



Children's Court of New South Wales

30 March 2012

Ms Merrin Thompson
Principal Council Officer
Standing Committee on Social Issues
Parliament of NSW
Macquarie Street
Sydney NSW 2000

Dear Ms Thompson,

RE: Inquiry into domestic violence trends and issues in NSW

Thank you for the opportunity to speak to the Standing Committee on Social Issues on Monday 5 March 2012 in relation to domestic violence trends and issues from the perspective of the Children's Court. Magistrate Mulrone and I have read the transcript and are satisfied that it is a correct record of the discussion that occurred, and in particular the comments that were made by us.

I enclose the submission on Family Violence made by the Children's Court to the Law Reform Commission, dated 22 July 2011, as agreed by Magistrate Mulrone (at page 37 of the transcript). As requested I also enclose the court statistics for charges involving domestic violence against young people in 2011 (at page 39 of the transcript). Please contact us if you need further information on these two documents.

In response to the further questions of the Committee the Children's Court makes the following comments:

Apprehended Domestic Violence Orders

- 1. ADVO system – suggestion that the system would be improved if greater attention were paid to ensuring more realistic and workable conditions which were tailored to the individuals concerned.**

Legal Representation

- (i) *In the Children's Court:* Young people who are defendants in ADVO proceedings are almost invariably legally represented. This is of considerable assistance in ensuring that an order is appropriate and does not have unintended consequences.
- (ii) *In the Local Court:* We are aware of a number of cases arising in the Care and Protection jurisdiction of the Children's Court where an order will be made against an unrepresented parent in the Local Court prohibiting all contact with children when appropriately supervised contact would be in the

best interests of the children. Often these orders will be consented to by a bewildered or disengaged parent. Sometimes it will be made in the absence of the parent, and therefore absent relevant information. Some form of representation or support might have avoided this outcome. Another possibility would be to add to the standard conditions which allow contact approved of under the Family Law Act to also include an order of the Children's Court.

Court Support Workers

At some major Children's Courts, Court support workers are in attendance. These people perform a very valuable role with young people, particularly in cases where there is no adult available to support the young person. They are also extremely helpful in providing referrals to family counselling or similar agencies.

Mediation

Where there are ADVO proceedings against a young person for the protection of other family members the first aim should be to seek to restore the family relationship. In many cases that restoration process will be able to be achieved by a referral to family counselling provided by agencies such as Reconnect (an agency of the Salvation Army) or Relationships Australia. In other situations the need for counselling will not be so significant but the family will need assistance to negotiate some ground rules to avoid future conflict. At present there is inconsistent availability of mediation, usually through Community Justice Centres. (This is not a criticism of the CJC's, which operate with limited resources). The better and faster availability of mediation would be useful in some circumstances.

Domestic Violence Liaison Officers

DVLOs are also particularly effective in ensuring that orders can be negotiated which suit the particular circumstances of the people affected by those orders. Only at Campbelltown Children's Court has there been a satisfactory arrangement for DVLO involvement for any period of time. Only recently has this been in place at Parramatta Children's Court and then only as a result of considerable effort by the Court. This is primarily due to issues arising from police organisation. A DVLO is attached to a Local Area Command. Specialist Children's Courts usually cover more than one LAC and issues arise within the police regarding whose responsibility it is to provide the DVLO.

Rural and Regional Children's Courts

We recognise that outside of specialist Children's Courts there are resource implications arising from proposals to provide support workers and DVLOs where there may be a low volume of ADVO applications against young people. Obviously careful consideration would need to be given regarding what is a practical solution.

Apart from the reference to resource implications we believe that the suggestion referred to is practicable in Children's Courts.

2. Concern about a requirement to report an ADVO to a future employer as part of a "working with children check" because of potential damage to young person's employment prospects.

In many cases an AVO arising from conflict between a young person and a parent will also see the order extend to protect other children in the household. This is quite appropriate. However, if an AVO is made against a young person for the protection of a child, there are consequences because of the provisions of section 34 of the *Commission for Children and Young People Act 1998* if the young person is seeking child related employment. The definition of child related employment in section 33 of that Act is extensive. This would not only operate to influence the decision of a potential employer but also to discourage a young person from seeking employment in this area. It should be noted that child related employment would extend to people such as lifeguards, maintenance workers, etc.

Blanket removal of this requirement creates a potential risk to other children. There will be some cases which involve serious violence, an ongoing pattern of violence or sexual assault where it would be important for background checking to occur. A better balance could be achieved if the court is required to declare whether or not a particular order should be subject to the provisions referred to above.

The Court System

3. Introduction of court support workers to give advice to enhance compliance of ADVOs.

It is very important that young people who are the subject of ADVO's understand the implications of those orders, including such issues as how to deal with changes of circumstances eg reconciliation with the parent, the consequences of a breach and other matters. The courtroom environment is not an ideal place for this to occur, although it is important that magistrates take appropriate steps to ensure that young people understand the orders. Even more importantly this should be the responsibility of the legal representative of the young person. A support worker may be valuable in this process although there is a risk of confusion and misunderstanding particularly if this results in lawyers abrogating their responsibilities. It would also be helpful for other steps to be taken including clear written information to be provided to the young person with a copy of the order, and addresses for accessing further information on the internet.

In some specialist Children's Courts support workers are available and can fulfill this task. The provision of adequate explanation by legal representatives appears to vary from very good to non-existent. If a young person receives a copy of an order from the court office, court staff will usually provide some explanation. However it appears that the usual practice is for a copy of the order to be posted to the young person.

4. **"Specialised domestic violence court lists within existing Local Courts in NSW"** (Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service (Submission 39, pp9-12))

It is desirable that domestic violence matters are dealt with by people who have relevant expertise and resources. The proposal is good in principle but doesn't address how it should be implemented in detail. There is a special AVO call-over at Parramatta Children's Court and an assigned prosecutor attends. In other courts there is not the volume of work that would justify a special list if that means that time is set aside exclusively on a particular day to deal with domestic violence matters.

Ongoing training of magistrates is welcomed (the submission mistakenly assumes it doesn't already occur) but the prevalence of domestic violence is such that all magistrates should be adequately trained. It would also be extremely de-skilling to have a magistrate exclusively devoted to presiding in domestic violence matters.

We agree that the observations about the deficiencies in the way that prosecutors deal with domestic violence matters are correct on many occasions, but these deficiencies are not confined to domestic violence matters and reflect a frequent pattern of inadequate preparation by prosecutors. This would appear to be due to resource limitations and the limited capacity of some prosecutors.

The proposal on page 14 of submission 39, regarding smaller courts for training of local practitioners demonstrates the ill-informed nature of the submission. Legal Aid NSW has difficulty getting duty solicitors for its rosters in many courts. The reality is that unless it is financially rewarding there would be no take-up of such a scheme.

Sentencing

5. **Should domestic violence be an aggravating factor to be taken into account in sentencing?**

Any offence that has a domestic violence component should be dealt with seriously. With all due respect, the above-mentioned submission fails to make reference to the existing law in NSW.

There are a number of existing provisions in Section 21A which are relevant to domestic violence offences. These include the following aggravating circumstances:

- (b) the offence involved the actual or threatened use of violence,*
- (c) the offence involved the actual or threatened use of a weapon,*
- (ea) the offence was committed in the presence of a child under 18 yrs of age,*
- (eb) the offence was committed in the home of the victim or any other person,*
- (f) the offence involved gratuitous cruelty,*
- (g) the injury, emotional harm, loss or damage caused by the offence was substantial,*

(l) *the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant).*

The risk of adding additional aggravating factors to Section 21A is that it further complicates the sentencing process as the court seeks to take account of overlapping aggravating factors. Furthermore the Court of Criminal Appeal has been very specific on this topic, *Hiron v R* [2007] NSWCCA 336 and *R v Hamid* [2006] NSWCCA 302, (2006) 164 A Crim R 179. The following is the guidance provided to all courts in the Sentencing Bench Book prepared by the Judicial Commission of NSW.

Domestic violence

Domestic violence offences should be treated with real seriousness: Hiron v R [2007] NSWCCA 336 at [32]. *General deterrence, personal deterrence and denunciation are of particular importance: Vragovic v R* [2007] NSWCCA 46 at [33]; *R v Hamid* (2006) 164 A Crim R 179 at [68]; *R v Dunn* (2004) 144 A Crim R 180 at [47]; *R v Edigarov* (2001) 125 A Crim R 551 at [41].

A prior relationship between the offender and the victim does not operate to mitigate an offence of personal violence: Raczkowski v R [2008] NSWCCA 152 at [46]. *A sentencing judge should not enter into a determination of the merits of matrimonial disputes: R v Kotevski* (unrep, 3/4/98, NSWCCA). *Distress at the breakdown of a relationship is no excuse for violence: Walker v R* [2006] NSWCCA 347 at [7]. *Nor should an indication of forgiveness on the part of the victim be used to reduce an otherwise appropriate penalty, given that victims of domestic violence "may be actively pressured to forgive their assailants or compelled for other reasons to show a preparedness to forgive them": Shaw v R* [2008] NSWCCA 58 at [27] (but given some weight on re-sentencing in that case because it indicated favourable prospects of rehabilitation: at [45]); *R v Quach* [2002] NSWCCA 173 at [28]; *R v Rowe* (1996) 89 A Crim R 467 at 472-473; *R v Fahda* [1999] NSWCCA 267 at [26]; *R v Berry* [2000] NSWCCA 451 at [32].

An offence committed in breach of an Apprehended Domestic Violence Order is thereby aggravated: Kennedy v R (2008) 181 A Crim R 185 at [8]; *R v Macadam-Kellie* [2001] NSWCCA 170 at [37]-[38]; *R v Rumbel* (unrep, 15/12/94, NSWCCA).

Section 12 Crimes (Domestic and Personal Violence) Act 2007, which commenced on 10 March 2008, provides for the recording of "domestic violence offences" on a person's criminal record when a person pleads guilty to or is found guilty of such an offence: s 12(2). If the court makes a direction for the recording of an offence as a domestic violence offence, the prosecution may apply for further offences on the person's record to be classified as "domestic violence offences": s 12(3). In the Second Reading Speech it was said that having a conviction for domestic violence "would leave a permanent stain on a person's record and would be readily identifiable by a sentencing court or a court making a bail determination." A domestic violence offence is defined as a personal violence offence committed against a person with whom the offender has a domestic relationship: s 11. "Domestic relationship" is defined in s 5.

In addition, on convicting an offender of a domestic violence offence, a court must make an Apprehended Domestic Violence Order for the protection of the victim unless satisfied that an order is "not required": s 39 Crimes (Domestic and Personal Violence) Act 2007.

Thank you again for the opportunity to contribute to the discussion on domestic violence trends and issues from the perspective of the Children's Court. If you have further questions please feel free to contact us.

Yours sincerely,

Judge Mark Marien ~~SC~~
PRESIDENT