendments were outlined by the Attorney-General in his second reading speech for the amending Bill<sup>20</sup>:

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<sup>19</sup> The predecessor to the current Act was the *Domestic Violence Act 1992*.

<sup>20</sup> Northern Territory, DEBATES – Thursday 25 August 2005, page 596-7.

*The purpose of this bill is to amend the Domestic Violence Act to provide for authorised police officers to issue urgent restraining orders in certain circumstances, and to repeal the Domestic Violence Amendment Act 2001. The objectives of the amendments contained in the bill are to give police greater flexibility in their immediate response to incidents of domestic violence, and to decrease the amount of out-of-hours work for magistrates.*

*Section 6 of the act currently provides for a police officer to make an application outside of normal court hours by telephone to a duty magistrate for a restraining order. This process provides access to the protection of a restraining order overnight and on weekends and public holidays, when it is not possible to file an application for a restraining order at a court registry.*

*The number of urgent out-of-hours applications being made under section 6 of the Domestic Violence Act has increased significantly. Applications increased from 39 in 1999 to 724 in 2004. In 2005, to the end of March, 199 applications had been made by police under section 6 of the act. This reflects both an increased awareness about legal remedies available for domestic violence, and some recent operational changes made by police with respect to domestic violence.*

.....

*The bill repeals the existing section 6 of the act and replaces it with new provisions for urgent, out-of-hours orders to be made by either a magistrate or authorised police officers. The bill permits a police officer of or above the rank of senior sergeant, or an officer in charge for the time being of a police station, to issue a restraining order if it is necessary to ensure the immediate safety of a person for whose protection the order is being made.*

*The bill also provides the option for police to make an application to a magistrate by telephone, facsimile or other electronic means for an urgent order where it is not practicable for an application to be made at the court.*

*In order to provide immediate protection for people at risk of harm from domestic violence, police will be able to either make an application to a magistrate, or have an authorised police officer issue an order.*

*It is envisaged that, while police will now be able to deal with many incidents of domestic violence that occur outside the normal court hours or in remote areas on an urgent basis without having to make an application to a magistrate, it is still necessary to preserve the option for police to make an application for an urgent order to a magistrate in particularly complex or sensitive matters. However, it is understood that these matters will be in a minor proportion.*

*If police or a magistrate make an urgent order, it will then be adjourned to a later date for a magistrate to confirm the order. The defendant is summoned to appear at the confirmation hearing when they receive a copy of the urgent order. An urgent order is not binding on a defendant until it has been served on them.*

*The confirmation hearing before a magistrate gives the parties an opportunity to consider their position, and to advise the court whether any alteration needs to be made to the scope and nature of a restraining order. It is also a mechanism for providing procedural fairness for a defendant, as urgent orders may be made without notice and in the absence of the defendant.*

*In centres such as Darwin, Katherine and Alice Springs, it is anticipated that urgent orders made by either police or a magistrate will be confirmed by the court within two to five working days. In other remote locations, the return date may be up to four weeks of an urgent order being made. Given that some urgent interim orders issued by police in remote areas will not be listed for confirmation for some weeks, it is*

necessary to provide a review process for people affected by these types of orders who do not have access to a court other than a circuit court.

*When police make an urgent order, they will be obliged to inform the defendant of their right under the act to seek a review of that order from a magistrate. Where a defendant requests a review of a police order, police must facilitate an application by the defendant to a magistrate for a variation or revocation of the order. Such an application may be made by telephone or other form of electronic communication to a magistrate. This process is analogous to the review that is available in the Bail Act, where police have refused to grant bail to a person. Under section 20AB of the Domestic Violence Act, the Chief Magistrate may issue rules or practice directions for the purposes of the act. It is anticipated that the Chief Magistrate may make rules or practice directions relating to the time and manner for making such applications.*

*It is not intended that an application for a review be immediately available to a defendant, particularly when police issue an order outside of normal court hours, and that a review within one to three working days of the order being made would meet the needs of a defendant in this regard.*

[emphasis added]

65. The power for a Police officer to make a DVO under the now revoked *Domestic Violence Act 1992* (“the former Act”) was found in section 6A of that Act. The right of review was contained in section 6B of the former Act. Those sections provided as follows:

**6A Restraining order made by police officer**

- (1) An authorised police officer may make an order under this section if satisfied:
  - (a) it is not practicable in the circumstances to obtain an order under section 4(1); and
  - (b) it is necessary to ensure the immediate safety of the person for whose protection the order is to be made; and
  - (c) the Court might reasonably have made an order under section 4(1).
- (2) In addition, before making or refusing to make an order of the type referred to in section 4(8), the police officer must consider the effect of making or refusing to make the order on:
  - (a) the accommodation of the persons affected by the order; and
  - (b) any children of or in the care of the persons affected by the order.
- (3) The police officer may make the order in the same terms as an order the Court may make under section 4(1).
- (4) The order may be made even though the defendant has not been given an opportunity to answer any allegation made in relation to the making of the order.
- (5) The order has effect as if it were an order made under section 4(1).
- (6) The police officer must record on the order the reasons for making it and the time and place for its return.

- (7) For subsection (6), the time for the return of the order must be as soon as practicable after its making.
- (8) As soon as practicable after the order is made, a police officer must:
  - (a) serve a copy of it on the defendant; and
  - (b) inform the defendant of the defendant's right to apply for a variation or revocation of the order under section 6B; and
  - (c) send the original of the order to the Clerk.
- (9) The order served is taken to be a summons to the defendant to appear before the Court, at the time and place shown on the order for its return, to show cause why the order should not be confirmed by the Court.
- (10) In this section:
 

*authorised police officer* means:

  - (a) a police officer of or above the rank of Senior Sergeant; or
  - (b) the officer in charge for the time being of a police station.

**6B Review of order made by police officer**

- (1) This section applies to an order made under section 6A(3).
- (2) The defendant may apply for a variation or revocation of the order.
- (3) If the defendant wants to apply for a variation or revocation of the order under subsection (2):
  - (a) the defendant must inform a police officer; and
  - (b) the police officer must facilitate the application.
- (4) Without limiting subsection (3)(b), the police officer must:
  - (a) contact a magistrate; and
  - (b) ensure the application complies with any rules or practice directions made or issued by the Chief Magistrate under section 20AB relating to the time and manner for making the application; and
  - (c) ensure the magistrate is given the information required for the application.
- (5) The application may be made by telephone, facsimile or other form of electronic communication.
- (6) The magistrate may decide to vary or revoke or refuse to vary or revoke the order.

- (7) The magistrate must record the reasons for the decision and inform the police officer of the reasons.
- (8) If the magistrate varies the order, the magistrate must also inform the police officer of the terms of the order as varied and the time and place for the return of the order as varied.
- (9) If the magistrate varies or revokes the order, the police officer must:
  - (a) complete a form of order as directed by the magistrate and write on it the magistrate's name and the date and time it is made; and
  - (b) as soon as practicable after the form of order is completed:
    - (i) serve a copy of it on the parties; and
    - (ii) send the original of it to the Clerk.
- (10) If the magistrate varies the order, the form of order served is taken to be a summons to the defendant to appear before the Court, at the time and place shown on it for its return, to show cause why the order as varied should not be confirmed by the Court.
- (11) If the magistrate refuses to vary or revoke the order, the police officer must inform the defendant of the decision and the reasons for it.

66. This power and process has been replicated in Part 2.6 and Part 2.9 of the current Act. As can be seen between the former Act and the current Act, the nature of a Police DVO has remained the same and the review process has remained the same. The second reading speech contained above in paragraph 64 is thus relevant to an interpretation of Part 2.9 under the current Act<sup>21</sup>.

67. Under the current Act, section 73 outlines, in express mandatory terms, how an application is to be made. The steps are as follows:

- (a) The application for a review may be made by phone, fax or another form of electronic communication.<sup>22</sup> This is again an acknowledgment that the review process is primarily intended to be used by parties in remote areas where there will be a delay in the matter progressing to a Part 2.10 confirmation hearing before the Court.
- (b) A party must tell a police officer that they want to apply for a review<sup>23</sup>. There is no automatic review. There must be a request to trigger the commencement of the review process;
- (c) The police officer must facilitate the application.<sup>24</sup> This step is mandatory, though, as was explained in the second reading speech contained in paragraph 64, *“It is not intended that an application for a review be immediately available to a defendant, particularly when police*

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<sup>21</sup> *Interpretation Act 1978*, section 62B(2)(e).

<sup>22</sup> Section 73(1) of the Act.

<sup>23</sup> Section 73(2)(a) of the Act.

<sup>24</sup> Section 73(2)(b) of the Act.

*issue an order outside of normal court hours, and that a review within one to three working days of the order being made would meet the needs of a defendant in this regard.”*

- (d) It is the police officer who must contact the judge and give the judge the required information and the police officer must follow the rules and practice directions relating to the making of such an application<sup>25</sup>.
68. Under both section 6B(4)(b) of the former Act and 73(3)(b) of the current Act, when facilitating the application, the police officer is to comply with applicable rules and practice directions relating to making the application.
69. The current Practice Direction was issued on 30 September 2019. This Practice Direction directs the police and parties in relation to the process to be followed when seeking a Part 2.9 review. The Practice Direction provides:

**Review of Police Domestic Violence Orders under Part 2.9**

- 30.8 When a party to a police issued domestic violence order requests a review of that order, the police officer to whom that request is made shall:
- 30.8.1 provide the applicant with a copy of Application to Review a Police Order, to complete and if necessary, assist that person to complete the form;
  - 30.8.2 arrange for the applicant to sign an affidavit outlining what information they wish to put before the Judge;
  - 30.8.3 provide the completed forms to the Court;
  - 30.8.4 assist the applicant in his/her application to the Court, including arranging appropriate interpreters if necessary; and
  - 30.8.5 explain the result of the review to the applicant and the reasons given by the Court.
- 30.9 An Application to Review a Police Order shall be made to the nearest Local Court within business hours of that registry. If the Court registry is not open, subject to 30.10 the application may be to the on-call Judge.
- 30.10 A Judge should only be contacted out of hours if the police officer is satisfied that there is a real threat of imminent actual violence or intimidation on the protected person and in all the circumstances, it is necessary to contact a Judge out of hours.
70. Under the current Practice Direction, the requisite form has been issued by the Court under section 126 of the Act. The Form is an *Application to Review Police Order* and is contained in the appendix to the Practice Directions.

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<sup>25</sup> Section 73(3) of the Act.

## **Can a party (other than a police officer) apply for a review of a police DVO?**

71. It is important to note that section 73 of the Act does not provide that a police officer is to make an application. The section provides that the police officer is to facilitate the application. The application remains the application of the person seeking the review. The police officer might be seen as the conduit to the application being made.
72. There are a number of practical and policy reasons behind a police officer having to facilitate the application.
73. Firstly, it is impossible for a defendant or a protected person to telephone a judge afterhours to seek a review.
74. Secondly, because the application is intended to be made remotely, the police officer has a number of tasks to complete after the review has occurred. The judge is to inform the police officer of the reasons for the decision<sup>26</sup>. The police officer is to inform the parties of the outcome of the review.<sup>27</sup> If the review results in a confirmation with variation, then it is the role of the police officer to create the form of order, serve it on the parties and send the original to the Court.<sup>28</sup>
75. Thirdly, the process is a review of the decision the authorised police officer made. Like a bail review, the police officer will need to advise the Court of the matters that gave rise to the decision being reviewed. The officer will inform the Court as to the basis for making the police DVO and the reasons for the type of orders made.
76. Police DVO's are generally made in high pressure situations where police officers are responding to violence incidents where they are required to deal with angry or emotional parties who are often under the influence of alcohol or other intoxicating substances. They often have to take a party into custody and/or transport parties to alternate accommodation to deescalate the situation. These environments are not conducive to the officer taking lengthy detailed witness statements, gathering evidence of matters contained in section 19(2) or recording detailed reasons for making the orders. These tasks generally occur in the days following the incident but prior to the Part 2.10 confirmation hearing.
77. Accordingly, when a Part 2.9 review occurs, the judge will not have a transcript of the discussions between the parties and the authorised officer. They will not have the evidence the authorised officer relied upon to make the police DVO. They will not have written reasons for the decision. It is for these reasons that it will be essential for the police to be part of the review process to provide the Court with evidence as to the basis for the Police DVO being made and to answer questions from the reviewing judge.
78. Fourthly, Part 2.9 does not provide for a general right for a party to be heard at the review hearing. Although the Part provides that 'a party' may bring the application, the reality is that it will generally be the respondent seeking the review rather than a protected person. The Part 2.9 review process does not require notice to be given to the protected person and provides no express right for them to

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<sup>26</sup> Section 74(3) of the Act.

<sup>27</sup> Section 75(b) and 76(b) of the Act.

<sup>28</sup> Section 78 of the Act.



be heard. A review could result in a revoking of the police DVO under section 75 without the person for whom the order was intended to protect, even being aware of the review application.

79. The converse scenario is that a protected person seeks a review of the police DVO because they might feel that the order made by the authorised officer was not restrictive enough. Perhaps the protected person is seeking a premises access order, which may result in the defendant becoming homeless. Again, the Part 2.9 review process does not require notice to be given to the defendant or for the defendant to have an opportunity to be heard in the review process.
80. The defendant and the protected person would each have a reasonable expectation that the police DVO would not change prior to the Part 2.10 hearing and certainly not without notice to them. Accordingly, by the police officer participating in the review process and providing the judge with all of the relevant information and the reasons for the decision, this ensures that the review is not an entirely ex parte process.
81. Having considered the matters outlined above, it is clear that a Part 2.9 review application is an application by a party other than a police officer. However, whilst it remains an application of that party, the application must be facilitated by a police officer or a legal representative for a police officer. The wording of the Part is prescriptive. The role that the police officer has in this process is more than just a conduit for the application to be made. The police officer is an integral part of the review process.
82. If it was intended for a party to be permitted to lodge their own application with the Court to review a police DVO, the parliament would not have intentionally excluded Police DVO's from being subject to an application under Part 2.8 Division 1 of the Act.

### **Can a Part 2.9 review be sought once the matter is before the Court.**

83. As was outlined by the Attorney-General in his second reading speech for the 2005 Bill that first introduced 'police DVOs' (see paragraph 64 above), the purpose of a Part 2.9 review is to allow a judge to reconsider the police's decision because it was acknowledged that there can sometimes be a significant delay between the making of the police DVO and the ability of the Court to conduct the Part 2.10 confirmation hearing. The review process was described by the Attorney-General as "*analogous to the review that is available in the Bail Act, where police have refused to grant bail to a person*". It is clear both from the wording of the Act and this second reading speech that the Part 2.9 review process was intended to be available from the date that the police DVO is made until when the matter first comes before the Court for the Part 2.10 confirmation hearing.
84. Indeed, as has already been outlined above, when the Act was further amended in 2010 to introduced the ability for a police officer to apply to a judge for a variation of a Police DVO in urgent circumstances, the then Attorney-General said:

The act does not provide for variation of police DVOs, as a police DVO must be confirmed by the court. However, police DVOs are sometimes unconfirmed by the court for a period of time. Usually, this is in remote areas where there may be up to

three months between sittings of the court. The bill provides that a police officer may apply to a magistrate in urgent circumstances in the same manner as a court DVO to seek variation of the police DVO.<sup>29</sup>

85. In this speech, it was clearly acknowledged by the Attorney-General that police DVO's could not be subject to a Part 2.8 Division 1 application because once the matter is before the Court it needs to proceed to a Part 2.10 confirmation hearing.
86. It cannot be said that the inability for a party to apply to the Court for a variation or revocation of a police DVO once the matter is before the Court is an unintentional omission on the part of the legislature. If it were the legislature's intention to allow a party to apply to review or revoke a police DVO once the matter was before the Court, then Police DVO's would not have been excluded from being subject to applications under Part 2.8 Division 1.
87. Part 2.10 outlines the process to be followed once the matter comes before the Court for the return of the summons to show cause and it clearly outlines the options the Court has available to it when dealing with the matter. These matters have been considered by Judge Oliver in *Police v Natasha George (supra)*. Her Honour said<sup>30</sup>:

8. It is submitted that section 82 is clear in its requirement for a decision to be made for either confirmation or revocation of the police domestic violence order on the date of return. Section 82 provides

**82 Decision at hearing**

- (1) At the hearing, the Court may, by order:
- (a) confirm the DVO (with or without variations); or
  - (b) revoke the DVO.
- (2) The Court must not confirm the DVO unless:
- (a) it is satisfied the defendant has been given a copy of the DVO; and
  - (b) it has considered any evidence before it and submissions from the parties to the DVO.
9. In my view, there is nothing apparent either from this provision or any other part of the Act that requires there to be a hearing for a final determination of the matter on the date of first return.
10. A police DVO serves two purposes
- (a) it imposes certain restraints on a defendant for the protection of another or others
  - (b) it acts as summons to attend court to show cause why those restraints or other restraints that the court might see fit to impose and become confirmed as a court DVO
11. Under the *Justices Act* a summons may be issued to require the attendance of a person at court to answer a charge that has been made against him or her. Similarly pursuant to the *Sentencing Act* when a court makes an order for an offender to pay restitution that person can be required to attend on a future date to show cause why he or she should not be imprisoned for failure to make for restitution. In neither case is there a requirement that these matters be determined on the date of first return or show cause.

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<sup>29</sup> Northern Territory, DEBATES – Wednesday 20 October 2010, page 6428.

<sup>30</sup> *Police v Natasha George* [2015] NTMC 018 at 8 to 23

This is of course partly due to the impracticality in terms of time in the Court of Summary Jurisdiction of hearing all summons matters listed on a particular day to finality but also due to the need to allow a defendant time to prepare his or her own case.

12. In the context of the first return of a Police DVO the impracticality of this submission is that it would require the prosecution to attend with all witnesses in tow or on standby on the first return so that in the event that the defendant appears in answer to the summons and does not consent to confirmation of the order they would be able to immediately then to proceed to a hearing in the matter. In the context of a domestic violence proceeding this would require the attendance of the protected person in circumstances where there may be potential for a risk to them arising out of their attendance. It is possible in some matters that the protected person would be unavailable because they are hospitalised with injuries.
13. On the other hand it would also be procedurally unfair to a defendant to insist that a police DVO be dealt with to a final determination on the first return date. As these matters are to be brought before the court as soon as practicable, it may be the case that a defendant has had less than 24 hours to consider his or her position. A defendant may be unrepresented on the first return but wishing to obtain legal advice. A defendant may wish to contest the confirmation of the DVO and will require time to consider the evidence that will be led by the police and may need to make arrangements for the attendance of their own witnesses.
14. A further outcome on the first return of a police DVO is that the parties may wish to discuss and negotiate a variation of the police DVO, for example from a full noncontact order to one that restrains conduct whilst the defendant is consuming alcohol or is intoxicated. Again it would be procedurally unfair to all parties, including the protected person, to insist on the finalisation of the police DVO on the first return.
15. It would also potentially impact unfairly on a protected person. A police DVO is taken out by police. It is not always the case that the conditions imposed with those orders are those which the protected person desires. A protected person is a party to the proceedings and has a right to be heard on the question of confirmation. As with a defendant, it would be procedurally unfair for the question of confirmation to be required to be determined on a first return.
16. In my view, the Legislature cannot have intended to introduce a procedure for domestic violence matters that would procedurally disadvantage and be unfair to the parties.
17. The submission referred to my decision in *Police v RA* [2010] NTMC 61 with reference to paragraphs [13] and [14]. There is nothing in those paragraphs that supports a contention that a Police DVO **must** be determined on the first review. As I think is clear the observations there were as to a case where the defendant fails to appear on the first return date. In that circumstance there is no impediment to the court considering the evidence before it and any submissions and either proceeding to confirm a domestic violence order (with or without variation) or revoke the police DVO.
18. In this case the defendant was present in the matter adjourned at the request of Counsel.
19. In my view sections 81 and 82 are clear in their intent and do not require the “hearing” of the matter on the first return.

20. Section 81 provides

**81 Appearing at hearing**

- (1) Subject to applicable procedural directions, a protected person may appear at the hearing of the proceeding.
- (2) If the defendant has been summoned under section 44 or 71, the Commissioner is a party to the proceeding. (my emphasis)

21. If the intent was that a police DVO is to be finalised on the first return there would be no opportunity for the court to make procedural directions as is envisaged by section 81(1). Such directions might include, for example, the giving of evidence by CCTV. It is obvious that this is not a matter that can be attended to or arranged at short notice. It should also be obvious that procedural directions of this nature are ones which may well be desirable in the context of dealing with domestic violence.

22. Section 82 provides

**82 Decision at hearing**

- (1) At the hearing, the Court may, by order:
  - (a) confirm the DVO (with or without variations); or
  - (b) revoke the DVO.
- (2) The Court must not confirm the DVO unless:
  - (a) it is satisfied the defendant has been given a copy of the DVO; and
  - (b) it has considered any evidence before it and submissions from the parties to the DVO.

23. In my view, the phrase “at the hearing” encompasses two separate circumstances. First, where a defendant fails to attend in answer to the summons to show cause. In that case the court may well proceed to “hear” the matter, consider the evidence and submissions before it and either confirm, with or without variation, a DVO or revoke the police DVO. It does not preclude and in my view, it envisages the alternate outcome, that is that a defendant (or protected person) wishes to contest the ongoing existence of a domestic violence order for its terms and in that case the matter may be set for a “hearing” at which time evidence may be provided by all parties and the matter finally determined.

88. I agree with Her Honour’s analysis of the process. I agree that the Court may make procedural directions prior to conducting the ‘hearing’. Further, sections 81 and 82 are clear in their intent and do not require the ‘hearing’ of the matter on the first return. In contested matters, it would be contrary to the interests of justice to force the matter to an early hearing before each party is given an opportunity to properly prepare and present their case. If a defendant or a protected person seeks to oppose the confirmation of the police DVO, the matter should be listed for a contested hearing with appropriate hearing directions being made for the filing evidence-in-chief by each party.

89. As has been outlined above, a police DVO is not an interim order. It is not temporary in nature. There is an expectation that the order will be confirmed at a confirmation hearing unless the defendant can show cause as to why the order should not be confirmed or unless the judge is not satisfied that the requisite criteria are met.<sup>31</sup>

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<sup>31</sup> *Bonney v Thompson* [2011] NTSC 81 at 33.

90. After considering the Act as a whole, the authorities and the relevant second reading speeches outlined above, I find that a Part 2.9 review of a Police DVO is only available to a party prior to the matter first coming before the Court under Part 2.10. A party cannot be allowed to circumvent the Part 2.10 process through a Part 2.9 review once the matter is before the Court.

### Implied Powers

91. Neither the protected person nor the defendant submitted that the Court may have an implied power to vary a police DVO. However, given that they are unrepresented parties, it cannot be expected that they would articulate such matters. It is therefore necessary for the Court to consider all potential sources of power to give effect to the orders they seek.
92. The starting point, as was submitted by Counsel for the police is that “*The Local Court possesses no prerogative or inherent jurisdiction. It is a creature of statute and, as such, has only that jurisdiction conferred on it by statute, whether expressly or by implication.*”<sup>32</sup>
93. The relevant approach to determine whether an inferior court has an implied power was summarised by the majority in *Pelechowski v The Registrar, Court of Appeal* [1999] HCA 19. Justices’ Gaudron, Gummow and Callinan stated<sup>33</sup>:

50 Some guidance in the matter is provided by the decision of this Court in *Grassby v The Queen*[23]. It was there held that specific provision upon the subject made in the Justices Act 1902 (NSW) left no room for the implication of a discretionary power to terminate proceedings in a manner other than that provided[24]. The result was that a magistrate had no power to order a stay of committal proceedings as an abuse of process. The leading judgment was given by Dawson J. After referring to the proposition that it is the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power, his Honour continued[25]:

"It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster[[26]]. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise ... Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J points out[[27]], fundamental."

Dawson J concluded that recognition of the existence of the powers which an inferior court must possess by way of necessary implication will be called for[28]:

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<sup>32</sup> Paragraph 3 of Counsel for the Commissioner for Police’s written submissions. Also citing *Grassby v the Queen* (1989) 168 CLR 1 at 16-17 (Dawson J).

<sup>33</sup> *Pelechowski v The Registrar, Court of Appeal* [1999] HCA 19 at 50 and 51.

"whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'".

51. The term "necessary" in such a setting as this is to be understood in the sense given it by Pollock CB in *The Attorney-General v Walker*[29], namely as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided in Div 4 of Pt 3 of the District Court Act. In this setting, the term "necessary" does not have the meaning of "essential"; rather it is to be "subjected to the touchstone of reasonableness"[30].

94. Counsel for the police submitted that:

No general power to vary police DVOs on an interim basis arises by implication. The power of the Local Court to confirm a police DVO carries with it everything which is necessary for its exercise [*Grassby v the Queen*]. However, those implied powers are limited to what is reasonably required or legally ancillary to the accomplishment of the specific remedy sought [*Pelechowski v Registrar, Court of Appeal NSW (1999) 198 CLR 435 at 51*]. All implied power to vary police DVOs on an interim basis is not reasonably required or ancillary to the power to confirm police DVOs for three reasons.<sup>34</sup>

[References added]

95. The three reasons submitted were:

Firstly, the express power is capable of exercise without that implication.

Secondly, the specific remedy sought by s82 of the DFVA is the final confirmation or revocation of police DVO, and the making of orders which alter the rights and parties on an interim basis is not necessary for or ancillary to that end.<sup>35</sup>

.....

Thirdly, the DFVA, read as a whole, demonstrates an intention that the power to vary a police DVO is to be confined, and exhaustively described by Part 2.8, Division 2 and Part 2.9.<sup>36</sup>

96. The Supreme Court of the Northern Territory considered a similar dilemma in the matter of *Muir v Nunn* [2006] NTSC 71. The question the Court was considering in that matter was whether the Northern Territory Local Court had the power to make an interim DVO under the *Domestic Violence Act 1992* (being the predecessor to the current Act). In considering these matters Martin (BR) CJ found<sup>37</sup>:

[28] When a defendant is present and opposes the making of an order, there is no express power to make an order pursuant to s 4 which is subject to confirmation. From a practical point of view, it is obviously desirable that in these circumstances a Magistrate unable to embark on a full hearing should have the power to make interim orders "on the papers" until a hearing is held and a final resolution of the application is achieved. On this view, a power should be inferred. However, in my opinion the legislative scheme and the consequences of making an order pursuant to

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<sup>34</sup> Paragraph 14 of Counsel for the Commissioner for Police's written submissions.

<sup>35</sup> Paragraphs 15 and 16 of Counsel for the Commissioner for Police's written submissions.

<sup>36</sup> Paragraph 17 of Counsel for the Commissioner for Police's written submissions.

<sup>37</sup> *Muir v Nunn* [2006] NTSC 71 at 28 and 29

s 4 in these circumstances does not permit of that interpretation. If an order is made in these circumstances pursuant to s 4, it is not subject to confirmation pursuant to s 4(5). As s 4(5) does not apply, such an order would automatically trigger the serious consequences under the Firearms Act to which I have referred. In that situation those consequences would follow notwithstanding that a defendant had not had an opportunity to be heard and present evidence before an order pursuant to s 4 was made. Such a result would be contrary to the legislative scheme which is designed to ensure that a defendant has an opportunity to be heard and present evidence before an order is made.

[29] The practical consequences of denying the existence of a power to make an interim order when a defendant is present and opposes the application are inconvenient, but they are not such as to defeat the objects of the legislative scheme. If, for practical reasons, a Court is not in a position to conduct a full hearing, it can reasonably be said that it is not practicable to obtain an order from the Court pursuant to s 4 and the alternative ex parte procedures become available to an applicant. In many situations the inconvenience of proceeding ex parte could be avoided if a defendant is prepared to give appropriate undertakings to the Court pending the hearing and final resolution of the application.

97. The consequence of the decision in *Muir v Nunn (supra)* was that the Local Court had no power to make interim DVO's until the current Act commenced the following year. The current Act now expressly provides that the Court has the power to make interim DVO's under section 35.
98. The decision in *Muir v Nunn (supra)* highlights the importance of the objects of the Act in determining whether a power should be implied. Section 62A of the *Interpretation Act 1978* also provides:

**62A. Regard to be had to purpose or object of Act**

In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.

99. While the express objects of the Act are significant, the legislative intention as determined by reading the Act as a whole<sup>38</sup> and taking into account any relevant second reading speeches<sup>39</sup> is also essential in assisting the Court to determine if a power exists by implication.
100. The objects of the Act are found in section 3:

**3 Objects of Act and their achievement**

- (1) The objects of this Act are:
  - (a) to ensure the safety and protection of all persons, including children, who experience or are exposed to domestic violence; and
  - (b) to ensure people who commit domestic violence accept responsibility for their conduct; and
  - (c) to reduce and prevent domestic violence.

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<sup>38</sup> *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 at 69.

<sup>39</sup> Section 62A, *Interpretation Act 1978*

- (2) The objects are to be achieved by providing for the following:
- (a) the making of domestic violence orders to protect people from domestic violence and to encourage the people committing it to change their behaviour;
  - (b) the registration of orders made in other jurisdictions;
  - (c) the enforcement of those orders;
  - (d) the enabling of particular entities to share information so that:
    - (i) assessments can be made about threats to the life, health, safety or welfare of people because of domestic violence; and
    - (ii) responses can be made to threats mentioned in subparagraph (i); and
    - (iii) people who fear or experience domestic violence, or people who commit domestic violence, can be referred to appropriate providers of domestic violence related services.

101. Section 19 of the Act also provides:

**19 Matters to be considered in making DVO**

- (1) In deciding whether to make a DVO, the issuing authority must consider the safety and protection of the protected person to be of paramount importance.

102. Having read the Act as a whole, taking into account the second reading speeches (referred to above) and having considered the relevant authorities, I find that there is no implied power to vary or revoke a police DVO on an interim basis. The only power to vary or revoke a police DVO on an interim basis is expressly found in Part 2.8 Division 2 or Part 2.9 of the Act. The reasons for my reaching this conclusion are as follows.

103. Firstly, it is the clear express intention of the legislature for police DVO's to only be subject to variation or revocation under Part 2.8 Division 2 or Part 2.9. As is outlined above, the legislature intentionally prevented police DVO's from being subject to Part 2.8 Division 1 applications to vary or revoke, "*as a police DVO must be confirmed by the court*"<sup>40</sup> before it can be subject to variation or revocation.

104. The objects of the Act include the requirement to "*to ensure the safety and protection of all persons, including children, who experience or are exposed to domestic violence*"<sup>41</sup> and in making or varying a DVO the Court "*must consider the safety and protection of the protected person to be of paramount importance*"<sup>42</sup>. In my view, it would be contrary to the intention of the legislature and the objects of the Act, to allow a police DVO to be varied or revoked by way of an interim hearing before each party is given an opportunity to properly prepare and present their case at the Part 2.10 confirmation hearing.

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<sup>40</sup> Northern Territory, DEBATES – Wednesday 20 October 2010, page 6428.

<sup>41</sup> Section 3(1)(a) of the Act.

<sup>42</sup> Section 19(1) of the Act.



105. While it may be inconvenient to both defendants and protected persons to be unable to apply to vary or revoke an unconfirmed Police DVO once the matter is before the Court until the final hearing, the inconvenience cannot defeat the objects of the legislative scheme or overcome the express language of the Act.
106. Secondly, the power to vary or revoke an unconfirmed police DVO prior to ‘hearing’ the matter under Part 2.10 is not “*reasonably required or legally ancillary*”<sup>43</sup> to exercise of the Court’s power to revoke or to confirm (with or without variation) the police DVO under that Part.
107. For the reasons outlined above, the oral application for a Part 2.9 review is declined. The Court has no such power to entertain such an application.

Dated this 13 day of November 2020

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Kris Norrington  
LOCAL COURT  
JUDICIAL REGISTRAR

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<sup>43</sup> *Pelechowski v The Registrar, Court of Appeal* [1999] HCA 19 at 51.