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Section 37(1)(C) of the
*Domestic and Family Violence
Protection Act 2012 (Qld)*



*Don't neglect this significant section when seeking a final protection order.
Report by **Katrina Oner**.*

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Applications before the Magistrates Court for the making of protection orders are commonly sought, particularly in the context of the breakdown of a marriage or de facto relationship.

It is not uncommon for a party involved in a family law matter to seek a final protection order, not only to protect the safety of the aggrieved, but also to seek negative findings made against the respondent during the protection order proceedings, in the hope that the findings will help the aggrieved in family law proceedings (particularly in regard to children).

It is the writer's experience with domestic violence matters that, throughout protection order proceedings, most parties focus on whether an act of domestic violence was in fact committed (section 37(1)(b) of the *Domestic and Family Violence Protection Act 2012* (the Act)), without placing as much importance on whether it is necessary or desirable to protect the aggrieved from domestic violence moving forward on a final basis (section 37(1)(c) of the Act).

Meaning of domestic violence

The meaning of domestic violence is defined in section 8 of the Act.

Section 8(1) says that:

- (1) Domestic violence means behaviour by a person (the first person) towards another person (the second person) with whom the first person is in a relevant relationship that—
- (a) is physically or sexually abusive; or
 - (b) is emotionally or psychologically abusive; or
 - (c) is economically abusive; or
 - (d) is threatening; or
 - (e) is coercive; or
 - (f) in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.

Section 8(2) goes on to list some of the behaviour which is deemed to be domestic violence, which includes the unauthorised surveillance and stalking of a person.

Section 37 – When the court may make a protection order

Section 37 says:

- (1) A court may make a protection order against a person (the respondent) for the benefit of another person (the aggrieved) if the court is satisfied that—
- (a) a relevant relationship exists between the aggrieved and the respondent; and
 - (b) the respondent has committed domestic violence against the aggrieved; and
 - (c) the protection order is necessary or desirable to protect the aggrieved from domestic violence.
- (2) In deciding whether a protection order is necessary or desirable to protect the aggrieved from domestic violence, the court—
- (a) must consider the principles mentioned in section 4; and
 - (b) may consider whether a voluntary intervention order has previously been made against the respondent and whether the respondent has complied with the order.



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Section 4 of the Act outlines the principles for administering the Act, the main principle being that the safety, protection and wellbeing of people who fear or experience domestic violence are paramount (section 4(1)).

Meaning of 'necessary or desirable'

The decision of *Armour v FAC* [2012] QMC 22, provides a good examination of what "necessary or desirable to protect the aggrieved" means pursuant to section 37(1)(c). The case was heard by Magistrate Costanzo in the Southport Magistrates Court. His Honour's decision was also reconsidered by him in the case of *WJM v NRH* [2013] QMC 12.

His Honour held that:

- a. The test is stated in the alternative.
- b. A court may find it necessary to make an order without finding it to be necessary to protect the aggrieved person. An example of this would be where a respondent needs to be held accountable.
- c. A court may find it necessary to make an order without finding it to be desirable to protect the aggrieved person. An example of this could be when a court finds it necessary to make an order contrary to the wishes of the aggrieved who is opposed to the making of an order.
- d. Whether the court finds it necessary or finds it desirable, the finding must be made in the context that it is either necessary or desirable that the order be made in order to protect the aggrieved.
- e. The need for protection must be a real one, not some mere speculation or fanciful conjecture.
- f. Need often arises from risk, with the court needing to assess the risk to the aggrieved and assess whether management of the risk is called for.
- g. The risk of further domestic violence and the need for protection must actually exist.
- h. There is no stated necessity that the need or the risk be significant or substantial.
- i. The need for protection of an aggrieved must be sufficient, however, to make it necessary or desirable to make the order in all the circumstances.
- j. It may be necessary or desirable to make an order in order to protect an aggrieved person even if one of the grounds for finding that domestic violence has been committed by the respondent has ceased to exist.
- k. It could be decided that a risk of future domestic violence is because of ongoing contact, such as in Family Court proceedings, or because of other unresolved relationship issues.
- l. In some cases it may be appropriate to make an order not only if the relevant risk is 'likely', but also if it is 'possible'.
- m. A further factor to consider may be the gravity of the situation. The gravity of a situation could include an inexplicable or irrational outburst of severe physical violence. In such a situation, even if the court considers it could not say that it was 'necessary' to make the order sought, the gravity of the situation could strongly suggest that it is 'desirable' that an order be made.
- n. The Act is protective legislation but it is not intended to be punitive for the respondent.
- o. The Act in aiming to hold the perpetrators of domestic violence accountable, also aims to ensure the respondent is given an opportunity to change their behaviour.

Conclusion

The examination/consideration of section 37(1)(c) both in the preparation of your client's material (whether acting for the aggrieved or the respondent) and in submissions is as important as proving that an act of domestic violence has taken place.

Do not underestimate the effectiveness of utilising section 37(1)(c); to do so is possibly to be setting up your client for failure from the outset.

Katrina Oner is a QLS accredited family law specialist and principal of Oner Family Law.



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