

**IN THE MATTER OF THE ROYAL COMMISSION
INTO FAMILY VIOLENCE**

**ATTACHMENT TC-8 TO STATEMENT OF ASSISTANT COMMISSIONER THOMAS
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This is the attachment marked '**TC-8**' produced and shown to **THOMAS DONALD LUKE CORNELIUS** at the time of signing his Statement on 27 July 2015.

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An Australian legal practitioner
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• DIRECTOR'S POLICY • FAMILY VIOLENCE

2 April 2012

- 1 Purpose
 - 1.1 The purpose of this Policy is to provide guidance to solicitors in relation to:
 - (a) the prosecution of the new breach offences with respect to family violence intervention orders (FVIOs) and family violence safety notices (FVSNs); and
 - (b) the criteria relevant to determining whether a prosecution for such an offence should proceed by way of indictment or summarily.
- 2 New indictable offences
 - 2.1 The *Justice Legislation Amendment (Family Violence and Other Matters) Act 2012* created three new offences relating to breaches of family violence intervention orders and family violence safety notices¹. These offences were inserted into the *Family Violence Protection Act 2008*.
 - Contravention of notice intending to cause harm or fear for safety – section 37A;
 - Contravention of order intending to cause harm or fear for safety – section 123A;
 - Persistent contravention of notices and orders – section 125A
 - 2.2 Each new offence has a maximum penalty of 5 years imprisonment.
 - 2.3 The section 37A and 123A offences ('the Harm/Fear breach offences') provide for increased maximum penalties for breaches under the summary breach offences (s37 and 123) where the circumstances of the offending is aggravated by an intention to cause harm.

¹ A family violence safety notice is a notice issued by police outside court hours designed to protect affected family members from a family member who is using family violence. It can be issued 'on the spot' and breaching a notice is a criminal offence.



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- 2.4 The section 125A offence ('the persistent breach offence') provides for increased punishment for offenders who persistently contravene FVIOs or FVSNs.
- 3 Commencement dates
- 3.1 The provisions which create these three new offences came into effect on 17 April 2013.
- 4 Prospective offences
- 4.1 Each of the three offences is a prospective offence. It applies only to contraventions alleged to have been committed after the commencement of the provisions (ie: on or after 17 April 2013).
- 4.2 These provisions apply to a contravention of FVIO/FVSN (as the case may be) that occurs on or after 17 April 2013 irrespective of when that FVIO/FVSN was made. Therefore these new offences do not apply to any contraventions alleged to have been committed on or before 17 April 2013.
- 4.3 See Transitional Provisions in section 29 of the *Justice Legislation Amendment (Family Violence and Other Matters) Act 2012* (Act 83/2012).
- 5 Between dates offending
- 5.1 The effect of the transitional provisions means that offences with a 'between date' that straddle the commencement date (ie. with a date before 17 April 2013 and a date after 17 April 2013) are not covered by these offences.
- 6 Harm/Fear breach offences - s37A and s123A
- 6.1 The insertion of sections 37A and 123A in the *Family Violence Protection Act 2008* created two offences, s37A relating to FVSNs and s123A relating to FVIOs.
- 6.2 These offences are aimed at contraventions which – while not constituting an offence other than a contravention – are particularly harmful to the victim². As such these offences are elevated to the status of indictable offences.

² See *Justice Legislation Amendment (Family Violence and Other Matters) Bill 2012* Explanatory Memorandum p.4.



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Elements of offence

6.3 These provisions make it an offence to contravene a FVSN or FVIO (as the case may be) if the accused intends to cause, or knows that his/her conduct will probably cause

- Physical or mental harm to the person protected by the FVSN or FVIO, including self-harm; or
- Apprehension or fear in the person protected by the FVSN/FVIO for his/her safety or that of any other person.

Harm – Physical or mental

6.4 The harm can include physical or mental harm. The *Family Violence Protection Act 2008* defines mental harm to include psychological harm and suicidal thoughts: s37A(1) and 123A(1).

Examples of Harm/Fear breaches

6.5 The following is a list of examples of behaviour by an accused which might constitute a Harm/Fear breach offence:

- Sending a funeral wreath to a protected person
- Placing a bullet in the protected person's letter box or sending a text message of a photo of a bullet
- Killing a family pet and leaving it in plain view of the protected person and/or their child
- Uploading naked photos of the protected person on Facebook

Maximum penalty – Harm/Fear breaches

6.6 The section 37A breach offence is an indictable offence with a prescribed maximum penalty of level 6 imprisonment (5 years maximum) and/or a level 6 fine (600 penalty units).

6.7 The section 123A breach offence is an indictable offence with a prescribed maximum penalty of level 6 imprisonment (5 years maximum) and/or a level 6 fine (600 penalty units).

Not 'a course of conduct' offence

6.8 The offences created by s37A and 123A are not course of conduct offences. As such the caselaw relating to 'course of conduct' which has developed around stalking offences and



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6.9

'Giretti' drugs charges does not have any application in relation to these breach offences.

Wording of indictment – Section 37A

The Director of Public Prosecutions charges that AB at Melbourne in Victoria on the 1st day of July 2013 having been served with a family violence safety notice and having had an explanation of the notice given to him/her in accordance with Section 35 of the *Family Violence Protection Act 2008* contravened that notice [intending to cause] / [knowing that his or her conduct would probably cause] [physical or mental harm to the protected person] / [apprehension or fear in the protected person for his or her own safety or that of any other person].

Particulars

- (a) The family violence safety notice was issued by Sergeant X on 20 June 2013;
- (b) The notice was served on AB by Constable Y and at that time an explanation of the notice was given to AB by Constable Y at Sunbury in Victoria on 20 June 2013;
- (c) The protected [person / people] under that notice are CD and EF;
- (d) The conduct contravening the notice was [*specify act or acts, who they were in respect of, where and when*].

Wording of indictment – Section 123A

6.10

The Director of Public Prosecutions charges that AB at Melbourne in Victoria on the 1st day of July 2013 having been served with a family violence intervention order or having had an explanation of the order given to him/her in accordance with Section [57 (*if interim order*) / 96 (*if final order*)] of the *Family Violence Protection Act 2008* contravened that order [intending to cause] / [knowing that his or her conduct would probably cause] [physical or mental harm to the protected person] / [apprehension or fear in the protected person for his or her own safety or that of any other person].

Particulars

- (a) The family violence intervention order was issued at Melbourne Magistrates' Court on 20 June 2013;
- (b) The order was served on AB by Constable Y on 20 June 2013 [OR] An explanation of the order was given to AB by [*insert name of Registrar if s57 applies (interim order)*]



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insert name of Magistrate if s96 applies (final order)] at the Melbourne Magistrates' Court on 20 June 2013;

- (c) The protected [person / people] under that order are CD and EF;
- (d) The conduct contravening the order was [*specify act or acts, who they were in respect of, where and when*].

Extra-territorial operation

- 6.11 These two offences are designed to have some limited extra-territorial operation.
- 6.12 Where some or all of the course of conduct constituting the breach occurred outside Victoria, that conduct can still be relied upon to prove the breach so long as the 'protected person' was in Victoria at the time the conduct occurred – see sections 37A(3) & 123A(3).
- 6.13 Conversely, where the 'protected person' was outside Victoria at the time of some or all of the course of conduct constituting the breach, that conduct can still be relied upon to prove the breach so long as that conduct itself occurred within Victoria. – see sections 37A(4) & 123A(4).

7 Persistent breach offence – s125A

- 7.1 The insertion of section 125A into the *Family Violence Protection Act 2008* created an offence of persistent contravention of FVIOs/FVSNs.
- 7.2 The gravamen of this offence is the persistent nature of the breaches over a short 28 day period that demonstrates a disregard for the law³.

Elements of offence

- 7.3 The prosecution must prove:
 - The accused engaged in conduct that would constitute a contravention of a FVIO or FVSN under section 37 or 123 of the *Family Violence Protection Act 2008*; and
 - That the accused did so on at least three occasions within a 28 day period; and

³ See *Justice Legislation Amendment (Family Violence and Other Matters) Bill 2012* Explanatory Memorandum p.6.



- That those contraventions related to (a) the same 'protected person' or (b) the same FVSN or FVIO whether or not in relation to the same 'protected person', or (c) a FVSN and a FVIO made on the FVSN as an application, whether or not in relation to the same 'protected person'; and
- The accused knew or ought to have known that on each occasion the conduct constituted a contravention of the FVSN or FVIO.

Calculation of the 28 day time period

- 7.4 The 'persistent breach offence' requires two pre-requisite contraventions and one trigger contravention. Section 125A(2)(b) refers to '...a period of 28 days immediately preceding the conduct referred to in paragraph (a)'. This does not simply mean that three contraventions must occur in a 28 day period.
- 7.5 Rather, where the accused commits an offence under s37 or s123 of the *Family Violence Protection Act 2008* which triggers the operation of section 125A (the triggering contravention), the 28 day period is calculated from the day before the date of the triggering contravention (ie count back 28 days from the day before the trigger).

Maximum penalty

- 7.4 The 'persistent breach offence' is an indictable offence with a prescribed maximum penalty of level 6 imprisonment (5 years maximum) and/or a level 6 fine (600 penalty units).

Actus reus – Individual acts v course of conduct

- 7.5 The prosecution needs to prove that the accused, during a particular 28 day period, engaged in conduct that would constitute offences under section 37 or 123 of the *Family Violence Protection Act 2008* on at least three occasions. The prosecution is required to prove each of the three contraventions.
- 7.6 It is important to note that section 125A is not a 'course of conduct' offence like stalking.

Each contravention to be proved separately

- 7.7 Each breach must be capable of being proved by the prosecution. However, a separate charge need not be included on the indictment for each breach, rather a single s125A charge



which covers all relevant breaches and sufficiently particularises them.

7.8 The breaches themselves may not have been reported at the time to police. They can be ‘historical’ breaches so long as they occurred within the relevant 28 day period. Equally, they may have been reported but no charges commenced. Each such breach can be relied upon in support of a persistent breach offence.

7.8 Note also paragraph 7.15 below and the relevance of alternative verdicts in this regard if the prosecution should fail to prove the s125A offence.

7.9 Policy regarding the averring of this charge on an indictment may differ to Victoria Police practice for charging these offences or dealing with them in the summary stream.

Meaning of ‘occasion’

7.10 The wording used in the offence is ‘occasion’. The same wording is used with reference to the offence of Persistent Sexual Abuse under section 47A of the *Crimes Act 1958* which requires the doing of an act which constitutes a sexual offence on three or more occasions.

7.11 The meaning of the word ‘occasions’ was discussed in the context of the section 47A offence in the Victorian Court of Appeal in *Tognolini v R* [2011] VSCA 112. The court held that there is a distinction between an ‘act’ (which refers to the actus reus) and an ‘occasion’ which is a reference to a junction of circumstances amounting to an episode. Where two or more acts occur, it will not be open as a matter of law to conclude that they occurred on separate ‘occasions’ unless there is a clear separation in time or circumstances between the acts. In *Tognolini* the individual sexual acts took place as part of an unbroken sequence of sexual activity on a single night. This was held to be a single occasion, a single episode and as such could not support a section 47A charge.

7.12 If the same approach is applied to the section 125A ‘persistent breach offence’, the prosecution could only rely upon breaches which are separated by time or circumstance. Of course it may be possible to rely upon two breaches which involve different ‘protected persons’ covered by the same FVSN or FVIO that occur on the same day as these breaches might be said to be separated by circumstance. Otherwise, it is preferable to rely upon breaches which are separated by time, eg on different days within the 28 day period.



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Jury unanimity

- 7.13 With reference to the offence of Persistent Sexual Abuse under section 47A of the *Crimes Act 1958*, the High Court found in *KBT v R* (1997) 191 CLR 417 that a person cannot be convicted of an offence under section 47A 'unless the jury is agreed as to the commission of the same three or more illegal acts'.
- 7.14 As the section 47A offence is analogous to the section 125A 'persistent breach offence', the Director's view is that the jury decision on the trial of a s125A offence must also be unanimous as to the three occasions on which the contraventions are alleged to have occurred.

Alternative verdicts

- 7.15 Upon the hearing of a s125A charge, if a jury is not satisfied that the accused is guilty of the offence charged but are satisfied that the accused engaged in conduct during that period which constituted any of the summary contravention offences (section 37 or 123 of the *Family Violence Protection Act 2008*), the jury must acquit on the s125A offence but may find the accused guilty of that other offence: see section 125A(4).
- 7.16 So where the prosecution fails to prove the 'persistent breach offence' but can prove two contraventions, then the accused can still be found guilty of the two summary offences and sentenced accordingly.

Wording of indictment – s125A

- 7.17 The Director of Public Prosecutions charges that AB at Melbourne in Victoria between the 1st day of July 2013 and the 28th day of July 2013 persistently contravened a family violence [intervention order/safety notice] by engaging in the conduct particularised below that would constitute an offence against Section 37 or 123 of the *Family Violence Protection Act 2008* in respect of such conduct AB knew or ought to have known that each constituted a contravention of the family violence [intervention order/safety notice].

Particulars *(list all contraventions within the time period)*

- (a) On 20 June 2013 a family violence safety notice was issued by Sergeant X /[OR] a family violence intervention order was issued at Melbourne Magistrates' Court;
- (b) [*Where the contravention is of s37*] The notice was served on AB by Constable Y and at that time an explanation in accordance with section 35 of the notice *Family Violence Protection Act 2008* was given to AB by Constable Y at



Sunbury in Victoria on 20 June 2013 / [OR] [*Where the contravention is of s123*] The order was served on AB by Constable Y on 20 June 2013 [OR] An explanation of the order was given to AB by [*insert name of Registrar if s57 applies (interim order)/ insert name of Magistrate if s96 applies (final order)*] at the Melbourne Magistrates' Court on 20 June 2013 in accordance with [section 57 / section 96] of the *Family Violence Protection Act 2008*;

- (c) The protected [person / people] under the order are CD and EF;
- (d) On 1 July 2013 AB at Sunbury in Victoria did [*set out details of the contravening act described and name of protected person – eg. Contacted the protected person CD by telephone in contravention of the family violence intervention order dated 20 June 2013*];
- (e) On 13 July 2013 AB at Geelong in Victoria did [*set out details of the contravening act described and name of protected person*];
- (f) On 26 July 2013 AB at Sunbury in Victoria did [*set out details of the contravening act described and name of protected person*].

8 Subsequent summary prosecutions for same breach

- 8.1. A person convicted of a 'persistent breach offence' must not subsequently be prosecuted for a breach offence contrary to section 37, 37A, 123 or 123A in respect of the same circumstances concerned or the relevant 28 day period: see 125A(5).
- 8.2 The prosecution must ensure that all relevant contraventions are alleged as part of the 'persistent breach offence'. The prosecution is not allowed to have a second bite of the cherry if it fails to prove the 'persistent breach offence' by instituting separate prosecutions for the single breaches at a later date.
- 8.3 However, as mentioned previously at paragraph 6.5, a jury can return a guilty verdict on summary contravention offences under section 37 or 123 that were the basis of the 'persistent breach offence' if they are not satisfied of the accused's guilty on the 'persistent breach offence'.



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9 Indictable triable summarily

9.1 According to the formula set out in section 28(1)(b) of the *Criminal Procedure Act 2008*, each of these new offences is indictable triable summarily.

9.2 It is anticipated that only the most serious of these new breach offences will be prosecuted by the Office of Public Prosecutions (OPP) and that the majority will be dealt with summarily by Police Prosecutors.

9.3 Even where a 'persistent breach offence' has been filed it may deal with a string of relatively 'minor' contraventions. As such, not all 'persistent breach offences' will be prosecuted by the OPP. Regard should be had to the 'Family Violence' Category-Specific criteria listed below at paragraph 9.6.

9.4 The 'Harm/Fear breach offence' is likely to involve more serious contraventions designed to terrorise and/or humiliate the victim. As such it is expected that more of these types of breaches will be prosecuted by the OPP. Regard should be had to the 'Family Violence' Category-Specific criteria listed below at paragraph 9.6

When should these offences proceed indictably?

9.2 This part of the policy should be read in conjunction with Director's Policy 7.2.1 CPA in relation to Indictable Offences Triable Summarily.

9.3 Policy 7.2.1 CPA outlines the relevant statutory criteria set out in section 29(2) of the *Criminal Procedure Act 2009* which the court must have regards to when deciding whether to grant summary jurisdiction.

9.4 The policy also sets out a number of General Criteria and Category-Specific Criteria relevant to the issue of jurisdiction. Neither the General Criteria nor the Category-Specific Criteria are exhaustive or determinative, and every matter is to be considered and determined on its own merits.

9.5 It is the Director's policy that, where a matter is already proceeding indictably, the decision to consent to a matter proceeding summarily should be approved by a Crown Prosecutor.



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9.6

Family Violence matters - Category-Specific Criteria

The relevant Category-Specific Criteria with respect to family violence offences set out in paragraph 7.2.1.20A of Director's Policy 7.2.1 CPA is replicated below for ease of reference:

Family Violence matters

- a) serious injury which required that the victim be admitted to hospital;
- b) the use of a weapon of a kind likely to cause serious injury;
- c) a weapon is used and serious injury is caused;
- d) more than minor injury is caused by assault without a weapon;
- e) the accused has (or has had) access to a weapon (eg handgun) and has a history of threatening to kill the victim;
- f) the accused has a history of choking the victim;
- g) the accused has a prior conviction(s) for breaching an intervention order;
- h) the accused has a prior conviction(s) for violent offending within a family violence context;
- i) the offending involves a breach of an intervention order (or safety notice) in circumstances designed to terrorise and/or humiliate the protected person or cause them to fear for their safety or the safety of another person.
- j) the offending forms part of a series of violent incidents against the victim which are increasing in severity and/or frequency;
- k) the accused has ever committed a violent offence against a child or threatened to do so;
- l) the offending was carried out in the presence of a child.

10

Charging both substantive and contravention offences – duplicity principles

10.1

Many contraventions of FVIOs and FVSNs will also involve other serious substantive offences such as assaults, aggravated burglary, injury charges, sexual offences and criminal damage.



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- 10.2 It is the Director's policy that including both substantive charges and breach offences arising out of the same circumstances in the same indictment is not duplicitous. The reason being the breach offences involve very different sets of elements to the substantive offences.
- 10.3 Solicitors should bear in mind that the breach offences is a different kind of offending to the substantive offence and demonstrates the accused's disregard for court orders. As such, solicitors are encouraged not to simply negotiate away these breach offences during plea discussions by agreeing that they be subsumed within the narrative of the substantive offences.
- 11 **Bail considerations**
- 11.1 Solicitors should be aware that, in certain circumstances, an accused who is arrested and charged with any of these three indictable offence will have to 'show cause' why their detention in custody is not justified: section 4(4)(ba) of the *Bail Act 1977*.
- 11.2 The 'show cause' provisions will apply if, in the course of committing the offending, the accused is alleged to have used or threatened violence; and
- (a) the accused has a prior conviction within the last 10 years of an offence involving violence or threats of violence; or
 - (b) the court is satisfied that the accused, on a separate occasion, used or threatened violence against the person who is the subject of the order (whether or not the accused was ever charged or convicted in connection with that use or threat of violence).
- 12 **Other relevant policies**
- 12.1 This policy should be read together with Director's policy 20 on Family Violence and Director's policy 7.2.1CPA in relation to Indictable Offences Triable Summarily.
- 13 **Review of policy**
- 13.1 This Policy will be regularly reviewed and updated.