WOMEN'S LEGAL SERVICES NSW

Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program

Statutory Review: Crimes (Domestic and Personal Violence) Act 2007

Women's Legal Services NSW

Submission to the
Department of Attorney General and Justice

18 November 2011

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Summary of recommendations

General comments

1. Resources should also be focused on the implementation of laws and policies, and on 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. The government should improve its response to domestic violence in Aboriginal communities, including through further training programs for police on domestic violence and on Aboriginal culture and history, and improved police guidelines and standard operating procedures for responding to reports of violence (including recording decisions and reasons for refusing to act).

The objects of the Act

3. The current objects of the Act should be retained – in particular, the gendered nature of domestic violence should continue to be recognised in section 9(3)(b – and Domestic and Family Violence Action Plan Item 30 should be implemented.

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

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.

Definition of 'domestic relationship'

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.

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

6. The current limitations on who can apply to vary an order concerning children should be retained.
7. Police policy should include a requirement that police record and give reasons for refusing to apply to vary an order, and a review process for the decision.

Revocation of apprehended violence orders

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 Sections 72(5) – 72(8) should be repealed: An expired AVO that was validly made and enforceable throughout its operation should not be able to be revoked.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

Costs in AVO matters

11. Section 99 should clearly state that costs can only be awarded against police where a police officer makes an application 'knowing it contained matter that was false or misleading in a material particular' (as per section 99(4)).
12. The government should review and publish findings on costs orders made by Magistrates in ADVO matters to determine the circumstances in which they are being made.

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

13. Option 2 should be implemented – with the ADVO matter heard by the higher court – to address issues with the operation of provisions dealing with ADVOs involving 'serious offence' matters.
14. If ADVO matters are heard by the local court in cases involving serious offences, then option 3 should also be implemented.
15. The Law Reform Commissions' Family Violence Report recommendation 10-3 should be implemented to impose obligations to inform victims of bail conditions and how they interact with ADVOs.

Apprehended Personal Violence Orders

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 without the consent of the person in need of protection 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. Separate legislation for the APVO and ADVO schemes is not necessary but other steps should be taken to ensure the seriousness and particular dynamics of domestic violence are understood, and that the response to domestic violence is appropriate, prioritised and resourced adequately.

Domestic and Family Violence Action Plan

22. Items 29, 30, 32 and 33 of the Domestic and Family Violence Action Plan should be implemented.
23. In relation to item 33, tenancy laws should also be amended to provide that an interim AVO that includes an exclusion order should enable a victim of violence to terminate their tenancy without liability.
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 ADVO proceedings.

Family Violence Report

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:
    a. 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;
    b. 18-3 – provided that adequate funding is available for legal representation of both parties; and
    c. 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 areas for legislative change

29. Section 32 should be amended as proposed by AVLICC to clarify the position in respect of the duration of a provisional order.
30. The Crimes (Domestic and Personal Violence) Act 2007 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).

About Women's Legal Services and our domestic violence work

1. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.

2. One of our services is the Domestic Violence Legal Service, which is a specialist legal service for women experiencing domestic violence. The Domestic Violence Legal Service provides a range of free and confidential legal services including advice through our dedicated Domestic Violence Legal Advice Line, fortnightly or weekly attendance at Blacktown, Mount Druitt and Penrith local courts to provide representation for ADVO matters, and education and training on domestic violence. Our other services – the Women's Legal Resource Centre and the Indigenous Women's Legal Program – also regularly provide legal services to women experiencing domestic violence. In the 2010-2011 financial year, 64 per cent of all of our clients indicated that they had experienced domestic violence.

Note on the structure and content of this submission

3. Our submission is structured in line with the structure of the Department of Attorney General and Justice's Discussion Paper for this inquiry. We have also included, at the start of the submission, some general comments on the objects of the Act and the gendered nature of family violence, and the importance of supporting implementation and service delivery, and some additional comments on other legislative amendments needed at the end of the submission.

4. We have provided case studies throughout the submission. These case studies are based on matters that our services have dealt with, but names and identifying facts have been altered to protect the privacy of the clients involved.

General comments

The need to support implementation and service delivery

5. It is essential that, in addition to amending laws to better protect women and children from domestic violence, resources should also be focused on the implementation of laws and policies, and on 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. Further detail on these issues can be found in our submission to the NSW Legislative Council Standing Committee on Social Issues inquiry into Domestic Violence Trends and Issues in NSW (dated 16 September 2011).

Issues with police response in Aboriginal communities

6. As discussed in our submission to the NSW Legislative Council Standing Committee on Social Issues and elsewhere in this submission, police response to domestic violence continues to be a problem. This is particularly the case in Aboriginal communities.

7. Over the past two years we have been conducting a series of workshops with Aboriginal women and community workers across rural and remote NSW and we are consistently receiving feedback from them about issues they are facing with police response. These issues include police telling women 'to go home and stop being stupid', police telling women that unless they 'fear for their life' they cannot get an ADVO, and police being unavailable when breaches occur, with police officers in some towns not being on duty 24 hours a day and taking so long to come at other times that ADVOs become effectively meaningless. Women have reported to us that they feel like 'police are playing god', choosing who will get protection and who will not.

8. WLS NSW recommends that the government improve its response to domestic violence in Aboriginal communities, including through further training programs for police on domestic violence and on Aboriginal culture and history, and improved guidelines and standard operating procedures for responding to reports of violence (including recording decisions and reasons for refusing to act).

Recommendations

1. *Resources should also be focused on the implementation of laws and policies, and on 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. *The government should improve its response to domestic violence in Aboriginal communities, including through further training programs for police on domestic violence and on Aboriginal culture and history, and improved police guidelines and standard operating procedures for responding to reports of violence (including recording decisions and reasons for refusing to act).*

The objects of the Act

9. Section 9(3)(b) of the *Crimes (Domestic and Personal Violence) Act 2007* states that Parliament recognises 'that domestic violence is predominantly perpetrated by men against women and children'. We would like to highlight the ongoing importance of this provision in recognising the gendered nature of domestic 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.

10. We acknowledge that domestic violence also affects men and people in same-sex relationships and that the policy response must address this. A gendered analysis of domestic violence need not detract from this but it does assist us in understanding the gendered nature and dynamics of domestic violence, and ensure there is an appropriate response to this.

11. WLS NSW also supports Domestic and Family Violence Action Plan Item 30, which suggests amending the objects of the Act to include:

    - recognition of a presumption that a victim of domestic violence has the right to remain in the home;
    - a focus on perpetrators of violence taking responsibility for their actions.

Recommendation

3. The current objects of the Act should be retained – in particular, the gendered nature of domestic violence should continue to be recognised in section 9(3)(b – and Domestic and Family Violence Action Plan Item 30 should be implemented.

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

12. WLS NSW supports the expansion of the definition of 'personal violence offence' as set out in the discussion paper so that such offences will be included within the definition of 'domestic violence offence'. The offences listed, such as breaking, entering and assaulting with intent to murder (*Crimes Act 1900* s 110) and being armed with intent to commit indictable offence (*Crimes Act 1900* s 114) are not uncommon in the context of domestic violence and should be included within any definition of a 'domestic violence offence'.

13. WLS NSW also supports the comments made by Australian and NSW Law Reform Commissions in their 2010 Family Violence Report that offences, other than offences against a person, that are committed in a family violence context should be included 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 (para 5.218 and recommendation 5-4(a)). We also support the recommendation made by the Law Reform Commissions that relevant federal offences should also be 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.

Definition of 'domestic relationship'

14. WLS NSW supports the retention of the relationships covered by the current definition of 'domestic relationship'. Further, the definition should be expanded to include the new partner of an ex-partner.

Section 5(d), (e) and (f) – flatmates, carers and residential facilities

15. We note that the inclusion of these relationships was considered in detail at the time that they were introduced in 1999 (in the now repealed section 562A(3) of the *Crimes Act 1900*).[1] The policy rationale for including these relationships remains the same. That is, women with disabilities are particularly vulnerable to abuse, especially within residential facilities, group homes, institutions and boarding houses. The reality of their home life can differ from traditional family settings but, nonetheless, a power imbalance can exist between carers and residents, and violence occurs in the context of power and control that makes it a form of domestic violence.[2] As former Attorney-General Jeff Shaw put it when introducing the amendments, the current definition 'recognises the range of domestic contexts in which people live'.[3] We are concerned that if the definition were narrowed, the power to obtain the greatest level of protection would be removed from the most vulnerable and disadvantaged groups of women, including women with intellectual disabilities living in group homes, women with mental illness and elderly women living in hostel accommodation.

16. We are concerned that removing the relationships covered by subsection (d), (e) and (f) would reduce the access to justice for women who are already disenfranchised and marginalised. These women would need to seek protection under APVOs. In our experience, police are less likely to apply for an APVO and these women will need to navigate the legal system themselves in order to seek protection from abuse. Further, a police initiated application is more likely to result in an interim or provisional AVO than a private application, so a woman trying to obtain a private APVO would be less likely to obtain interim protection from a person who continues to live in their home. Classifying the relationship as 'personal' rather than 'domestic' may also result in the woman being unable to access community and government services established to assist victims of domestic violence.

17. In addition, in our experience, the nature of relationships that involve co-habitation are not always clear or straightforward. Narrowing the definition of 'domestic relationship' may also exclude relationships that should be covered by the domestic violence provisions. For example, we have had clients who have described themselves as a boarder or a carer but subsequent investigation has revealed that the relationship is in fact an intimate one, with high levels of dependency. Further, some same sex couples who share flats do not want the nature of their relationship to be revealed but are in fact in an intimate personal relationship. They may appear as flatmates but the relationship is in reality more than that. The removal of flatmates from the definition of 'domestic relationship' may make responding to violence in that situation more difficult.

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[1] See, for example, Attorney-General's Department (Criminal Law Review Division), *Apprehended Violence Orders: A Review of the Law*, August 1999.
[2] Ibid.
[3] NSW Legislative Council, *Hansard*, J Shaw, 25 November 1999 page 3675

Case study – labels for relationships – Magda

Magda approached our service for assistance at court. She was seeking an ADVO to protect her from Keith, who had a history of violence against her, including screaming at her, destroying her property and threatening to hurt her. She described Keith as her carer and best friend but on asking her more questions about her situation, the WLS solicitor advising her learnt that their relationship was an intimate personal relationship involving sexual intercourse.

18. We are aware others have argued that the wide definition of 'domestic relationship' detracts from the original concept of domestic violence as between intimate partners. However, we submit that viewing domestic violence within the context of an abuse of power and control within a relationship justifies the broad definition and the protection of people in relationships that currently fall within the definition.

19. The relationships in subsection (d), (e) and (f) are distinguishable from other types of relationships that are generally captured by APVOs. They are characterised by living together in confined spaces with nightly proximity that cannot be avoided, dependency in the case of older women or women with disabilities. Flatmates and residents in the same facility share common areas of accommodation with other people. They may share a lounge room, kitchen, bathroom and bedroom. This makes it easy for intimidation or control by one person over another to become an issue. People may be dependant upon the facility in which they live. In the case of nursing homes or residential facilities for the elderly, it may be difficult to find alternative accommodation, or the person being threatened may not have the capacity or support to move. In the case of shared accommodation, issues of tenancy arise and people may also be unable to leave for financial reasons.

New partners of ex-partners

20. New partners of ex-partners should be covered by the definition of 'domestic relationship'. We have had clients who have been subjected to violence from the ex-partner of their current partner. As the relationship does not fall within the definition of 'domestic relationship', the APVO process must be used to obtain protection for that person. The context of power and control exists in such relationships and, as such, these relationships should be included within the definition.

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.

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

21. WLS NSW recognises the complexity of this issue. On the one hand, we are concerned that limiting women from seeking variations to orders that protect them and their children disempowers them and limits their agency, that police may not always take appropriate action, and that some women may be reluctant to approach police for assistance. However, we are also concerned that women experiencing violence are often pressured by a defendant to apply to vary or revoke orders, as part of the continuing violence, and that police will increasingly not take action to apply to vary an order if women can do this on their own.

22. In our experience, police sometimes refuse inappropriately to apply to vary an order but this is not common. Conversely it is common for our clients to be pressured to apply to withdraw or vary an application, and the requirement that only police can apply to vary an order concerning children provides some protection against this. As such, our preference is to retain the current limitations on applying to varying orders that include children on the order.

Case study – inappropriate refusal by police to apply to vary an order – Megan

Megan had an ADVO to protect her and her children from domestic violence perpetrated by her ex-partner, Wayne, who was a police officer. Wayne threatened to kill Megan by shooting her. When the ADVO was made, Wayne was placed on office duties but later return to general duties with access to a firearm. The ADVO did not clearly restrict Wayne's access to firearms and Megan asked the police to take out an application to vary the terms of the ADVO to clearly state that Wayne must not have access to firearms, including in the course of his employment, but the police refused to initiate the application because they felt that their internal procedures were sufficient protection.

Case study – pressure to withdraw an ADVO – Masa

Masa was living with her parent-in-laws and her husband and young daughter. Her in-laws were abusing her physically, verbally and emotionally as well as threatening and assaulting her young son. When she called us for advice, Masa and her son were protected under a police ADVO (provisional) and the in-laws started to harass her further by bringing a private ADVO application against her. They said they would drop their application if she would get the police to drop hers. We organised her a solicitor and a grant of legal aid to defend the cross application but on the day of the hearing both matters were withdrawn by consent because of the immense pressure Masa's family had put on her to do so. She was in such a state of fear of what might happen further if she went through with the ADVO application.

23. Regardless of who can apply to vary the order, there needs to be greater accountability for police decisions. Police are effectively the gatekeepers to the next step in the process and this needs to be reflected in police policy. When refusing to apply to vary an order, police should be required to record and give reasons for this, and there should be a review process available to an applicant who wishes to disagree with the refusal.

Recommendation

6. *The current limitations on who can apply to vary an order concerning children should be retained.*
7. *Police policy should include a requirement that police record and give reasons for refusing to apply to vary an order, and a review process for the decision.*

Revocation of apprehended violence orders

24. The Discussion Paper addresses this issue in the context of the power to grant a firearms licence and in relation to the Working with Children Check.

25. We note that the *Crimes (Domestic and Personal Violence) Amendment Act 2008* amended section 72 of the Act to allow for the revocation of expired AVOs (the Amendment). The Amendment inserted subsections 72(5) to (8) after section 72(4). The Amendment was a late addition to the Bill in 2008 as a result of representations made to the Minister for Police and the Attorney General by the Shooters Party.

26. WLS NSW submits that an expired AVO should not be able to be revoked, because as a matter of policy, it is inappropriate to:

    - enable the revocation of an order that no longer exists;
    - purport to 'wipe from the record' an order that was validly made, and that was enforceable throughout its operation; and
    - it is inappropriate that a test for revoking an expired AVO is based at the time of application for revocation – when the order is no long in place – rather than at the time that the order was made and in place.

27. The revocation of expired orders gives rise to a number of related practical issues including whether successful applications to revoke will give rise to applications to amend the defendant's criminal history.

28. 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, if exceptions for firearm licences are thought to be necessary, alternative provisions enacted as set out below.

29. If exceptions for firearms licences are to be included, this should be done by amending section 11(5)(c) of the *Firearms Act* 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.[4]

30. In making such an application:

    - the applicant must prove exceptional circumstances that cannot be merely there have been no further incidents between the protected person and the defendant;
    - the protected person's safety must be the primary consideration; and

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

- the protected person must be served by the police with a copy of the application attaching the evidence the applicant seeks to rely on to prove the exceptional circumstances, and the protected person must have a right of response.

31. We note that applicants would only be eligible to make an exceptional circumstances application if they had not committed a disqualifying offence within the past 10 years (*Firearms Act* s 11(5)(b)). The disqualifying offences which are likely to be particularly relevant in an AVO context are the offences involving violence and offences of a sexual nature as set out in clause 5 of the *Firearms Regulation 2006*.

Recommendation

8. *Sections 72(5) – 72(8) 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, including with respect to 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.*

Costs in AVO matters

32. In our experience, the threat of costs under section 99 can deter women from applying for an ADVO. One such case study is set out below.

Case study – impact of threat of costs orders on client – Elsie

Elsie is an Aboriginal woman who was seeking to obtain an ADVO to protect her from violence against her former partner, Shane. Shane had been making threats to seriously harm Elsie in person, by text message and through social media. Shane had already obtained an ADVO against her. The police told Elsie that they couldn't help her out because they had already assisted Shane.

Elsie applied for a private ADVO but, when she arrived at her local court, court support workers told Elsie that she should withdraw the application and that she risked the magistrate making a costs order against her because the magistrate in question regularly made costs orders against applicants. Elsie feared that Shane would harm her but she was also scared about having a costs order made against her. Our solicitor advised Elsie that costs orders were only made if the court was satisfied that the application was frivolous or vexatious, but Elsie remained very stressed that a costs order would be made against her and was reluctant to continue with her application.

33. WLS NSW supports clarifying that section 99 intends costs to be awarded against police in more limited circumstances than is set out in section 214(1)(b) of the *Criminal Procedure Act 1986*; that is, costs should only be awarded against police where a police

officer has made an application 'knowing it contained matter that was false or misleading in a material particular'. The provision should not be broadened to include proceedings 'initiated without reasonable cause' (as per section 214(1)(b) *Criminal Procedure Act*). As noted above, police can at times be reluctant to make applications for an ADVO. We are concerned that broadening section 99 would result in police increasingly refusing to make applications to protect a woman from domestic violence for fear that costs would be awarded against them.

Recommendations

11. Section 99 should clearly state that costs can only be awarded against police where a police officer makes an application 'knowing it contained matter that was false or misleading in a material particular' (as per section 99(4)).

12. The government should review and publish findings on costs orders made by Magistrates in ADVO matters to determine the circumstances in which they are being made.

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

34. WLS NSW supports option 2, with a preference for the matter being dealt with by the higher court. If the matter is dealt with by the local court, then option 3 should also be implemented. We agree with the comments in the Discussion Paper that there are a number of issues with the operation of the current provision and believe that these options will assist in addressing these. We do not support option 1 because we have procedure fairness concerns about a final ADVO being made on the basis of a committal for an offence. The approach taken should preserve natural justice and fairness for all parties while minimising the extent to which the victim is retraumatised by having to reappear to give evidence about the same fact situation.

35. In addition to providing for the transmission and admissibility of evidence, there must be an opportunity (but not a requirement) in the ADVO proceedings for the applicant to present additional evidence relevant to the making of an ADVO, such as evidence as to the history and context of violence, and the fear of the victim.

36. A related issue is that of bail conditions and notification to the victim of such. WLS NSW supports the Law Reform Commissions' recommendation 10-3 in its Family Violence Report that the *Bail Act 1978* should impose an obligation on police and prosecutors to inform victims of family violence promptly of decisions to grant or refuse bail, and the conditions of release, where bail is granted. As set out in the recommendation, victims should also be given or sent a copy of the bail conditions, and police and prosecutors should explain to them how they interact with the ADVO. We note that while section 6 of the *Victims Rights Act 1966* provides that '[a] victim should be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family', this does not create an obligation on police and prosecutors to inform victims. We also note that while the practice in NSW is that prosecutors are instructed to inform victims about bail conditions as soon as practicable after the bail application, this is not always possible for a number of reasons, including inability to contact the police informant and a lack of resources to call the victim at the time.[5]

[5] Australian and NSW Law Reform Commission, *Family Violence Report*, vol 1, October 2010, p 428.

Recommendations

13. *Option 2 should be implemented – with the ADVO matter heard by the higher court – to address issues with the operation of provisions dealing with ADVOs involving 'serious offence' matters.*
14. *If ADVO matters are heard by the local court in cases involving serious offences, then option 3 should also be implemented.*
15. *The Law Reform Commissions' Family Violence Report recommendation 10-3 should be implemented to impose obligations to inform victims of bail conditions and how they interact with ADVOs.*

Apprehended Personal Violence Orders

37. We note the concerns raised in the media and by judicial officers, and outlined in the Discussion Paper, that APVOs may be sought and granted frivolously and vexatiously. We also note that there is a lack of information relating to APVOs.[6] In relation to all proposals, it seems that greater evidence is needed of the use of APVOs and the problem areas that need to be addressed, before major change to the way the APVO process works is introduced.

38. Before addressing the proposals listed in the Discussion Paper, we would like to highlight some of the current valuable uses of APVOs. In our experience, APVOs can provide important protection for victims in cases involving serious violence or threats of violence. For some clients, especially those from culturally and linguistically diverse backgrounds, the obstacles that are already in place for accessing the APVO system (such as the threat of costs), combined with police reluctance to apply for APVOs, make it very difficult for them to access the APVO system. For example, we have advised clients on the use of APVOs as set out in the case studies below.

Case study – racism and APVOs – Mariam

Mariam is a refugee. She and her children were relocated to regional NSW due to available housing. Mariam's new neighbours were very hostile towards her and her children. They would constantly abuse her when they saw her, using extremely aggressive and threatening language. Mariam saw her neighbours empty her rubbish bin across her front yard and believes they were responsible for damaging her house. Mariam's caseworker contacted the police. The police arrived at her home and told her that they could not assist with an AVO because it was not a domestic relationship and because there was no evidence of the neighbours' abuse. She was not aware of other options for pursuing an APVO until she attended a community education session run by our service.

[6] 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

Case study – sexual harassment in the workplace – Maggie

Maggie called our advice line for advice relating to her work. She was working at an insurance company and a male colleague in a more senior position had started showing her a lot of unwanted attention, making comments on her cleavage, asking her about her sex life and patting her on the bottom. Maggie said that she wanted to leave the job because she was feeling so harassed and didn't feel that she could continue to work in that environment. Maggie was uncomfortable at the thought of having to go through mediation with the person who was harassing her, and at having to explain to him herself that what he was doing was wrong. As well as advising her on actions she could take under her work's sexual harassment policy and discrimination law, we also advised Maggie about the option of obtaining an APVO to provide her with some protection while remaining in her workplace. Maggie was relieved that there was something she could do to make herself feel safer about her workplace, but she also faced difficulties in pursuing this course of action, as she had to do it on her own without representation and her human resources department tried to talk her out of it.

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

39. WLS NSW supports retaining the current provision providing the registrar with the discretion to refuse an APVO application notice.

40. We do not support option 1 because the registrar already has sufficient discretion to refuse frivolous cases. There may be circumstances where a single comment from a neighbour (such as a death threat) may give rise to a person believing that the neighbour will actually carry through with this threat and seeking a private APVO for their protection. Such an APVO should not be refused.

41. We do not support option 2. Our understanding of option 2 is that it is suggesting that offences under section 13 (stalking or intimidation with intent to cause fear of physical or mental harm) should be removed from the list of allegations for which a registrar is not to refuse to issue process (set out in section 53(5)). 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.

42. We do not support option 3 because, 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.

43. We do not support option 4 because requiring a determination on the papers would disadvantage people who have low levels of English literacy.

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

44. WLS NSW supports the use of mediation in appropriate APVO matters and supports the court having power to direct parties to attend mediation, as in the Victorian model. It is essential that referrals to mediation are made after an assessment that such a referral is appropriate, rather than automatically. 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 should be excluded from referral to mediation unless the person in need of protection requests or agrees to a referral to mediation.

45. Given that the Act already provides for referral to mediation but that referrals have not increased since 2002, it would be appropriate to provide education and training to registrars and other court staff.

Recommendations

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

18. Referrals to mediation should not be made without the consent of the person in need of protection 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

46. WLS NSW does not support introducing means to prosecute protected persons for false or vexatious APVOs. As noted above, there is a lack of evidence of the way the APVO system is working and it is unclear whether there is evidence that there is a significant number of false and vexatious applications that needs to be addressed. Further, costs orders already act as a deterrent to many clients considering applying for APVOs, and we are concerned that the proposed amendments will disproportionately affect applicants with language barriers or disabilities.

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

47. We note the concern that the conflation of ADVOs and APVOs can have the effect of trivialising domestic violence, particularly in the media reporting of AVOs. However, we do not think separating the APVO system into a separate Act will have a significant practical impact on this.

48. Other steps must be taken to communicate more clearly to the legal profession, media and public the difference between the two orders and the seriousness and particular dynamics of domestic violence. One approach may be to address confusions in terminology by using more distinct names for the different types of orders. There is already a lot of confusion between the terms 'private' AVOs and 'personal' AVOs. Other approaches include appropriate resource allocation to domestic violence and ADVO processes; comprehensive education programs, particularly education and training for police, the judiciary and court staff; and separate reporting of data on ADVOs and APVOs. From a practical perspective, it is useful to have the schemes within one piece of legislation, rather than as parallel schemes, particularly in cases where the nature of the relationship is not entirely clear.

Recommendation

21. Separate legislation for the APVO and ADVO schemes is not necessary but other steps should be taken to ensure the seriousness and particular dynamics of domestic violence are understood, and that the response to domestic violence is appropriate, prioritised and resourced adequately.

Domestic and Family Violence Action Plan

49. **Item 29**: WLS NSW supports reviewing the definition of domestic violence to consider whether it captures relevant forms of violence, such as (but not limited to) economic, emotional, sexual and animal abuse. We support a board and non-exhaustive definition of domestic violence.

50. **Item 30**: WLS NSW supports reviewing 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.

51. **Item 31**: WLS NSW 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.

52. First, responses to domestic violence should be evidence based. There is not currently good evidence that domestic violence offender programs are effective. According to Dr Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research, the international literature on perpetrator programs is 'fairly dismal', with the best performing programs only produced a 5 per cent reduction in reoffending.[7] While we are aware that the Department of Corrective Services claims the evaluation of its perpetrator program shows it has been successful,[8] its evaluation report has not been made public. We understand that the evaluation is yet to be peer reviewed. Again we note Dr Weatherburn's comments that claims of success should not be made until a program has fully passed the peer review process.[9]

[7] NSW Legislative Council Standing Committee on Social Issues, *Domestic violence trends and issues in NSW*, Transcript (uncorrected proof), Hearing 2, 7 November 2011, p 12.
[8] Geesche Jacobson, 'Domestic offenders find soft sell beats a jail cell', *Sydney Morning Herald*, 7 November 2011.
[9] NSW Legislative Council Standing Committee on Social Issues, above n 7, p 19.

53. Second, if referrals are made, they should be separate to ADVO proceedings. We are concerned that including such referrals in the ADVO proceedings may result in such referrals being treated as an alternative to an ADVO or an alternative to particular orders within an ADVO which otherwise may have been made by the court. We are also concerned that false hope regarding these types of programs may lead to victims remaining in unsafe situations.

54. **Item 32**: WLS NSW 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.

55. **Item 33**: WLS NSW supports consistency between the *Crimes (Domestic and Personal Violence) Act 2007* and reforms to the tenancy laws in the area of ADVOs and the rights of occupants. However, the legislation should be amended to provide that an *interim* ADVO that includes an exclusion order should enable a victim of violence to terminate their tenancy without liability. Under the current provisions, such a right is limited only to final ADVOs.

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, tenancy laws should also be amended to provide that an interim AVO that includes an exclusion order should enable a victim of violence to terminate their tenancy without liability.*
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 ADVO proceedings.*

Family Violence Report

56. **Recommendation 5-1**: WLS NSW supports this recommendation.

57. **Recommendation 5-2**: WLS NSW supports this recommendation and a consistent approach throughout jurisdictions. We are aware of many instances where police are reluctant to apply for a protection order in NSW unless there has been a physical altercation. This is despite women complaining of non-physical violence such as isolation, harassment, intimidation and economic abuse. Having specific examples of economic, emotional or psychological abuse would give police confidence that protection orders are appropriate in circumstances where there is not a physical altercation. However we also note the need for careful consideration of the complexities of persons deemed to be part of a vulnerable group. In particular, the specific needs of each group should be clarified to ensure that these diverse groups are not treated as homogenous.

Case study – elder abuse in Aboriginal communities – Jan

Jan is an elderly Aboriginal woman and is in receipt of a Centrelink pension. She lives by herself but her eldest son, John, comes to visit her regularly. John is a large man and often runs out of money a week or so before he gets his pension. John would start harassing his mother on her pension days. He would say, 'I'm not going to visit you anymore if you don't give me some money'.

Other times he would be quite aggressive and would literally stand over his mother demanding her pension money. Jan felt really bad that she could not support her son, however she did not support the way he was behaving or what he was spending his money on.

Jan complained to the police that she was often left without money because she was unable to stand up to his aggressive behaviour. The police told her that there was nothing that could be done, and that she needed to stand up to her son.

On a later day, Jan spoke to a different police officer, who told her that if there is economic or financial abuse then the police can apply for an order that says her son is not to harass or intimidate her and that will inform him that his behaviour in demanding money from her is not acceptable. Jan was surprised that previous police officers had not told her about this when she had complained to them before.

58. **Recommendation 5-4**: WLS NSW supports this recommendation. See our comments above on the definitions of 'personal violence offence' and 'domestic violence offence'.

59. **Recommendation 7-2**: WLS NSW supports this recommendation. If reference is made to the particular impact of family violence on particular communities, appropriate measures must be in place to ensure that these diverse groups are not treated homogenously and that the unique situation of every case is taken into account, as well as these broader contextual considerations.

60. **Recommendation 7-4**: WLS NSW supports this recommendation.

61. **Recommendation 7-5**: WLS NSW supports this recommendation in general, however, paragraph (b) should be amended to provide that '*the person seeking protection has reasonable grounds to believe that* the person he or she is seeking protection from has used family violence and is likely to do so again'. The legislation should not require proof of the likelihood of repetition of family violence.

62. **Recommendation 7-6**: WLS NSW does not support this recommendation. We note that the NSW definition already includes these categories and includes the additional categories of carers, people living in the same household and long-term residents in the same residential facility. As outlined in detail above, WLS NSW supports the current NSW definition.

63. **Recommendation 9-4**: WLS NSW supports this recommendation.

64. **Recommendation 11-1**: WLS NSW supports this recommendation.

65. **Recommendation 11-2**: WLS NSW supports this recommendation.

66. **Recommendation 11-4**: WLS NSW supports this recommendation.

67. **Recommendation 11-6**: WLS NSW supports this recommendation.

68. **Recommendation 11-8**: WLS NSW supports this recommendation. It may also need to be combined with education of judicial officers about using exclusion orders when appropriate to ensure that they are taken advantage of to protect victims of violence.

69. **Recommendation 11-9**: WLS NSW supports this recommendation. It may also need to be combined with education of judicial officers about using exclusion orders when appropriate to ensure that they are taken advantage of to protect victims of violence.

70. **Recommendation 11-11**: WLS NSW does not support this recommendation. As set out above in response to Domestic and Family Violence Action Plan Item 31, there is insufficient evidence to demonstrate that counselling and rehabilitation programs for family violence offenders are effective, and we are concerned that including rehabilitation programs on ADVOs will jeopardise women's safety.

71. **Recommendation 11-13**: WLS NSW supports this recommendation.

72. **Recommendation 16-1**: WLS NSW supports this recommendation.

73. **Reccommendation 16-2**: WLS NSW supports this recommendation. (Note: This recommendation is listed as recommendation 16-6 in the Discussion Paper.)

74. **Recommendation 16-11**: WLS NSW supports this recommendation. However we note that many of our clients do not use the provisions of the *Family Law Act* to effect a property settlement. This can be for reasons such as small property pools, prohibitive litigation costs or ineligibility for legal aid. We are also concerned that awareness of potential or actual property proceedings under the *Family Law Act* might result in state or territory courts electing to refrain from making ancillary property recovery orders. It is important to ensure that property will still be recovered with police assistance when required.

75. **Recommendation 16-12**: WLS NSW supports this recommendation.

76. **Recommendation 18-3**: WLS NSW supports this recommendation provided adequate funding is available for legal representation of both parties. Legal aid is only available in limited circumstances to defendants. Without legal representation, this recommendation could result in an inability of a person to adequately defend an application for protection order, cross-examination being crucial to testing the evidence of the applicant. This would also be disadvantageous in the situation of cross-applications, where two people have each applied for a protection order against the other: there would be no cross-examination at all unless one or both parties could afford a private solicitor. We note that the Law Reform Commissions suggest that a court appointed representative could be used to ask questions on behalf of the defendant. If a court appointed representative is used, there should be limits on the questions that the defendant can ask via that person.

77. **Recommendation 18-4**: WLS NSW supports this recommendation.

78. **Recommendation 18-5**: WLS NSW does not support this recommendation to prevent mutual applications from being made by consent. The recommendation is proposed to address the issue of inappropriate cross-applications. We share the Law Reform Commissions' concern that cross-applications are made inappropriately and can be made by a perpetrator as part of a pattern of violence and harassment (see the case study of Masa, outlined above under the our comments on '3. Variation applications'). However, we do not think that requiring mutual protection orders to go to hearing is the answer to this problem.

79. In our experience, inappropriate cross-applications often result from an inappropriate initial application by police for a protection order by a male person against a woman, despite a history of violence perpetrated by the male. After incidents or alleged incidents police sometimes fail to determine who is the actual victim, and police will often make applications for protection orders against female victims of family violence. This may be because at the time the victim was considered 'hysterical' and is deemed 'the aggressor'. Police action against a victim can also stem from a lack of understanding of the gendered nature of domestic violence and its dynamics.

Case studies – police ADVOs against victims – Jo, Ruby and Sue

Jo attended the police station after being assaulted by her ex-boyfriend. She was bruised and swollen and needed medical attention. Jo was taken into an interview room. A short time later Jo's ex-boyfriend attended the police station and asked that an Apprehended Violence Order application be made for his protection as Jo had 'intimidated' him. The police applied for this order. When Jo emerged from the interview room she was informed that she would need to attend court later that day. Jo was astonished to hear that an order was being made for her ex-boyfriend's protection when she was the one who was assaulted. Jo does not understand how the police could be assisting him when she went to the police station to ask for help and she was injured.

Ruby was at home with her partner John. John became abusive towards Ruby. He grabbed her arm and pushed Ruby up against the wall then put his hand around her neck. Ruby struggled and her nails dug into his wrist – there were marks but no blood. John let her go but continued to shout and move around the room knocking things over. Ruby screamed at him to stop. Neighbours called the police because they heard the shouting. John said there had been a verbal fight and that Ruby had scratched his wrist. Ruby told the police that John had assaulted her but the police said that they couldn't see any blood so didn't believe her. They warned her to calm down, told her she was lucky they weren't arresting her for assaulting John, then left. Ruby went to a friend's house and by that time could see bruises on her neck and arm.

Sue, aged 65 and her husband Fred had been married for 40 years. Throughout their marriage Fred had been emotionally abusive, financially controlling and had isolated her from her family. He had been physically violent early in the marriage but Sue had learned how to appease him so he had not hit her in recent years. Fred expected Sue to have sex with him whenever he wanted. Sue decided she wanted to leave Fred but when she told him that she would be going to stay with their daughter for awhile Fred stood over her and threatened that she would pay if she left him. Fred became very aggressive and shouted abuse at Sue. Sue locked herself in the bedroom and started packing some clothes. About half an hour later the police arrived. They said that Fred had called them because Sue had assaulted him. She said that she had tried to tell the police that about the emotional abuse and controlling behaviour but they wouldn't listen. The officer asked if her husband had hit her, and Sue said "no not recently". She tried to explain that was

only because she knows how to placate him, but felt they weren't listening to her. Because the police officers were dismissive she did not feel comfortable to tell them about the sexual abuse. She said that one of the police officers told her that she should stop hen-pecking her poor husband. The police arrested Sue. It was late so she was kept in custody overnight. The police did not end up pressing charges because they lacked sufficient evidence. Sue was extremely distressed because she had never been in trouble with the police before.

80. Requiring mutual orders to go to hearing will not address the problem of inappropriate applications being made in the first place. In addition, we are concerned that, in practice, it will mean a lot more cases will be required to go to hearing. As well as placing additional demands on court resources, women who are reluctant to go to hearing may be pressured to withdraw an order for their own protection and consent to an order made against them as the only alternative to going through the hearing process.

81. In our view, the issue of cross-applications could be better dealt with by addressing problems in inappropriate applications being made by police. This could be done by the inclusion of a primary aggressor tool in the NSW Police Standard Operating Protocols, as recommended the Law Reform Commissions in Recommendation 9-5. Further detail of what should be included and how this could work are in our submission to the NSW Legislative Council Standing Committee on Social Issues' Inquiry into Domestic Violence Trends and Issues in NSW and Redfern Legal Centre's submission to the same inquiry. These submissions are available on the inquiry website.

82. Another possible approach would be to require consent to mutual orders to occur only after both parties have had access to legal advice.

83. **Recommendation 20-3**: WLS NSW supports this recommendation.

84. **Recommendation 20-4:** WLS NSW supports this recommendation.

85. **Recommendation 20-5:** WLS NSW supports this recommendation.

86. **Recommendation 20-6:** WLS NSW supports this recommendation.

87. **Recommendation 30-3**: WLS NSW supports this recommendation provided that the maker of the initial disclosure gives prior consent as to where and how the information will be used. The makers of disclosures must be fully informed of the consequences of disclosure and have control over how the information is used in family law proceedings.

88. WLS NSW understands the basis aimed at increasing the capacity to disclose confidential information and we support efforts made to improve the system's responsiveness to disclosures of family violence. Many women report to us the difficulties that they experience in bringing evidence before the courts of family violence. The lack of available evidence regarding family violence and sexual assault is one of the biggest hurdles for victims in family law proceedings. Also, many women expect that their disclosures to people working in the family law system will be listened to and acted upon.

89. However, we have concerns about a range of issues that arise in moving towards a system where there is more disclosure and sharing of information. These include potential risk of harm to the person disclosing violence; the integrity of counselling relationships and family dispute resolution processes; and the possibility that failure to

indicate family violence could inappropriately lead to an assumption that there is no family violence. These and other concerns must be fully considered.

90. **Recommendation 30-6**: WLS NSW supports this recommendation.

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:*
    a. *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;*
    b. *18-3 – provided that adequate funding is available for legal representation of both parties; and*
    c. *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 areas for legislative change

Section 32 – clarity of wording for the duration of a provisional order

91. The wording of section 32 of the *Crimes (Domestic and Personal Violence) Act 2007* is unclear resulting in different judicial outcomes about the duration of a provisional order. Our concerns include the 28-day time limit for listing of applications and whether failure to comply with this mean that victims were being left unprotected was an issue. This issue has been discussed in detail at the Apprehended Violence Legal Issues Coordinating Committee (AVLICC) and we support the proposal agreed to by AVLICC at its October 2011 meeting. Our comments here are based on those discussions and the relevant papers produced through them.

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

93. Section 24 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 that relates to the duration of a provisional order. Both sections are reproduced below.

24 Interim court order ceases when final court order made or served

(1) An interim court order remains in force **until**:

(a) it is revoked, or

(b) it ceases to have effect under subsection (2), or

(c) the application for a final apprehended violence order is withdrawn or dismissed, whichever first occurs.

(2) If a final apprehended violence order is made in respect of an interim court order (whether with or without variation), the interim court order ceases to have effect:

(a) in a case where the defendant is present at court—when the final apprehended violence order is made, or

(b) in any other case—when the defendant is served in accordance with this Act with a copy of the final apprehended violence order.

32 Duration

(1) A provisional order remains in force until midnight on the twenty-eighth day after the order is made, **unless it is sooner** revoked or ceases to have effect under subsection (2) or the application for a final apprehended violence order is withdrawn or dismissed.

(2) If a court makes an apprehended violence order against a defendant for the protection of a person protected by a provisional order, the provisional order ceases to have effect:

(a) in a case where the defendant is present at court—when the court order is made, or

(b) in any other case—when the defendant is served in accordance with this Act with a copy of the court order.

94. Although the two sections have similar wording they use slightly different terminology. Section 24 of the Act used the word 'until' whereas section 32 uses the words 'unless … sooner'. This has led to some confusion and was canvassed in two recent matters: Magistrate Heilpern in *DPP v Jeremy Jane* [2010] NSWLC 13 and Magistrate Mijovich in *Police v Shannon Paul Mathieson* (2010) unreported (Grafton Local Court,18 August 2010).

95. There are policy issues regardless of which way one decides to interpret section 32 (in terms of whether a provisional order should continue to have effect beyond 28 days). These were raised as part of an AVLICC discussion paper and outlined below.

96. On 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 section 32 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 Magistrate 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.

97. On 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 Magistrate Heilpern referred to in *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.

98. WLS NSW supports the proposed amendments to section 32 agreed to by AVLICC at its October 2011 meeting. The proposal is as follows:

> An application for a final apprehended violence order must be listed before the Court within 28 days of the making of a provisional order.
>
> However, the terms of the provisional order remain in force until:
>
> (a) where the defendant is present at court on the listing date – an interim or final order is made by the court;
>
> (b) where the defendant is not present at court on the listing date – an interim or final order is served upon the defendant; or
>
> (c) the application is withdrawn or dismissed.
>
> whichever occurs first.

Recommendation

29. Section 32 should be amended as proposed by AVLICC to clarify the position in respect of the duration of a provisional order.

Victims of domestic violence giving evidence

99. The *Crimes (Domestic and Personal Violence) Act 2007* 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*). In particular, victims of domestic violence should be recognised as in a vulnerable position by virtue of their relationship with the person against whom they are giving evidence. Such protections are essential to reduce the impact and trauma of giving evidence on victims of domestic violence.

100. In particular, the *Crimes (Domestic and Personal Violence) Act 2007* should be amended to permit victims to give evidence by audio-visual link. We note that while the *Evidence (Audio and Audio Visual Links) Act 1998* appears to provide a mechanism for the appearance of witnesses by audio-visual link (in sections 3, 5A and 5B), this is at the discretion of the court and, if the other party opposes it, there is a threshold of 'interests of the administration of justice'. This is not appropriate to the position of a victim of domestic violence giving evidence where the reason for audio-visual link is minimising or preventing further trauma to a victim. It is clear that this Act was not drafted with these considerations in mind. We note that the *Criminal Procedure Act* specifically provides for certain classes of witnesses giving evidence such as victims of sexual

assault and vulnerable persons and does not rely on the *Evidence (Audio and Audio Visual Links) Act* to do this.

101. We are aware that there is some concern that such a provision would extend the delay in hearing dates. However, we believe that many victims would rather wait an additional time for a hearing date and be given the option of using an audio-visual link than to give evidence in the courtroom at an earlier date. In the majority of cases an interim AVO will be in place to continue protection for the victim until the matter comes before a court for final determination.

Recommendation

30. The Crimes (Domestic and Personal Violence) Act 2007 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).