Submission No 71

INQUIRY INTO DOMESTIC VIOLENCE TRENDS AND ISSUES IN NSW

Organisation: Hawkesbury Nepean Community Legal Centre Inc

Date received: 2/12/2011

Hi Merrin,

Thank you for your email. I am happy that our submission to the review of the Crimes (Domestic and Personal Violence) Act be considered as a part of your inquiry into the DV trends and issues in NSW.

Kind regards,
Pip

Pip Davis
Principal Solicitor
Hawkesbury Nepean Community Legal Centre
Unit 2, 299 George Street, Windsor NSW 2765
PO Box 736, Windsor NSW 2756
Ph (02) 4587 9599
Fax (02) 4587 8938

HAWKESBURY NEPEAN COMMUNITY LEGAL CENTRE

Hawkesbury Nepean Community Legal Centre, located in Windsor NSW, is an independent, non-government and non-profit community-based legal service providing free legal information, advice and casework to people living in the Hawkesbury, Nepean and Hills areas and is one of forty community legal centres in New South Wales.

Hawkesbury Nepean Community Legal Centre works for the public interest, particularly for disadvantaged and marginalised people and communities. We promote human rights, social justice, and a better environment by advocating for access to justice and equitable laws and legal systems through the provision of legal services including strategic casework, community legal education, community development and law reform campaigns.

Community Legal Centres:

- have a human rights focus;
- work within human rights frameworks;
- advocate for human rights on behalf of their clients and communities of interest;
- inform, advise and represent individuals and groups where human rights are at issue;
- educate individuals, groups and communities of interest about human rights and related legal and societal processes; and
- undertake law reform activities to improve human rights protections and processes.

Domestic and family violence issues fall squarely within human rights and social justice issues.

Our Services

Hawkesbury Nepean Community Legal Centre has 3 services:

1. Legal Service

The Legal Service provides free legal services to people living in the Hawkesbury, Hills and Nepean areas. We provide legal advice and representation on a broad range of legal issues and in particular, target our casework services to those clients who are the most economically and socially disadvantaged in our community. Our client base consists of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, gay, lesbian, bisexual, transgender and intersex people, women, prisoners, young people and other people who, because of mental illness, disability or social or economical disadvantage, find it difficult to access legal services.

In the financial year 2010 - 2011, advice and assistance on domestic and family violence issues accounted for more than 60% of all work provided by the Centre, with 2832 people advised about their domestic or family violence matters. Further, casework in family violence matters accounted for 58% of all casework provided to clients by the Centre.

The Centre also advised more than 100 people on apprehended personal violence matters.

In addition to advice and casework, the Legal Service also provides community legal education and advocates for reforms to laws and practices which negatively impact upon our clients.

2. North West Sydney Women's Domestic Violence Court Advocacy Service

Hawkesbury Nepean Community Legal Centre has been the auspice of a women's domestic violence court advocacy service since 1995. The service provides a holistic support, referral and legal advocacy service for women experiencing domestic violence and who are applying for Apprehended Domestic Violence Orders at Windsor and Blacktown Courts. Solicitors from the legal service provide advice and representation to women appearing at Windsor Court in AVO matters.

3. Aboriginal Legal Access Service

Hawkesbury Nepean Community Legal Centre has provided an Aboriginal Legal Access Service (ALAS) for more than ten years. The service is involved in a variety of groups and committees advocating for increased access and participation to legal and community services for Aboriginal families and individuals in the Hawkesbury. The ALAS also provides outreach services at locations South Windsor and Riverstone.

While providing legal services to individuals, the descriptions above also illustrate that we work beyond the individual. Our centre undertakes community development, community legal education and law reform projects that are based on client need, are preventative in outcome, and that develop the skills of individual clients and strengthen our communities.

We believe that the experience afforded by our service provision and client contact provides us with the capacity to make an informed and relevant submission to the review of the *Crimes (Domestic and Personal Violence) Act 2007*.

CRIMES (DOMESTIC AND PERSONAL VIOLENCE) ACT 2007

In 2007, the provisions relating to domestic and personal violence and apprehended violence orders were removed from the NSW *Crimes Act 1900* and a new stand-alone Act, the *Crimes (Domestic and Personal Violence) Act 2007* (the Act) was created.

Section 104 of the Act states that the Attorney General is to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate to securing those objectives.

Hawkesbury Nepean Community Legal Centre (HNCLC) is pleased to have the opportunity to provide submissions to this review.

Summary of Recommendations

1. The current policy objects of the Act with respect to both domestic violence and personal violence matters should be retained.

2. The gendered nature of domestic violence should continue to be recognised in section 9(3)(b) of the Act.

3. Resources should also be focused on implementing laws and policies, and providing women and children with access to appropriate support services, such as integrated services, specialist court lists, and increased funding for legal services, refuges, counselling and health services.

4. The definition of 'domestic violence offence' should include:
   a. additional offences involving violence, as set out in the discussion paper;
   b. other offences committed in a family violence context; and
   c. relevant federal offences.

5. The current definition of 'domestic relationship' should:
   a. retain the relationships already covered by the definition; and
   b. include the additional relationship of being a partner of an ex-partner.

6. The current legislative provisions as they relate to variation applications where a child is named as a protected person should be retained.

7. Police policy should include a requirement that police provide reasons for refusing to vary an order, and their decision should be reviewable.

8. Sections 72(5) – 72(8) of the Act should be repealed: An expired AVO that was validly made and enforceable throughout its operation should not be able to be revoked.

9. Issues about the impact of AVOs on defendants, such as employment and firearms licensing, should be dealt with in the legislation that gives rise to the issue, not the domestic violence legislation.

10. If exceptions for firearms are to be included, the Firearms Act and Weapons Prohibition Act should be amended such that a defendant to an AVO can, 5 years after the expiry of his or her AVO, apply to the Commissioner for a firearms license and the Commissioner can grant a license if:

    a. the Commissioner is satisfied that there are exceptional circumstances;

    b. the protected person's safety is the primary consideration; and

    c. the protected person is served with a copy of the application and has a right of response.

11. If there is to be a test for revocation of expired AVOs, the test must include an assessment of the original grounds of the application, any incidents which occurred during the course of the AVO, any incidents which occurred following the expiry of the AVO and proof of the exceptional circumstances that warrant the revocation application.

12. If the provisions for revocation of expired AVOs are retained, the legislation must expressly provide for notification of any and all protected persons of the revocation application and provide a right of response for all protected persons.

13. If the provisions for revocation of expired AVOs are retained, the legislation should provide that a defendant must serve notice upon the NSWPF in a similar way to the service of subpoenas.

14. If the provisions for revocation of expired AVOs are retained, the legislation should provide that application is listed in the same Court in which the original AVO was granted, unless exceptional circumstances apply.

15. Options 2 and 3 should be implemented to address issues with the operation of provisions dealing with ADVOs involving 'serious offence' matters.

16. The current discretion for the registrar to refuse to issue an APVO application notice should be retained.

17. Courts should have the power to direct parties to attend mediation.

18. Referrals to mediation should not be made in matters involving serious and ongoing threats and those involving personal violence offences, stalking or intimidation or harassment relating to a protected person's sex, race, religion, sexual orientation, gender identity, HIV / AIDS infection or disability.

19. Further education and training should be provided to registrars and court staff on identifying matters suitable for mediation.

20. Amendments should not be introduced to provide a means to prosecute protected persons for false or vexatious APVOs.

21. The Act should continue to provide for both ADVO and APVO matters.

22. Items 29, 30, 32 and 33 of the Domestic and Family Violence Action Plan should be implemented.

23. In relation to item 33, section 100 of the *Residential Tenancies Act 2010* should also be amended to allow a tenant with an interim AVO that includes an exclusion order to terminate their fixed term residential tenancy agreement without compensating their landlord.

24. In relation to item 31:
    a. responses to domestic violence, including perpetrator programs should be based on evidence; and
    b. if referrals to perpetrator programs are made, they should be separate to AVO proceedings.

25. Family Violence Report recommendations 5-1, 5-2, 5-4, 7-2, 7-4, 9-4, 11-1, 11-2, 11-4, 11-6, 11-8, 11-9, 11-13, 16-1, 16-2, 16-11, 16-12, 18-4, 20-3, 20-4, 20-5, 20-6 and 30-6 should be implemented.

26. The following Family Violence Report recommendations should be implemented with some minor changes:

    Recommendation 7-5 – paragraph (b) should be limited to requiring only 'reasonable grounds to believe' that family violence has been used and is likely to be used again;

    Recommendation 18-3 – provided that adequate funding is available for legal representation of both parties; and

    Recommendation 30-3 – provided that the maker of the initial disclosure gives prior consent as to where and how the information disclosed will be used.

27. Family Violence Report recommendations 7-6, 11-11 and 18-5 should not be implemented.

28. Family Violence Report recommendation 9-5 (not listed in Discussion Paper) should be implemented to address the issue of inappropriate police applications being made against victims, including introducing a primary aggressor tool into the police standard operating procedures.

29. Legislation should not provide for police to issue "on the spot" AVOs.

30. Section 32 of the Act should be amended to clarify the position in respect of the duration of a provisional order.

31. Section 32(2) of the Act should be amended as follows:

An application for a final apprehended violence order must be listed before the court within 28 days of the making of the provisional order.

However, the terms of the provisional order remain in force until:

(a) in a case where the defendant is present at court – when a final or interim order is made by the court;

(b) in a case where a defendant is not present at court – when a final or interim order is served on the defendant; or

(c) the application is withdrawn or dismissed

whichever comes first.

32. The Act should be amended to specifically provide for victims of domestic violence to be afforded the same protections as victims of sexual assault when giving evidence (as set out in the *Criminal Procedure Act 1986*).

1. Policy Objectives of the Act

1.1 Submissions are sought on whether the policy objectives of the Act remain valid.

1.2 HNCLC supports the retention of the current Objects of the Act in relation to domestic and personal violence. HNCLC believes the Objects of the Act are appropriate for ensuring the needs of victims of domestic violence are met. Further, the Objects acknowledge the power and control dynamics of domestic violence and acknowledge through sub-sections (c) and (d) that women and children are primarily the victims of domestic violence.

1.3 **Section 9** of the Act sets out the objects in relation to **domestic violence** as being:

(a) to ensure the safety and protection of all persons, including children, who experience or witness domestic violence, and

(b) to reduce and prevent violence by a person against another person where a domestic relationship exists between those persons, and

(c) to enact provisions that are consistent with certain principles underlying the Declaration of the Elimination of Violence Against Women, and

(d) to enact provisions that are consistent with the United Nations Convention on the Rights of the Child.

1.4 Section 9(3)(b) of the Act states that Parliament recognises 'that domestic violence is predominantly perpetrated by men against women and children'. Whilst we acknowledge that domestic violence is also perpetrated against men by women and also affects people in same-sex relationships, we submit that it is important to highlight the ongoing relevance of the gendered nature of violence. The NSW Bureau of Crime Statistics and Research's 2010 report, *Trends and Patterns in Domestic Violence 2001-2010*, reveals that 69.2 per cent of victims of domestic violence assault are women, 82 per cent of offenders are male, and 61.2 per cent of offences involve female victims and male offenders.

1.5 In addition to amending laws to better protect women and children from domestic violence, resources should also be focused on implementing laws and policies, and providing women and children with access to appropriate support services. Consideration should be given to integrated services, specialist court lists, and increased funding for legal services, refuges, counselling and health services. We believe such an approach is acknowledged in part in section 9(3)(g) of the Act.

1.6 **Section 10(1)** of the Act sets out the object in relation to **personal violence** as being to ensure the safety and protection of all persons who experience personal violence outside a domestic relationship. Section 10(2) sets out the ways in which the Act sets out to achieve the Object.

1.7 HNCLC supports the retention of the policy objectives in section 10.

Recommendation

1. *The current policy objects of the Act with respect to both domestic violence and personal violence matters should be retained.*
2. *The gendered nature of domestic violence should continue to be recognised in section 9(3)(b) of the Act.*
3. *Resources should also be focused on implementing laws and policies, and providing women and children with access to appropriate support services, such as integrated services, specialist court lists, and increased funding for legal services, refuges, counselling and health services.*

2. Definition of 'personal violence offence' ('domestic violence offence')

2.1 Submissions are sought on whether the definition of 'personal violence offence' should be expanded to include additional offences involving violence.

2.2 The current definition of 'personal violence offence' excludes some offences that commonly occur in the context of domestic violence and warrant inclusion in the definition of 'personal violence offence.' Some of those offences are included as examples in the Discussion Paper.

2.3 HNCLC supports the expansion of the definition of 'personal violence offence' to include offences set out in the Discussion Paper so that such offences will be included within the definition of 'domestic violence offence'.

2.4 HNCLC also supports the comments made by Australian and NSW Law Reform Commissions in their 2010 Report on Family Violence that offences, other than offences against a person, that are committed in a family violence context should be treated as domestic violence offences. The Law Reform Commissions suggest this could be done by permitting a judicial officer to classify an offence as a family violence offence (recommendation 5-4(a)). We also support the recommendation made by the Law Reform Commissions that relevant federal offences are also included within the definition.

Recommendation

4. The definition of 'domestic violence offence' should include:

a. additional offences involving violence, as set out in the Discussion Paper;

b. other offences committed in a family violence context; and

c. relevant federal offences.

3. Definition of 'domestic relationship'

3.1 Submissions are sought on issues relating to the definition of 'domestic relationship.'

3.2 HNCLC supports the retention of the current sub-sections of persons defined to be in a definition of 'domestic relationship.'

3.3 HNCLC submits further that the definition should also include the new partners of ex-partners.

3.4 The current definition of "domestic relationship" in s5 of the *Crimes (Domestic and Personal Violence) Act 2007*, includes a person who:

a) Is or has been married to the other person; or

b) Has or has had a de facto relationship with the other person, or

c) Has or has had an intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature, or

d) Is living or has lived in the same household as the other person, or

e) Is living or has lived as a long-term resident in the same residential facility as the other person (not including a correctional or detention facility)

f) Has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the person who commits the offence, or

g) Is or has been a relative (within the meaning of s4(6)) of the person who commits the offence, or

h) In the case of any Aboriginal or Torres Strait Islander, is or has been a part of the extended family or kin of the other person according to the Indigenous kinship system of the person's culture.

3.5 A relationship defined as 'domestic' rather than 'personal' is treated differently by the legal system in the following ways:

- police are obliged under the Act to respond to and make an application for an ADVO for a victim defined as living in a domestic relationship;
- a registrar can not refuse to issue an application for an ADVO, but has discretion to refuse to issue an application for an APVO;

- the criteria for eligibility for a grant of legal aid is different for ADVO and APVO matters; and

- from our experience, the police and courts treat the violence and applications for ADVOs very differently to APVOs.

Sections 5(d), (e) and (f)

3.6 There has been some concern that the current definition of 'domestic relationship' is too broad. Criticism has been directed in particular at sub-sections 5(d), (e) and (f) of the Act, which can generally be defined as relationships covering flatmates, persons living in the same long term residential facility and carer type relationships respectively.

3.7 Detailed consideration of the relationships typically covered under sub-sections 5(d), (e) and 5(f) of the Act was made at the time that they were introduced in 1999 (in the now repealed section 562A(3) of the *Crimes Act 1900* (NSW)).[1] It is our submission that the policy considerations which lead to their inclusion in 1999, remain the same today.

3.8 Relevantly, the Criminal Law Review Division (CLRD) research paper, which informed the 1999 amendments, stated:

> *"...The main concern would be in relation to people with disabilities - especially women - who are particularly vulnerable to abuse. Women with disabilities are more likely to be abused than any other group of women. As stated in a National Committee on Violence against Women study, '[w]omen with disabilities are more often in positions of powerlessness and dependence, which increases their likelihood of being abused.'[2]" For example, women with intellectual disabilities are almost three times more likely to be physically assaulted, and ten times more likely to be sexually assaulted, than non disabled women.[3]*
>
> *Many people with disabilities form relationships that are recognised under the current definition of a domestic relationship. However, many people with disabilities live in domestic situations which are not currently recognised, such as group homes, institutions, boarding houses and transition houses. People in these situations - especially if they are isolated and need assistance with day-to-day functions - are vulnerable to abuse from other residents as well as from workers.[4] They are also less likely to have access to the legal system and appropriate services.*
>
> *People with disabilities or older people who do not require institutional or semi-institutional care may similarly be vulnerable to abuse from a "carer" (paid or unpaid) who is not a relative, spouse, intimate partner or household member. In fact, dependence on a carer places people at a significant risk of abuse[5], yet such a relationship on its own would currently not be defined as domestic. ..."*

3.9 Further, The Honourable J Shaw, former Attorney General, acknowledged the importance of the amendment to the definition of "domestic relationship" in his

---

[1] See, for example, Attorney-General's Department (Criminal Law Review Division), *Apprehended Violence Orders: A Review of the Law*, August 1999.
[2] Helen Cattalini, Access to services for women with disabilities who are subjected to violence, National Committee on Violence against Women, AGPS, Canberra, 1993, Page 2.
[3] National Police Research Unit and Flinders University, the West Australian, 24 June 1992.
[4] Helen Cattalini, Access to services for women with disabilities who are subjected to violence, National Committee on Violence against Women, AGPS, Canberra, 1993, Page 13.
[5] Helen Cattalini, Access to services for women with disabilities who are subjected to violence, National Committee on Violence against Women, AGPS, Canberra, 1993, Page 14.

second reading speech to the Legislative Council on 25 November 1999 and stated,

"... Accompanying the new distinction between ADVOs and APVOs is a new definition of a domestic relationship. This definition is significant because it determines accessibility to ADVOs. New section 562A (3) extends the definition of a domestic relationship to include persons who have lived in the same household[6] or other residential facility, and persons in a relationship of ongoing, dependent care. This recognises the range of domestic contexts in which people live. ...".[7]

3.10 The Law and Justice Foundation report "The Legal Needs of Older People in NSW" (2004), outlines the prevalence of elder abuse, particularly for older people in nursing homes and in residential aged care facilities. The report recorded the abuse as including:

- financial abuse (e.g., abuse of power of attorney, theft, pressure to change their will or to become guarantors);
- psychological abuse (e.g., social isolation, verbal abuse, treating them like children);
- physical abuse, including violence, physical restraint and neglect;
- sexual abuse;
- neglect (e.g., inadequate food, shelter, clothing, medical care/assistance, hygiene, medication); and
- multiple abuses — different kinds of abuse occurring at the same time or on a continuum within a single relationship of trust.[8]

3.11 In 2007, the Office of Aged Care Quality and Compliance released a report which looked at 3,947 cases of abuse and mistreatment of the elderly in nursing homes from July to December 2007. Of these cases, 418 complaints involved reportable assaults including unreasonable use of force and unlawful sexual contact.[9]

3.12 Relationships covered by sub-sections 5(d), (e) and (f) of the Act are different to the relationships typically involved in APVO proceedings. This is because these relationships involve some of the most vulnerable and disadvantaged people in our community and those who are most likely to be susceptible to power and control issues and who will require an AVO to afford them protection. Typically, these relationships are characterised by people who are living in confined spaces, have nightly proximity which cannot be avoided, experience dependency in the case of the elderly or disabled, suffer physical and / or financial vulnerability and experience difficulties in moving should a situation arise, due to capacity, support or financial means.

---

[6] The issue of people living in the same household is no longer important when the definition of relative as set out at Section 6 of the Crimes (Domestic and Personal Violence) Act 2007 and the greater recognition of same sex relationships before the law is considered.

[7] Hansard, Legislative Council, J Shaw, 25 November 1999, page 3675

[8] Sarah Ellison, Louis Schetzer, Joanna Mullins, Julia Perry & Katrina Wong, *The legal needs of older people in NSW*, (2004) The Law & Justice Foundation of NSW.

[9] Office of Aged Care Quality and Compliance, Commonwealth Department of Health and Ageing, *Six Monthly Report on the OACQC*, 1 July to 31 December 2007.

3.13 Further, the nature of relationships that involve co-habitation are not always clear. Narrowing the definition of 'domestic relationship' may exclude relationships that should be covered by the domestic violence provisions. Some same sex couples hide the intimate nature of their relationship and describe themselves as flat mates. In other situations, people describe their relationship as one of a dependant and carer but do not disclose that their relationship is also an intimate one. Such relationships should properly be covered by a definition of 'domestic violence' but a repeal of sub-sections 5(d), (e) or (e) of the Act would mean relationships in such examples would not be afforded the protection of an ADVO.

3.14 If the definition were narrowed, the power to obtain the greatest level of protection by way of an ADVO would be removed, leaving them with the need to seek protection under an APVO. We are concerned about this for a number of reasons. It is our experience that police are less likely to apply for APVOs. This means that people seeking protection under an APVO would need to navigate the legal system themselves (assuming they are not able to afford private legal representation). It is our experience that APVO applications are frequently refused by registrars and such a discretion does not exist with ADVO applications. Further, a police initiated application is more likely to result in an interim or provisional AVO than a private application, so a person trying to obtain a private APVO would be less likely to obtain interim protection from a person who continues to live in their home. Finally, classifying the relationship as 'personal' rather than 'domestic' may also result in the person needing protection being unable to access community and government services established to assist victims of domestic violence.

3.15 There should not be any limits placed on the extent of the protection afforded under sections 5(d), (e) and (f) of the Act by, for example, limiting the protection to those relationships where people live together or where it is established that one person is caring for or has a position of responsibility for a more vulnerable person. The current legislation includes a discretion which enables Police to elect not to issue an application for an ADVO where the allegations are not strong and there is a further check and balance once a matter is before the Court where prior to making an Order, the Court must be satisfied the test is made out.

3.16 Whilst it may be argued that the current definition detracts from the original concept of violence between intimate partners, we submit that domestic violence should be viewed within the context of an abuse of power and control within a relationship. This context justifies the broad definition and protection of people within those relationships which are currently defined as falling within the definition of 'domestic relationships' rather than limiting it to only those which may involve an intimate relationship.

3.17 The repeal of sub-sections 5(d), (e) and / or (f) of the Act would mean a departure from the policy objectives set out in section 9 of the Act.

3.18 The law should not be changed in a way which further disadvantages those who are already disenfranchised and marginalised and less likely to be in a position to exercise their legal rights. Further, the law should not be changed so as to reduce the demands placed on already over-stretched legal, police and community services.

New partners of ex-partners

3.19 The current definition of 'domestic relationship' does not recognise the new partners of ex-partners. This means that people who are subjected to violence by the ex-partner of their new partner are only able to obtain protection under an APVO.

3.20 We submit that such relationships should be covered by the definition of 'domestic relationship'.

Recommendation

5. The current definition of 'domestic relationship' should

a. retain the relationships already covered by the definition; and

b. include the additional relationship of being a partner of an ex-partner.

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

4.1 Submissions are sought on whether the legislation should be amended to enable a protected person or defendant to make an application to vary an order under circumstances where the protected person (or one of the protected persons) is a child.

4.2 Whilst acknowledging the complexity of the issue and some of the challenges that may arise from time to time, HNCLC supports the retention of the current legislative provisions as they relate to variation applications where a child is named as a person in need of protection.

4.3 We are concerned that the primary driver for many variation and revocation applications is pressure from the defendant. Such pressure is part of the pattern of violence within the relationship and a reflection of the power and control dynamics. We believe there is a risk that the best interests of the child will not necessarily be prioritised in a process where the applicant or defendant can make an application to vary. As it currently stands, the legislation removes the potential for pressure by a defendant (or other persons) to seek to vary orders in a way that may not maintain adequate protection for the child (or the protected adult) because police are charged with the responsibility for bringing any applications for variation where a child is named on an order.

4.4 It is our experience that children are only listed separately as protected persons when there has been an incident involving a child directly or the child is at risk or directly witnessed incidents. A child's right to safety should be protected independently of the applicant or defendant's interests.

4.5 There is a risk that by changing of legislation to enable a protected person or defendant to make a private application to vary an AVO may decrease the willingness of police to bring such applications. This will have the corresponding effect of increasing the number self-represented people in court, which is particularly problematic in domestic violence cases.

4.6 Failure by police to apply for an order to vary an existing ADVO should be treated as a systemic problem within police practice rather than an issue to be resolved by legislative amendment.

4.7 We recommend the development of a policy regarding variation applications where a child is a protected person so that there is increased consistency and accountability in decisions by police with respect to such applications. Further, we submit that police should be required to provide written reasons as to why they refused to initiate an application to vary or revoke an AVO and that decision should be reviewable by the person seeking the variation or revocation. Other responses which should be considered include supporting existing services such as Women's Domestic Violence Court Advocacy Services (WDVCASs) and Community Legal Centres (CLCs) to advocate with and for applicants and defendants to ensure that police make appropriate variation and revocation applications.

Recommendation

6. *The current legislative provisions as they relate to variation applications where a child is named as a protected person should be retained.*
7. *Police policy should include a requirement that police provide reasons for refusing to vary an order, and their decision should be reviewable.*

5. Revocation of expired AVOs

5.1 Submissions are sought on:

- the policy considerations around providing a mechanism for a person to seek revocation of an AVO after the term of an order has expired;
- where the provision for revocation should be located;
- the appropriateness of the current test; and
- what considerations should form part of a test to determine whether an application to revoke an expired order should be granted.

5.2 The Discussion Paper seeks submissions on the revocation of expired AVOs in the context of the power to grant a firearms licence and the working with children check.

Firearms and prohibited weapons

5.3 Section 11(5)(c) of the *Firearms Act 1996* (the Firearms Act) provides that a licence must not be issued to a person who is subject to an apprehended violence order or who has, at any time within 10 years before the application for the licence was made, been subject to such an order (other than an order that has been revoked).

5.4 Section 10(3)(b) of the *Weapons Prohibition Act 1998* (the Weapons Prohibition Act) provides that a permit must not be issued to a person who is subject to an apprehended violence order or who has, at any time within 10 years before the application for the permit was made, been subject to such an order (other than an order that has been revoked).

5.5 There is no discretionary power available to a court under either the *Firearms Act* or the *Weapons Prohibition Act*.

5.6 The only remedy available to a defendant who wishes to apply for a licence or permit during the 10 year period is to apply for a revocation of the AVO pursuant to section 72 of the Act, which in turn enables a defendant to apply for a licence or a permit.

5.7 The section 72 amendment was a late addition to the *Crimes (Domestic and Personal Violence) Amendment Bill 2008* (the Amendment) as a result of representations made to the Minister for Police and the Attorney General by the Shooters Party. AVLICC was not given the opportunity to consider or advise on the Amendment.

Children and Young People Employment Issues

5.8 An AVO can impact on a person's employment through a 'working with children check' (WWCC), which is conducted under the *Commission for Children and Young People Act 1998*.

5.9 Section 14 of the *Children (Criminal Proceedings) Act 1987* provides that convictions for children under the age of 16 years are not to be recorded, and for persons between the ages of 16 and 18 years, convictions are only recorded at the discretion of the Magistrate.

5.10 There is no equivalent discretionary power to exclude AVOs made against juvenile defendants from the WWCC process. The only remedy available to a defendant under the age of 18 who wishes to avoid a final AVO being considered is to apply for a revocation of an AVO. A related issue is that a defendant cannot apply for the revocation of a final order where the protected person was under 16 years because such applications can only be made by police.

Policy considerations in providing a mechanism for a person to seek revocation of an AVO after the term of the order has expired

5.11 HNCLC submits there should be no power to revoke an expired AVO.

5.12 As a matter of policy, it is inappropriate to:

a) enable the revocation of an order which no longer exists; and

b) purport to 'wipe from the record' an order which was validly made, and which was enforceable throughout its operation; and

c) apply a test which is based on the circumstances at the time of the revocation application, that is, when the AVO is no longer in force.

5.13 Further, the revocation of expired orders raises a number of related practical issues including whether successful applications to revoke will give rise to applications to amend the defendant's criminal history.

Recommendation

8. Sections 72(5) – 72(8) of the Act should be repealed: An expired AVO that was validly made and enforceable throughout its operation should not be able to be revoked.

Where the provisions for revocation should be located

5.14 HNCLC submits that there should not be any provisions enabling the revocation of an AVO which has expired.

5.15 Notwithstanding this, the Discussion Paper sets out a number of issues to be addressed, including where provisions for revocation should be located, in the event a decision is made to retain the current provisions.

5.16 Issues about the impact of AVOs on defendants, including with respect to firearms / weapons licensing and employment, should be dealt with in the legislation that gives rise to the issue, not domestic violence legislation. Thus, sections 72(5) – 72(8) of the Act should be repealed and alternative provisions enacted as set out below.

5.17 Section 11(5)(c) of the Firearms Act should be amended to enable the Commissioner of Police to issue a firearms license 5 years **after the expiry of an AVO where there are exceptional circumstances**. This would ensure that there is a complete ban on a firearms license where an applicant / license holder has been the subject of an AVO within the past 5 years, as required by the National Firearms Agreement.[10]

5.18 In making such an application:

a) the applicant must prove exceptional circumstances which cannot be merely that there have been no further incidents between the protected person and the defendant; and

b) the protected person must be served with a copy of the application and the evidence the applicant seeks to rely on to prove the exceptional circumstances; and

c) the protected person has a right of response.

5.19 Service on the protected person is the role of police. Statutory provisions should require that the victim be contacted at their last known address and should not preclude an application from being made is the victim cannot be contacted.

5.20 Applicants would only be eligible to make an exceptional circumstances application if they had not committed a disqualifying offence within the past 10 years[11]. The disqualifying offences which are likely to be particularly relevant in an AVO context are offences involving violence and offences of a sexual nature as set out in clause 5 of the *Firearms Regulation 2006*.

---

[10] Resolution 6 of the Australasian Police Ministers Council Special; Firearms Meeting (10 May 1996).

[11] *Firearms Act* s 11(5)(b)

Recommendation

9. *Issues about the impact of AVOs on defendants, such as employment and firearms licensing, should be dealt with in the legislation that gives rise to the issue, not the domestic violence legislation.*
10. *If exceptions for firearms are to be included, the Firearms Act and Weapons Prohibition Act should be amended such that a defendant to an AVO can, 5 years after the expiry of his or her AVO, apply to the Commissioner for a firearms license and the Commissioner can grant a license if:*
    a. *the Commissioner is satisfied that there are exceptional circumstances;*
    b. *the protected person's safety is the primary consideration; and*
    c. *the protected person is served with a copy of the application and has a right of response.*

The appropriateness of the current test for revoking an expired AVO

5.21 HNCLC submits that there should not be any provisions which enable the revocation of an AVO which has expired.

5.22 Notwithstanding this, the Discussion Paper sets out a number of issues to be addressed, including the appropriateness of the current test for revoking an expired AVO, in the event a decision is made to retain the current provisions.

5.23 Section 72(6) of the Act provides that a court may revoke an expired AVO if satisfied that if the order was still in force, it should be revoked. This test is based upon the circumstances at the time of the application to revoke, not when the order was made and / or in force, although the court must take into account the effect that the revocation may now have on the protected person, having regard to the grounds of the original order under s 72(8)(b).

5.24 HNCLC has a number of concerns about the test under s 72(6):

a) The test is inappropriate in that it does not consider whether the AVO was validly made. Instead it essentially considers whether the order would be required under the current circumstances. Presumably in many circumstances an AVO will not be required once it has expired, which is the reason that there is no order currently in place.

b) The test becomes easier with the passage of time.

c) The existence of an expired AVO may be the only bar to the issuing of a firearms licence and / or prohibited weapons permit. This may be persuasive when considering an application but should not be a relevant consideration for a revocation application.

d) The revocation erases the existence of the order for any future application for an AVO. This can have a negative impact on victims and future applications by the police for an AVO.

e) It may be difficult for the court to be informed of the grounds of the original order (s72(8)(b)) because transcripts and tapes are only kept for a period of five years. Accordingly, there may be advantages to a defendant to apply for a revocation after such records have been destroyed.

What considerations should form part of the test to determine whether an application to revoke an expired order should be granted?

5.25 HNCLC submits that there should not be any provisions in any Act which enable the revocation of an AVO which has expired.

5.26 Notwithstanding this, the Discussion Paper sets out a number of issues to be addressed, including any considerations which should be included in the test to determine whether an expired AVO should be revoked, in the event a decision is made to retain the current provisions.

5.27 Any such test must include consideration of the following:

(a) the grounds of the original application and any evidence relied upon in the original application; and

(b) any reported incidents which occurred during the term of the AVO and not limited to those incidents prosecuted as a breach; and

(c) any proved breaches of the AVO during it's term; and

(d) any reported incidents which have occurred since the AVO has expired; and

(e) proof of the exceptional circumstances that have lead to the application. Exceptional circumstances cannot merely be that there have been no further incidents between the protected person and the defendant;

5.28 The protected person must be served with a copy of the application and the evidence the applicant seeks to rely on to prove the exceptional circumstances. The protected person has a right of response.

Recommendation

11. If there is to be a test for revocation of expired AVOs, the test must include an assessment of the original grounds of the application, any incidents which occurred during the course of the AVO, any incidents which occurred following the expiry of the AVO and proof of the exceptional circumstances that warrant the revocation application.

12. If the provisions for revocation of expired AVOs are retained, the legislation must expressly provide for notification of any and all protected persons of the revocation application and provide a right of response for all protected persons.

Notification of Commissioner of Police

5.29 HNCLC submits that there should not be any provisions which enable the revocation of an AVO which has expired.

5.30 Notwithstanding this, in the event a decision is made to retain the current provisions, it is imperative that the current problems regarding notification of an application to revoke an expired AVO are resolved.

5.31 Under section 72 of the Act, an applicant seeking to revoke an expired order is not required to notify any party of his or her application, or serve any party with a copy of the application. Instead it appears to be for the Court to notify

the Commissioner of Police of the application. Section 72 can be contrasted with sections 73(4) and 73(6) of the Act which require a defendant / applicant to personally serve each protected person with a notice of the application to revoke a current AVO which sets out the grounds on which an application is made (s 72(4)). The requirement under s 72(8)(a) to notify the Commissioner of Police is too vague and not consistent with the service requirements for revocation applications where an order has not expired.

5.32 Since the Amendment, the Department of Justice and Attorney General and the NSW Police Force have experienced difficulties in tracking applications and their outcomes through the courts. There have been issues where local prosecutors and / or the NSWPF AVO Unit have not received the notifications and there have also bee issues with the internal tracking of these notifications by the NSWPF.

5.33 The legislation should require the defendant / applicant to serve the Police in a similar way to the service of subpoenas on police. The formulation "Commissioner of Police" should not be used because in effect, this may mean any police officer could be served with a copy of the application.

5.34 The legislation should expressly provide that the NSW Police Force has standing with respect to the application. Although standing could be implied from the requirement for the police to be notified, police practice is to seek leave to be heard on the application.

5.35 There is no requirement that the protected person be notified, although 72(8)(b) does require the court to take into account the effect of the revocation on the protected person. In effect, this requires the police to notify the protected person and make inquiries of them. The legislation should provide that a protected person must be notified of the application and give rise to a right to put submissions to the court on the matter.

Recommendation

13. If the provisions for revocation of expired AVOs are retained, the legislation should provide that a *defendant must serve notice upon the NSWPF in a similar way to the service of subpoenas.*

Which Court should hear an application to revoke?

5.36 The power for a defendant to apply to revoke an expired order is analogous to the ability of a defendant to apply for annulment of a conviction or sentence made or imposed by the Local Court using section 4 of the *Crimes (Appeal and Review) Act 2001.* Such an annulment application must be made to the Local Court sitting at the place at which the original Local Court proceedings were held: s 4(1).

5.37 There should be a presumption that an application to revoke an expired AVO should be made at the Local Court sitting at the place at which the original Local Court proceedings were held. However, applications to change location can be made in exceptional circumstances.

Recommendation

14. If the provisions for revocation of expired AVOs are retained, the legislation should provide that application is listed in the same Court in which the original AVO was granted, unless exceptional circumstances apply.

6. Costs in AVO matters

6.1 Submissions are sought on the issue of costs orders against Police and assessment of quantum. HNCLC does not have any comments on these provisions.

7. AVO applications involving 'serious offence' matters that are remitted to a higher court

7.1 Submissions are sought on the following 3 options with respect to AVO applications involving 'serious offence' matters that are remitted to a higher court:

Option 1: Provide that, when a defendant is committed for trial in a higher court for a serious offence and there is a related AVO matter is a lower court, a two year final order be made from the date of committal.

Option 2: Enable the AVO matter to be remitted to a higher court for finalisation (either by making the order or dismissing the application). Alternatively the higher court may formally refer the matter back to the lower court to finalise (together with any material to assist the Local Court). This would enable the serious charge matter and the related AVO matter to travel through the system together.

Option 3: If the existing system is retained or Option 2 adopted, provide for the transmission of evidence given in the higher court to the lower court and provide for the admissibility of that evidence in the AVO proceedings.

7.2 HNCLC supports **Option 2.** Option 2 will resolve the issues caused by the operation of the current provisions of the Act. It is practical and expedient that the AVO matter is remitted to the higher court for finalisation once the associated charge matters are resolved. HNCLC is concerned though that where a charge is dismissed and the Court must then turn to the question of the contested AVO application, that a reliance solely on the transcripts and other evidence from the criminal proceedings, will not necessarily meet the needs of a hearing for an AVO. Criminal proceedings focus on proving beyond a reasonable doubt whether or not a particular event took place whereas AVO hearings apply the civil test, can bring evidence of past incidents of violence and focus on the issue of fear and other feelings or emotions. It is important therefore that the legislation provides for the admission of further evidence directly relevant to the AVO proceedings.

7.3 **Option 3** is also supported by HNCLC subject to our concerns raised above regarding the need for further evidence to be brought to an AVO hearing where necessary and appropriate. HNCLC would prefer **Option 2** rather then **Option 3**.

7.4 HNCLC does not support **Option 1**. We are concerned there would be denial of procedural fairness in the making of a final AVO against a person when the veracity of the charges brought against that person have not been fully tested. It is our submission that a final AVO should only be made once there has been a plea or finding of guilt with respect to the charges.

Recommendation

15. Options 2 and 3 should be implemented to address issues with the operation of provisions dealing with ADVOs involving 'serious offence' matters.

8. Apprehended Personal Violence orders

8.1 Part 5 of the Act provides for the making of APVOs between persons who are not in a domestic relationship.

8.2 The Discussion Paper notes that media reports have raised a number of issues associated with APVOs, namely that they are sought and granted frivolously and vexatiously. Notwithstanding media commentary, the Discussion Paper notes that there remains little to no empirical evidence to support or refute such a claim.[12] The Discussion Paper also notes that some judicial officers have expressed concerns about abuse of APVOs.[13]

8.3 The Discussion Paper sets out four proposals to address the concerns expressed about vexatious applications. It is our submission that there should be greater research into the apparent issues involving APVO matters prior to making any legislative changes to the current provisions.

8.4 HNCLC believes APVOs are an important protection for people who experience violence, threats and intimidation from those they do not have a domestic relationship with. For example, HNCLC advised a client who lived in a Housing NSW complex. Her neighbour regularly threatened her and her children and threw things at her house and car. She had very real fears for the safety of her children and herself. Unfortunately the police would not intervene so our client was left with no option but to pursue an APVO. The matter was referred to the CJC but the defendant would not attend. Ultimately, an APVO was made for the protection of our client and her children. Our client felt much safer and the behaviour of her neighbour ceased.

8.5 HNCLC submits the importance of APVOs should not be underestimated in the face of inflammatory media reporting about vexatious and frivolous applications.

Proposal A: Enhancing the registrar's discretion to refuse to issue an APVO application notice

8.6 HNCLC supports the retention of the current provisions as they relate to the discretion of a registrar to refuse to issue an APVO application.

---

[12] See Apprehended Violence Orders: A review of the Law, http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_avo#5 and NSW Law Reform Commission Report 103 (203) – Apprehended violence orders 3.85.

[13] See for example PEvMU [2010] NSWDC 2 (per Williams J).

8.7 The Discussion Paper states that registrars rarely use their discretion to refuse APVO applications. However, this has not been the experience of many clients of HNCLC who report that a registrar has refused to issue an application for an APVO despite a history of intimidation, harassment and threats by another person. Many of our clients initially report the threats and actual violence to police but the usual course of action by police is to refer the matter to the registrar. Commonly, the registrar also refuses to issue an application, exercising his or her discretion under section 53 of the Act.

8.8 HNCLC does not support **Option 1** to amend the presumptions against a refusal to issue an APVO application. Registrars already have sufficient discretion under section 53 of the Act to refuse frivolous cases. It is inappropriate to limit an APVO application to those circumstances involving a 'continuing course of conduct.' In some circumstances, a one off threat or violent incident will warrant the making of an APVO for a person's protection and it would be inappropriate to refuse to issue an application.

8.9 HNCLC does not support **Option 2**. The amendment suggested by Option 2 would mean that the offences of stalking or intimidation with intent to cause fear of physical or mental harm under section 13 should be removed from the list of allegations which do not give rise to a registrar's discretion to refuse to issue process. The reason given for this is that it is difficult for the registrar to determine whether a person knew their conduct is likely to cause fear in the other person in the context of determining whether conduct constitutes an offence under section 13 (and thus a matter for which they do not have a discretion to refuse to issue process). However, we note that the registrar should not be determining whether a person knew their conduct is likely to cause fear. This is a matter for the court to determine. Section 53(5) requires the registrar to not refuse to issue process if an *allegation* of a section 13 offence is made, unless there are compelling reasons to do so. If there is a question of whether the person knew their conduct was likely to cause fear, the registrar should be leaving this question to be answered in the court process.

8.10 **Option 3** is not supported. Where a police officer has brought an application for an APVO, it should not be subject to further checks and balances other than those applied to a case before the court.

8.11 **Option 4** is not supported. Such a procedure will disadvantage people who have low levels of literacy and / or parties who do not have sufficient English language skills.

Recommendation

16. The current discretion for the registrar to refuse to issue an APVO application notice should be retained.

Proposal B: ensuring the referral of appropriate APVOs to mediation

8.12 HNCLC agrees that mediation is important in appropriate APVO matters and may be a valuable complement to an APVO. It is important though that referrals to mediation are assessed as being appropriate rather than being automatically referred to mediation.

8.13 Given the Act already provides for referral to mediation, and yet referrals still remain at levels similar to those of 2002, it would suggest that education and training of registrars and other court staff is necessary, as opposed to further legislative change.

8.14 Notwithstanding, HNCLC supports a model similar to the Victorian model and notes that a model such as this would introduce a power to direct attendance at mediation rather than a power to enable a referral to mediation. In the event a model such as that in Victoria is adopted, it is imperative that such a model must ensure that matters are screened as being appropriate for referral.

8.15 It is our submission that the following matters should be deemed inappropriate for referral **unless** the person in need of protection requests a referral to mediation:

- allegations of serious and ongoing threats;
- allegations of personal violence offences;
- allegations of stalking or intimidation; and
- allegations of harassment relating to a protected person's race, religion, homosexuality, transgender status, HIV / AIDS infection or disability.

Recommendations

17. Courts should have the power to direct parties to attend mediation.

18. Referrals to mediation should not be made in matters involving serious and ongoing threats and those involving personal violence offences, stalking or intimidation or harassment relating to a protected person's sex, race, religion, sexual orientation, gender identity, HIV / AIDS infection or disability.

19. Further education and training should be provided to registrars and court staff on identifying matters suitable for mediation.

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

8.16 HNCLC does not support amending section 307A of the *Crimes Act 1900* or requiring an applicant to file a statutory declaration or affidavit when applying for an AVO.

8.17 It is unclear from the Discussion Paper why this proposal has been suggested and whether it is in response to a finding of a significant number of false and vexatious applications.

8.18 It is our experience that the costs provisions with respect to APVO matters are already a barrier to many people proceeding with an APVO application for fear they will be ordered to pay costs in an unsuccessful application. Amendments such as those proposed will only cause a further barrier for people seeking an APVO for their protection.

8.19 Such changes will also disproportionately impact applicants with language barriers, disabilities and those who live in rural, regional and remote locations.

Recommendation

20. Amendments should not be introduced to provide a means to prosecute protected persons for false or vexatious APVOs.

Proposal D: further legislative distinction between ADVOs and APVOs

8.20 HNCLC does not support the creation of a separate piece of legislation to address APVO matters.

8.21 It is much more practical to have provisions that deal with ADVOs and APVOs within the one Act. HNCLC does not agree that this trivialises domestic violence and undermines the integrity of the legislation.

8.22 HNCLC also disagrees that separating out the Acts will reduce media criticism of frivolous complaints.

Recommendation

21. The Act should continue to provide for both ADVO and APVO matters.

9. The Action Plan

9.1 Comments are sought on the actions in the Action Plan which may impact on or be relevant to the operation of the Act.

9.2 HNCLC's comments are as follows:

Item 29: HNCLC **supports** the review of the definition of domestic violence in the Act to consider whether it captures relevant forms of violence, such as (but not limited to) economic, emotional, sexual and animal abuse.

HNCLC **supports** a broad and non-exhaustive definition of domestic violence.

Item 30 HNCLC **supports** a review of the objects in the Act to consider:

(a) recognising the presumption that a victim of domestic violence has the right to remain in the home;

(b) focussing on perpetrators of violence taking responsibility for their actions.

Item 31 HNCLC does **not support** allowing courts to make voluntary referral orders to a program which has the primary objective of stopping or preventing domestic violence on the defendant's part, promoting the protection of the protected person or assisting a child to deal with the effects of domestic violence.

Any such referrals should be separate to AVO proceedings. Including such referrals in the AVO proceedings may result in such referrals being treated as an alternative to an AVO or an

alternative to particular orders within an AVO which otherwise may have been made by the Court.

HNCLC also questions the evidence of success of such programs.

Item 32 HNCLC **supports** a review of the Act to consider providing a statutory presumption (which can be displaced) in favour of the protected person remaining in their place of residence.

Item 33 HNCLC **supports** consistency between the Act and reforms to the tenancy laws in the area of AVOs and the rights of occupants. However we submit that section 100 of the *Residential Tenancies Act 2010* should be amended to allow a tenant with an interim AVO that includes an exclusion order to terminate their fixed term residential tenancy agreement, without compensating their landlord. Currently this right is limited to tenants who have a final AVO with an exclusion order and in our experience a victim of violence will need to terminate their tenancy before a final AVO is made.

Recommendations

22. Items 29, 30, 32 and 33 of the Domestic and Family Violence Action Plan should be implemented.

23. In relation to item 33, section 100 of the Residential Tenancies Act 2010 *should also be amended to allow a tenant with an interim AVO that includes an exclusion order to terminate their fixed term residential tenancy agreement without compensating their landlord.*

24. In relation to item 31:

a. responses to domestic violence, including perpetrator programs should be based on evidence; and

b. if referrals to perpetrator programs are made, they should be separate to AVO proceedings.

10. The Family Violence Report

10.1 Comments are sought on recommendations of the Law Reform Commissions in their Family Violence report, which may impact on or be relevant to the operation of the Act.

10.2 HNCLC's comments are as follows:

Rec 5-1 HNCLC **supports** recommendation 5-1 and submits that the definition of family violence must be broad and non-exhaustive.

Rec 5-2 HNCLC **supports** recommendation 5-2. It is important that a definition of violence recognises that violence is not just limited to physical assaults, but also includes a multitude of other forms of violence such as emotional abuse, isolation, economic abuse, intimidation and harassment. Any examples should be part of a non-exhaustive list.

Rec 5-4 HNCLC **supports** recommendation 5-4 and refers to our comments above with respect to 'personal violence offences' and 'domestic violence offences.'

Rec 7-2 HNCLC **supports** recommendation 7-2.

Rec 7-4 HNCLC **supports** recommendation 7-4.

Rec 7-5 HNCLC **supports** recommendation 7-5 but submit that the test in (b) should state that the person **has reasonable grounds** to believe the person he or she is seeking protection from has used violence and is likely to do so again. The current proposed definition under (b) would require proof.

Rec 7-6 HNCLC does **not support** a change in the definition of 'domestic relationship.' As stated above, HNCLC supports the current definition of 'domestic relationship' under the Act. We note the current definition of 'domestic relationship' includes those who fall within Indigenous concepts of family and would support the addition of those who fall within culturally recognised family groups to the current definition.

Rec 9-4 HNCLC **supports** recommendation 9-4 to empower a police officer, for the purposes of arranging a protection order **only**, to direct a person who has used family violence to remain at, or go to, a specified place or remain in the company of a specified officer.

Rec 11-1 HNCLC **supports** recommendation 11-1.

Rec 11-2 HNCLC **supports** recommendation 11-2.

Rec 11-4 HNCLC **supports** recommendation 11-4.

Rec 11-6 HNCLC **supports** recommendation 11-6 but notes that the legislation should provide that the Order does not prohibit a party from serving an application under the *Family Law Act 1975* on the protected person.

Rec 11-8 HNCLC **supports** recommendation 11-8.

Rec 11-9 HNCLC **supports** recommendation 11-9.

Rec 11-11 HNCLC does **not support** recommendation 11-11. The inclusion of such provisions risks that Courts will use referrals to services as an alternative to the making of an AVO or the making of particular orders within an AVO that otherwise should have been made for the protection of a victim.

Rec 11-13 HNCLC **supports** recommendation 11-13 but notes that the making of the AVO itself should not be seen as a relevant factor in the length or type of any sentence imposed.

Rec 16-1 HNCLC **supports** recommendation 16-1.

Rec 16-6 HNCLC **supports** recommendation 16-6 but queries whether this should read as recommendation 16-2.

Rec 16-11 HNCLC **supports** recommendation 16-11 but notes that such a power should not be used as a replacement for the proper use and function of ancillary property orders.

Rec 16-12 HNCLC **supports** recommendation 16-12.

Rec 18-3 HNCLC **supports** recommendation 18-3 but notes that it is essential there is proper funding for legal representatives for both parties and / or proper funding of court appointed legal representatives for the proceedings. Where a court appointed representative is utilised, there should be some parameters to the questions a defendant can ask via a person appointed by the court. Further issues to be resolved with court appointed representatives include (a) How does a person appointed by the Court get paid? (b) Is this person pre-selected (and if so, how) or is a person appointed on the day taken from the pool of representatives who are already within the Court precinct? (c) How is the court appointed representatives liability limited?

Rec 18-4 HNCLC **supports** recommendation 18-4.

Rec 18-5 HNCLC **does not support** recommendation 18-5. While we recognise that cross applications are inappropriately made by perpetrators in retaliation for a properly made application for an AVO, we do not believe that requiring all cross applications to go to a hearing will resolve the issue. The amendment will mean that a many more cases will go to hearing, which will place additional demand on court resources and women who are reluctant to go to hearing may feel pressured to withdraw their application for an AVO and consent to an order being made against them as an alternative to going through a hearing.

Rec 20-3 HNCLC **supports** recommendation 20-3.

Rec 20-4 HNCLC **supports** recommendation 20-4.

Rec 20-5 HNCLC **supports** recommendation 20-5.

Rec 20-6 HNCLC **supports** recommendation 20-6.

Rec 30-3 HNCLC **supports** recommendation 30-3 subject to the maker of the disclosure giving prior informed consent as to where the information is to be used and how.

Rec 30-6 HNCLC **supports** recommendation 30-6 and notes the onus should be on the Court to make an active inquiry as to an existing parenting orders or pending parenting orders.

Recommendations

25. Family Violence Report recommendations 5-1, 5-2, 5-4, 7-2, 7-4, 9-4, 11-1, 11-2, 11-4, 11-6, 11-8, 11-9, 11-13, 16-1, 16-2, 16-11, 16-12, 18-4, 20-3, 20-4, 20-5, 20-6 and 30-6 should be implemented.

26. The following Family Violence Report recommendations should be implemented with some minor changes: Recommendation 7-5 – paragraph (b) should be

limited to requiring only 'reasonable grounds to believe' that family violence has been used and is likely to be used again; Recommendation 18-3 – provided that adequate funding is available for legal representation of both parties; and Recommendation 30-3 – provided that the maker of the initial disclosure gives prior consent as to where and how the information disclosed will be used.

27. *Family Violence Report recommendations 7-6, 11-11 and 18-5 should not be implemented.*

28. *Family Violence Report recommendation 9-5 (not listed in Discussion Paper) should be implemented to address the issue of inappropriate police applications being made against victims, including by introducing a primary aggressor tool into the police standard operating procedures.*

Other Issues

11. Police Issued AVOs

11.1 Hawkesbury Nepean Community Legal Centre does not support any amendments to the legislation to provide for police issued "on the spot" AVOs.

Recommendation

29. *Legislation should not provide for police to issue "on the spot" AVOs.*

12. Section 32 – clarity of wording about the duration of a provisional order

12.1 The wording of section 32 of the Act is unclear. Legislative amendment is necessary to resolve the different judicial interpretations regarding the duration of a provisional order.

12.2 Issues regarding this provision arise where:

- a defendant has been served with a provisional order; and
- a defendant fails to appear in court when an interim or final order is made; and
- an interim or final order is not served on the defendant; and
- a defendant is alleged to have breached the order 29 or more days after service of the provisional order.

12.3 Section 24 of the Act provides that an interim court order ceases to have effect when a final court order is made or served. It is worded similarly to section 32 of the Act which relates to the duration of a provisional order.

12.4 Although the two sections have similar wording they use slightly different terminology. Section 24 of the Act uses the word "until" whereas section 32 uses the words "unless ... sooner". This has led to some confusion and was discussed in the two matters discussed below.

DPP v Jeremy Jane [2010] NSWLC 13.

In *Jane* Magistrate Heilpern considered whether a provisional order:

- expired in all circumstances at midnight on the twenty-eighth day after it was made; **or**
- could continue if an interim or final order was made prior to the expiry of the provisional order but had not yet been served.

Facts: the defendant (who had been served with a provisional order) failed to appear at Court where a final order was made in his absence. The final order had not been served when the defendant was alleged to have breached the order. The breach was alleged to have occurred after the 28-day period.

The DPP argued that the alleged breach of an AVO beyond the twenty eight day period was a breach of the provisional order as the final order had yet to be served.

The Crown contended that although section 32(1) of the Act limits the duration of a provisional order to midnight on the twenty-eighth day after it is made, there is a second limb that provides that a provisional order can extend beyond the twenty eight days if an interim or final order is made prior to the expiry of the twenty eight day period and the interim or final order has not been served.

The defence contended that, regardless of the making of the final order, the provisional order expired at midnight on the twenty-eighth day and as the final order was yet to be served there was no valid AVO in force at the time of the incident subject of the charge before the court.

The defence contended that interim orders are expressly enforceable until the final order is served. However there is no such extension for provisional orders.

For discussion of the arguments, see Heilpern J's comments at 12 – 18 of the judgment

Magistrate Heilpern held that the provisional order was in force at the time of the alleged breach.

Police v Shannon Paul Mathieson (2010) unreported (Grafton Local Court, 18 August 2010)

Facts: Police applied for and served a Provisional order on the defendant on 20 December 2009. On 22 December 2009, the parties reconciled and wanted to cohabit. Parties presented together to Grafton Local Court and made an application to vary the order. The Court dealt with the matter in Court that day and a final order was made by consent but *in the absence of the parties* and *the final order was not served.*

In April 2010, an incident resulted in the defendant being charged with an offence (against his partner). Police at that time served the final order on him. The matter before Magistrate Mijovich was whether the provisional order was in force at the time of the alleged offence.

Mijovich J made a contrary determination to a similar argument, dismissing a breach AVO charge on the basis that the provisional order had expired at the time of the alleged breach. Police have referred this to the ODPP requesting an appeal.

Mijovich determined that s32 was clear – that is, the Provisional order ceased to have effect after midnight twenty-eight days after it was made as the Defendant was neither at court when the final order was made, nor was he served with a copy of the final order after it was made.

There are policy issues regardless of which section 32 is interpreted (in terms of whether a provisional order should continue to have effect beyond 28 days). These are explained below:

If you accept Magistrate Heilpern's view:

- There is no incentive for Police to serve an order (either final or interim) made in the absence of a defendant at the first return date, if the defendant has been served with the provisional order. This is because until the final order is served, the provisional order continues to have effect notwithstanding that more than 28 days have passed since it was served on the defendant. Although cynical, resource implications for police will inevitably mean that service of AVOs become less of a priority if s32 is interpreted in this way.

- The legislation clearly intends that provisional orders are to be of limited duration, however if section 32 is interpreted in the manner Heilpern has suggested, provisional orders can potentially be of unlimited duration. That is to say, a provisional order can and does extend beyond 28 days if a Court makes a subsequent final or interim order, and it is not served.

If you accept Magistrate Mijovich's view:

- The provisional order has a maximum life of 28 days, and thus creates an incentive for Police to serve a subsequent order (either final or interim).

- 'Rewards' a defendant for failing to appear - creates the issue that Heilpern J referred to *Jane*, providing a 'reward' to a defendant for failing to appear in Court and avoiding service.

- May result in 'gap' in protection for the victim - where service cannot be effected there are concerns that a victim may be left unprotected because the provisional order does not continue.

Recommendation

30. Section 32 of the Act should be amended to clarify the position in respect of the duration of a provisional order.

31. Section 32(2) of the Act should be amended as follows:

An application for a final apprehended violence order must be listed before the court within 28 days of the making of the provisional order.

However, the terms of the provisional order remain in force until:

(a) in a case where the defendant is present at court – when a final or interim order is made by the court;

(b) in a case where a defendant is not present at court – when a final or interim order is served on the defendant; or

(c) the application is withdrawn or dismissed

whichever comes first.

13. Protections and procedures for victims of domestic violence giving evidence

13.1 As it currently stands, the Act does not afford protection for victims of domestic violence giving evidence. We submit the Act should make such provision in terms similar to those contained in the *Criminal Procedure Act 1986* as they apply to victims of sexual assault giving evidence, namely:

- the availability of CCTV in accordance with the *Evidence (Audio Visual Links) Act 1998*;
- self-represented litigants cannot directly cross-examine the victim; questions have to be put through a third person who is court appointed;
- a provision for recording evidence-in-chief and using that recording on an appeal or retrial may also be appropriate. However we would suggest a thorough review of the arguments for and against using recorded evidence, including consideration of any academic or legal literature on that subject, before introducing such a provision to ensure natural justice is afforded to all parties.

13.2 The availability of these protections would reduce the impact and trauma of victims of domestic violence giving evidence.

Recommendation

32. The Act should be amended to specifically provide for victims of domestic violence to be afforded the same protections as victims of sexual assault when giving evidence (as set out in the Criminal Procedure Act 1986).