The Shopfront
YOUTH LEGAL CENTRE

The Director
Criminal Law Review
Department of Attorney-General and Justice
GPO Box 6
SYDNEY NSW 2001

18 November 2011

Dear Sir/Madam

Statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* – submission from the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this review.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under.

Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront employs 4 solicitors (3.2 full-time equivalent), 2 legal assistants, a paralegal (0.4 full-time equivalent) and a social worker. We are also assisted by a number of volunteers. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law.

The Shopfront represents young people in criminal matters, mainly in the Local, Children's and District Courts. We prioritise those young people who are the most vulnerable, including those in need of more intensive support and continuity of representation than the Legal Aid system can provide.

The Shopfront also assists clients to pursue victims' compensation claims and deal with unpaid fines. We also provide advice and referrals on range of legal issues including family law, child welfare, administrative and civil matters.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Issues covered in this submission

The Shopfront Youth Legal Centre has worked with numerous young people who are victims of domestic violence, some of whom have sought protection through apprehended violence orders. Our clients' experience suggests that the AVO system has not been very effective in ensuring protection for vulnerable young people.

We also act for young people who are respondents to AVO applications or who are charged with breaching AVOs.

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Over the years we have observed a number of problems with the way AVOs are used against young people, particularly for the "protection" of their parents or carers. We are concerned about the criminalisation of young people for what is essentially normal adolescent behaviour, often in the context of a dysfunctional family relationship and sometimes in response to violence or mistreatment by their parents. There is also a growing problem with AVOs being taken out against young people in out-of-home care, where police intervention seems to have become a substitute for an appropriate behaviour management policy on the part of the out-of-home care agency.

Our experience suggests that there is no "typical" domestic or personal violence situation and that there is no "one size fits all" approach to protecting people from domestic and personal violence.

We are also concerned about the often inflexible and cumbersome procedures associated with applying for, responding to, and seeking variations of, AVOs.

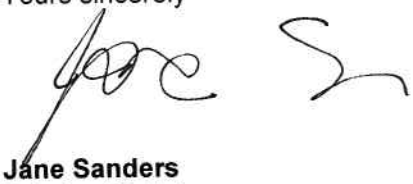
Our response to the specific terms of reference is attached to this letter.

We also attach a copy of our recent submission to the NSW Parliament Standing Committee on Social Issues on *Domestic Violence Trends and Issues*, which in turn includes an extract from our submission to the NSW Law Reform Commission on *Young People With Cognitive and Mental Health Impairments in the Criminal Justice System*.

Further comments and consultation

We would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at jane.sanders@freehills.com.

Yours sincerely



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1 Definition of "personal violence offence" and "domestic violence offence"

1.1 Inclusion of break and enter type offences

In general we support the inclusion of break and enter type offences as "personal violence", and by extension "domestic violence ", offences if the property broken into is a dwelling and there is personal violence towards an occupant.

Similar offences, if they involve "violent conduct", are currently included in the definition of "serious personal violence offence" for the purpose of section 9D of the *Bail Act*.

Guidance may also be drawn from the *Drug Court Act* and related case law as to what constitutes "violent conduct".

Whether an offence is a "personal violence" offence will depend on the facts of each case. In our view it is important that a court (and not the police or the prosecution) must make the ultimate decision as to whether it is a "personal violence" offence.

It is also important that the meaning of "personal violence" not be extended to include mere property damage.

1.2 Redefining "domestic violence offence" as recommended by Action Plan and Family Violence Report

In principle we support the amendment of the definition of "domestic violence offence" to make sure it reflects the definition of family violence as suggested in item 29 of the Action Plan and recommendation 5-4 of the Family Violence Report,.

The focus of domestic violence legislation should be on conduct that bears the hallmarks of family violence (that has a coercive, controlling or intimidating effect on the victim), not minor or one-off incidents between people who happen to be in a domestic or family relationship. See also our response to question 2 below.

We note that the Action Plan only deals with violence between intimate partners. It is important that domestic violence also be defined to include violence towards children and other vulnerable people within family relationships.

We do not think it is desirable to expand the definition of "personal violence offence" and "domestic violence offence" beyond physical and sexual violence, and serious intimidatory behaviour such as stalking. We take no issue with the definition of "personal violence offence" and "domestic violence offence" being expanded to include relevant Commonwealth offences such as "use carriage serve to threaten serious harm".

We accept that domestic violence often includes economic, emotional and other forms of abuse (and indeed the experience of some of our clients suggests that this can be just as damaging as physical violence). The court should be able to take these behaviours into account in deciding whether domestic violence exists, but we do not believe such behaviours in themselves should be criminalised.

We agree with the Family Violence Report that: "The Commissions are not advocating that all types of conduct that constitute family violence should be criminalised." (Executive Summary, p56).

1.3 Inclusion of child neglect offences

The definitions of "personal violence offence" and "domestic violence offence" are also relevant for other purposes, including a victim's access to statutory compensation under the *Victims Support and Rehabilitation Act*.

The definition includes an offence under section 44 *Crimes Act* (failure to provide wife, servant etc with necessities) but not section 43A (failure to provide child with necessities of life). Until the enactment of the *Crimes Amendment (Child Neglect) Act* 2004 both offences were included in section 44.

It appears that the omission of s43A from the definition of "personal violence offence" was inadvertent rather than deliberate. It has deprived victims of child neglect from accessing their entitlements under the *Victims Support and Rehabilitation Act*.

We ask that offences under section 43A be included in the definition of "personal violence offence" and "domestic violence offence".

For further detail please see our submission on this issue sent to the Criminal Law Review Division in September 2010 (copy attached).

2 Definition of "domestic relationship"

As noted in your discussion paper, it has been suggested that the definition of "domestic relationship" in section 5 is too broad. We agree with this.

The consequences of a relationship being defined as a "domestic relationship" may include:

- Mandatory provisions requiring police to apply for an AVO if they suspect or believe a domestic violence offence has been or is likely to be committed;
- Police exercising little or no discretion as to whether charges are laid and whether charges are ultimately proceeded with;
- Loss of presumption in favour of bail;
- The requirement to enter a plea within a very short time frame, and loss of entitlement to a full brief of evidence before a matter is set down for hearing;
- Offences being listed as "domestic violence" offences on the person's criminal record;
- Mandatory AVO on conviction for such an offence;
- Impact on eligibility for future sentencing options including home detention.

In "classic" domestic violence situations, where there is a significant power imbalance between the victim and the alleged offender, such strong measures may be necessary.

However, the broad definition of "domestic relationship" brings in a range of relationships that do not warrant such special treatment (for example, the one-night stand or transient sexual relationship suggested by the Law Society of NSW in its submission, or many extended family relationships).

Case study: Yasmine

Yasmine, aged 19, and her cousin, Rebecca, aged 20, have not been on good terms since they had an argument a few months ago. They do not live in the same household and rarely see each other.

On one occasion they ran into each other on the street. Rebecca, who was with a group of friends, yelled at Yasmine in an aggressive and threatening way. Yasmine felt scared so she (unwisely) borrowed a pair of scissors from a nearby shop to "defend herself". She did not come close to Rebecca or threaten her with the scissors; in fact there was no evidence that Rebecca even saw the scissors.

Despite this, Yasmine was charged with intimidation and, because the alleged victim was her cousin, this was categorised as a domestic violence offence. Consequently the police also made an AVO application on Rebecca's behalf and the court was mandated to make an interim order. Yasmine was also charged with wielding a knife in a public place.

Although there was no evidence that Yasmine had intimated Rebecca, we had difficulty persuading the police to withdraw the charge because of their strict policy on domestic violence matters.

Ultimately, on the date the matter was listed for hearing, Yasmine pleaded guilty to the "wield knife" charge and the prosecution agreed to withdraw the intimidation charge.

We suggest that the inclusion of paragraphs (d), (e) and (f) were well-intentioned but have had unintended consequences.

There is no doubt that vulnerable people such as children, elderly people or people with disabilities are sometimes abused by people providing residential care. Also, the

dynamics within a shared household may sometimes be similar to those within a family even if the parties are not related.

Anecdotal evidence suggests that ADVOs are rarely being taken out to protect vulnerable people in these environments; instead, they are more likely to be taken out for the "protection" of the more powerful party.

For example, adolescent children in out-of-home care sometimes exhibit difficult behaviour which is often a reflection of past abuse and neglect, mental health problems or certain types of disabilities. Much of this behaviour is of the type that would, in a functional family, be dealt with in-house rather than referred to the police or the courts. However, where the behaviour involves significant violence, or where the out-of-home care providers lack an appropriate behaviour management policy, police become involved and have very little discretion over the laying of charges and the making of an AVO application.

We suggest that the definition at recommendation 7-6 of the Family Violence Report would be preferable to the current definition. In terms of intimate relationships, however, we think that it is still too broad as it may include transitory relationships which do not bear the hallmarks of a domestic relationship.

3 Variation applications where a child is the person in need of protection

Section 71 in its current form is highly problematic.

The considerations in support of amending the legislation to enable applications to be made by parties other than police, as listed in your discussion paper, are much more compelling than the considerations against amendment.

We accept that it is probably not desirable for a child (defined for the purposes of the Act as a person under 16) to have standing to apply to vary or revoke an AVO, except perhaps a child over 12 with the leave of the court.

However, where a child is a protected person, any other party – including the police, an adult protected person or the defendant – should be able to apply for variation or revocation.

The court when dealing with such an application should expressly be required to consider the best interests of the child. We believe this would better ensure appropriate protection of children than the current situation where police are gatekeepers and the court is not expressly required to consider the best interests of the child.

Case study: Jason

Jason, aged 19, and his former partner, Danielle, have a 2-year-old daughter, Taylor. Taylor currently lives with Danielle's parents and has regular contact with both Jason and Danielle.

Last year, soon after Jason and Danielle broke up, Jason went back to Danielle's flat to pick up some of his belongings. Danielle refused to let him in and a fight ensued. Danielle called the police, who took out an AVO on her behalf.

At court, Jason consented to a final AVO containing the statutory orders plus a condition that he not reside at, enter or go within 100 metres of Danielle's residence.

Taylor was not named as a protected person on the AVO. However, unbeknown to Jason and without mentioning it in court, pursuant to section 38(2) the court included condition 12 in the final order. This had the effect of extending the operation of the AVO to Taylor, and meant that Jason was prohibited from going to visit Taylor.

When Jason realised the problem, he sought to have the AVO varied. However, the court would not allow him to file a variation application, because of section 72(3) which provides that, if any of the protected persons is a child, an application for variation or revocation may only be made by a police officer.

On Jason's behalf we contacted the local police Domestic Violence Liaison Officer, who was fortunately very co-operative. He agreed to lodge a variation application and did so promptly. However, our experience with police DVLOs has not always been so positive; at the very least, many of them have a heavy workload and may not prioritise an application such as Jason's.

4 Revocation of AVOs

We support the retention of the court's power to revoke an AVO that has expired.

Given that many final AVOs are made by consent, without legal advice and without knowledge of the potential consequences, it is especially important that a respondent retains the right to seek revocation of an expired order.

However, we do concede that the current test could lead to expired AVOs being revoked inappropriately. A consequence could be that the defendant may be eligible for a firearms licence, for example, in circumstances where there were strong grounds for the making of the original AVO and where there may be real concerns about the defendant's fitness to hold such a licence.

We suggest that the test could be amended to provide that an AVO may be revoked if the court finds that an AVO would not be required in the current circumstances *and* it is in the interests of justice that the AVO be revoked.

We have significant concerns about the impact of final AVOs on the Working With Children Check under the *Commission for Children and Young People Act*. The current scheme has the potential to cause significant injustice (without any corresponding child protection benefit) to young people who have had AVOs taken out for the protection of siblings or similar aged peers. Ordinary children engaged in family or schoolyard fights are not child abusers and do not pose the sort of risk that the Working With Children Check seeks to manage.

There is a real need for amendment of the *Commission for Young Children and Young People Act*. However, the *Crimes (Domestic and Personal Violence) Act* should also be amended in the following ways:

- To allow a defendant to apply for revocation of a final order where the protected person was or is a child (see our response to the previous question)
- To put in place a higher threshold or test before a court can make an AVO against a juvenile defendant, including a requirement for the court to be satisfied that the child is capable of understanding and complying with its terms (see our discussion of "other issues" at the end of this submission).

5 Costs in AVO matters

We agree that the current costs provisions, especially as they interact with the *Criminal Procedure Act and the Legal Profession Act*, are confusing and need clarification. However, we have limited experience with the costs provisions and will not comment any further on how they should be drafted.

In relation to costs orders against police, we would support the wider availability of costs. While we would not wish police to be discouraged from applying for AVOs where the circumstances appear to warrant it, we would comment that many AVO proceedings have been continued by police where the circumstances clearly do not warrant it (for example, where investigations show that the defendant did not in fact commit the act of violence initially alleged, or where there is no appreciable risk of violence towards the protected person) or where they have conducted the proceedings in a manner that has caused the defendant to incur costs (e.g. an ill-prepared case leading to unnecessary adjournments). We see no reason why police should not be required to pay the defendant's costs in these circumstances.

6 AVO applications involving "serious offences" that are remitted to a higher court

We do not support Option 1. A person who is committed for trial may in fact be acquitted of the offence and the grounds for a final AVO may turn out to be baseless. The onus should not be on the defendant to then go and seek revocation of the final order made by the Local Court.

We support Option 2 in combination with Option 3. This would provide a flexible and sensible way to deal with AVOs in tandem with serious indictable offences.

7 Apprehended Personal Violence Orders

We are not convinced that a serious problem exists with frivolous and vexatious APVO applications.

Our experience suggests that APVO applications often involve people involved in long-running and emotionally-charged disputes. They are often without legal representation. The issues and evidence can be hard to narrow down and this can consume a disproportionate amount of court resources. However, this is not to say that any of these applications are frivolous or vexatious and our observations suggest that many are not.

We would add that, in our view, ADVOs are just as likely to be abused as APVOs.

7.1 Proposal A: enhancing the Registrar's discretion to refuse to issue an APVO application notice

We note the comments from the Local Court quoted in your discussion paper. We agree that APVOs should not be used in the case of isolated incidents, particularly where physical violence is not involved.

We note that section 19 provides that a court may make an APVO if satisfied that the applicant has reasonably grounded fears of certain conduct, "being conduct that is sufficient to warrant the making of an order". We suggest that further guidance may be needed as to what amounts to "conduct sufficient to warrant the making of an order" so it is clear that a trivial and one-off incident will not provide a basis for an APVO.

We would also add that ADVOs are often granted in response to relatively trivial incidents which do not form part of a pattern of domestic violence. We would also like to see an amendment to section 16 to raise the threshold for the granting of ADVOs.

We are of the view that Registrars already have sufficient discretion to refuse to issue APVO application notices. It does not appear to us that Registrars are issuing APVO application notices lightly. In fact, we have been approached by several young people who have effectively been "talked out of " AVO applications by Registrars who warn them about the difficulty of pursuing proceedings and the potential cost implications.

7.2 Proposal B: ensuring the referral of appropriate APVOs to mediation

We fully support the referral of APVO applications to mediation in appropriate cases.

We believe the current section 21 could benefit from amendment to give the court more discretion to refer matters to mediation. Currently a magistrate is prohibited from referring a matter for mediation if one or more factors listed in subsection (2) exists. We would prefer this to be a list of factors that the magistrate must take into account when deciding whether to refer a matter to mediation.

7.3 Proposal C: Providing a means to prosecute protected persons for false or vexatious APVOs

We have reservations about criminalising people for making frivolous or vexatious applications. However, we see some merit in requiring AVO applications to be supported by a statutory declaration or similar document, which would potentially leave them open to be charged with making a false declaration in appropriate circumstances.

Based on our involvement in APVO matters, and our observations of other matters in the Local Court AVO lists, we would suggest that the number of wilfully or knowingly false complaints is quite low.

It appears that a significant number of people involved in APVO applications are living in stressful conditions, often exacerbated by poor health, financial hardship and having to live at close quarters with similarly disadvantaged neighbours and family members. They may also suffer from mental health problems. Rather than making false complaints they are acting on a genuine, albeit misguided, belief that they are victims of conduct worthy of an AVO.

7.4 Proposal D: Further legislative distinction between ADVOs and APVOs

Unless there is a radical re-definition of "domestic violence", we do not support further legislative distinction between ADVOs and APVOs. In particular we do not believe it is necessary or desirable to place them in separate Acts.

As the discussion about the definition of "domestic relationship" shows, the line between a domestic and a non-domestic relationship is often blurred. We are in favour of a more integrated system which does not depend on an often artificial distinction between domestic and non-domestic relationships.

8 Comments on the Action Plan and Family Violence Report

Time does not permit us to provide detailed comments. However, we wish to comment briefly on the following issues:

8.1 Definition of "domestic violence" or "family violence" (Action Plan item 29, Family Violence Report Items 5-1, 5-2 & 5-4)

We believe there is merit in reconsidering how "domestic violence" is defined.

Currently, "domestic violence offence" can include a one-off personal violence offence committed by someone who happens to be related to the victim in some way, even if the conduct bears none of the hallmarks of domestic violence. The case study of "Yasmine" above illustrates this.

The legislation, combined with the NSW Police policy of exercising little or no discretion when a domestic violence offence is allegedly committed, can operate unfairly. We have seen many vulnerable people, who are themselves victims of domestic violence, become respondents to AVO applications and defendants in criminal proceedings.

The Victorian model may be worth exploring, although we have had very limited practical experience with it and would not support its adoption without careful consideration.

Melissa

Melissa, aged 21, was involved in a long-term relationship with Sam, who is a few years older than her and who was violent during and after their relationship. Melissa and Sam have two young children, who currently live with extended family members.

Following the breakdown of their relationship, Melissa and Sam had a number of heated verbal arguments which at times escalated into physical violence and resulted in mutual AVOs being taken out.

At one stage Sam was charged with assaulting Melissa but she failed to attend court on the hearing date and the charges were dismissed. Melissa, who had also been abused as a child, was overwhelmed by a feeling of powerlessness and was fearful of reprisals from Sam should she give evidence against him.

Although the AVOs did not prohibit Melissa and Sam from contacting each other, they did of course contain the statutory orders prohibiting harassment, intimidation and the like. It was not uncommon for Sam to call Melissa, provoke her into a heated argument, and then call the police when she became verbally abusive. As a result, Melissa was charged with breach AVO on more than one occasion.

It appeared to us that Melissa was the disempowered one in this relationship, yet she ended up worse off than Sam in terms of criminal charges and convictions. While we tried to support and empower Melissa throughout the court process, her experience left her feeling even more disempowered and reluctant to seek assistance from the police and courts.

8.2 Programs for perpetrators of domestic violence (Action Plan item 31, Family Violence Report recommendation 11-11)

We support the wider availability of perpetrator programs.

Such programs have been criticised by some who suggest that they may enable perpetrators to avoid taking responsibility for their actions. We respectfully disagree with this approach (which is somewhat similar to arguments used against drug courts and other rehabilitation programs for drug-related offending).

The reality is that many defendants in ADVO applications, and in related criminal charges, are vulnerable people. Some are children and young people whose social, emotional and cognitive development is not complete. Many defendants suffer from a mental illness or cognitive impairment, and may also have grown up in an environment where violence is normalised. Most of these people (and ultimately victims and the community) could benefit from programs dealing with the underlying causes of the offending.

As the Family Violence Report notes (in the Executive Summary at p64):

> Rehabilitation programs are an essential measure for treating the causes rather than the symptoms of family violence. While protection order conditions prohibiting or restricting a respondent's contact with the victim may assist in reducing or preventing violence against that victim in the short term, successful participation by a respondent in appropriate and relevant rehabilitation and counselling programs has the advantage of targeting the long-term reduction or prevention of family violence—including as against persons other than the victim who is the subject of the protection order.

We understand that there is a perpetrator program available through Corrective Services in NSW, and that the preliminary evaluation has been encouraging.

We have reservations about making attendance at a program a condition of an AVO, particularly an AVO made without admissions. However, we wholeheartedly support voluntary referral in the context of AVO applications.

We also support attendance at programs being made a condition of a good behaviour bond or other community-based order in criminal proceedings.

8.3 Jurisdiction of Children's Court (Family Violence Report recommendations 20-3 to 20-6)

We see merit in giving the Children's Court jurisdiction over AVO applications where the person in need of protection is a child, in addition to situations where the respondent is a child.

It is generally accepted that courts can be intimidating places, particularly for vulnerable people including children. Children's Courts, particularly those staffed by specialist children's magistrates, are better equipped to deal with the child appropriately. This includes taking into account the best interests of the child, dealing with children in a developmentally appropriate way and making them feel more at ease.

We also support the suggestion that the Children's Court should be able to make orders for the protection of other family members affected by the same or similar circumstances.

9 Other issues

We wish to comment on a range of other issues affecting young and disadvantaged people, mostly respondents, in AVO matters.

9.1 Raising the threshold for making AVOs

The criteria for making AVOs varies according to whether it is a provisional, interim or final AVO.

To make a final AVO, the court must essentially be satisfied that the complainant has reasonably-grounded fears of certain conduct, being "conduct that is sufficient to warrant the making of the order" (see section 16 for ADVOs and section 19 for APVOs).

Section 22 provides that an interim order may be made if the court regards it as "necessary or appropriate to do so in the circumstances".

Section 28 provides for a provisional order to be made if the Magistrate or authorised officer is "satisfied there are reasonable grounds for doing so".

In practice, the threshold for making an AVO (whether it be domestic or personal, provisional, interim or final) appears to be very low. We believe there would be some benefit in raising the threshold, or at least providing some guidance as to what constitutes "conduct sufficient to warrant the making of the order".

Given that all provisional orders and many interim orders are made ex parte, without the respondent having an opportunity to respond to the application, there is a need to ensure that these orders are not made unless absolutely necessary for the protection of the alleged victim. Where provisional or interim orders are concerned, we believe the Magistrate or authorised officer should have to be satisfied *that there is an imminent and unacceptable risk of violence or serious harassment*.

Interim and final AVOs that are not made ex parte are often made by consent, and usually without admissions. It is of course sensible for the court to be able to make orders by consent without admissions, but the ease of having consent orders made can cause problems.

Our experience suggests that where orders are made by consent, there is usually little or no court scrutiny over the need for an order, whether the alleged conduct is sufficient to warrant the making of an order, and the most appropriate conditions. Most respondents are unrepresented and, particularly when the applicant is the police, are at a considerable disadvantage. We will discuss this further in the context of conditions below.

Our primary position is that Legal Aid should be made available to all respondents in ADVO and APVO matters, subject of course to a means test. Even if aid were not available for ongoing representation, having a lawyer available on the first return date to explain the respondent's options and help negotiate appropriate terms would be of great benefit to all concerned. See further our comments in relation to legal representation in the attached submission to the Standing Committee on Social Issues.

9.2 Onerous and inappropriate conditions

We refer to our comments about "realistic and appropriate conditions" in the attached submission to the Standing Committee on Social Issues.

Section 17(3) of the Act provides:

> When making an apprehended domestic violence order, the court is to ensure that the order imposes *only* those prohibitions and restrictions on the defendant that, in the opinion of the court, are *necessary* for the safety and protection of the protected person, and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order, and the protected person's property. (emphasis added)

There is a similar provision (section 20(3)) in relation to APVOs.

This appears to be rarely adhered to in practice, when orders are made by consent. While the magistrate will sometimes ask a police applicant "is that condition really necessary?", this usually falls short of ensuring that all conditions are necessary and appropriate.

As mentioned above, most respondents are unrepresented and, especially if the applicant is the police, are at a considerable disadvantage. They generally consent to the order in the terms sought by the applicant, with little or no negotiation. Indeed, some respondents do not even realise there is the potential to negotiate terms.

Magistrates usually do their best to ensure that unrepresented respondents understand the terms of the order being made. However, in our experience they seldom take steps to satisfy themselves that the conditions are necessary or appropriate.

The situation is somewhat different in the Children's Court, where respondents are nearly always legally represented.

It might be said that AVO proceedings are civil in nature and therefore the parties should be able to arrive at a settlement without the court having to carefully scrutinise the terms. However, AVOs differ fundamentally from other civil proceedings. AVOs can impose significant restrictions on a person's liberty, behaviour and livelihood. Further, a breach of an AVO is a criminal offence with imprisonment as a potential penalty. Therefore, even when orders are made by consent, the court should be required to satisfy itself that the order and all its terms are appropriate in the circumstances.

9.3 Appropriateness of AVOs, including respondent's capacity to understand and comply

The focus of sections 16 and 19, which set out the circumstances in which a court may make an AVO, is on whether the alleged *conduct* is sufficient to warrant the making of the AVO.

Sections 17 and 20 provide some further matters to be considered by the court.

However, the court is not required to consider the reasons behind the alleged conduct (eg a psychotic episode) or the characteristics of the respondent, including their capacity to understand and/or comply with the terms of an AVO.

The consequence is that children and vulnerable people, including those with intellectual disabilities who may have real problems understanding and complying with AVO conditions, often have AVOs made against them and are at significant risk of being charged with a breach.

We have also seen AVOs inappropriately taken out against people who have behaved in a violent manner because of serious mental health problems, including those who have threatened harm to themselves.

We suggest that sections 16 and 19 be amended to impose an additional requirement for the court to be satisfied that *an AVO is justified in all the circumstances*. The court would be required to have regard to the characteristics of the respondent, including age and any cognitive and/or mental health impairment.

There currently exists an anomalous situation where a person cannot be found guilty of a criminal offence (eg. because of the doli incapax principle, or because they lack mens rea due to mental impairment) but can have an enforceable AVO against them. Although such people may have a good defence if charged with breaching the order, this will not always be the case. Also, the existence of a possible defence does not stop breach charges being laid, causing the defendant anxiety, inconvenience, and (sometimes) deprivation or restriction of liberty due to arrest and bail decisions.

Please see also our comments in the attached extract from our submission to the NSW Law Reform Commission on *Young people with cognitive and mental health impairments in the criminal justice system*.

Case study - Danny

Danny, aged 12, was referred to us by a police officer from the Joint Investigation and Response Team. Community Services (DOCS) and police had received allegations from Danny's mother, suggesting that Danny may have been involved in inappropriate sexual conduct with his younger sister.

Danny had a significant developmental disability and this was clear to the police. Ultimately the police did not pursue a prosecution, recognising that, even if there was sufficient evidence of the alleged acts, they would be unable to rebut the presumption of *doli incapax*.

However, a police officer acceded to a request from DOCS and applied for an AVO against Danny for the protection of his younger sister. This application was made despite the fact that Danny's DOCS case worker had already arranged foster care and therapy for him and only allowed him to see his sister under strict supervision.

We appeared with Danny in court and submitted that an AVO was inappropriate because adequate arrangements were being made to protect his sister, and also because Danny would find it difficult to understand the legally binding nature of an AVO and the consequences of a breach. After some negotiations with DOCS and the police, we succeeded in having the AVO application withdrawn.

Case study - Ivan

Ivan, aged 22, grew up in a superficially stable but actually very dysfunctional family. His father was, and still is, violent and controlling towards Ivan and his mother. Ivan's elder sister left the family home as soon as she was old enough, and has not returned.

During his teens, Ivan began defending himself against his father's violence. This resulted in his father having him charged with assault and taking out an AVO.

In his late teens, with the assistance of a youth service, Ivan moved out of home and lived independently for a couple of years. During this period he did well, obtaining employment and improving his relationship with his parents.

Ivan moved back in with his parents a few months ago. Recently he broke up with his girlfriend and went through what he described as "a very bad patch". He was very depressed and, on a couple of occasions, told his parents he wanted to die.

One day Ivan was in the kitchen making a sandwich and having a conversation with his mother which turned into an argument. His father heard them arguing and came into the kitchen and confronted Ivan. Ivan took a couple of steps towards his father, still holding the butter knife but not brandishing it or threatening his father.

His father immediately called the police, who attended the house. Ivan was taken to hospital where he was assessed for involuntary admission under the *Mental Health Act,* but he was only detained for a few hours and then discharged.

Meanwhile the police took out provisional orders for the protection of both of Ivan's parents. These orders prohibited him from going back to the house or approaching or contacting either of his parents.

It appears that the provisional order was served on Ivan when he was at, or on his way to, the hospital. He was not in a position to properly understand its terms and he did not keep a copy.

On discharge from hospital, Ivan had to find somewhere else to stay. A few days later he spoke with his mother on the phone and she agreed that he could come back to the house to pick up some of his belongings. He did not understand that the AVO prohibited him from doing this. His mother did not seem to understand this either, or at least she thought there would be no breach of the order if she consented.

When Ivan attended his parents' house, his father was at home and an argument ensued which resulted in the police being called. Ivan was charged with contravening the AVO and was initially refused bail overnight.

9.4 Mandatory AVOs on conviction or charge for certain offences

Sections 39 and 40 require the court to make an AVO upon conviction for certain domestic violence offences, or upon charge for certain "serious offences", unless the court is satisfied that an AVO is not necessary.

We do not support these provisions, as they reverse the onus of proof and unreasonably lower the threshold for the making of an order. In our experience this has resulted in both interim and final orders being made in circumstances where they are not necessary.

We concede that there may be a case for an AVO to be made upon conviction if there is an ongoing relationship or likelihood of contact between the parties.

However, mandatory AVOs upon charge offend against the presumption of innocence that is a fundamental plank of our criminal justice system. Unfortunately an appreciable number of criminal charges are without foundation, or at the very least are not capable of being proved. The court should have full discretion to decide whether an interim order is necessary and appropriate in the circumstances of the case.

9.5 Consent as a defence

Consent is not a defence to a breach of an AVO, and a protected person cannot be charged with inciting, aiding or abetting a breach (section 13(7)).

The fact that consent is not a defence often causes significant injustice. The case studies of Ivan, Kurt and Eddie in this submission illustrate the problems frequently encountered by our clients. We also refer to our comments on "technical breaches" in the attached submission to the Standing Committee on Social Issues.

We concede that it may not be appropriate for consent to be a defence to some types of breaches, for example breaches that amount to stalking or intimidation (it is difficult to imagine how one would consent to being stalked or intimidated in any event). However, where orders prohibit the respondent from approaching or contacting the victim, or approaching or attending their premises, consent should be a defence.

We do not necessarily support the criminalisation of protected persons for inciting, aiding or abetting breaches. However, the combined effect of this protection, with the unavailability of consent as a defence, means that protected persons can encourage respondents to breach AVOs with no consequence to themselves.

It may be inappropriate for consent to be a defence where the protected person is a child under 16 and the respondent is aged 18 or over. Similarly, if the protected person has an intellectual disability or similar impairment, and the respondent is in a position of relative power, consent should not be a defence unless it is a consent in the true sense. However if the parties are both children and are not greatly different in age, consent should be a defence.

It is not sufficient to rely on parties to apply for an AVO to be revoked or varied if they reconcile. As pointed out in our previous submissions, parties in AVO matters are often disadvantaged and unsophisticated when it comes to legal proceedings. They may find it difficult to make a variation or revocation application, especially at short notice; they may even be unaware of the availability or necessity of such an application.

Kurt

Kurt, aged 20, is an Aboriginal young man with schizophrenia and a history of homelessness, abuse and trauma. Kurt finds it particularly challenging to deal with all his legal issues and to remember court dates and the details of court orders such as bail conditions.

There has been a lot of conflict and instability in Kurt's family. Following an argument with his mother, the police took out an ADVO against Kurt on his mother's behalf. Kurt had a final 12-month order made against him, which included a condition not to go within 100m of his mother's place.

Almost a year after the final order was made, Kurt went to his mother's house after she invited him to stay there. Kurt, his girlfriend and Kurt's mother all thought that the ADVO had already expired.

Police attended the premises on an unrelated matter. When police raised the issue of the breach of ADVO, Kurt, his girlfriend and his mother all explained that he was there with her permission and that they all thought the AVO had expired. Kurt's mother had no concerns for her safety as a result of Kurt being there. Kurt was cooperative with police and explained that he and his pregnant girlfriend had become homeless and so had arranged to stay with his mother until other accommodation could be found.

Despite this, Kurt was arrested, taken to the police station and charged. He was eventually released with a court attendance notice. As consent was not a defence to the charge, he pleaded guilty. The matter was dismissed under section 10, but not without considerable anxiety being occasioned to Kurt.

9.6 Sentencing for breaches of apprehended violence orders

We note the comments in the Family Violence Report (summarised in the Executive Summary at pp 64-65) about the importance of ensuring fairness to accused persons.

We concur with these comments and, in particular, we are strongly opposed to mandatory sentences of imprisonment, or even a presumption in favour of imprisonment (as currently exists in section 14).

In our view, mandatory sentencing has no place in a fair criminal justice system. A presumption in favour of imprisonment is also at odds with section 5(1) of the *Crimes (Sentencing Procedure) Act* which provides that "A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate".

We also support Recommendation 11-13 of the Family Violence Report that, in sentencing an offender for a family violence-related offence, the court should be required to take into account the duration and conditions of an protection order to which the person is subject.

9.7 Registration of interstate orders

Part 13 of the Act deals with registration of "External Protection Orders", that is, domestic or personal violence orders made interstate. Although there are sound reasons for allowing interstate registration, we have encountered problems with the operation of these provisions.

The case study below illustrates a situation where an order was made in the protected person's state of residence (where the defendant did not reside) and was then registered in NSW where the defendant resides. There was no reasonable opportunity for him to have the matter heard on the merits and, indeed, had there been a hearing on the merits in an NSW court, it is most unlikely that an order would have been made against him. The process of registering the interstate order was remarkably easy for the police, and required no advance notice to our client, yet the process of having this registration revoked was onerous and time-consuming for our client (it would also have been costly but for the availability of pro bono legal assistance).

Eddie

Eddie, aged 24, is affected by Asperger's disorder and has mental health problems. He is immature for his age, often has difficulty with social interaction and tends to associate with friends in a younger age group.

A couple of years ago Eddie developed a friendship with a young woman, Celina, who was 15 and in departmental care in Victoria. Celina would frequently abscond from her residential placements and travel to Sydney to "hang out" with her friends. It was on one of these visits that she met Eddie. After a few months, after Celina had turned 16, their relationship became an intimate one.

On one occasion Eddie went to visit Celina in Victoria and, despite requests by Celina's carers and departmental staff, would not leave her alone. Although Celina did not report any assaults or mistreatment by Eddie, her carers suspected this was the case and took out an Intervention Order (the Victorian equivalent of an Apprehended Violence Order) for her protection.

At the time the Intervention Order application was listed in court, Eddie was back in Sydney and had no means to travel to Melbourne to defend the application. In any event, he thought the Order would only be valid in Victoria and would not restrict his conduct in NSW. A Final Intervention Order was made, prohibiting Eddie from having any form of contact with Celina.

While the order was in force only in Victoria, this did not pose any significant problem. However, at the request of the Victorian Department of Human Services, the NSW Police had the Intervention Order registered in NSW, without any advance notice to Eddie. Eddie only found out about the registration when he was arrested by police for being in Celina's company, and charged with breach of AVO. The charge was ultimately dismissed because Eddie did not knowingly breach the order. However, while the proceedings were pending he was subject to strict bail conditions and the order remained in force, placing him at significant risk of breaching it.

The situation was made extremely difficult for Eddie because Celina continually put herself in his path. She would frequently abscond from her placement in Melbourne and come to Sydney to visit; when she was not with him, she would call him, text him or send him messages on Facebook. Although Eddie tried to tell her to stay away because it could get him into trouble, this did not seem to trouble Celina. Celina, who by this time was well over 16 and therefore considered an adult under the NSW Act, made it clear that she wanted to pursue a relationship with Eddie and did not want the "protection" of an AVO.

With our assistance, Eddie applied to the Local Court to have the registration of the interstate order revoked, or at least varied to remove the prohibitions on seeing and contacting Celina. This turned out to be a very long and complex process, which would have been impossible for Eddie without access to pro bono legal representation. Because section 98(5) requires the protected person to be served with the application for variation or revocation, and Celina was in Victoria and her whereabouts were unknown to us, we had to apply for a substituted service.

Although the Local Court police prosecutor saw the injustice of the situation, he was bound by the instructions of the Domestic Violence Liaison Officer, who refused to consent to Eddie's application and contributed to the delay in the proceedings. Ultimately, the registration of the interstate order was revoked and Eddie was no longer restricted from contacting or seeing Celina.

Although Celina remains a young person, and a child according to most laws, in this situation she is old enough to know her own mind and to act accordingly. It was a matter of some injustice to Eddie that Celina could repeatedly put him in danger of breaching the AVO, with no consequence to herself.

There are legitimate questions about the appropriateness of the relationship between Eddie and Celina. However, we suggest the legislation has operated unfairly in this case: firstly, in that consent is not a defence to a breach and a protected person cannot be charged with inciting a breach; and also because of the ease of getting an interstate order registered and the difficulty of getting it revoked or varied.

The Shopfront Youth Legal Centre
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